Implications of Proposed Amendments to Customs Tariff Act - An Analysis

Feb 10, 2023

R Parthasarathy
Advisor, BDO India LLP

THE PROPOSED AMENDMENTS

1. Clause 125 of the Finance Bill 2023 ['FB'], seeks to amend sections 9, 9A and 9C of the Customs Tariff Act, 1975 ['CTA'], with retrospective effect from 1 January 1995.

2. After incorporating the proposed amendments, the first proviso to section 9(6), will be as follows (The proposed deletions are struck off and the proposed insertion is underlined in italicised bold fonts in all cases):

"Provided that if the Central Government, in a review, ***on consideration of a review***, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of subsidization and injury, it may, from time to time, extend the period of such imposition for a further period upto five years and such further period shall commence from the date of order of such extension:"

3. Similarly, section 9(7), after incorporating proposed amendments will be as below:

(7) The amount of any such subsidy as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary……

4. The first proviso to section 9A (5) and in 9A (6) after incorporating the proposed amendments are as follows:

"Provided that if the Central Government, in a review, ***on consideration of a review***, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, ……

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, ……."

5. Section 9C, after incorporating the proposed amendments will read as follows:

"9C (1) An appeal against the order of determination or review thereof shall lie to the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal),

(2) Every appeal under this section shall be filed within ninety days of the date of order***determination or review*** under appeal:

(3) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass

such orders thereon as it thinks fit, confirming, modifying or annulling the order ***determination or review*** appealed against."

6. An explanation is also proposed to be inserted below section 9C (5), which is as follows:

Explanation.--For the purposes of this section, "determination" or "review" means the determination or review done in such manner as may be specified in the rules made under sections 8B, 9, 9A and 9B.'

BACKGROUND

7. Sections 9, 9A, 9B and 9C were introduced in the CTA in 1995 to fulfil India's obligations under the Uruguay round, which resulted in the formation of WTO. Section 9 deals with the obligations under the Agreement on Subsidies and Countervailing Measures [ASCM], section 9A with the Agreement on Implementation of Article VI [popularly referred to as the anti-dumping agreement], Section 9B with certain other requirements and 9C with the obligation to have appellate procedures against the findings in subsidy and dumping investigations.

8. Since 1995 and until 2019, India had conducted hundreds of investigations and the Designated Authority for Anti Dumping ['DGAD'] now renamed as Directorate General of Trade Remedies ['DGTR'], had issued final findings recommending imposition of anti-dumping duties. Most of these recommendations, barring 4 or 5, have been accepted by the Central Government [Ministry of Finance – MOF].

9. However, the position has undergone a sea change in 2020, 2021 and 2022. In these three years many recommendations (more than 100), have not been accepted by the MOF, with the terse statement –"***the Central Government, after considering the final findings of the designated authority, has decided not to accept the aforesaid recommendations***".

10. Many such notifications of the MOF have been / are under appeal before the CESTAT, under section 9C of the CTA.

WHY THESE AMENDMENTS?

11. It is relevant to refer only to a very recent judgement dated 23-12-2022, in the case of Reliance Industries Vs UOI and others, of the CESTAT. In this case the CESTAT held as follows:

"49. Thus, for all the reasons stated above, the office memorandum dated 28.10.2022 is set aside and the matter is remitted to the Central Government to reconsider the recommendation made by the designated authority in the final findings in the light of the observations made above at an early date but within three months. The directions contained in paragraph 48 of this order shall continue to operate till such time as a decision is taken by the Central Government. The appeal is allowed to the extent indicated above."

12. Similar orders of the CESTAT are under challenge by the UOI in the Delhi HC, for example in **Jubilant Ingrevia** and **Association of Synthetic Fibre Industry vs. Union of India** and 4 others, where the Delhi HC has passed certain interim orders pending disposal of the WPs on merits.

13. The stand taken by the MOF is that the acceptance or otherwise of the recommendations of the DGTR, is a legislative action and not a quasi-judicial action. In other words, the decision of the MOF cannot be challenged in any court and is not amenable to judicial scrutiny.

14. The proposed amendments in section 9C, read with the Explanation make it clear that the "determination" or "review" refers to the determination or review undertaken under the Rules made[1] (in this behalf. These determinations or reviews are made by the DGTR. In other words, what becomes appealable is the determination or review finding of the DGTR and not its acceptance or otherwise by the MOF, with retrospective effect from 1 January 1995.

15. One interesting question that arises is – what purpose will the challenge to the DGTR determinations

serve, if these are not accepted by the MOF? Suppose the MOF had decided not to accept the recommendation and the appeal upholds the determination, the situation is like proverbial “operation successful, but the patient died!”. The appeal itself becomes academic.

SUPREME COURT IN SAURASHTRA CHEMICALS LTD

16. From 1995 till about 2000, parties were challenging the final finding / determinations made by the DGAD/DGTR, without waiting for its acceptance or otherwise by the MOF. When one of the matters reached the SC, in Saurashtra Chemicals Ltd Vs UOI reported in 2000 [118] ELT 305 (SC), it held as follows:

“We see no reason whatsoever to entertain these special leave petitions. It is perfectly clear now that we have seen the provisions of the Act that the order of the Designated Authority is purely recommendatory. The appeal that lies is against the determination and that determination has to be made by the Central Government. For this reason, we decline to exercise jurisdiction under Article 136 of the Constitution of India and dismiss the special leave petitions.”

17. The proposed amendment which makes the order of the DGTR appealable, is contrary to the principle laid down by the SC in Saurashtra Chemicals Ltd, and renders the appeal under section 9C otiose.

18. So, another long haul and litigation on whether the MOF is bound to give reasons for the rejection of the recommendation of the DGTR, awaits the taxpayers.

---

[1] Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, Customs Tariff (Identification, Assessment And Collection Of Countervailing Duty On Subsidized Articles And For Determination Of Injury) Rules, 1995 and Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 etc.