

2022 Trade Recap

A SHORT SUMMARY FOR TRADE DEVELOPMENT IN YEAR 2022

I. Trade Remedies:

2022 has been comparatively a proactive year for the DGTR. During the past year, the DGTR initiated 31 Anti-dumping investigations and issued 38 final findings.¹ However, only 14 positive recommendations were adopted and measures were imposed by the Department of Revenue, Ministry of Finance² and in 24 investigations it was decided to not impose or continue anti-dumping duty.³ The Department of Revenue has continued to communicate its decision to not impose duty on a specific good via an ‘office memorandum’. The recurring action of the department’s unreasoned communication via these ‘office memorandums’ has come under legal scrutiny. Presently, the CESTAT’s order in *Jubilant Ingrevia* has been assailed to the Delhi High Court via a writ petition, and is *sub judice*.⁴ The decision of the Delhi High court is expected to settle the dispute arising from these office memorandums. However, in the interim the High Court passed an order directing provisional assessment of goods.

1. *The High Court’s decision to direct provisional assessment of Goods is questionable*

The order of the High Court directing provisional assessment of goods in the *Jubilant Ingrevia* decision is a digression from the statutory framework of the Customs Act, 1962. As an interim measure, the High Court directed that the imports of Products Under Consideration in the impugned investigations be provisionally assessed before being entered for home consumption. The CESTAT in its recent decision in *Reliance Industries v Union of India*, passed an order similar to similar effect⁵. The High Court’s interim measure added another legal question to a scenario already entrenched with multiple questions of law.

The procedure for provisional assessment of goods is provided under section 18 of Customs Act, 1962.⁶ From a reading of the provision, provisional assessment of a good can be undertaken only when one of the following four situations provided under the Act arise:

“(a) where the importer or exporter is unable to make self-assessment under subsection (1) of section 17 and makes a request in writing to the proper officer for assessment; or

¹ <https://www.dgtr.gov.in/anti-dumping-cases> (Directorate General of Trade Remedies, Anti-Dumping Cases Repository); <https://www.dgtr.gov.in/countervailing-duty-investigation> (Directorate General of Trade Remedies, Countervailing Cases Repository).

² <https://taxinformation.cbic.gov.in/content-page/explore-notification> (Central Board for Indirect Tax and Customs, Notification Repository).

³ <https://www.dgtr.gov.in/anti-dumping-cases> (Directorate General of Trade Remedies, Anti-Dumping Cases Repository); <https://www.dgtr.gov.in/countervailing-duty-investigation> (Directorate General of Trade Remedies, Countervailing Cases Repository).

⁴ *Union of India v Jubilant Ingrevia* WP(C) 5185/2022

⁵ *M/s. Reliance Industries Limited v Union of India* CESTAT ADA 52241/2022

⁶ Customs Act, 1962

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

(c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry,”

From reading of the provision it is clear that ‘provisional assessment of goods’ is an exercise undertaken by the Customs authority to either accurately assess goods in a situation where the importer/exporter is unable to self-assess his goods, or where malpractice in declaration is suspected.

Further, the provision is operative only when there is a duty to be paid by the importer or the exporter. However, in effect, the Hon’ble High court’s decision directing provisional assessment of the goods being investigated in ‘anti-dumping’ investigations do not account for the lack of any levy of duty. The entire dispute before the High Court stems from the decision of the Central Government to not levy any duty. The direction of the High Court in effect, requires execution of a bond for duty that may arise in the future. Further, the effective duty rate in the present situation would be the recommended duty rate and not an actual duty rate.

The convoluted order of the High Court is apparent. Presently, “there is a levy of duty, without the authority of law”.

2. The CESTAT’s order to direct legislature to provide reasons for its decision on tax

The Orders of the CESTAT mandating the government to provide reasons for its decisions is a jurisprudential error. It is now trite that the levy of any Duty is a legislative action. However, contrary to sound judicial principles of taxation law, the Central Government is being asked to give reasons for implementing legislation.

3. Implications of the “Office Memorandum”

The present operation of Trade Remedial matters concludes with the Central Government’s final decision. The Central Government makes the final decision on implementing the recommendations of the DGTR.⁷ While making its decision the Central Government, under its own discretion decides the impact of the levied duty on industry and assesses the impact of the duty based on larger public interest. User industry and exporter concerns are taken into consideration by the Central government in its decision to not impose Anti-Dumping Duty. Although not recorded, the decision to not impose Dumping duty on certain goods contrary to the DGTR’s recommendations stems from some economic rationale. A dilution of this

⁷ Sec. 18 Customs Act, 1962

discretion could potentially lead to alleviation of injury in specific product sectors, however the implication of this duty in the larger scale of public interest may be negative.

On the contrary, an argument can be made that Domestic Industry would be dissuaded from approaching the DGTR and undertaking long and expensive investigations. The lack of any reasoning given by the ministry in its decision may lead to industry moving to the DGTR to alleviate injury caused by dumped goods. Domestic Industries may feel abandoned by the lack of any reasoned decision to not implement the DGTR's recommendations.

II. Developments in India's FTA's

India's approach to Free Trade Agreements witnessed a drastic shift in 2022. The Comprehensive Economic Partnership Agreement signed between India and UAE was a paradigm shift in India's earlier approach to Free Trade Agreements. Although, the Australia-India Agreement was the resurrection point for India's FTA's, the CEPA entered with UAE truly marked India's contemporary and holistic approach to FTA's.

The India-UAE Comprehensive Economic Partnership Agreement (CEPA) marked a crucial departure from India's approach to Free Trade Agreements (FTAs) with other WTO members.⁸ The CEPA is the first major '*deep and full Free Trade Agreement to be signed by India with any country in the past decade*'.⁹ The commitments of both the parties are towards Trade in Goods, Rules of Origin, Trade in Services, Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS) measures, Dispute Settlement, Movement of Natural Persons, Telecom, Customs Procedures, Pharmaceutical products, Government Procurement, IPR, Investment, Digital Trade, Services and Cooperation in other Areas.¹⁰

Presently, India is negotiating agreements with the EU, Canada and UK.¹¹ Assuming the India-UAE CEPA as a template, industry can expect a comprehensive agreement with these countries as well. The Ministry's intentions of entering into balanced agreements without creating adverse effects for the Domestic Industry are clear. Accordingly, industry can hope to reap benefits from these new FTAs.

India's recent trend of entering into trade agreements with members stems from a realisation of a goal identified by the present administration in 2015.¹² With the intention of being a large part of the global value chain and increasing its exports significantly, the government views Free Trade Agreements (FTAs) as one of key tools in attaining this objective.¹³

⁸ The UAE-India CEPA: Analyzing the potential approaches to maximizing gains, Observer Research Foundation. (Mar. 30, 2022), <https://www.orfonline.org/expert-speak/the-uae-india-cepa/>

⁹ Press Release, Comprehensive Economic Partnership Agreement (CEPA) between India and the United Arab Emirates (UAE): Unveiling of Indo- UAE CEPA is Historic day in India UAE ties (Mar. 27, 2022) (on file with an author) <> ¶3

¹⁰ Id.

¹¹ Press Information Bureau India Notification on 04 AUG 2021 (<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1825389>)

¹² . Press Trust of India, "Narendra Modi Govt Unveils its First Trade Policy, Targets Doubling of Exports at \$900 Bn," Financial Express, April 1, 2015, <http://www.financialexpress.com/economy/narendra-modi-govt-unveils-its-first-trade-policy-targets-900-bn-in-exports/59535/>

¹³ <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1889341>

III. Foreign Trade Policy:

India's foreign trade policy continues to stay operative, despite being extended for 3 years beyond its life cycle. The first extension of the policy was on account of the Global Pandemic situation in 2019 and the second extension has been made on account of the volatile global economy and geopolitical trends. The department is clear that at present it is most appropriate to continue with the existing Foreign Trade Policy. Simultaneously, the DGFT is looking to undertake more consultations with Export Promotion Councils and leading exporters before coming out with the new policy.¹⁴

Indian Exports in 2023 are however predicted to be similar or higher to export figures in 2022. The recent Free Trade Agreement signed with UAE and Australia are expected to boost exports this year. Additionally, future FTAs will most likely have a positive impact on Indian exports.¹⁵

IV. Successful Representations by SBA:

1. SBA Group with its tireless dedication and commitment to its valuable clients have been able to provide exceptional results in the following cases: In Anti-dumping investigation on Certain Preserved Mushrooms exported from Netherlands by USDOC, SBA represented the largest exporter and got Zero anti-dumping duty imposed,
2. In Anti-dumping investigation on Ophthalmic lenses exported from China PR by DGTR, one the largest exporter represented by SBA got NIL duty on imports to India,
3. In Anti-dumping duty investigation on Polyester Spun Yarn exported from Indonesia, China PR, Nepal and Vietnam by DGTR, the SBA group was representing exporters and Department of Revenue notified for no imposition of Measures recommended by DGTR,
4. In Sunset Review of Antidumping duty on Glass Fibre from China PR and Anti-dumping duty investigation on Glass Fibre from Bahrain and Egypt by DGTR, SBA Group was representing more than 200 user association and made several representations before the Government of India, as a successful outcome no duties were continued and imposed by Department of revenue.
5. In Sunset Review investigation of Anti-dumping Duty on Elastomeric Filament yarn exported from China PR, South Korea, Vietnam and Taiwan, SBA team was representing the user industry after several submissions and representation, the Department of Revenue did not continue the imposition of Anti-dumping duty.
6. European Commission in its preliminary determination in Anti-dumping investigation on Ceramic Tiles exported from India and Italy determined NIL duty for one of the exporters represented by SBA.
7. SBA also assisted one of the Domestic Industry in initiation of Anti-dumping investigation on Rock breaker and Alloy Steel Chisel from China PR.

¹⁴ <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1884123>

¹⁵ <https://theprint.in/economy/similar-or-higher-goods-exports-likely-for-india-in-fy-2023-24-director-general-of-foreign-trade/1291748/>