

Introduction

In a recent decision, the Customs Excise & Service Tax Appellate Tribunal (**CESTAT**) has clarified that the determination of “level of development” of market economy third country is relevant only if the domestic sales price or cost of production of a product in a market economy third country is adopted for the determination of normal value of such product in a non-market economy under paragraph 7 of Annexure I of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (**AD Rules**).

The CESTAT also clarified that if the disclosure statement provides the reasons for selecting a particular third country as a market economy third country / surrogate country for determining normal value for non-market economy subject country, an interested party can offer its comments to the disclosure statement. The order of the CESTAT seems to suggest that the Directorate General of Trade Remedies (**DGTR**) is not obligated under the law to disclose the methodology it has adopted prior to the issuance of disclosure statement.

The present note discusses these issues in detail in the paragraphs below.

Factual Background

A New Shipper Review¹ application was filed by M/s Kuitun Jinjiang Chemical Industry Co. Ltd. (**Producer**) and Foshan Kaisino Building Material Co. (**Exporter**) from China under Rule 22 of the AD Rules pertaining to anti-dumping duty imposed on the imports of Melamine originating in or exported from China PR. The DGTR issued its final finding dated June 19, 2019 recommending individual anti-dumping duty to the producer / exporter (**Final Finding**). Consequently, the customs notification dated September 06, 2019 imposing the recommended individual anti-dumping duty to the producer / exporter was issued.

The Producer and the Exporter challenged the Final Finding and the customs notification on several grounds including that the DGTR erred in selecting Qatar as surrogate third country for China PR given the significant differences between China PR and Qatar.

Findings of the CESTAT

Level of Development

Paragraph 7 of Annexure I of the AD Rules that provides guidance on calculation of normal value for a non-market economy subject country (e.g., China PR) states as follows:

“7. In case of imports from non-market economy countries, normal value shall be determined on the basis if the price or constructed value in the market economy third country, or the price from such a third country to other countries, including India or where it is not possible, or on any other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin. An appropriate market economy third country shall be selected by the designated authority in a reasonable manner, keeping in view the level of development of the country concerned and the product in question, and due account shall be taken of any reliable information made available at the time of selection. Accounts shall be taken within time limits, where appropriate, of the investigation made in any similar matter in respect of any other market economy third country. The parties to the investigation shall be informed without any unreasonable delay the aforesaid selection of the market economy third country and shall be given a reasonable period of time to offer their comments.”

As can be seen from the above, while ascertaining a market economy third country / surrogate country for determining the normal value for non-market economy third country, the DGTR has to keep in view the “level of development” of the surrogate country.

In the aforementioned Final Finding, the DGTR considered Qatar as the surrogate country for China PR and assessed the normal value on the basis of adopting the second method i.e. price from such a third country to other countries, including India.² The DGTR particularly considered the DGCI&S data for determining the volume and prices of Qatar.³ Whilst determining whether Qatar has the same “level of development” as that of China, the DGTR reasoned that the “level of development” assumes relevance only if prices and constructed value in Qatar is considered. It particularly noted that Qatar’s export prices to India are not contingent on the “level of development” of Qatar but it is established by benchmarking the

¹ According to Rule 22 of the AD Rules, the DGTR can conduct a review to determine individual margins of dumping for any exporters or producers who have not exported the product to India during the period of investigation of the previous investigation and not related to any of the exporters or producers who are subject to anti-dumping duties on the products.

² Paragraph 10 of Final Finding

³ Ibid

prices of the domestic industry and other exporting countries to India. It also noted that Qatar was a non-dumped source with its volume of exports close to those exported from China PR and that it was an appropriate third country as per paragraph 7 of Annexure 1 of AD rules.⁴

Being aggrieved by the same, the Producer / Exporter contended before the CESTAT that the “level of development” in Qatar is not comparable to China PR.⁵ The CESTAT upheld the DGTR’s approach noting that:

“48. The producer / exporter is also not justified in asserting that Qatar could not have been taken as a surrogate country as the level of development is not similar to that of China. The level of development would be relevant only if the domestic sale price or cost of production of a market economy third country is adopted since the level of development affects the price and cost. The price in international trade is a function of demand and supply in the international market and it is not affected by the level of development of the supplier country. The price to India is, therefore, the price meant for consumption in the Indian market. When the second option under paragraph 7 is exercised for determination of the normal value, what is relevant is the volume of exports and the country concerned should not be dumping during the period of investigation, since these parameters will affect the price comparability in the Indian market”⁶

■ **Disclosure of Qatar as Surrogate Country at the Stage of Disclosure Statement**

The Producer / Exporter also contended that the DGTR erred in disclosing its methodology towards the end of the investigation process i.e. through the disclosure statement⁷ and added that it was not granted the opportunity of hearing with respect to the issue of considering Qatar as surrogate country.⁸

It is pertinent to note that the Producer / Exporter⁹ neither filed a Market Economy Questionnaire⁹ nor raised any claim with respect to the appropriate method for determination of normal value until the stage of rejoinder.

Taking into account all these events, the CESTAT noted that it was not appropriate for the Producer / Exporter to argue that a hearing was not granted to the Producer / Exporter before the issuance of disclosure statement.¹⁰ The CESTAT also noted that a *litigant cannot complain of the violation of the principles of natural justice if the litigant himself fails to avail opportunity to bring the correct facts to the notice of the authority.*¹¹

The CESTAT further noted that the DGTR had provided detailed reasons on considering Qatar as a surrogate country and that it was open for the Producer / Exporter to raise any grievance in response to the disclosure statement.¹² Accordingly, the CESTAT held that no prejudice was caused to the Producer / Exporter.¹³

Conclusion

As explained above, the decision clarifies two important aspects. First, it clarifies that “level of development” under paragraph 7 of Annexure I of AD Rules is not relevant while determining the surrogate country under second methodology i.e. price from such a third country to other countries, including India. The ruling, in other words, offers the DGTR the discretion to determine any third country as surrogate country under the second methodology as long as the third country is representative in terms of volume and price in comparison to the non-market economy third country and the “level of development” of surrogate country is not required to be assessed. One could argue that the CESTAT’s decision is unsupported by the plain text of paragraph 7 of Annexure I of the AD Rules.

Second, in respect of appropriate stage for disclosure of the methodology adopted by the DGTR, the CESTAT makes it clear that the DGTR can disclose the methodology it has adopted to determine a parameter at the stage of disclosure statement. This is considering the fact that the interested parties are afforded a reasonable period of time to comment / express their grievances, if any, by way of comments to the disclosure statement.

⁴ Paragraph 29 of Final Finding

⁵ Paragraph 11 (v) of the CESTAT Order

⁶ Paragraph 48 of the CESTAT Order

⁷ Paragraph 11 (v) of the CESTAT Order

⁸ Paragraph 11 (vi) of the CESTAT Order

⁹ Paragraph 33 (i) of the CESTAT Order

¹⁰ Paragraph 44 of the CESTAT Order

¹¹ Paragraph 43 of the CESTAT Order

¹² Ibid

¹³ Id

In the facts of this case, the CESTAT has appropriately come to this conclusion, particularly, given that this case was a New Shipper Review as well as it pertains to China PR (wherein in such cases the DGTR has been denying market economy treatment and accordingly, using the best facts available in order to determine the normal value on the basis of surrogate country or constructed costs basis). Since this case is a New Shipper Review as opposed to an original or review investigation, the onus of providing the best information available to determine the normal value was primarily on the Producer / Exporter i.e. new shipper. By providing this information early in the investigation as an alternative to the normal value determined as per the books of the new shipper, new shipper could have provided a basis for consideration by the DGTR as well as the opposing domestic industry to make its comments so as to obtain their views either at the public hearing and / or at the time of verification process that is conducted prior to the disclosure statement – which could have accorded an expectation to the new shipper with regard to the methodology and could have been used by the DGTR in the disclosure statement.

The order of the CESTAT may be accessed [here](#).

In the meantime, should you require any information or clarification, please do not hesitate to contact us at insights@elp-in.com

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