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F. No.14/01/2014-DGAD
Government of India
Department of Commerce
Ministry of Commerce & Industry
Directorate General of Trade Remedies
4th Floor, Jeevan Tara Building, 5 Parliament Street, New Delhi -110001

Dated: 28th December, 2020

NOTIFICATION

FINAL FINDINGS

Subject: Anti-circumvention investigation concerning imports of "Cold-Rolled Flat Products of Stainless Steel" originating in or exported from China PR, Korea, European Union, South Africa, Taiwan, Thailand and USA remanded by Hon'ble CESTAT through Order no. 51204-51205/2019 dated 12.9.2019.

A. Background of the Case

1. No. 14/1/2014-DGAD – Having regard to the Customs Tariff Act, 1975, as amended from time to time (hereinafter also referred to as the Act), and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, as amended from time to time, (hereinafter also referred to as the Rules) thereof, M/s Jindal Stainless Limited had filed Anti-circumvention petition and the Authority had issued Final Finding dated 18th August, 2017 recommending imposition of AD Duty on imports of "Cold-Rolled Flat Products of Stainless Steel" originating in or exported from China PR, Korea, European Union, South Africa, Taiwan, Thailand and USA. In pursuance of the above mentioned Final Findings, Department of Revenue through Notification No. 52/2017-Customs (ADD) dated 24th October, 2017 imposed antidumping duty.
2. Thereafter, two appeals no. AD/50291/2018 and AD/50334/2018 were filed by the domestic industry from M/s Jindal Stainless Limited and M/s Jindal Stainless Hisar Limited regarding retrospective application of anti-circumvention duties.
3. The Hon'ble CESTAT in the operative paras 31, 32, and 33 of order dated 12.09.2019 has held as under:

"31.This, it is clear from the aforesaid decisions of the Supreme Court that the principles of natural justice not only require the Designated Authority of grant an opportunity to the party to show cause but the order passed by the Designated Authority should also give reasons for arriving at conclusions and any violation the these two facets can vitiate the order. In the present case, the final findings do not give any reason.

32. It is seen that the Designated Authority, without examining whether the anti-dumping duty should be levied retrospectively from the date of initiation the investigation, recommended that the anti-dumping duty will be applicable from the date of its notification by the Central Government. The Central Government issued the Notification No. 52/2017 that was published in the Gazette of India, Extraordinary on 24 October, 2017 imposing anti-dumping duty from the date of publication in the Gazette. The matter, therefore, needs to be remitted to the Designated Authority to record a specific finding as to whether the anti-circumvention duty should be levied retrospectively from the date of initiation of the investigation.

33. Thus, without disturbing the imposition of levy of anti-dumping duty in the Notification published in the Gazette, it is considered necessary to remit the matter to the Designated Authority to record a finding whether the Central Government should levy anti-dumping duty from the date of initiation of anti-dumping or from the date of publication in the Gazette. The anti- circumvention proceedings were initiated on 19 February, 2016 and the Notification was issued by the Government on 24 October, 2017. It is therefore, a fit case where a further direction needs to be issued to the Designated Authority to pass an appropriate order expeditiously and preferably within three months from the date a copy of this order is produced by any of the parties before the Designated Authority. The final finding and the notification shall abide the decision of the Designated Authority. The Appeal in allowed to the extent indicated above."

B. Procedure

4. In compliance with the above direction of Hon'ble CESTAT, the Authority conducted oral hearings on 30.10.2019, 03.12.2019, and 17.07.2020. The representatives of domestic

industry, concerned exporters and other interested parties attended the oral hearings. The parties attending the oral hearings were requested to make their submissions in writing and rejoinders, if any. Pursuant to the oral hearings the following parties made their submissions:

(a) Written submissions;

(i) M/s TPM representing M/s Jindal Stainless Limited (DI)

(ii) M/s ELP representing M/s Outokumpu OYJ, (producer/exporter)

(iii) M/s POSCO India PC (exporter)

(iv) M/s POSCO IPPC (exporter)

(v) Ankit Jain representing M/s Suncity Strips and Tubes Pvt. Ltd.

(b) Rejoinder submissions;

(i) M/s TPM representing M/s Jindal Stainless Limited (DI)

(ii) M/s ELP representing M/s Outokumpu OYJ, (producer/exporter)

5. On account of change in the Designated Authority, as per the judgement of the Hon'ble Supreme Court in the matter of Automotive Tyre Manufacturers' Association (ATMA) vs. Designated Authority, delivered in Civil Appeal No. 949 of 2006 on 07-01-2011. a second oral hearing was held on 3.12.2019. The following parties filed submission in pursuance for this hearing.

(a) Written submissions;

(i) M/s TPM representing M/s Jindal Stainless Limited (DI)

(ii) M/s ELP representing M/s Outokumpu OYJ, (producer/exporter)

(iii) M/s POSCO India PC (exporter)

(iv) M/s POSCO IPPC (exporter)

(v) Ankit Jain representing M/s Suncity Strips and Tubes Pvt. Ltd.

(b) Rejoinder submissions;

(i) M/s TPM representing M/s Jindal Stainless Limited (DI)

(ii) M/s ELP representing M/s Outokumpu OYJ, (producer/exporter)

(c) Submissions of other interested parties

(i) M/s All India Induction Furnaces Association;

(ii) M/s Navnidhi Steel & Engg. Co. Pvt. Ltd.; and

(iii) M/s Ramani Steel House

C. Written Submissions

C.1 Submissions by the Domestic Industry (First oral hearing)

6. The domestic industry, during the course of sunset review investigation of the present case had urged the Authority to impose retrospective duty because the exporters had started circumventing the product concerned through various ways. The Authority completely ignored the request of the petitioners. The petitioners went on appeal against the impugned finding of the Designated Authority. The CESTAT, remanded the case back to the Authority to decide if the date of imposition of duty should have been the date if initiation or the date of publication of the Gazette.
7. It is also important to consider that there is a need for sending a right message with regard to the circumvention practices that are being found in the country. Since introduction of rule from January 2012, there are already a number of investigations by the authority.
8. The domestic industry has been made to suffer for more than a decade. The investigation was initiated in 2008 and the provisional duty was imposed in 2009. Post imposition of definitive duties in February 2010 which became effective in 20110-11, imports of circumvented product started showing significant increase. The domestic industry has practically suffered for 129 months before the duty became effective. The circumvention of the duty significantly diluted the relief that was intended by the Authority while recommending original duties.
9. The domestic industry could not get the desired effect of anti-dumping duties, infact, the domestic industry continued to incur losses. The sunset review investigation conducted by the Authority is an evidence of this fact. The sunset review final findings issued by the Authorities shows significant losses being incurred by the domestic industry during the period 2011-12 to POI (January 2013 to 31st December, 2013) and further intensified losses in post POI (January 2014 - June 2014). The Authority acknowledged the fact of circumvention of subject goods as a reason for continued injury.
10. Profits for the subject goods from the period of 2004-05. The domestic industry was incurring losses in the POI of the original case, the losses thereafter declined however stared increasing from 2011-12 and intensified significantly in the POI of the sunset review case and further in the post POI (Jan 14-June 14).

11. The parties have adopted various ways to avoid anti-dumping duty, when the duty was imposed on width of 1250 mm, the importers started importing the goods of wider width, and the domestic industry filed an MTR and brought this issue before the Authority. The Authority in its final findings clarified the Product under Consideration by specifying tolerances of+30mm for mill edge and 4 mm for trim edge. Immediately, after the MTR findings were issued providing for tolerance, the producers and importers started circumventing the duties imposed by exporting large width products and getting it slit to desired levels after importation.

12. By circumventing the subject goods in various ways, the parties have made a mockery of the process and system. Circumvention resorted to by the parties is a disrespect to the quasi-judicial process and Authority, especially having passed through the anti-dumping investigation process and vehemently opposing it.

13. Loss of revenue to the Govt. is equally important. Had the product being imported in its original form, the Govt. of India would have collected revenue.

14. As per DRI, large number of producers/exporters and importers have tried to evade duties and a large number of DRI investigations have taken place against such producers/ exporters. According to the preliminary report of DRI, these exporters obtained certificate of origins and the importers have evaded the customs duty by availing concessional duty rates by misrepresenting the Regional Value Content; misdeclaration of goods by selectively using words; usage of advance authorisation during non-applicable periods; non-compliance of RMS in bill of entry; importing under advance license scheme; and not completely revealing specifications such as width, length etc.

15. Circumvention constitutes an abuse of the authority and the Central Govt. The intent to wilfully avoid the duty is well built in the circumvention practice. Therefore, the fact that circumvention is an abuse is important in deciding that such duty shall apply with retrospective effect.

16. In this case, parties have resorted to wilful avoidance of duty, it is settled principle of law that parties must suffer consequences, irrespective of the hardship. A comparison can be drawn from evasion of duty, wherein the parties must pay the duties for whatever past period it may pertain. Similarly, circumvention constitutes wilful avoidance of duty, thus, such duty should be collected from the date of initiation.

17. The circumvention has not only undermined the effects of anti-dumping duties but has but had rendered the antidumping duties levied fruitless to such an extent that the domestic industry in fact suffered aggravated injury.
18. In Rule 27, once it is determined that circumvention exists, then the Authority shall have to make a recommendation for extension of duty earlier imposed to address circumvention. Thus, the Authority does not have discretionary powers to refuse to recommend ant-circumvention duties, when circumvention has been found to exist. Thus, in that context the word 'may' is to be read as 'shall' in Rule 27.
19. Having regard to the purpose and object of the legislation, the use of the second 'may' in rule 27, is also to be read as 'shall'. As the purpose of the remedy will be defeated if it is not imposed retrospectively.
20. In the cases of N. Nagendra Rao & Co. v. State of A.P; Dinkar Anna Patil v. State of Maharashtra; Sub-Committee On Judicial Accountability vs Union Of India And Ors; State of Uttar Pradesh vs Jogendra Singh; State of U.P. vs Manbodhan Lal Srivastava; and Siddheshwar Sahakari Sakhar Karkhana Ltd v CIT Kolhapur; the Hon'ble Supreme Court has held that considering the (a) purpose and object of the legislation; and (b) in situation where term 'may' is coupled with an obligation, the term 'may' be read as 'shall'. In this case as the object is to prevent circumvention and also, as the term 'may' is used with a condition precedent, therefore retrospective imposition becomes mandatory.
21. Even when the word "may" has been used under the Rules at number of places, the same has a force of "shall" and has binding effect on the investigation.
22. From perusal of EU and US findings it is seen that circumvention duties have been extended from date of initiation by these authorities as well.
23. The following considerations are useful to consider the meaning of circumvention: (a) attempt to import PUC in modified form; (b) intention of exporters and importers; (c) adverse impact of circumvention on imposed duty; (d) nature of circumvention; (e) value addition in the process by exporting the product in wider width; (f) relevance and importance of knowledge with the exporters and importers; and (g) considerations in case retrospective imposition of duty in original investigation. All these considerations are fully met and hence, retrospective imposition is required.
24. It is clarified that duty has to be collected from the date of initiation and not prior to the date of initiation. Also, there are certain perpetual defaulter companies who find ways of circumventing. Thus, collection retrospectively is a right message to the parties.

25. Where the statutory language being used is specific in one case and general in the other, the specific language should ordinarily prevail over the generic one. Any matter that could possibly fall under either, would first be subject to the specific expression and only in case of non-applicability of the specificity, that the generic expression will be applied. The same was held by the High Court of Patna and Supreme Court in the case of Azad Transport Company Pvt. Ltd. and Ors. vs. The State of Bihar and Ors, and The J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. The State of Uttar Pradesh and Ors, respectively. Thus, the first rule of applicability is extending the anti-dumping duty retrospectively from the date of initiation of the investigation, and in case the first stands inapplicable then from such date as may be recommended by the Designated Authority.
26. As the Authority had not recommended any date from which the Central Government should have imposed the duty, the Ministry of Finance can only recommend duties retrospectively.
27. A plain grammatical meaning of the word 'or' is at variance with the intention of the legislature and purpose of the statute itself and is leading to repugnant effect to the objective of the law. The objective of circumvention law is to prevent the producers and importers from circumventing the duty and provide a remedy to the domestic industry. In New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, the Supreme Court held that where two constructions are plausible, the one that remedies the mischief and serves the object it was meant for, must be adopted. In the instant case considering the objective of Circumvention rules, Rule 27 (3) must be interpreted to provide for extension of anti-dumping duties retrospectively.
28. Rules are an extension of the parent Act and unless anything contrary is provided under the Rules, the Rules and Act needs to be read together as part of one code. in an original investigation if the circumstances indicate that the remedial effect of ant dumping duties is likely to seriously undermine the remedial effect then duties can be imposed retrospectively. Whereas, in a circumvention case, the fact of undermining of remedial effect of ADD is proved on the contrary to a "likely" scenario. Thus, when in "likely circumstances" of undermining effect of ADD retrospective duties can be applied, it follows that when injury has been once established and measures have been imposed then circumvention of such measure undermining the effect of ant dumping duty necessarily warrants retrospective imposition of duty.

C.2 Written submissions (2nd Oral Hearing)

29. If the Designated Authority had a discretion to decide whether or not to recommend ADD on retrospective basis, the CESTAT would not have a passed an order directing the Designated Authority to decide the issue. In other words, the issue under consideration is not existence or otherwise of a discretion to the authority. The issue under consideration is the need or otherwise for imposition of duty on retrospective basis. Without prejudice, the domestic industry submits that there was no discretion under the law to the authority in deciding whether to recommend ADD on retrospective basis.

30. Plain reading of Rule 27 makes it evident that the authority should recommend imposition of duty on imports of the circumvented article in case authority comes to a conclusion that circumvention of anti-dumping duty exists. Once the authority decides to hold circumvention of anti-dumping duty exists, the authority shall also decide the date from which such duty should be imposed. Such date may be date of initiation or some such other date as may be considered appropriate by the authority. The fact that the authority shall also decide date of imposition of duty is well established by the plain reading of the Rule 27 (3).

31. The rule will have to be read sequentially and in the manner in which this has been laid. In the context of Rule 27(1) and (3), the Rules first provide imposition of duty on retrospective basis and specifies any other date as may be recommended by the Designated Authority as an alternative basis. In a situation where the legislature has provided for a specific condition and has provided thereafter another alternate option, ignoring the prescribed first condition (when that is available) and jumping to alternate provision is not open and is in fact illegal.

32. There are various other provisions under the Rules where the Rule provides for "or" with a prescription. For instance, in the context of Rule 2(b) or Rule 7 of Annexure I. Under both the provisions there are sequencing of conditions, the Authority will not pick and choose any one of these by stating that these conditions have been placed as alternative conditions and Authority has discretion. The manner and sequence in which these conditions have been specified will have to be considered and given due importance, recognition and preference while making a determination.

33. The present case warrants imposition of ADD on retrospective basis for the reasons such as (a) the domestic industry has been suffering injury for more than a decade (b) circumvention of duties has not only undermined but has also rendered the levy fruitless, to the extent that it aggravated the injury suffered (c) exporters/importers

have avoided duties in various ways (d) There are several DRI issues against the importers (e) loss of revenue of Government of India.

34. The claims made by the other interested parties that, duty cannot be imposed retrospectively because they had no notice that such things, cannot be accepted because the Authority, in its initiation notification clearly mentioned that it may recommend the duty retrospectively.

35. Had the authority recommended ADD on retrospective basis while notifying the final findings, in any case, it would have pertained to the past period where imports had already been cleared and consumed. Thus, the fact that imports had already been cleared and consumed and it would be quite belated to collect ADD at this stage in any case does not have any merit. In any case, whether this ADD would have been recommended with retrospective effect at the time of notifying final findings or now, the position of clearance by the parties and consumption of the material would have remained the same.

C.3 Written Submissions made by M/s ELP representing M/s Outokumpu OYJ, (producer/exporter) – (First and 2nd Oral Hearing)

36. Order Passed by the Hon'ble CESTAT vis-à-vis the issue of "shall" and "may"

(i) As the Hon'ble Designated Authority already knows, the Petitioners have approached the CESTAT to challenge the absence of a retrospective recommendation by the Hon'ble Designated Authority. OTK understands that it is the Petitioners' case that the levy of anti-circumvention duties should have been enacted retrospectively from the date of the initiation of the anti-circumvention investigation.

(ii) Rule 27(1) of the AD Rules allows for the Hon'ble Designated Authority, on concluding an anti-circumvention investigation with the determination that there is circumvention of anti-dumping duties, to recommend the levy of anti-circumvention duties, which may apply retrospectively from the date of initiation. However, the Petitioners have argued that the word "may" must be read as "shall", whereby the retrospective levy of anti-circumvention duties must be mandatory, once circumvention has been found to be taking place.

(iii) The use of the word 'may' in Rule 27 (1) of the Rules is intentional. Sub-rule (2) of Rule 27 of the Rules specifically uses the term 'shall'. Thus, both words have

been intentionally and simultaneously used in the Rule. Rule 27(1) addresses a situation where the Designated Authority must make a recommendation and therefore the word 'may' has been used. The Designated Authority is bound to issue a public notice and record its finding and therefore the word 'shall' is used in Rule 27 (2). Thus, the only reasonable interpretation of both provisions is that both words "may" and "shall" have been consciously used in the Rules. The Hon'ble Designated Authority may make a recommendation for imposition of anti-dumping duty either prospectively or retrospectively. Such a recommendation is given to the Central Government, which then takes further action pursuant to Rule 27(3). Post the recommendation of the Designated Authority, it is for the Central Government to take a decision and it is the Central Government which imposes the levy.

(iv) Thus, it is for the Central Government to decide whether the anti-dumping duty is to be extended from the date of initiation of the investigation under rule 26 or such date, as is, recommended by the Designated Authority. If these two dates were always to be the same, there was then no requirement for the latter part of rule 27(3) (i.e. or such date as may be recommended by the Designated Authority). This part of the provision has been included for a reason, as the Designated Authority may recommend anti-dumping duty either prospectively or retrospectively.

(v) Consequently, the latter part of rule 27(1) states that even if Designated Authority makes a recommendation of anti-dumping, there may arise a situation where the levy has come to be imposed retrospectively [i.e. Central Government under its powers of rule 27 (3) has levied the anti-dumping from the date of initiation of investigation under rule 26]. In this manner, the two sub-Rules [rule 27(1) and 27(3) of the Rules] are in harmony with each other, and also provide clear guidance on the word "may" must be interpreted under Rule 27(1). If the argument of the Petitioners on rule 27(1) were to be accepted then this would make part of rule 27 (3) otiose. This cannot be permitted in law. Thus, it submitted that rule 27 (1) of the Rules is required to be given a meaning in the context of its setting [i.e. rule 27(1), 27(2) and 27(3)].

(vi) Further, under section 9A (1A) of the Customs Tariff Act, 1975, where the Central Government, on such inquiry as it may consider necessary, is of the opinion that

circumvention of anti-dumping has taken place, whereby the anti-dumping duty so imposed is rendered ineffective, it may extend the anti-dumping duty. Thus, it is the prerogative of the Central Government whether or not to extend the anti-dumping duty in cases of circumvention where the anti-dumping duty is being rendered ineffective. If the intention of the law was that in all cases of circumvention, anti-dumping duty was required to be imposed retrospectively then section 9A (1A) would have expressly provided for the same. It is submitted that Rule 27 of the Rules cannot be read de-hors section 9A (1A) of the Act. It is settled law that the basic test is to determine and consider the source of power which is relatable to the rule.

(vii) The Hon'ble CESTAT has remanded the matter to the Hon'ble Designated Authority with the objective of recording "a specific finding as to whether the anti-circumvention duty should be levied retrospectively from the date of initiation of the investigation". Implicit within this finding is the understanding that the Hon'ble Designated Authority has a discretion to take such a decision – a position that would not be tenable if the word "may" under rule 27(1) is interpreted as "shall". If the CESTAT was of the view that the word "may" does not bestow a discretion upon the Hon'ble Designated Authority to make such a determination, it would not have directed the Hon'ble Designated Authority to provide a reasoned order after deciding whether or not duties should be recommended retrospectively.

(viii) In other words, the Hon'ble Designated Authority is not required, at this stage, to entertain any averments from the Petitioners on whether the word "may" must be interpreted as "shall" in the above provision. Since the Hon'ble Designated Authority has already determined in the original finding that there was no justification for a retrospective levy justified based on its assessment of the Petitioners' documents and submissions, the Hon'ble Designated Authority is now only required to provide a reasoned order for its findings.

(ix) The Petitioners specific averments in their Comments to Disclosure Statement regarding the retrospective levy of duties is as below:

a. "may" must be interpreted as "shall";

b. 18 months have lapsed since initiation and the domestic industry has continued to suffer; and

c. if duties are not levied retrospectively then the users / traders / importers who are engaging in the act of circumvention and have tried to delay the investigation would succeed.

37. At the outset, the Petitioners' averments were liable to be disregarded simply by virtue of the fact that they chose to make these arguments at the last moment. An anti-dumping proceeding is a time-bound process and the Hon'ble Designated Authority cannot be expected to provide appreciation to averments / evidence that is placed on record in the closing stages of the investigation. Further, these comments are not normally made available in the public file therefore not providing the other interested parties an opportunity to make their views known on the issue.

38. OTK submits that Passage of time cannot be the basis of retrospective levy. There is no data or information provided to demonstrate how the passage of 18 months since initiation has caused some manner of grave injury to the domestic industry. In the absence of any actual information indicating how this delay has irrevocable damaged the Petitioners, mere passage of time cannot possibly be a justification for the retrospective levy of duty.

39. OTK further submits that the process of law cannot be recast as a delaying tactic in order to justify retrospective levy. The Petitioners have claimed that "if the Authority recommends only prospective anti-circumvention duties, the motive of importers / exporters to delay the extension of duties by blocking the investigation will be achieved". The only delay to the investigative process was caused by the various litigation proceedings that took place at the writ courts over the course of the investigation. The Hon'ble Designated Authority may appreciate that these were legitimate concerns raised by various interested parties regarding the nature of the investigation, which were duly recognized by the learned writ courts. If the Petitioners believe these to be delaying tactics, they are also impugning the wisdom of the courts which provided the stay during the investigation.

40. Succinctly put, the exercise of a party's rights under law cannot be the basis for retrospective levy of duties.

41. With regard to the Petitioners' averments upon the interpretation of "may" and "shall", OTK has already demonstrated its views above in these submissions.

42. For the abovementioned reasons, OTK humbly requests the Hon'ble Designated Authority to determine that a retrospective levy of duties would not be justified.

C.4 Written Submissions made by M/s POSCO India PC and M/s POSCO IPPC

43. The following submissions were made by POSCO India Processing Center Pvt. Ltd. and POSCO India Pune Processing Center Pvt. Ltd. during the Oral Hearing on October 30, 2019 and 2nd Oral Hearing on December 3, 2019.
44. It is submitted that the extension of the duty in the instant case must be prospective, as was the decision of the Designated Authority following the investigation. There is no obligation on the Designated Authority to impose the duty retrospectively.
45. Rule 27 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 clearly specifies that the levy of duty may apply retrospectively from the date of initiation of the investigation. It is trite law that ordinarily the words "shall" and "must" are mandatory and the word "may" is discretionary. In view of the intentional use of the word 'may' in sub-rule (1) and (3) of Rule 27 and of the word 'shall' in sub-rule (2), it is evident that the legislature has consciously made a distinction in choosing the respective verbs in the various sub rules of the same rule. This is also evident from the use of 'may' and 'shall' through the legislation. Therefore, it cannot be assumed that in Rule 27(1) and (3) alone, 'may' and 'shall' are to be used interchangeably, as contended by the Domestic Industry. A similar interpretation of 'may' and 'shall' in Section 437 of the Criminal Procedure Code, 1973 was made in Pramod Kumar Manglik and Ors vs Sadhna Rani and Ors (1989 CriLJ 1772).
46. The anti-circumvention investigations must comply with the general anti-dumping framework in India and under the WTO. It is a settled position in law that any law which affects substantive rights is presumed to be prospective in operation, unless expressly made retrospective. Even in the case of retrospective application of anti-dumping duties, the scheme of the Customs Tariff Act, as clarified by the Supreme Court in Commissioner of Customs, Bangalore vs G.M. Exports and Ors ((2016) 1 SCC 91), is that "an anti-dumping duty is normally to be imposed with prospective effect unless, inter alia, because of massive dumping of an article in a relatively short time the remedial effect of the anti-dumping duty to be levied would be seriously undermined". Therefore, the Designated Authority was correct in choosing to apply the duty

prospectively in the earlier anti- circumvention investigation, which must be upheld herein.

47. In the instant investigation, at the time of final findings, the gap period between the Initiation (February 19, 2016) and the Notification (October 24, 2017) was almost 18 month. Therefore, it is submitted that it would have led to administrative upheaval if the DGTR had recommended imposition of duty retrospectively from the date of the Initiation.

48. Further, an imposition of anti-circumvention duties retrospectively from the date of initiation of investigation, i.e. February 19, 2016, which is now more than three years ago, will bring severe confusion to the user industries of India which are now going through an extreme downturn. Major users of POSCO material have commented that this could bring a severe confusion in their procurement activity. To reopen an already settled case will not only cause loss and inconvenience to user industries, but also impact the standing of India as a country providing fair opportunities to foreign exporters/investors. This would also be contrary to the Supreme Court's position in the aforementioned GM Exports case that the delicate balancing act between protection of domestic industry and the hardship caused in the course of international trade has to be tilted in favour of the latter.

49. Finally, it is also submitted that the investigation in the instant case lasted for 18 months, within the time frame provided under law and there have been no delaying or other malafide tactics employed by the parties herein.

C.5 Written Submissions made by Ankit Jain representing M/s Suncity Strips and Tubes Pvt. Ltd.- (First Oral Hearing)

50. The aforesaid hearing had been held by the present authority, pursuant to the directions issued by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, as contained in its judgment dated 12.09.2019 passed in Anti-Dumping Appeal No.50291/2018 titled as M/s. Jindal Stainless Ltd. Vs. Designated Authority Directorate General Anti-Dumping & Allied Duties as well as well as Anti-Dumping Appeal No.50334/2018 titled as Jindal Stainless Hisar Ltd. Vs. Designated Authority Directorate General Anti-Dumping & Allied Duties.

51. That vide the aforesaid judgment dated 12.09.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, the matter had been remitted back to this

designated authority to record a specific finding as to whether the anti-circumvention duty should be levied retrospectively from the date of initiation of investigation.

52. That the submissions of Suncity Strips and Tubes Pvt Ltd. are as under:- That the investigation relating to anti-circumvention in relation to the PUI (Product Under Investigation) had begun vide Initiation Notification dated 19.02.2016.

53. That a bare perusal of the said notification would show that the period of investigation was w.e.f. 01.07.2014 till 30.09.2015.

54. That pursuant to the said investigation, this authority had come out with its final findings dated 18.08.2017. The Ministry of Finance, Govt. of India, vide notification dated 24.10.2017 had imposed Anti-Dumping Duties on PUI, pursuant to the said final findings of this authority.

55. It is to submit that it was never the case of any of the parties to the present proceedings that any duty were being circumvented for any period after the initiation Notification dated 19.02.2016. It is to submit that even the period of investigation was prior to 19.02.2016.

56. That none of the parties had placed any material before this authority to either allege or prove that any duty was being circumvented between the period 19.02.2016 (the date of the Initiation Notification) and 18.08.2017 (the date of the final findings of this Authority).

57. That in absence of any such allegation or proof having been placed by any of the parties hereto, before this authority at the time of the investigation, it is not open for domestic industry to contend that any such duty should also be imposed with retrospective effect from 19.02.2016.

58. That for the purposes of levy of any duty retrospectively, from the date of the Initiation Notification, it is obligatory upon this Authority to come to a definite conclusion that duty was being circumvented even during the period between 19.02.2016 (the date of the Initiation Notification) and 18.08.2017 (the date of the final findings of this Authority). Once domestic industry neither alleged nor placed any proof in relation thereto, no such duty can be levied retrospectively from the date of the initiation notification.

59. That the final findings dated 18.08.2017 clearly record that this Authority had called for post disclosure comments from all the parties. Pursuant thereto, various parties had filed their post disclosure comments. A bare perusal of the said post disclosure comments would clearly show that the domestic industry had only contended that the

duty should be imposed retrospectively. However, it was not their case that duty was being circumvented even between the period 19.02.2016 (the date of the Initiation Notification) and 18.08.2017 (the date of the final findings of this Authority). The domestic industry never placed any material before this Authority, even in their post disclosure comments to demonstrate that any duty circumvention took place between 19.02.2016 (the date of the Initiation Notification) and 18.08.2017 (the date of final findings of this Authority). The domestic industry never placed any material before this Authority, even in their post disclosure comments to demonstrate that any duty circumvention took place between 19.02.2016 (the date of the Initiation Notification) and 18.08.2017 (the date of the final findings of this Authority). In view thereof, it is not open to the domestic industry to contend that any such duty should be levied retrospectively from the date of Initiation.

60. It is to submit that during the period between 19.02.2016 (the date of the Initiation Notification) and 18.08.2017 (the date of the final findings of this Authority), various importers/exporters have imported/exported the goods in question, considering that no duty existed on the product at the said time on PUI. Imposition of any duty retrospectively on PUI would amount to interference in the rights which have come to vest in such importers/exporters. The duty cannot be imposed retrospectively, even following the principles of legitimate expectation and estoppel.

61. That even a bare perusal of the judgment dated 12.09.2019 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi, would clearly show that the Appellate Tribunal had specifically directed this Authority to record a specific findings as to whether the duty should be levied retrospectively or not. The same is clear from a bare reading of paragraphs 32 and 33 of the Judgment dated 12.09.2019.

62. It is to submit that the present proceedings are being held pursuant to the aforesaid judgment dated 12.09.2019. Thus the parties as well as the present authority is bound by the directions contained in the said judgment. The said judgment itself envisages that it is for this Authority to decide as to whether the duty is to be imposed retrospectively or not. Thus it is clear that even the directions contained in the judgment dated 12.09.2019 clearly lay down and recognise the discretion of this Authority to take a decision as to whether the duty is to be imposed retrospectively or not.

63. That in the aforesaid facts and circumstances, it is most respectfully prayed that this Designated Authority may come to a conclusion that Anti-circumvention duty is not to be imposed retrospectively from the date of Initiation Notification dated 19.02.2016 as

the Notification imposing anti-dumping duty on PUI is a conditional notification expecting importers to follow the procedure, which had been set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017. Further, any recommendations of the Designated Authority to recover duty retrospectively would be in conflict with the provisions and prescribed procedure of Customs Act. It is settled tax law that an interpretation that would render certain substantive provision of the Customs Act otiose has to be avoided. The exercise of jurisdiction and discretion vested in the Designated Authority would be contrary to these settled legal principles and would therefore rendered bad in law in the event such a recommendation as proposed by domestic industry is made.

64. Without prejudice to the above, it is respectful submission of the importer herein that law on this subject is no longer res-integra that a power to frame subordinate legislation with retrospective effect has to be expressly conferred by the parent Act. In the absence of any express stipulation in Section 9A(1A), such a power could not have been conferred or could be exercised through the subordinate legislation. To this extent, Rule 27 is ultra vires of Section 9A(1A). In this backdrop, Rule 27 is required to be interpreted in a manner that does not go contrary to this settled principle of law. Reliance in that regard is placed on the Constitution Bench Judgment of Hon'ble Supreme Court of India in Indramani Pyarelal Gupta vs W. R. Nathu And Others [AIR 1963SC 274] wherein the Hon'ble Supreme Court of India held as under:

> *"58. Section 11 enumerates the matters in respect of which the recognized associations can make bye-law for the regulation and control of forward contracts. Neither section 12 nor section 11 expressly states that a bye-law with retrospective operation can be made under either of those two sections. Full effect can be given to both the section by recognizing a power only to make bye-laws prospective in operation, that is, bye-laws that would not affect any vested rights. In the circumstances, can it be held that the Central Government to which the power to make bye-laws is delegated by the Legislature without expressly conferring on it a power to give them retrospective operation can exercise a power thereunder to make such bye-laws. Learned counsel for the respondents contends that, as the Legislature can make a law with retrospective operation, so too a delegated authority can make a bye-law with the same effect. This argument ignores the essential distinction between a Legislature*

functioning in exercise of the powers conferred on it under the Constitution and a body entrusted by the said Legislature with power to make subordinate Legislation. In the case of the Legislature Article 246 of the Constitution confers a plenary power of Legislation subject to the limitations mentioned therein and in other provisions of the Constitution in respect of appropriate entries in the Seventh Schedule. This Court, in Union of India (UOI) v. Madan Gopal Kabra MANU/SC/0053/1953: [1954]25ITR58 (SC), held that the Legislature can always Legislature retrospectively; unless there is any prohibition under the Constitution which has created it. But the same rule cannot obviously be applied to the Central Government exercising delegated Legislative power for the scope of their power is not co-extensive with that the Parliament. This distinction is clearly brought out by the learned Judges of the Allahabed High Court in Modi Food Products Ltd. V. Commissioner of Sales-Tax, U.P. MANU/UP0017/1956 : AIR1956All35 , wherein the learned Judges'observed :

"A Legislature can certainly give retrospective effect to pieces of Legislation passed by it put an executive Government exercising subordinate and delegated legislative powers, cannot make legislation retrospective in effect unless that power in expressly conferred."

59. In Strawboard Manufacturing Co. Ltd. v. Gutta Mill Workers Union MANU/SC/0056/1952: (1953) lLLJ186SC a question arose whether the Governor of U.P., who referred an industrial dispute to a person nominated by him with a direction that he should submit the award not later than a particular date could extend the date for a making of the award so as to validate the award made after the prescribed date. Reliance was placed upon section 21 of the U. P. General Clauses Act, 1904, in support of the contention that the power of amendment and modification conferred on the State Government under that section might be so exercised as to have retrospective operation. In rejecting that contention, Das, J., as he then was, observed:

"It is true that the order of April 26, 1950, does not ex facie purport to modify the order of February 18, 1950, but, in view of the absence of any distinct provision in section 21 that the power of amendment and modification conferred on the State Government may be so exercised as to have retrospective operation

the order of April 26, 1950, viewed merely as an order of amendment or modification cannot, by virtue of section 21, have that effect."

60. This decision is, therefore, an authority for the position that unless a statute confers on the Government an express power to make an order with retrospective effect, it cannot exercise such a power. The Mysore High Court in a considered judgement in India Sugar & Refineries Ltd. v. State of Mysore A.I.R. 1960 Mys. 326 dealt with the question that now arises for consideration. There, the Government issued there notification dated 9-4-1956, 15-10-1957 and 13-2-1958 purporting to act under section 14(1) of the Madras Sugar Factories Control Act, 1949, whereby cess was imposed on sugarcane brought and crushed in petitioner's factory for the crushing season 1955-56, 1956-57 and 1957-58 respectively. One of the question raised was whether under the said section the Government had power to issue the notifications imposing a cess on sugarcane brought and crushed in petitioner's factory for a period prior to the date of the said notifications. Das Gupta, C. J., delivering the judgment of the division Bench, held that it could not. The learned Advocate General, who appeared for the State, argued, as it is now argued before us that in a case where power to make rules is conferred on the Government and if the provision conferring such a power does not expressly prohibit the making of rules with retrospective operation, the Government in exercise of that power can make rules with retrospective operation. In rejecting that arguments, the learned Chief Justice, delivering the Judgment of the division Bench, observed at p. 332: "In my opinion a different principle would apply to the case of an executive Government exercising subordinate and delegated legislative powers. In such cases, unless the power to act retrospectively is expressly conferred by the Legislature on the Governments, the Government cannot act retrospectively."

61. With respect, I entirely agree with the said observations. The same question was again raised and the same view was expressed by the Kerala High Court in C. W. (P) Ltd. v. State of Kerala A.I.R. (1950) Ker. 347. There the Regional Transport Authority, Kozhikode, granted a stage carriage permit to the third respondent therein in respect of proposed Ghat routs. The grant of the permit was challenged on the ground that when that order was passed there was no

contended on behalf of the contesting respondent that the said defect was cured by a subsequent notification issued by the Government whereby Government ordered the continuance of the Road Transport Authority from the date of the expiry of the term of the said Authority till its successor was appointed. The High Court held that the notification with retrospective operation was bad. In that context, Varadaraja Iyangar, J., observed :

"The rule is well-settled that even in a case where the executive Government acts as a delegate of a legislative authority, it has not plenary, power to provide for retrospective operation unless and until that power is expressly conferred by the parent enactment."

62. The House of Lords in Howell v. Falmouth Boat Construction Co. Ltd. (1951) A. C. 837 expressed the same opinion and also pointed out the danger of conceding such a power to a delegated authority. There, a licence was issued to operate retrospectively and to cover works already done under the oral sanction of the authority. Their Lordships observed:

"It would be a dangerous power to place in the hands of Ministers and their subordinate officials of allow them, whenever they had power to license; to grant the licence ex post facto; and a statutory power to license should not be construed as a power to authorise or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction.".

63. It is true that this is a case of a licence issued by an authority in exercise of a statutory power conferred on it, but the same principle must apply to a bye-law made by an authority in exercise of a power conferred under a statute. Our Constitution promises to usher in a welfare State. It involves conferment of powers of subordinate legislation on government and governmental agencies affecting every aspect of human activity. The regulatory process is fast becoming an ubiquitous element in our life. In a welfare State, perhaps it is inevitable, for the simple reason that Parliament of legislature cannot be expected to provide for all possible contingencies. But there is no effective machinery to control the rule-making powers, or to prevent its diversion through authoritarian channels. If the conferment of power to make delegated Legislation proper vigor carried with it to make rule or bye-law with

retrospective operation, it may become an instrument of oppression. In these circumstances, it has been rightly held that the provision conferring such a power must be strictly construed and unless a statute expressly confers a powers to make a rule or bye-law retrospectively, it must be held that it has not conferred any such power. It is said that such a strict construction may prevent a rule making authority from making a rule in an emergency, though the occasion demands or justifies a rule with retrospective effect. The simple answer to this alleged difficulty is that if the Legislature contemplates or visualizes such emergencies, calling for the making of such rules or bye-laws with retrospective effect, it should expressly confer such power. It is also said that the Government can be relied upon to make such rules only on appropriate occasions. This Court cannot recognize implied powers pregnant with potentialities for mischief of such assumptions. That apart, the scope or ambit or a rule cannot be made to depend upon the status of a functionary entrusted with a rule making power. In public interest the least the court can do is to construe provisions conferring such a power strictly and to confine its scope to that clearly expressed therein.

64. Applying that rule of strict construction, I would hold that section 12(1) does not confer a power on the Central Government to make a bye-law with retrospective effect and, therefore, the new bye-law made on January 21, 1956, in so far it purports to operate retrospectively is invalid."

65. Reliance is also placed on R.K.V. Motors & Timbers (p) Ltd. VS. Regional Transport Officer [AIR 1982 Ker 156]; and Managing Committee vs. Hyderabad Allwyn Metal Works [AIR 2006 AP 330]. In view of the submissions made hereinabove, it is most respectfully prayed that no recommendation may be made to impose duties with retrospective effect from the date of the initiation of the anti-circumvention investigations.

C.6 Written Submissions (2nd Oral Hearing)

66. The undersigned has already filed submissions earlier, pursuant to first oral hearing. The submissions already filed earlier may be read as part and parcel of the present

submissions and the same are not being repeated herein for the sake of brevity and convenience.

67. That vide the aforesaid judgment dated 12.9.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, the matter had been remitted back to this Designated Authority to record a specific finding as to whether the anti-circumvention duty should be levied retrospectively from the date of initiation of investigation.

68. That the submissions of Suncity Strips and Tubes Pvt. Ltd. are reiterated as under:-

    a. That the question which falls for consideration in the present proceedings is as to whether anti-circumvention duty is to be levied retrospectively from the date of initiation of investigation.

    b. It is a matter of record that anti-circumvention duty has already been levied vide notification issued by the Govt. of India, Ministry of Finance, vide notification dated 24.10.2017. The initiation notification was dated 19.2.2016. Thus, the only question to be considered is as to whether for the period between 19.2.2016 and 24.10.2017 also anti-circumvention duty is to be imposed.

    c. That the domestic industry has contended that anti-circumvention duty should be applied retrospectively to cover the period between 19.2.2016 and 24.10.2017. Thus, the domestic industry has no role to play in the adjudication in question.

    d. That the contention raised before this Authority that the onus is upon the importer/exporter to show as to why the anti-circumvention duty should not be imposed retrospectively, is without any basis and is infact contrary to the reading of Rule 27(1) itself. The said Rule provides for imposition of anti-circumvention duty and thereafter, mentions that the said duty may be applied retrospectively from the date of the initiation of investigation. Thus the intention of the rule is very clear that the duty is to be applied prospectively, but it is opened to the Authority to apply retrospectively from the date of initiation of investigation. If the circumstances so require, which off-course would be subject to the determination as to whether there is enough material to show circumvention after the initiation of investigation. If the intention was to give retrospective effect as the default position, the said Rule would have mentioned that the duty will be applied retrospectively, but the Authority may apply the same prospectively. However, the rule has not been worded in the said manner. Thus the only interpretation of the said rule can be that the duty is to be applied prospectively as a default position, however, the Authority has been conferred power to apply it retrospectively.

e. That the contention of the domestic industry that the domestic industry is suffering or that there was a need to send a right message were without any basis whatsoever. The said contentions were raised only in an attempt to prejudice this Authority. In the first place, since the imposition of any such duty for the period between 19.2.2016 and 24.102017, as domestic industry failed to place on record any material to show that they were suffering injury in any manner. Further, the question to be considered by this Authority is on the basis of the material before this Authority and the legal principles applicable thereto. There is no question of consideration of any other aspect, including the aspect of sending any 'right message'.

f. That the notification dated 24.10.2017 issued by the Govt. of India, Ministry of Finance, imposes duty prospectively. A perusal of the said notification would show that it provides that no anti-dumping duty shall be payable on imports of the goods, subject to certain conditions. It is not possible to comply with the said conditions retrospectively, regarding the imports which have already taken place and stand completed.

69. In view and reiterated in line with our earlier submissions of the submissions made hereinabove, it is most respectfully prayed that no recommendation may be made to impose duties with retrospective effect from the date of the initiation of the anti-circumvention investigations.

C.7 Submissions made by other interested parties

70. **M/s Navnidhi Steels & Engg. CO. Pvt. LTD** in their letter dated 25.10.2019 have reiterated the contents of their earlier letter dated 7.7.2019 that they have never imported goods with the intention to the width of PUI. Hence, Anti-Circumvention is not applicable on them.

71. **M/s Ramani Steels House** in their letter dated 22.10.2019 have reiterated the contents of their earlier letter dated 10.8.2017 that they never imports materials with intention to circumvent, as required width Cargo of 600-1250 mm is easily available in India as well Countries outside Anti –dumping e.g Indonesia, Malaysia, Mexico, Japan, Brazil, and at very competitive price. Hence, Anti-Circumvention is not applicable on them.

72. **All India Induction Furnaces Association** in their letter dated 30.10.2019 has made the following submissions:

The All India Induction Furnace Association represents the interest of large number of small scale units of induction furnace manufacturers operating

in various industrial areas. We would like to bring to your kind notice that this industry is largely fragmented and unorganized. Our industry represents many stainless steel producers using induction furnace. We primarily supply blooms / ingots to Flat & Patta Re Rollers for further conversion to Circles for producing utensils. Most of the members in this supply chain are in MSME.

Further to the Personal Hearing dated 15-Oct-2019 on the above mentioned subject, we would like to submit as under –

a. Ours is a significant industry segment has the capacity to produce more than 1.25mn tons stainless steel per annum at Pan India level and employ a significant number of people contributing to the economy positively.
b. There are more than 65 induction furnace units manufacture stainless steel ingots which is the primary raw material for the Pattie and Patta Units.
c. We have direct investment of approximately more than *** as Capex *** as working capital in these manufacturing units.
d. We provide direct and indirect investment to more than ***people on Pan India basis.
e. Melting of scrap is done manually by Induction furnace Manufacturers to produce Stainless Steel Ingots by the recycling process and supply to Pattie and Patta units.

Further, we wish to inform that the volume of imports of the subject goods has increased multiple folds in the last few months and specifically in the month of Aug '2019.

Since this sudden surge in the imports is alarming, therefore we request your good self to kindly impose the Anti-Dumping Duty (ADD) at the earliest and oblige.

C.8 Rejoinder Submissions

Submissions by the Domestic Industry (First oral hearing)

73. 'May' cannot be interpreted as 'shall' under Rule 27(1). Such interpretation would make part of Rule 27 (3) otiose. Even if it is argued that retrospective duty is not mandatory and there exists an element of discretion, that discretion should be exercised judiciously and not arbitrarily and anti-dumping duties must be imposed retrospectively from the date of initiation unless any other date is found more appropriate. From the

text of Rule 27, it becomes plenty clear that Rule 27(1) and 27(3) provides for retrospective imposition of duties.

74. Rule 27 (3) specifies that the central government may extend anti-dumping duties from the date of initiation of investigation or any other date as is recommended by the Authority. Applying the rule of literal interpretation, there is a choice between the two alternatives, the former is specific, the latter is general, but in no way do they imply a prospective date. Further, the DA being a quasi-judicial body, is obligated to provide a reasoning if any other date is provided. The objective of this legislation is to avoid circumvention of the law and taking he grammatical meaning of the word 'or' would be at variance with this intention of the legislature.

75. In New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, the Hon'ble Supreme Court held that interpretation of expressions used in statutes should be such that it is in harmony with the object of the statute and of the legislature. Therefore, when two constructions are feasible, the court will prefer that which advances the remedy and suppress the mischief, as the legislature envisioned. The Court's approach should be such that legislative futility is ruled out so long as interpretative possibility permits. Applying this ruling to the case in hand, it can be deduced that Rule 27 (3) must be interpreted to provide for extension of anti-dumping duties retrospectively and only if that is not found reasonable should the DA recommend any other date.

76. In, Azad Transport Company Pvt. Ltd. and Ors. vs. The State of Bihar and Ors, the Hon'ble HC of Patna opined that where there are two provision/options for a given situation, the specific terms are not to be included in the general, and the specific option is to be exercised. Similarly, in The J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. The State of Uttar Pradesh and Ors., the Hon'ble SC, reiterated the view that, "in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision". From the cases cited above, and applying the same principles to this case, it can be seen that where there was a specific and a general provision in the same Rule, the specific rule is the one that will apply. Hence, when there is a date of initiation, that is the date that will apply and only when that is inapplicable, can the DA recommend the date.

77. When there is no date provided, then the only option is retrospective levy of duties. And it must be noted that the Authority had not recommended any date from which the

Central Government should have imposed the duty. Thus in such a situation, the Ministry of Finance can only recommend duties retrospectively.

78. The contention of the other interested parties that If the intention of the legislature was that in all cases of circumvention, anti-dumping duty was to be applied retrospectively, it would have been expressly provided for the same in section 9A (1A) of the Act itself, cannot be accepted because rules are an extension of the parent Act, and unless something contrary is provided in the Rules, the two must be read harmoniously as one Code. The provision concerning retrospective imposition of duty in the original investigation stated the follows: "and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied". Thus, while in the original investigation a likelihood of undermining the remedial effect due to anti-dumping duties would be reason for duty to be imposed retrospectively, in a circumvention case, the fact of undermining of remedial effect of ADD is proved on the contrary to a "likely" scenario. After establishing injury and the imposing such measures, circumvention of the same necessarily warrants retrospective imposition of duty.

79. Refence placed by other interested parties on the matter of Commissioner of Customs vs GM Exports is incorrect. The issue at hand was relating to a fresh investigation. It is inappropriate to consider an obiter dictum of a particular case in order to mislead the Authority.

80. The contention of the other interested parties that, the Authority has already determined in the original finding that there was no justification for a retrospective levy justified based on its assessment of the Petitioners' documents and submissions, the Authority is now only required to provide a reasoned order for its findings, is false, as the Authority made no determinations on the retrospective imposition of Anti-Dumping Duty. The Hon'ble CESTAT held that the Authority had not examined the issue of retrospective imposition of anti-dumping duties, thus the matter was remanded back.

81. Anti-circumvention duty differs from a fresh investigation and has to be imposed retrospectively, as it applies to those exporters who try to circumvent the duty and continue dumping. Further, as per the original investigation, there is a history of dumping, the increase in imports concluded in the original investigation has remained at a similar level, and the Authority has concluded that the circumvention has undermined the ADD. Thus the conditions as required in an original investigation are present, warranting retrospective imposition of duty.

82. The producers and exporters are habitual evader of duties and are involved in malpractices because: The exporters brought in subject goods just above 120mm to circumvent ADD. As per DRI, there have been several investigations against them for evading duty. Preliminary report of DRI shows that these exporters obtained certificate of origins and the importers have evaded the customs duty by availing concessional duty rates by misrepresenting the Regional Value Content; misdeclaration of goods by selectively using words; usage of advance authorisation during non-applicable periods; non-compliance of RMS in bill of entry; importing under advance license scheme; and not completely revealing specifications such as width, length etc. Hence the genuineness of the exporters and importers needs to be examined.

C.9 Rejoinder Submissions (2nd Oral Hearing)

83. Other interested party's contention that that anti-circumvention duty should be applied retrospectively. DI has no role in this adjudication is baseless and tantamount to saying that the CESTAT wrongly accepted the appeal and passed the present order. The domestic industry requests for retrospective imposition of circumvention duty as it has already been proved that the exporters and importers have resorted to willful disobedience of the ADD imposed by the Authority

84. The contention of the other interested parties that for imposition of duty between 19.02.2016 and 24.10.2017, DI has not placed material on record to show that they were suffering injury in any manner, is baseless. Once it has been established that the exporters have circumvented the anti-dumping duties, it stands proved that such activity is being continued. The duty is collected from the date of initiation. Moreover, there is no provision requiring such establishment of circumvention. And such retrospective collection is right message to the parties as there are certain perpetual defaulters.

85. The following considerations are useful to consider the meaning of circumvention: (a) attempt to import PUC in modified form; (b) intention of exporters and importers; (c) adverse impact of circumvention on imposed duty; (d) nature of circumvention; (e) value addition in the process by exporting the product in wider width; (f) relevance and importance of knowledge with the exporters and importers; and (g) considerations in case retrospective imposition of duty in original investigation. All these considerations are fully met in the present investigation; hence, retrospective imposition is required.

C.10 Submissions made by ELP representing M/s Outokumpo OYJ-(First Oral Hearing)

86. In the SSR, the Petitioners at numerous instances have claimed that the injury caused to them was entirely due to the imports of the PUC. However, in this instance, they argue that the injury caused to the Domestic Industry is primarily due to the Product Under Investigation ("PUI"), in a period which overlaps with the period assessed in the SSR. As the PUC in the SSR has been settled to not include the widths above 1250 mm (after allowing for tolerance) it is evident that in the above extracts the dumped imports are in fact the PUC and not the PUI. Therefore, the injury caused to the Petitioners was clearly due to the PUC and not the PUI. OTK therefore submits that the Petitioners must not be allowed to change their averments regarding the cause of injury to suit their whims.

    (i) Further, OTK submits that existence of historical injury is the basis of all Anti-dumping determinations. The mere existence of historical injury does not validate the retrospective imposition of any duties. Even in an original investigation, the presence of historical injury is analysed to determine whether duties are to be recommended (prospectively). In fact, there are separate and clear thresholds to consider the imposition of retrospective duties in any form distinct from the existence of historical injury.

    (ii) Lastly, at Paragraph 14, the Petitioners have averred that "the long duration for which the Domestic Industry has suffered is required to be sympathetically considered". OTK submits that there is no justification for a "sympathetic" analysis of the factors laid out for the imposition of retrospective duties – there are clear parameters based on which the Hon'ble Designated Authority may determine whether or not a case for retrospective duties can be made.

87. At Paragraph 15, the Petitioners have stated that the AD rules require the Authority to examine whether the act of circumvention has undermined the effect of duties imposed.

88. OTK submits that the undermining effect (on duties imposed) by circumvention activities as a pre-requisite for anti-circumvention duties, not for retrospective levy of duties, as is evident from Rule 25(3)(b) of the AD Rules.

89. At Paragraph 16, the Petitioners have provided an import data analysis that they believe shows egregious increase in imports of the PUC and the PUI. OTK submits that the analysis is patently wrong. In the year 2014-15, the total imports did indeed increase. However, in the POI (annualised) the figures show a significant drop. In fact, between the year 2012-13 and the POI (Annualised), there has been a sheer decline of ***MT

in the import figures. OTK fails to see how declining imports of the PUC and PUI can be a basis for the recommendation of a retrospective levy.

90. At Paragraph 17, the Petitioners have relied upon data from the original investigation and the SSR (which are both outdated) to represent a decline in the Domestic Industry's profitability. OTK submits that the issue at hand pertains to whether or not anti-circumvention duties ought to have been levied retrospectively, and yet the analysis for injury relies on prior investigations, rather than the period of injury for the anti-circumvention investigation. Without prejudice, OTK submits that even when considering the outdated data submitted in the Petitioners' written submissions, majority of the time periods considered are periods wherein duties were in force.

91. Multiple ways attempted by the producers and exporters to circumvent duties (Paragraph 19 to 21): In this Section, the Petitioners have yet again belaboured the existence of circumvention, rather than presenting reasons for a retrospective levy. OTK therefore submits that all the averments made in this section have no bearing in the present investigation. OTK requests the Hon'ble Designated Authority to kindly reject these submissions.

92. Large scale investigations, including DRI investigations on imports (Paragraph 22): In this section, the Petitioners have relied on the existence of Directorate of Revenue Intelligence investigations against the Interested Parties. Considering the independent mandate of the Hon'ble Designated Authority as a quasi-judicial body, OTK fails to see the relevance of these averments in the context of achieving a well-reasoned determination for the need for retrospective duties as directed by the Hon'ble CESTAT.

93. Loss of revenue to the Govt. (Paragraph 23): In this section, the Petitioners have averred that the circumvention of duties has caused loss of revenue to the Government of India. OTK states that these averments are irrelevant to a retrospective levy.

94. Mockery of the process and the system (Paragraph 24 and 25): In this section, the Petitioners have made spurious and egregious allegations against the Interested Parties of mocking the process and systems of the Hon'ble Designated Authority. OTK submits that the Hon'ble Designated Authority, during the anti-circumvention investigation, has made clear exceptions for genuine import of the PUI in its recommendations by incorporating the condition of the end-user certificate. The existence of these carve-outs clearly reflects that there were instances of genuine end-use imports of the PUI.

95. Circumvention is an abuse (Paragraph 26): The Petitioners in this section are yet again arguing the existence of circumvention while the objective of the present investigation

is to determine the need for retrospective duties and the date of commencement of duties. OTK further reiterates that the issue of whether circumvention is taking place or actionable is not the question before the Hon'ble Designated Authority here, whereby the Petitioners' submissions are irrelevant to the present proceeding and therefore liable to be rejected.

96. Need for sending a right message (Paragraph 27): In this section, the Petitioners have made detailed averments about disciplining Interested Parties in such investigations by recommending anti-circumvention duties. OTK submits that such flamboyant statements are inappropriate in trade remedy investigations as every investigation must be adjudged on its own merits to determine the need for trade remedy duties.

97. Evasion of duty versus wilful avoidance of duty (Paragraph 28): In this section, the Petitioners have averred that the Interested Parties "must suffer consequences, irrespective of hardship". OTK submits that the Interested Parties have been bearing the burden of the anti-dumping duties as well as anti-circumvention duties, wherever found applicable. Therefore, the Interested Parties are already "suffering necessary consequences" as indicated by the Petitioners. There is no correlation of the Petitioners' arguments in this section with a retrospective levy of duties.

98. Word "may under rule 27 needs to be read "shall" (Paragraph 29 to 32): In these sections, the Petitioners have laboriously reiterated the arguments drawn for the interpretation of "may" and "shall". OTK reiterates the objective of the Hon'ble CESTAT's remand order and consequently the objective of this investigation is to achieve a cogent and comprehensive final finding with reasoning for the imposition of retrospective duties post the consideration of the interpretation of "may" and "shall".

99. The Petitioners have laboriously reiterated the arguments drawn for the interpretation of "may" and "shall". OTK reiterates the objective of the Hon'ble CESTAT's remand order and consequently the objective of this investigation is to achieve a cogent and comprehensive final finding with reasoning for the imposition of retrospective duties post the consideration of the interpretation of "may" and "shall".

100. Practices of other investigating authorities (Paragraph 41): OTK also submits that the Petitioners have averred that investigating authorities in the European Union ("EU") and the United States of America ("USA") have definitively levied retrospective duties from the date of the initiation. OTK submits that, just as it is in the Indian jurisprudence, the legal statues in the EU and USA too give their respective investigating authorities the discretion to impose such duties contingent on certain conditions being met. OTK

therefore submits that it is a global practice for the determination of a retrospective levy to be a matter of reasonably exercised discretion. Merely because other jurisdictions, in select cases have recommended retrospective duties does not mean that the present factual scenario automatically justifies the same. The Hon'ble Designated Authority is accordingly requested to reject the averments of the Petitioners.

101. Meaning of circumvention and what are relevant consideration: Between Paragraphs 42 and 48, the Petitioners have made averments regarding the relevance of attempt, intent, impact, form of import, value addition, etc, to Circumvention. OTK yet again fails to understand the relevance of these averments when the objective of the present investigation is not to reassess the existence of circumvention but to present a reasoned determination for the need for retrospective duties. The arguments made by the Petitioners all pertain to why circumvention should be remedied, but not why retrospective duties are justified in the present case. OTK therefore requests the Hon'ble Designated Authority to reject these averments.

102. Provision concerning retrospective imposition of duty (Paragraph 49 to 51): At Paragraph 49, the Petitioners have provided the rules and reiterated the conditions for imposition of retrospective duties. OTK submits that these conditions pertain to original anti-dumping investigation only, and not to anti-circumvention duties.

103. Submissions of the parties on collection of duty for the period prior to initiation (Paragraph 53 to 54): In this section, the Petitioners have claimed to benevolently not seek collection of duties prior to initiation. OTK submits that neither the Petitioners nor the Hon'ble Designated Authority is empowered to seek or impose duties from before the initiation of the investigation by virtue of Rule 20(2). Therefore, the Petitioners are attempting to portray that they have benevolently forgone protection, even though they were not entitled to it in the first place. OTK requests the Hon'ble Designated Authority to kindly reject such submission of the Petitioners.

C.11 Rejoinder Submissions (2nd Oral Hearing)

104. Retrospective imposition of duty is mandatory once circumvention is determined. In this section the Petitioners have attempted to misalign the understanding of the discretionary powers of the Hon'ble Designated Authority yet again. OTK has previously countered these averments of the Petitioners in its submissions post the first Oral Hearing and the same have not been repeated herein.

105. Sequential reference to conditions: In this section, the Petitioners have averred that the provisions regarding imposition of retrospective duty has to be read sequentially and thereby every sub-provision has to apply consequently. At the outset, OTK denies the claim of the Petitioners, and respectfully submits that the same is based on an incorrect reading of the law. Rule 27 (1) does not create any sequence of conditions in the powers that it vests on the Hon'ble Designated Authority.

106. Therefore, Rule 27(1) simply provides a starting point from which the duties may be applied. By use of the word "may", Rule 27(1) even grants the Hon'ble Designated Authority with the discretion to decide whether the duties must be levied from the date of initiation or any other date as it deems fit once it has determined circumvention and the definitive need for retroactive imposition of the anti-circumvention duty.

107. The very fact that the Central Government can levy the duties from the date of the initiation or any such date recommended by the Hon'ble Designated Authority clearly indicates that the legislative intent was to give the Hon'ble Designated Authority the discretion of determine whether or not retrospective levies are justified. Therefore, by acknowledging that there is a sequence of options, the Petitioners are themselves admitting that this discretion exists – this is in direct contradiction to their main ground for the very appeal (filed by the Petitioners) from which this remand has originated.

108. Lastly, now that the discretion of the Hon'ble Designated Authority (to determine whether a retrospective levy is necessary) has been recognized by the Petitioners, OTK also submits that the Petitioners have failed to provide any evidence or justification for such a retrospective levy. The Petitioners, at paragraphs 8(a) to 8(e) have merely reiterated prior grounds without any evidence to substantiate the same. The Hon'ble Designated Authority is requested to reject Petitioners' unsubstantiated request with immediate effect by way of a reasoned order.

109. The Petitioners at paragraph 8(d) have proceeded to allege that the Importers have evaded duties by fraudulently acquiring Certificates of Origin; concessional duty rates by misrepresenting Regional Value Content; misuse of advance authorization, non-compliance of RMS in bill of entries and misrepresenting description of goods while importing under an advance license.

110. OTK submits that a trade remedy investigation is not the appropriate forum for such allegations and the Petitioners have provided no evidence to support the same. The Petitioners are welcome to approach the relevant and appropriate authorities to investigate these allegations as per the evidence that they have; however, the Hon'ble Designated Authority is not obligated to assess these allegations and take them into consideration when determining trade remedy duties.

111. Absence of notice to the parties: The Petitioners in this section have stated that some Interested Parties contended that the recommendation of imposition from the date of initiation due to a lack of notice given to the Interested Parties. OTK submits that such a contention was not part of its previous submissions to the Hon'ble Designated Authority and it does not wish to contend the same at this juncture. Without prejudice to the same, OTK highlights that the onus to prove the need for imposition to the Hon'ble Designated Authority from the date of initiation or from any other date lies entirely on the Petitioners.

112. With the aim to re-emphasize the its averments, OTK reproduces its conclusions as is from the rejoinder below:

a. The Petitioners have repeatedly and egregiously made averments in their written submissions only on the issue of whether or not anti-circumvention duties are justified – an issue that has been well settled on facts and law;
b. There is no actual evidence to justify why a retrospective levy of duty in particular is well-suited to the facts at hand, and all analyses provide by the Petitioners only appear to address why anti-circumvention duties should be levied;
c. The order of the CESTAT clearly states that the Hon'ble Designated Authority is required to provide a reasoned order on whether or not a retrospective levy of duties is necessary – the consideration of new facts or "shall" / "may" arguments is beyond the scope of this proceeding;
d. In any event, since no evidence or averments have been forwarded by the Petitioners to justify a retrospective levy of duty, their request is liable to be rejected.

C.12 3rd Oral Hearing

113. A third oral hearing was held on 17.07.2020 pursuant to which written submissions were received by the Authority from many interested parties. The include, POSCO,

Taipei Economic and Cultural Centre, Domestic Industry, Navnidhi Steel and Engineering Co. Pvt. Ltd, NG Industries, Outokumpu Oyj, Ramani Steel, Siddhivinayak Steel, Saraswati Steel India and Navpad Steel Centre.

114. While Authority has reproduced all submission below, any submission if not included may be intimated for its consideration in the final finding.

Submissions by the Domestic Industry

115. As submitted in the previous submissions filed before the Authority that as per Rule 27 (1) read with Rule 27(3), once it is determined that circumvention exists, then the Hon'ble Authority shall have to make a recommendation for extension of duty earlier imposed to address circumvention. Further, a list of instances where 'may' has been interpreted as shall has also been attached.

116. With regards to the argument of the interested parties claiming that Rule 27 is *ultravires* as it provides for retrospective effect. Notwithstanding the irrationality and inappropriateness of such claim, it is submitted that, ultra vires of a provision cannot be argued before the Designated Authority.

117. With regards to the argument that for retrospective levy, it is obligatory upon the Authority to come to a definite conclusion that duty was being circumvented between the dates of Initiation Notification and Final findings. The DI while rejecting such an argument states that placing of such an obligation on the authority is without any basis in law or precedent set and would amount to the interested party framing laws by itself. Further, such an understanding is incongruous with law, as nowhere in the Circumvention law has the Authority been placed with such an obligation by the legislature.

118. Where the statutory language being used is specific in one case and general in the other, the specific language should ordinarily prevail over the generic one. Any matter that could possibly fall under either, would first be subject to the specific expression and only in case of non-applicability of the specificity, that the generic expression will be applied.

Submissions by Taipei Economic and Cultural Centre

119. Taiwan expressed its support for the Authority's recommendation for imposing prospective anti-dumping duties in its original Final Finding.

120. Rule 27 entrusts the Authority with a discretion, and not an obligation. Rule 27 of the Anti-Dumping Rules states that the Authority may recommend a retrospective

imposition of an anti-circumvention duty if deemed necessary. Pursuant to the recommendation of retrospective imposition made by the Authority, the Central Government also has the discretion in this regard

121. It is also pertinent to note that in the present situation, the allegation is of product-circumvention. The Authority has also carved out an exception in the PUC, by allowing *bona fide* imports. Retrospective duty imposition, in such a situation is also not practical and cannot be implemented effectively

Submissions by POSCO

122. The legislative intent is clear that discretion lies with the Designated Authority to impose duty with retrospective application from the date of initiation.

123. Article 10 of the Anti-dumping Agreement governs the retroactive application of anti-dumping duties. The Article provides for prospective application of anti-dumping duties, unless it is levied retrospectively, at the discretion of the relevant Authority, for the period for which provisional measures have been applied or there is a history of dumping and an injury is caused by massive dumped imports so as to seriously undermine the remedial effect of the duty applied.

124. In the instant investigation, at the time of final findings, the gap period between the Initiation (February 19, 2016) and the Notification (October 24, 2017) was almost 18 month. Therefore, it is submitted that it would have led to administrative upheaval if the DGTR had recommended imposition of duty retrospectively from the date of the Initiation.

125. With regard to the contention of the domestic industry that imposition of prospective duty will only result in promoting the ulterior motive of imports/exporters to delay the application of duties by delaying the investigation. As per Rule 26 of the Rules, any such investigation shall be concluded within 12 months and in no case more than 18 months of the date of initiation of the investigation. The investigation in the instant case lasted for 18 months, within the time frame provided. Therefore, there have been no delaying or other malafide tactics employed by the parties herein.

Submissions of the other interested parties

126. None of the parties have placed any material before the Authority to either allege or prove that the duty was being circumvented during the period of initiation and issuance of final findings. As a direct consequence, no duty should be imposed with retrospective effect.

127. The domestic industry has not placed any material before the Authority even in their post disclosure comments that nay duty circumvention took place after the issuance od initiation notification and before the issuance of Final Findings. In view thereof, the domestic industry cannot contend that any such duty should be levied retrospectively.

128. The judgment dated 12.09.2019 passed by CESTAT would clearly show that the Appellate Tribunal had specifically directed the Authority to record a specific finding as to whether the duty should be levied retrospectively or not. Thus, the parties as well as the Authority are bound by the directions contained in the said judgment.

129. The contention of the domestic industry that the domestic industry is suffering or that there was a need to send a right message are without any basis. The said contention are only being raided in an attempt to prejudice the authority.

130. Retrospective duties cannot be recommended merely because the domestic industry was injured since 2007 or that circumvention was taking place. Injury has already been addressed by way of anti-dumping duties, and circumvention has also been addressed by way of anti-circumvention measures. Indeed, if such a logical fallacy were to be entertained, then the domestic industry will likely next request that duties should be retrospectively levied from 2007 onwards.

131. With respect to the inability of the domestic industry "to get the desired effects of duties imposed", it is submitted that this is reflective of the poor performance of the domestic industry. Therefore, even if the Petitioner "continues to suffer" as claimed by it at paragraph 5, it is merely reflective of its own internal inefficiencies since the anti-circumvention duties have been in effect for a substantial period.

132. Another factor worth considering is that levying anti-circumvention duties retrospectively now will not do anything to alleviate the present status of the domestic industry, because those imports (post initiation and up to the levy of anti-circumvention duties) have already entered the Indian market years ago.

133. The alleged "multiple ways" in which the producers and exporters may have circumvented duty in no manner justifies the application of such duty on a retrospective basis.

134. If the argument of the Petitioner on Rule 27(1) were to be accepted, then this would make part of Rule 27 (3) otiose. This cannot be permitted in law. Thus, it submitted that rule 27 (1) of the AD Rules is required to be given a meaning in the context of its setting.

135. OTK also submits that the Petitioners have averred that investigating authorities in the European Union ("EU") and the United States of America ("USA") have definitively levied retrospective duties from the date of the initiation. OTK submits that, just as it is in the Indian jurisprudence, the legal statues in the EU and USA too give their respective investigating authorities the discretion to impose such duties contingent on certain conditions being met.

C.14 Summary of Submissions or Arguments

136. The submissions of the parties regarding arguments for and against the retrospective application of the circumvention duty are summarised herein under:

a) Arguments for the retrospective levy as given by the domestic industry:

137. The circumvention of the anti-dumping duty significantly diluted the relief for the domestic industry that was intended by the Authority while recommending original duties. Further, the Domestic Industry had practically suffered 129 months, before the circumvention duty became effective in 2017.

138. Now, there is a need for sending a right message with regard to the circumvention practices that are being found in the country. Since introduction of the circumvention rules from January 2012, there are already a number of circumvention investigations by the Authority.

139. Due to this circumvention, Government has faced huge revenue loss.

140. In this case, parties have resorted to wilful avoidance of duty through established circumvention and hence, it is a settled principle of law that parties must suffer consequences, irrespective of the hardship. A comparison can be drawn from evasion of duty, wherein the parties must pay the duties for whatever past period it may pertain. Similarly, circumvention constitutes wilful avoidance of duty, thus, such duty should be collected from the date of initiation (as allowed in the Rules), if not from the date of circumvention.

141. In Rule 27, once it is determined that circumvention exists, then the Authority shall have to make a recommendation for extension of duty earlier imposed to address such circumvention. Thus, the Authority does not have discretionary powers to refuse to recommend ant-circumvention duties, when circumvention has been found to exist. Thus, in that context the word 'may' is to be read as 'shall' in Rule 27. Even different authorities extend the circumvention duties from the date of initiation only.

142. The following considerations are useful to consider the meaning of circumvention: (a) attempt to import PUC in modified form; (b) intention of exporters and importers; (c) adverse impact of circumvention on imposed duty; (d) nature of circumvention; (e) value addition in the process by exporting the product in wider width; (f) relevance and importance of knowledge with the exporters and importers; and (g) considerations in case retrospective imposition of duty in original investigation. All these considerations are fully met and hence, retrospective imposition is required.

143. If the Designated Authority had a discretion to decide whether or not to recommend ADD on retrospective basis, the CESTAT would not have a passed an order directing the Designated Authority to decide the issue. In other words, the issue under consideration is not existence or otherwise of a discretion to the Authority. The issue under consideration is the need or otherwise for imposition of duty on retrospective basis. Without prejudice, the domestic industry submits that there was no discretion under the law to the Authority in deciding whether to recommend ADD on retrospective basis.

144. Since the Authority has mentioned the possibility of recommendation of retrospective duty from the date of initiation, contention of the interested parties, that they had no notice about retrospective imposition of duties, is incorrect and devoid of any merit.

145. That the contention of the other interested parties that if the intention of the legislature was that in all cases of circumvention, anti-dumping duty was to be applied retrospectively, it would have been expressly provided for the same in section 9A(1A) of the Act itself, cannot be accepted because rules are an extension of the parent Act, and unless something contrary is provided in the Rules, the two must be read harmoniously as one Code. The provision concerning retrospective imposition of duty in the original investigation stated as follows: "*and other circumstances is likely to*

seriously undermine the remedial effect of the anti-dumping duty liable to be levied". Thus, while in the provisional finding of original investigation a likelihood of undermining the remedial effect due to anti-dumping duties would be reason for provisional duty to be imposed retrospectively, in a circumvention case, the fact of undermining of remedial effect of ADD is proved on the contrary to a "likely" scenario. After establishing injury and imposing such measures, circumvention of the same necessarily warrants retrospective imposition of duty.

146. When there is no date provided, then the only option is retrospective levy of duties. And it must be noted that the Authority had not recommended any date from which the Central Government should have imposed the duty. Thus, in such a situation, the Ministry of Finance can only recommend duties retrospectively.

147. Certain users as well supported the contention of the Domestic Industry of applying the duties retrospectively.

b) <u>Arguments against retrospective levy as given by other interested parties:</u>

148. No case was made out by the domestic industry that duty was being circumvented between date of Initiation Notification (19th February, 2016) and date of final findings (18th August, 2017). Further, the domestic industry never placed any material or evidence in any of its submissions during the circumvention investigation/ proceedings including post disclosure comments to substantiate or demonstrate that circumvention of anti-dumping duty took place between date of Initiation and date of Final Findings.

149. That in terms of the latter part of Rule 27(1), even if Designated Authority makes a recommendation of anti-dumping, there may arise a situation where the levy has come to be imposed retrospectively [i.e. Central Government under its powers of Rule 27 (3) has levied the anti-dumping from the date of initiation of investigation under Rule 26]. In this manner, the two sub-Rules [Rule 27(1) and 27(3) of the Rules] are in harmony with each other, and also provide clear guidance on the word "may" must be interpreted under Rule 27(1). Further, if the argument of the Petitioners on Rule 27(1) were to be accepted then this would make part of Rule 27 (3) otiose/ redundant. This cannot be permitted in law. Thus, Rule 27 (1) of the Rules is required to be given a meaning in the context of its setting [i.e. Rules 27(1), 27(2) and 27(3)].

150. Under section 9A(1A), it is the prerogative of the Central Government whether or not to extend the anti-dumping duty in cases of circumvention where the anti-dumping duty is being rendered ineffective. If the intention of the law was that in all cases of circumvention, anti-dumping duty was required to be imposed retrospectively then section 9A(1A) would have expressly provided for the same. It is submitted that Rule 27 of the Rules cannot be read de-hors section 9A(1A) of the Act. It is settled law that the basic test is to determine and consider the source of power which is relatable to the Rule.

151. The Hon'ble CESTAT has remanded the matter to the Designated Authority with the objective of recording a specific reasoned finding as to whether the anti-circumvention duty should be levied retrospectively from the date of initiation of the investigation. Further, the Designated Authority is not required, at this stage, to entertain any averments from the Petitioners on whether the word "may" must be interpreted as "shall" in the above provision. Since the Designated Authority has already determined in the original finding that there was no justification for a retrospective levy justified based on its assessment of the Petitioners' documents and submissions, the Designated Authority is now only required to provide a reasoned order for its earlier findings.

152. Further, an imposition of anti-circumvention duties retrospectively from the date of initiation of investigation, i.e. 19th February 2016, which is now more than three years ago, will bring severe confusion to the user industries of India which are now going through an extreme downturn. Further, to reopen an already settled case will not only cause loss and inconvenience to user industries, but also impact the standing of India as a country providing fair opportunities to foreign exporters/ investors. This would also be contrary to the Supreme Court's position in the *Commissioner of Customs vs GM Exports* case that the delicate balancing act between protection of domestic industry and the hardship caused in the course of international trade has to be tilted in favour of the latter.

153. The present proceedings are being held pursuant to the aforesaid Hon'ble CESTAT judgment dated 12th September, 2019. Accordingly, the parties as well as the Authority are bound by the directions contained in the said judgment. Since, the said judgment itself envisages that it is for this Authority to decide as to whether the duty is to be imposed retrospectively or not. Thus, it is clear that even the directions contained in the

said judgment clearly lay down and recognize the discretion of this Authority to take a reasoned decision as to whether the duty is to be imposed retrospectively or not.

154. In the aforesaid facts and circumstances, the Designated Authority may come to a conclusion that Anti-circumvention duty is not to be imposed retrospectively from the date of Initiation Notification dated 19th February, 2016 as the Notification imposing anti-dumping duty on Product Under Investigation (PUI) is a conditional notification requiring importers to follow the procedure, which had been set out in the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017. Further, any recommendations of the Designated Authority to recover duty retrospectively would be in conflict with the provisions and prescribed procedure of Customs Act. It is settled tax law that an interpretation that would render certain substantive provision of the Customs Act otiose has to be avoided. The exercise of jurisdiction and discretion vested in the Designated Authority would be contrary to these settled legal principles and would therefore render bad in law in the event such a recommendation as proposed by domestic industry is made.

155. It is further submitted that law on this subject is no longer res-integra that a power to frame subordinate legislation with retrospective effect has to be expressly conferred by the parent Act. In the absence of any express stipulation in Section 9A(1A), such a power could not have been conferred or could be exercised through the subordinate legislation. To this extent, Rule 27 is ultra vires of Section 9A(1A). In this backdrop, Rule 27 is required to be interpreted in a manner that does not go contrary to this settled principle of law.

C.15 Post Disclosure Comments

Domestic Industry

156. The Court has refrained from delving on the issue of retrospective duty as it can only judge and opine on the basis of findings recorded by the Authority. To that end, the Hon'ble CESTAT has ordered and remanded the matter back to the Authority to record reasons.

157. Under Rule 27, once it is determined that circumvention exists, then the Hon'ble Authority shall have to make a recommendation for extension of duty earlier imposed to address circumvention

158. A plain grammatical meaning of the word 'or' under Rule 27(3) is at variance with the intention of the legislature and purpose of the statute itself and is leading to repugnant effect to the objective of the law. The objective of circumvention law is to prevent the producers and importers from circumventing the duty and provide a remedy to the domestic industry.

159. Regarding the observation of the Authority that no provisional assessment has been carried out in the instant case, the Domestic Industry states that this consideration would make the provision redundant. It is noted that the Central Govt. is not making provisional assessment. However, it is the domain of the Central Govt. The present rules were framed by Central Govt. and while framing these rules, the Govt. was aware that there may be situations where retrospective duty may need to be imposed. Thus, while framing the provision, if the Central Govt. has not specified any further requirement, then, the same cannot become relevant at this stage.

160. The ADD in the present case remained ineffective for a period of 109 months due to circumvention practices adopted by the parties. The long duration of abuse should also be considered while deciding on the matter.

161. It is immaterial whether, provisional assessment had been undertaken or not, as the circumventing exporters and importers, can nonetheless be asked to pay duties calculated and that are due from the date of initiation. In any case, the domestic industry requests that the wilful circumventing exporters and importers, should not be left scot free because of legal vagaries.

POCSO

162. The legislative intent is clear that a discretion lies with the Hon'ble DA to impose duty with retrospective application from the date of initiation. The Hon'ble DA in the Initiation Notification in this case also took consideration of this power to apply the circumvention duty retrospectively.

163. Rule 27 of the Antidumping rules clearly specifies that the levy of the duty **may apply retrospectively** from the date of initiation of the investigation. It is trite law that ordinarily the words "shall" and "must" are mandatory and the word "may" is discretionary. It was the contention of the domestic industry that while reading Rule 27 (1) of the Rules, the word "may" used therein with reference to retrospectivity, has to be constructed as "shall". This contention lacks merit.

164. In the case of retrospective application of anti-dumping duties, the scheme of the Customs Tariff Act, as clarified by the Supreme Court in **Commissioner of Customs, Bangalore vs G.M. Exports and Ors.**,[1] is that "*an anti-dumping duty is normally to be imposed with prospective effect unless, inter alia, because of massive dumping of an article in a relatively short time the remedial effect of the anti-dumping duty to be levied would be seriously undermined*".

165. An imposition of anti-circumvention duties retrospectively from the date of initiation of investigation, i.e. 19 February 2016 which is now more than three years ago will bring severe confusion to the user industries of India which are now going through an extreme downturn.

Other Interested Parties

166. The Hon'ble CESTAT has remanded the matter back to the Authority only to record a specific finding that why the anti-dumping duty pursuant to the anti-circumvention investigation was not recommended to be levied retrospectively. It is not the case that the Authority is required to re-examine its recommendation originally made in the Final Findings dated 18 August 2017.

167. It is clear that the scope of remand order is very limited. The Authority is neither required to nor it can examine the matter afresh that whether the anti-dumping duty should have been recommended to be levied retrospectively from the date of initiation of the anti-circumvention investigation. The Authority is merely required to record a specific finding that why it had not recommended the imposition of duty retrospectively.

168. It is submitted that it is at the discretion of the Authority whether to recommend the imposition of duty on prospective or retrospective basis. This is abundantly clear from the bare perusal of Rule 27 of AD Rules

169. Furthermore, if the intention of the legislature was that in each and every case of anti-circumvention investigation, duty is to be imposed retrospectively from the date of initiation of the investigation, there was no requirement for the phrase *'....or such date as may be recommended by the designated authority'* under sub-Rule (3).

170. It is incorrect to say that if no date is recommended by the Authority for imposition of duty, the Government is bound to impose the duty with effect from the date of initiation

[1] Commissioner of Customs, Bangalore vs G.M. Exports & Ors., (2016) 1 SCC 91.

of the anti-circumvention investigation. If such an interpretation is to be adopted, it would render Rule 27(3) ultra-vires of Section 9A(3) of the Customs Tariff Act, 1975.

171. Section 9A(3) contains the complete code for levy of duty on retrospective basis. The said sub-section provides for certain conditions, only upon fulfilment of which the Government can impose the duty on retrospective basis. The said sub-section nowhere provides for automatic retrospective imposition of duty in case the Authority does not recommend a particular date in its Final Findings.

D. Examination by the Authority:

172. The Authority notes that the Hon'ble CESTAT in its judgement dated 12.09.2019 has held that the Designated Authority has not recorded reasons for its recommendation in the final finding dated 18.08.2017 that the Anti-dumping duty shall be applicable from the date of notification by the Central Government issued notification no. 52/2017-Customs (ADD) that was published in Gazette of India, extraordinary on 24.10.2017 imposing anti-dumping duty from the date of publication in the Gazette. Therefore, the matter needs to be remitted to the Designated Authority to record a specific finding as to whether the anti-circumvention duty should be levied retrospectively from the date of initiation of investigation.

173. The Authority recalls the para E(7) of the initiation notification no. 14/1/2014-DGAD dated 19.02.2016 which stipulated that *"The Authority, upon determination that circumvention of anti-dumping duty exists, may recommend extension of anti-dumping duty to imports of articles found to be circumventing an existing anti-dumping duty may apply retrospectively from the date of initiation of the investigation under Rule 26".*

174. The Authority notes that the Hon'ble High Court of Delhi had stayed the proceedings of the Authority vide order dated 27.04.2016 which was vacated only on 08.03.2017. The Authority thereafter concluded and issued final finding dated 18.08.2017.

175. However, during the stay, the action on various aspects of initiation notification was on hold. Further, it is pertinent to note that while granting a stay on the initiation notification the Hon'ble High Court had not issued any specific instructions allowing the provisional assessment during the stay of the proceedings.

176. The Authority therefore notes that it had stated in the initiation notification that the AD duty may be imposed on the circumventing goods with retrospective effect from the

date of Initiation. Thus, this clause only provided an option of retrospective application of the anti-dumping duty, while investigating the case.

177. The Authority also notes the submissions made by various interested parties in the three oral hearings held during the conduct of remand proceedings on the aspect of position of law, the scope of remand and likely impact pertaining to retrospective application of AD duty and challenges.

178. The Authority notes the submissions made by the Domestic Industry regarding the significant extent of wilful circumvention of AD duty leading to loss of Revenue to the Government and hence need to send a right message to check mockery of the process.

179. The Authority notes that the other interested parties have also submitted that the CESTAT has remanded the matter back to the Authority only to record a specific finding as to why the anti-dumping duty pursuant to the anti-circumvention investigation was not recommended to be levied retrospectively.

180. The Authority notes that during the course of the hearing several arguments regarding the intention of the importers had been received from the interested parties. The Authority in this regard notes that based on the submissions made in the original investigation a possibility of bona fide users of the product under investigation also emerged. The, two distinct classes of importers is evident from the Final Finding of the Authority i.e. the bona fide users who would use the product considered to be circumventing in the same form as imported and circumventing users who would further split the same. Based on this distinction the Authority recommended extension of the AD duty only to the circumventing importers. The bona fide users were eligible for relief by filing a declaration of bona fide use of the same post the importation. Thus the purpose of this declaration was for a prospective usage of the goods, based on the declaration. The declaration could also be monitored by the field offices of DoR.

181. The Authority further notes the arguments made by the interested parties with respect to discretion vested in the Designated Authority. Rule 27(1) consciously chooses the word *may* thereby giving the discretion to the Authority in determination of whether the duty should be imposed either retrospectively or prospectively. While the word shall is used on Rule 27(2) to direct the Authority to issue a public notice recording its finding. The Authority notes that this deliberate and conscious choice by a mere literal interpretation further indicates that this discretion of the Authority was in fact envisaged.

182. As stated in foregoing para that the initiation notification was stayed which also provided the possibility of retrospective application of AD duty. Keeping in view the factual matrix as stated in para 174 & 175 above, any retrospective collection of duty in a situation where provisional assessment is not undertaken would lead to significant challenges on reopening of assessments already made and to deal with issues of recovering duty from final consumers especially when sold through traders. In the instant case, the initiation was done on 19/2/2016 and AD Duty notified on 24/10/2017. This fact would have required reopening of duty assessments of 613 days, that too in absence of any binding undertakings provided by the concerned importers to the custom Authorities in the backdrop of reasons as stated above.

183. The Authority in view of the two classes of importers that were identified did not consider it appropriate to recommend retrospective application of AD duty to the circumventing product in the final finding dated 18/8/2017. The Authority in view of the aforesaid therefore does not consider it necessary to address other issues of law and investigation related to retrospective application of AD duty as raised by interested parties.

184. The Authority confirms its final finding dated 18.08.2017 recommending application of AD duty on a prospective basis as stated in Para 111 of its final finding.

(B.B.Swain)
Special Secretary and Designated Authority