

Anti-Absorption Rules: Questions & Answers - Analysis for Stakeholders

The Ministry of Finance, Government of India, on October 27, 2021 notified Anti-Absorption Rules, i.e., the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Second Amendment Rules, 2021 (**AA AD Rules, 2021**) and the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Second Amendment Rules, 2021 (**AA CVD Rules, 2021**) vide [Customs Notification No. 84/2021-CUSTOMS \(N.T.\)](#) and [Customs Notification No.83/2021-CUSTOMS \(N.T.\)](#).

This is pursuant to an amendment to Sections 9 / 9A of the Customs Tariff Act 1975 (**CTA**) made vide the Finance Act, 2021, No. 13 of 2021. Accordingly, separate rules have been introduced for the conduct of Anti-Absorption (**A.A.**) investigations under the existing Anti-dumping (**A.D.**) and Anti-subsidy (**CVD**) regimes in India.

Some of the other World Trade Organization (**WTO**) member countries like the European Union (**E.U.**) and the United States of America (**USA**) also have provisions on anti-absorption, and India's new A.A. regime overlaps with that of the E.U. However, some critical differences exist between both the countries' legislations.

The following questions and answers are catered to address concerns that exporters/importers may have regarding the implementation of AA AD Rules, 2021 and AA CVD Rules, 2021.

Questions concerning background and key provisions of AA AD Rules, 2021 and AA CVD Rules, 2021

1. Why has the Indian Government introduced the A.A. provisions under the trade remedial statutes/rules?

While the Indian Government has not provided any explicit reasons for the introduction of A.A. provisions under the A.D. and CVD regimes, reasons can be deduced from a general understanding of absorption and impact on the efficacy of existing trade remedial measures due to absorption as India remains the most prolific user of trade remedial actions in the world.

In general, the objective of anti-dumping duty is to provide a level playing field to the domestic producers in the investigating country by removing injurious dumping. Therefore, the effect of such anti-dumping duty is an increase in the prices of the product concerned, whereby the anti-dumping duty is passed onto customers in the form of higher prices in the investigating country. This in turn, removes low priced/cheap imports from the investigating country's market and restores a level playing field for the domestic producers.

However, if the exporters/importers do not reflect the anti-dumping duty in their prices and in turn reduce their prices to the customers, this is referred to as "absorption" of anti-dumping duty. In such a scenario, the anti-dumping duty imposed to remove the effects of injurious dumping may not serve its purpose of a level playing field as absorption of anti-dumping duty will lead to increased dumping margin. Therefore, it becomes imperative to address this situation by levying anti-absorption anti-dumping duties.

The above reasons make it imperative for the Indian Government to make provisions too for anti-absorption countervailing duties.

2. What is absorption under AA AD Rules and AA CVD Rules?

As per AA AD Rules, 2021, an anti-dumping duty imposed under Section 9A of the CTA may be considered to be absorbed when export prices of an article from the exporting country(s) decrease post imposition of the anti-dumping duty without any commensurate change in:

- cost of production of such article; or
- export prices of such article to countries other than India; or
- resale price of such article in India imported from the exporting country(s).

As per AA CVD Rules, 2021, a countervailing duty imposed under Section 9 of the CTA may be considered to be absorbed where export prices of an article from the exporting country(s) decrease post imposition of the countervailing duty without any significant change in the resale price of such article in India imported from the exporting country(s).

3. Who can apply for the initiation of an A.A. investigation?

The domestic industry or any other interested party can file an application seeking initiation of A.A. investigation.

The investigating authority, i.e., the Directorate General of Trade Remedies (**DGTR**), can also *suo motu* initiate the investigation if it is satisfied from the information received from the Principal Commissioner of Customs or the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or any other source, that sufficient evidence exists as to the existence of the circumstances pointing to absorption of the anti-dumping duty/countervailing duty in force.

4. When can an application for an A.A. investigation be filed?

An application for an A.A. investigation can be filed within two (2) years from the date of imposition of definitive anti-dumping/countervailing duty. However, the investigating authority has the discretion to accept the application for initiation after the expiry of two years post the imposition in special circumstances.

5. If absorption is found to be taking place, what are the powers accorded to the DGTR?

As per AA AD Rules, 2021, the investigating authority can reassess the dumping margin and injury margin with appropriate changes or adjustments in previously determined normal value and injurious price, if necessary. Consequently, the investigating authority can recommend:

- modification in the form or basis of the anti-dumping duty; or
- the quantum of anti-dumping duty.

Similarly, as per AA CVD Rules, 2021, in countervailing investigations, the investigating authority can reassess the subsidy margin and injury margin with appropriate changes or adjustments in previously determined benefit from subsidy and injurious price, if necessary. Consequently, the investigating authority can recommend:

- modification in the form or basis of the countervailing duty; or
- the quantum of countervailing duty.

6. What is the scope of review of A.A. investigations?

The scope of review in A.A. investigations is limited to the re-computation of dumping/subsidy margin and injury margin as the existence of injury and causality are already determined in the original investigation.

7. What are the procedural nuances?

The AA AD Rules, 2021 and AA CVD Rules, 2021 prescribe the below procedural requirements:

- The investigating authority has the discretion to initiate an A.A. investigation upon receipt of an application that contains sufficient evidence of existence conditions explained at point 2 above.
- The investigating authority must notify the Government of the exporting country before initiating an A.A. investigation against such exporting country.
- **The investigating authority can recommend provisional assessment of the imports of the article alleged to be absorbing the duty in force, pursuant to which the Ministry of Finance has the discretion to give**



effect to the same by asking guarantee from the importer till a decision is reached by the Ministry of Finance (on the recommendation of the investigating authority to levy anti-absorption duty).

- Rule 6 of the A.D. Rules and Rule 7 of the CVD Rules, which prescribe rules for the conduct of original / review investigations, are applicable to AA AD investigations and AA CVD investigations, respectively.
- Investigating authority must conclude the investigation within six (6) months from the date of initiation, which is extendable by another three (3) months by the Ministry of Finance in special circumstances.
- Investigating authority has the discretion to recommend the retrospective application of duties from the date of initiation.

8. What is the power of the Ministry of Finance once the investigating authority recommends the implementation of anti-absorption measures?

The determinations of the investigating authority are recommendatory in nature. The Ministry of Finance has the discretion whether to levy or not to levy the anti-absorption duty recommended by the investigating authority.

Contrary to the time limit of three (3) months prescribed in original and review investigations, the A.A. rules prescribe no time limit within which the Ministry of Finance has to render its decision to levy anti-absorption duty from the date of final recommendation has been prescribed.

9. How does E.U. and Indian law overlap or differ on anti-absorption?

While India's AA AD regime overlaps with the EU AA AD regime, there are certain critical differences:

- **Factors for determining absorption:** According to the E.U., absorption occurs when export prices have decreased; (or) there is no movement or insufficient movement in the resale prices or subsequent selling prices of the imported product in the E.U. In the Indian law, absorption occurs when the export price decreases without a commensurate decline in the cost of production, exports price to other countries from the subject country or resale price after import into India.
- **Period of absorption:** The period considered for determining absorption in the E.U. is the period "after the original investigation period and prior to or following the imposition of measures". In India, the period prescribed for determination of absorption is "post imposition" of duty.
- **Limit on the quantum of duty:** The E.U. prescribes that the anti-absorption duty should not exceed twice the amount of the duty imposed initially, while no limit on the quantum of duty is prescribed in India,.
- **Dumping margin and injury margin:** While both the E.U. and India require the computation of dumping margin, India's AA AD Rules, 2021 require computation of injury margin as well. In practice, the E.U. also seems to compute injury margin.
- **Normal value:** While the E.U. specifies certain conditions for computing the normal value, no such conditions have been placed by India. The E.U. requires alleged changes in normal value to be considered if complete information (duly substantiated by evidence) on revised normal value is provided. Indian law merely vests the discretion of the investigating authority to make changes or adjustments to previously determined normal value.

Similarly, there are differences between India's AA CVD and the E.U.'s AA CVD regimes.

- **Pre-condition:** The determination of absorption in the E.U. is relevant in cases where the countervailing duties imposed are less than the amount of countervailable subsidies found, which is not the case in India.
- **Factors for determining absorption:** According to the E.U., absorption takes place when: export prices have decreased; (or) there is no movement or insufficient movement in the resale prices or subsequent selling prices of the imported product in the E.U. In the Indian law, absorption occurs when the export price decreases without a commensurate decline in the resale price after import into India.



- **Period of absorption:** The period considered for determining absorption in the E.U. is the period “after the original investigation period and prior to or following the imposition of measures”. Whereas in India, the period prescribed for determination of absorption is “post imposition” of duty.
- **Limit on the quantum of duty:** While no limit on the quantum of anti-absorption duty is prescribed in India, the E.U. prescribes that, pursuant to a finding of absorption, the countervailing duties may be increased to achieve the price required to remove injury. However, the increased duty level cannot exceed the amount of the countervailable subsidies.

Factors to be considered by Domestic Producers while applying for AA measures

10. What factors should the domestic producers keep in mind while assessing whether they have a fit case for AA measures?

Some key parameters that the domestic producer can keep in mind while applying for AA measures are:

1. Decline in export price in line with the definition of absorption provided in the law;
2. Comparison of prices before and after imposition of AD/CVD measures;
3. Impact of reduced export price on dumping and injury margins;
4. Impact of currency conversion rates on increasing/decreasing export price;
5. Product mix / PCNs etc, and impact thereof on export price; and
6. Relationship between producer/exporter and importers.

Given that the AA rules have been recently notified, the Indian investigating authority can be expected to shortly issue an application format which will likely contain specific requirements and prescriptions on the nature of evidences required to be filed by the domestic industry while alleging absorption of AD or CVD duties. With these questionnaire responses, there is expected to be more clarity on the evidentiary threshold and key factors that the DGTR will consider in its assessment.

We hope you find this update useful. Should you need any further information please write to us at – insights@elp-in.com or write to our authors:

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