

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

ANTI DUMPING APPEAL NO. 52460 OF 2022

(Arising out of Final Findings F.No. 6/30/2020-DGTR dated 31.03.2022 and Office Memorandum No. F. No. CBIC 190354/211/2021-TRU Section-CBEC dated 6th June 2022)

M/s. Reliance Industries Limited

Maker Chambers – IV, Nariman Point
Mumbai 400 021,
India

.....Appellant

VERSUS

- 1. Designated Authority, Directorate
General of Trade Remedies**
Department of Commerce & Industry
Parliament Street, Jeevan Tara Building,
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- 2. The Union of India**
Through the Secretary,
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- 3. Arabian Petrochemical Company
(Petrokemya),**
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Al Jubail 35713, Saudi Arabia
- 4. Eastern Petrochemical Company
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- 5. Equate Petrochemcial Company**
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- 7. Jubail United Petrochemical Company
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- 9. Mitsubishi Chemical Aisa Pacific Pte. Limited**
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- 14. SABIC Asia Pacific Pte. Limited**
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- 23. Filatex India Limited**
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New Friends Colony
New Delhi - 110025
- 24. Garden Silk Mills Limited**
Tulsi Krupa Arcade, Puna-Kumbharia
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- 25. Indo Rama Synthetics (India) Limited**
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- 26. IVL Dhunseri Petrochemical Industries
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- 27. Jindal Poly Film Limited,**
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Vasant Kunj, New Delhi-110070
- 28. KLJ Resources,**
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- 29. Sanathan Textiles Private Limited**
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- 32. PTA Users Association**
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33. Embassy of the Kingdom of Saudi Arabia,
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34. Embassy of State of Kuwait
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35. U.S. Embassy,
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New Delhi - 110021

.....Respondents

APPEARANCE

Shri Vipin Kumar Jain, Shri Vishal Agarwal, Ms. Reena Asthana Khair, Shri Rajesh Sharma, Ms. Tuhina Sinha, Ms. Shreya Dahiya, Ms. Vrinda Bagaria, Shri Subham Jaiswal and Shri Samarth Bajaj, Advocates for the appellant.

Shri Atul Sharma and Shri Salil Verma, Advocates for the Respondent No's 3, 4, 14, 15, 16 and 20

Shri Parthasarathi Jha, Shri Naghm Ghei and Shri Sanjay Notani, Advocates for Respondent No's 5 and 19

Ms. Ameeta Verma Duggal, Advocate for Respondent No. 6

Shri Devender Bagia, Shri Ankur Sharma, Shri Jayant Raghu Ram, Shri Ashutosh Arvind Kumar, Shri Arpit Mehra and Shri Aayush Rastogi, Advocates for Respondent No. 13

Shri Jitender Singh, Shri Akshay Soni and Shri Anshuman Sahni, Advocates for Respondent No. 12

Mr. Ameet Singh, Ms. Niharika Sharma and Shri Harsha Sri Nivas, Advocates for the DGAD

Shri Shobh Nath, Deputy Director (Cost) for DGAD

Shri Rakesh Kumar, Authorized Representative for the Central Government

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 01.05.2023
Date of Decision: 29.09.2023

FINAL ORDER NO. 51370/2023

JUSTICE DILIP GUPTA:

M/s. Reliance Industries Limited¹, a domestic producer of 'Mono Ethylene Glycol²' in India, has filed this appeal to assail the Notification dated 27.10.2022 notifying that since the domestic industry had not suffered material injury in terms of the provisions contained in the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995³ it would not be appropriate to recommend levy of anti-dumping duty on the import of MEG. Accordingly, the designated authority terminated the investigation which was initiated by a Notification dated 28.06.2021.

2. The appellant with M/s. India Glycol Ltd., another Indian producer of MEG, had filed an application before the designated authority seeking imposition of anti-dumping duty on imports of MEG from Kuwait, Saudi Arabia and United States of America⁴. The designated authority issued a Notification dated 28.06.2021 initiating investigation under section 9A of the Customs Tariff Act, 1975⁵ read with rule 5 of the 1995 Rules to determine the existence, degree and affect of alleged dumping of the subject good from the subject countries and to recommend the amount of anti-dumping duty, which if levied, would be adequate to remove the alleged injury to the domestic industry. The period of investigation was considered to be from 01.01.2020 to 31.12.2020 and the injury analysis period was notified to be from 2017-18, 2018-19, 2019-20 and the period of investigation.

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1. the appellant
 2. MEG
 3. the 1995 Rules
 4. the subject countries
 5. the Tariff Act

The designated authority disclosed the essential facts of the investigation to the known interested parties by a disclosure statement dated 23.09.2022, and after consideration of the comments issued final findings through a Notification dated 27.10.2022.

3. The present appeal has been filed against the final findings dated 27.10.2022 of the designated authority deciding not to recommend imposition of anti-dumping duty on imports of MEG originating in or exported from the subject countries primarily, despite concluding that MEG was being dumped by the subject countries, for the reason that the domestic industry had not suffered material injury as some of its significant performance parameters had improved in the period of investigation i.e. from January 2020 to December 2020 as compared to the previous year i.e. 2019-20.

4. MEG, as noted by the designated authority, is a clear, colourless, odourless, and slightly viscous liquid, which is majorly used as a chemical intermediate in the production of polyester fibres, polyester films, and resins such as polyethylene terephthalate⁶. PET is converted into plastic bottles which are used globally. The designated authority also noted that MEG is usually produced using two basic raw materials, ethylene and oxygen. Ethylene and oxygen are combined to produce ethylene oxide in a multi-tubular catalytic reactor. The highly exothermic reaction is carefully controlled with proprietary and effective safety systems developed by scientific design. Ethylene oxide produced in the reactor is separated to high quality purified ethylene oxide and/or is further processed to produce fibre-grade MEG as well as di- and tri- ethylene glycols (DEGTEG).

6. PET

5. The contention of the appellant that is it backwardly integrated in as much as it captively produces ethylene at its Ethylene plant, which it then converts into ethylene oxide for producing MEG at its MEG plant. As ethylene is not sold in the market, it is for the purpose of its Cost Accounting records, considered as a cost centre, and the ethylene captively produced is transferred to MEG plant at cost without any return or profit.

6. During the course of the investigation, the appellant had submitted that it was facing price injury on account of MEG being imported at dumped price from 2019-20 onwards. It was also submitted by the appellant that even though earlier there were considerable imports of the subject goods in the country, such imports were at fair prices and were on account of demand-supply gap in India. However, once the domestic industry enhanced capacities in 2018-19, the imports into India declined. Thereafter, from 2019-20, the imports in excess of demand-supply gap increased significantly, on account of dumping. The domestic industry also claimed that the landed price of the subject imports declined steeply over the injury period and was the lowest during the period of investigation. Further, the decline in landed price far outpaced the decline in the price of ethylene, i.e. the primary raw material. What was also submitted was that whereas the mark up of MEG import prices over Ethylene prices in the financial year 2017-18 was around Rs. 8,302/- metric ton, the same turned negative in the financial year 2019-20 and the period of investigation.

7. The appellant also submitted that since the subject goods require specialized storage capacities, prolonged storage is not viable.

Consequently, it was forced to sell its product in the market at prices which were not remunerative. The same resulted in a significant decline in its profitability.

8. The key profitability factors, as noted by the designated authority in paragraph 119 of the final findings, are as under:

Profitability, return on investment and cash profits of the domestic industry over the injury period is as follows:

Particulars	Unit	2017 -18	2018 -19	2019 -20	Period of investigation
Profit/(Loss)	Rs./MT	****	****	****	*****
Trend	Indexed	100	48	14	28
Profit/(Loss)	Rs. Lacs	****	****	****	*****
Trend	Indexed	100	81	25	44
Cash Profit	Rs. Lacs	****	****	****	*****
Trend	Indexed	100	94	51	60
Return on capital employed	%	****	****	****	*****
Trend	Indexed	100	108	45	61

9. It is clear from the aforesaid chart that the profitability of the domestic industry significantly declined during the period of investigation as compared to the base year (2017-18) and 2018-19. Though, there is an improvement in the condition of the domestic industry during the period of investigation as compared to 2019-20, but it is contended by the domestic industry that such marginal improvement was not at all significant to undo the previous decline. It was also submitted by the domestic industry that the slight improvement was primarily due to a decline in the imports because of the logistical challenges faced by exports/importers during the Covid-19 period. It was also submitted that post the period of investigation, the losses of the domestic industry have become so steep that the

domestic industry is now suffering cash losses and negative return on its capital employed. The profits of the domestic industry declined by 68% in financial year 2021-22, and by 344% in the first quarter of financial year 2022-23. The return on capital employed of the domestic industry had reduced by 41% and 147% during the same period.

10. The dumping and injury margin determined by the designated authority are as below:

S. No.	Country	Injury margin range	Dumping margin range
I.	Kuwait		
a.	Participating exporters	20%-30%	0%-10%
b.	Others	30%-40%	0%-10
II.	Saudi Arabia		
a.	All exporters	20%-30%	10%-20%
III.	USA		
a.	All exporters	35%-45%	10%-20%

11. It can be seen that both dumping and injury margins determined by the designated authority are positive and significant. Yet, the designated authority, in the final findings, concluded that though there is significant dumping, but there is no material injury to the domestic industry.

12. The determination of injury is governed by the provisions of article 3 to the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994⁷, which is as under:

“Part I: Article 3

Determination of Injury

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for

7. GATT

like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

13. A similar provision is incorporated in Annexure II to the 1995 Rules and the relevant provisions are as follows:

"ANNEXURE II

Principles for determinations of injury

The designated authority while determining the injury or threat of material injury to domestic industry or material retardation of the establishment of such an industry, hereinafter referred to as "injury" and causal

link between dumped imports and such injury, shall inter alia, take following principles under consideration–

(i) A determination of injury shall involve an objective examination of both (a) the volume of the dumped imports and the affect of the dumped imports on prices in the domestic market for like article and (b) the consequent impact of these imports on domestic producers of such products.

(ii) While examining the volume of dumped imports, the said authority shall consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in India. With regard to the affect of the dumped imports on prices as referred to in sub-rule (2) of rule 18 the designated authority shall consider whether there has been a significant price under cutting by the dumped imports as compared with the price of like product in India, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase which otherwise would have occurred, to a significant degree.

(iv) The examination of the impact of the dumped imports on the domestic industry concerned, shall include an evaluation of all relevant economic facts and indices having a bearing on the state of the industry, including natural and [Potential] decline in sales, profits, output, market share, productivity, return on investments or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital investments.”

14. A perusal of article 3.1 of GATT and paragraph (i) of the Annexure II to the 1995 Rules, makes it evident that a determination of injury shall involve an objective examination of both:

- (i) The volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like article, and
- (ii) The consequent impact of these imports on domestic producers of such products.

15. Under paragraph (i), two lines of examination have to be undertaken by the designated authority while determining injury to the domestic industry. The volume of dumped imports and its effect on the prices of domestic industry has to be examined first and the relevant criteria for this examination is provided in paragraph (ii) which requires (a) significant increase in dumped imports in absolute or relative terms, and (b) either the imports are undercutting the domestic prices or are otherwise, depressing or suppressing the domestic prices. The second examination that is required to be undertaken is of the impact of dumped imports on the domestic industry. The relevant factors are contained in paragraph (iv). Paragraph (iv) gives the parameters which may be examined by the designated authority for assessing the impact of dumped imports on the domestic producers.

16. So far as the first examination is concerned, the claim of the domestic industry has been that the dumping had started from the financial year 2019-20. According to the domestic industry, while there were significant imports in financial year 2017-18 and financial year 2018-19 as well, they were not at dumped prices.

17. The following table, would indicate that there was a significant quantum of import of dumped imports during the period of investigation:

	2017-18	2018-19	2019-20	Period of investigation
Dumped Imports	0	0	7,07,961	5,23,864

18. The appellant contends that prior to the domestic industry increasing its capacities in the financial year 2018-19, there was a considerable demand supply gap in India, which was being catered to by imports. The volume of imports came down in financial year 2018-19, consequent to increase in Indian capacities. However, from the financial year 2018-19, the subject countries started dumping MEG into India to capture the Indian market, and there was significant increase in imports in excess of demand-supply gap.

19. In this regard, reliance has placed upon the disclosure statement filed by the domestic industry and the relevant extract of the disclosure statement is reproduced below:

16. In addition to the above, the following factors demonstrate that the domestic industry has suffered injury due to the subject imports.

a. While the subject imports have declined, the same is an account of increased capacities of the domestic industry. It would be seen that the imports declined in 2018-19, but increased again in 2019-20. However, the imports have declined again in the period of investigation, due to Covid-19.

b. Further, the volume of imports exceeds the demand-supply gap in the country. In fact, the imports in excess of demand-supply gap have increased over the period.

Figure in MT

Particulars	2017-18	2018-19	2019-20	Period of investigation
Total demand	*****	*****	*****	*****
Capacity of Indian industry	*****	*****	*****	*****
Demand-supply gap	703,234	366,626	514,651	138,218
Volume of imports	1,065,947	632,261	786,548	551,611
Imports in excess of demand-supply gap	362,713	265,635	271,897	413,393
Volume of subject imports	905,364	541,087	707,961	523,864
Subject imports beyond demand-supply gap	202,130	174,461	193,310	385,646

20. The confidential version supplied by the domestic industry has also been perused.

21. It can be seen that there has been a significant increase in imports from the subject country in the period of investigation, in excess of the demand supply gap. Further, since financial year 2019-20, the imports have started coming at dumped prices and the landed value of such imports has been even below the raw material prices. Thus, evidently there has been a significant increase in dumped imports from financial year 2019-20 onwards. It needs to be noted that though in the period of investigation there was a slight decline in subject imports as compared to financial year 2019-20, such decline was on account of Covid-19 pandemic and, therefore, cannot undo the previous increase. What also needs to be noted is that though the

imports in the period of investigation were almost at financial year 2018-19 level, undisputedly such imports have been at dumped prices, as against financial year 2018-19 imports, which were at fair prices. Thus, it can be concluded that there has been an increase in 'dumped imports' in the period of investigation as compared to 2017-18 and 2018-19.

22. This apart, the contention of the appellant was that it had suffered price injury on account of the imports coming to India at dumped prices. When faced with cheap imports, any domestic industry has two options available. It can either retain its market by reducing prices to match imports, in which case there would be price injury but no volume injury, i.e. no decline in sales, market share, capacity utilization etc. The domestic industry may refuse to reduce prices which would result in volume injury but no price injury. In this context, it would be useful to reproduce paragraph 100 of the written submissions of the appellant and it is as follows:

"100. When faced with dumped imports, any domestic producer has two options:

a. It can either maintain its prices, in which case, the customers would shift to the cheaper imports. In such a situation, the domestic producer would lose its customer base and its production, sales, capacity, utilization, etc. would suffer. Further, the producer would lose the benefits of economies of scale and its cost per unit would increase, which would result in a decline in profits.

b. Alternatively, the producer may opt to retain its customers. In order to achieve that, it would have to reduce its prices to compete with the imports. Consequently, the imports would suppress or depress the prices of the domestic producer and its profits, cash profits, return on investment, etc.

would suffer. Such an approach is usually adopted in a product like the present, as the producer would want to maintain its production, cannot hold material in store beyond storage limits and need to retain its market to ensure long term survival, utilize its capacities, labor and other resources.”

23. The designated authority at paragraph 93 of the final findings also concluded that there is no requirement under the provisions to establish both volume and price injury, for making a determination of material injury. The relevant portion of the final findings is reproduced below:

“93. The other interested parties have claimed that both significant volume and price effect must exist to conclude material injury. It is noted that with regards to determination of injury to the domestic industry, para (i) of Annexure-II to the Rules provides that the Authority must examine both, volume of dumped imports and price effect of dumped imports on the domestic prices and the impact of such imports on the domestic industry. The term “both”, in context to para (i) refers to examination of volume and price effect on one hand and the examination of impact of dumped imports on the domestic industry. However, such provision does not mandatorily require the Authority to determine existence of injury to domestic industry only where the volume of imports has increased and the dumped imports have had an adverse price effect.”

24. Thus, the accepted position on record is that even in the absence of volume injury to the domestic industry during the period of investigation, the price effect of dumped imports by itself would be a sufficient factor for examining whether the dumped imports are causing material injury to the domestic industry.

25. Accordingly, the factors relevant for determination of injury in the present case can be narrowed down to:

- (i) the affect of dumped imports on domestic market on prices for like article and
- (ii) consequent impact of these imports on producers of such products.

Examination of price effect of dumping

26. Paragraph (ii) of Annexure II to the 1995 Rules provides the following guidance for examining the effect of the dumped imports on domestic prices:

“(ii) While examining the volume of dumped imports, the said authority shall consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in India. With regard to the affect of the dumped imports on prices as referred to in sub-rule (2) of rule 18 the designated authority shall consider whether there has been a significant price under cutting by the dumped imports as compared with the price of like product in India, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase which otherwise would have occurred, to a significant degree.”

27. Thus, it can be seen that the relevant parameters to determine whether there has been 'price injury' are:

- (i) 'Price undercutting', that is, whether subject imports are priced below domestic like products,

or, otherwise, whether such imports cause:

(ii) 'Price depression', that is, whether the prices of domestic like products have declined, due to the presence of subject imports.

or

(iii) 'Price suppression', that is, whether the prices of domestic like products have not increased as it should, due to the presence of subject imports.

Price undercutting and Price Depression

28. Paragraphs 105 and 106 of the final findings note that there is price undercutting. During the course of hearing, the respondents have suggested that 'Price undercutting' alone cannot establish price effect of dumped imports and also that the price undercutting was not significant.

29. The final findings nowhere state that the price undercutting was not significant. In fact, the domestic industry consistently submitted that the price injury is evident as the imports are coming at prices not only below the prices of the domestic industry but even below the raw material price. In this regard, it would be useful to reproduce portion of the comments made by the appellant to the disclosure statement, which indicates that even ethylene (raw material) prices during the period of investigation were higher than MEG import prices.

"B. i. Price undercutting

3. While the Authority has recorded the positive price undercutting, it has not been considered that the price of imports is even lower than the cost of raw material used to produce the subject goods based on international prices of the raw material,

ethylene. Therefore, the domestic industry cannot even hope to maintain the viability of its operations at such prices. This is evident from the fact that India Glycols Limited is already in losses. As regards Reliance Industries Limited, while the producer had been able to maintain its profitability during the period of investigation, it has also started suffering losses in the recent period. This can be seen from the information enclosed herewith.

Figures in Rs/MT

Particulars	2017-18	2018-19	2019-20	Period of investigation
Prevailing price of ethylene	84,831	84,737	72,109	62,005
Cost of ethylene consumed at prevailing price of ethylene	49,626	49,571	42,184	36,273
Landed price of subject goods	57,928	61,165	41,620	35,909
Mark-up over ethylene cost	8,302	11,594	-564	-364
Selling price of domestic industry	*****	*****	*****	*****
Price undercutting	*****	*****	*****	*****

30. The confidential version has also been examined. Evidently there is positive undercutting. It also transpires that on account of cheap imports, the domestic industry was forced to offer discounts to bring its prices down to match the import prices. Thus, the imports have not only undercut the domestic prices but have in fact also depressed the prices of the domestic industry.

31. While examining the price depression and suppression in the final findings, the designated authority noted as under:

Particulars	Unit	2017-18	2018-19	2019-20	Period of investigation
Cost of Sales	Rs./MT	*****	*****	*****	*****
Trend	Indexed	100	126	104	87
Selling Price	Rs./MT	*****	*****	*****	*****
Trend	Indexed	100	97	70	65
Landed Price	Rs./MT	*****	*****	*****	*****
Trend	Indexed	100	106	72	62

32. The confidential version of the table has been provided by the domestic industry as per the data available with it. It has also given the selling price without factoring discount and the net selling price.

33. The submission that has been advanced is that the designated authority should have considered the net selling price (discounted price) and not the average selling price while examining price depression and suppression. It has also been pointed out that a comparison of the cost of sales, net selling price and the landed price clearly shows that the domestic industry was forced to reduce its prices to match the import prices.

34. From the trends recorded in the aforesaid Table, it is seen that while the cost of sales of the domestic industry has gone down from 100 to 87, i.e. by 13 indexed points over the injury examination period, selling price has declined by 35 indexed points. Thus, the decline in selling price is much more steep than the decline in cost. It would also be relevant to note that the landed value of subject imports declined by 38 indexed points. It is, therefore, evident that the landed value of the imports is having a depressing effect on the domestic prices. It is for this reason that the learned counsel for the appellant submitted that the domestic industry was forced to reduce its prices substantially more than the quantum of decline in cost.

35. The designated authority has examined price suppression/depression by taking factors such as domestic industry profitability and volume effect of imports into consideration which, as noticed above, were not relevant and has not appreciate the aforesaid facts.

Price effect can be established by price-undercutting alone and there is no need to establish price suppression or depression

36. Learned counsel for the appellant also submitted that even otherwise, since there is positive price undercutting in the present facts, even assuming there is no price depression/suppression, price injury on account of dumped imports cannot be negated. From the use of disjunctive 'or' between these three phenomena, namely price undercutting, price depression and suppression, in paragraph (ii) of Annexure II of the 1995 Rules, it is evident that they are independent lines of inquiry, and satisfaction of one criteria in itself is sufficient to determine 'price effect' of dumped imports.

37. In this regard, reliance has placed on the recent panel report in **United States – Anti-Dumping and Countervailing Duties on Ripe Olives From Spain⁸**, in respect of examination of price effect of imports on domestic prices, wherein it has been held:

"7.256 ***** [W]e disagree with the central premise of the European Union's argument: the proposition that price undercutting is not, in and of itself, an effect on domestic prices. For the reasons that follow, we find that the text of Articles 3.1 and 3.2 and Articles 15.1 and 15.2 does not support this interpretation. Rather, in our view, those provisions recognize that consideration of significant price undercutting under the second sentence of Article 3.2 and Article 15.2 on its own constitutes an

8. WT/DS577/R dated 19.11.2021

'examination of ***** the effect of the dumped imports on prices in the domestic market for like products' under Article 3. 1 and Article 15. 1. *****

7.258 Article 3.2 and Article 15.2 instruct an investigating authority to consider whether the dumped or subsidized imports result in any of three phenomena, i.e. significant price undercutting, significant price depression, or significant price suppression. The use of the disjunctive 'or' between these three phenomena indicates that they are independent lines of inquiry. A view that only price depression and price suppression constitute price effects would read out of the text the option to consider price undercutting as an independent channel of inquiry. This would be inconsistent with the requirement that effect be given to all terms of a treaty. We thus interpret Article 3.2 and Article 15.2 to mean that a consideration of any of the three price effects can independently satisfy the requirement in Article 3.1 and Article 15.1 to examine the 'effect ***** on prices in the domestic market for like products'."

38. Thus, as there is positive price undercutting as well as the imports have depressed the domestic prices, the requirement of paragraph (ii) are met in the present case.

Examination of impact of dumped imports on the condition of the domestic industry as per paragraph iv

39. In connection with the second limb, namely, the examination of impact of dumped imports on the domestic industry, paragraph iv of the Annexure-II of the 1995 Rules provides as under:

"(iv) The examination of the impact of the dumped imports on the domestic industry concerned, shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the

industry, including natural and [Potential] decline in sales, profits, output, market share, productivity, return on investments or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories employment, wages, growth, ability to raise capital investments.”

40. Paragraph (iv) gives the broad guideline on the factors that the designated authority is required to consider while assessing the impact of dumped imports on the health of the domestic producers of like products. It may be noted that for a conclusion that material injury exists, it is not necessary that all the aforesaid illustrative factors must show deterioration. Infact, it means that on a holistic examination of data, it should be apparent that the performance of the domestic producers of like products has been adversely impacted by the imports. Whether a particular factor is relevant or not for assessing impact of dumped imports would have to be decided basis the facts and circumstances of each case. It is not necessary for the designated authority to consider factors enumerated in paragraph (iv) as a checklist, but a holistic examination has to be made after considering all the relevant factors.

41. Most of the above listed factors can be broadly segregated under two heads, namely factors relevant for determination of impact of price injury, and factors relevant for volume injury and they are as follows:

Factors relevant for volume injury	Factors relevant for price injury
Decline in sales	Decline in profit
Decline in output	Decline in Return on investment
Decline in market share	Factors affecting domestic prices
Decline in capacity utilization	Negative effect on cash flow
Inventories	Ability to raise capital investment

42. As an illustration, where an industry consequent to increase dumped imports, restricts its domestic sales, it is likely to show injury on all volume parameters, such as decline in sales, market share, etc. However, the price parameters such as profits, return on capital employed etc. may not show a decline, especially where the domestic industry has been able to maintain its production by exporting or by captive consumption. On the other hand, an industry which has continued competing with the imports by reducing its prices is not likely to show injury on volume parameters but its profitability, return on capital employed would register a decline. Thus, the factors relevant for assessing impact of dumped imports on the condition of domestic producers of like products would have to be determined on case-to-case basis.

43. In the present case, from the final findings, it does appear that all the factors relevant for examining impact of price injury on the condition of domestic industry clearly show a decline as compared to financial year 2017-18 and financial year 2018-19. The designated authority was required to return a finding of material injury only after examining all the relevant facts.

44. Some of the findings arrived at by the designated authority on the impact of the dumped imports on the state of domestic producers of like products are:

Finding on profitability

45. From a perusal of the final findings, it can be seen that the designated authority has based its finding of absence of material injury solely on the fact that the profits and return on investments in the

period of investigation of the domestic industry had increased from financial year 2019-20 level. The designated authority has brushed aside the low return on investment earned by the appellant during the period of investigation, on the basis that the same was on account of extensive capacity expansion done by the appellant in a fixed market size. The relevant finding of the designated authority are as follows:

"120. The domestic industry has claimed that there is a significant decline in profitability parameters during the POI as compared to the base year. However, it is seen that the profits of domestic industry reduced till 2019-20 but have increased during the POL. The percentage of profit earned during the POI on the cost of sales is about *****% (as compared to during 2019-20). Although, the selling price has reduced during the POI as compared to 2019-20, but the reduction in cost of sales is much higher during the same period. Further, cash profits have increased significantly during the POI as compared to 2019-20. Return on capital employed has also improved during the POI as compared to 2019-20. Due to extensive capital investment, the ROCE is about *****% during POI; which happens during initial period investment as the fixed market sized of the product cannot absorb such huge burden of investment during the initial years. For conducting wholistic and objective assessment of economic parameters, Authority is also required to consider intervening trends during the injury investigation period and cannot rely merely only on end-to-end comparison."

46. In this regard, learned counsel for the appellant made the following submissions:

- (i) It is an admitted position on record that the year financial year 2019-20 was itself a year of injury, where the Indian industry was already suffering on account of dumped imports. As such, any comparison made with respect to

figures of financial year 2019-20 would not be appropriate; and

- (ii) Without prejudice, the marginal increase in profitability and return on investment in the period of investigation as compared to the previous year (2019-20) does not outweigh the steep decline in the same as compared to the base year.

47. The trend of profitability and return on investment recorded in the final findings is as follows:

Particulars	Unit	2017-18	2018-19	2019-20	Period of investigation
Profit/(Loss)	Rs./MT	*****	*****	*****	*****
Trend	Indexed	100	48	14	28
Profit/(Loss)	Rs. Lacs	*****	*****	*****	*****
Trend	Indexed	100	81	25	44
Cash Profit	Rs. Lacs	*****	*****	*****	*****
Trend	Indexed	100	94	51	60
Return on capital employed	%	*****	*****	*****	*****
Trend	Indexed	100	108	45	61

48. It can be seen that both profit of the appellant as well as return of capital employed earned by it declined significantly as compared to the base year.

49. While examining profitability of the domestic industry, the designated authority placed excessive reliance on profits and has completely ignored the low return on investment.

50. In such Capital Intensive industry, the return on the capital employed is a true bench mark of the performance of the company. If the return on the capital employed is a meagre 9-10%, which is equal to the bank rate of return, no entrepreneur will invest in creating

manufacturing capacities, as the entrepreneur can without any risk and effort earn a bank rate return. It is for this reason that while computing the fair selling price⁹, the Trade Notice issued by the office of the designated authority provides for a Return on Investment of 22%.

51. Thus, while examining financial viability of the domestic industry, which is highly capital intensive, the designated authority should have considered the profit as 'Return on Investment (capital employed) and not 'profit' as % of cost/price. 'Price' is a difference between the selling price and the cost of sales i.e. the expenses incurred for manufacture and sale of the product. While Return on Investment is the profit as a % of capital employed i.e. fixed assets + working capital (current assets-current liabilities), profit % is profit as a % of selling price.

52. The fact that a comparison solely basis the profit can be misleading in the case of a capital incentive industry can be better understood from the example of an oxygen plant, wherein the cost of sales is comparatively very low on account of low input cost. Since, oxygen plant uses air as feedstock, which is available for free, it has very low material cost and consequently low cost of production. However, setting up an oxygen plant requires significant capital infusion. If such a plant is set up using own capital and not using borrowed money, the books of account will show a very high profit as % of the cost of sales, thus portraying a very mis-leading picture. However, if the correct yardstick of return employed is considered the true viability and profitability of the venture will become evident and clear. Unless profit earned are sufficient to give a fair return on

investment, the industry cannot be considered to be fully viable and profit making. For a capital intensive industry, a selling price allowing recovery of cost alone would not be sufficient, as it must earn a reasonable return on the capital invested in it to remain viable.

53. In the present case, since the appellant is a backwardly integrated plant, with a captive ethylene manufacturing facility, its cost of material is very low compared to the capital employed by it. Moreover, in terms of the cost accounting practice followed by the appellant, ethylene is transferred to MEG plant at cost only, without any return. As such, the cost of production of MEG factors in only bare cost of manufacturing of ethylene without any profit or return on the capital employed for setting up the ethylene facility. Accordingly, the cost of production of MEG in the books of the appellant is significantly low, whereas it's capital employed is very high as the appellant includes capital employed in ethylene plant (proportionate to ethylene used for MEG) in the total capital employed for MEG, which is evident from the data furnished by the appellant before the designated authority.

54. It is not the submission of the appellant that the cost or the capital employed as recorded in its books is incorrect. What has been submitted is that the cost accounting practice followed by the appellant has resulted in its cost being lower and capital employed being higher. Profit as % of capital employed would be a more relevant factor for determining the profitability of the appellant.

55. It is not possible to accept the submission of the learned counsel for the respondents that the domestic industry was earning abnormal per unit profits of around 60% in the financial year 2017-18, which

reduced to 20% during the period of investigation, but the domestic industry does not have a vested right of earning abnormal profits.

56. Learned counsel for the appellant further submitted that even otherwise, its cost of sales is significantly depressed as it does not factor in any interest on the capital invested by the company in itself. In this connection learned counsel pointed out that the appellant is primarily a self-financed capital intensive unit, and has very limited borrowing/loans. Ordinarily, when a company borrows money, the interest incurred on such borrowed money forms a part of the cost of sales of the product. However, if a company is self-financed, i.e. instead of borrowing, the company invests its own saving, no interest is added to the cost. As such, the interest cost that the company would have otherwise incurred had it borrowed money are not factored in the cost of production. In the present case, learned counsel also pointed out that as the appellant is mainly self-financed, its cost of sales is significantly low as it does not factor in the 'interest cost' that the appellant would have incurred had it invested borrowed money or the interest that the appellant is losing by investing its own money in this business. Therefore, the profitability or viability of the company can be more appropriately assessed by examining the return on capital employed, and not just by the 'profits' as a % of cost or selling price.

57. In this regard, as an illustration, learned counsel also made reference to profitability of three Cafés situated at a prime location, which have identical basic cost and selling price, but are financially structured in 3 different ways, namely, Café 1 – where the premises is rented, Café 2 – when the premises is bought using borrowed money,

Café 3 – when the Café is self-financed i.e. – owner takes out his own money saved in the banks and buys the premises:

		Café 1	Café 2	Café 3
		Rented premises	Bought on loan	Bought-self financed
A	Cost of coffee, milk sugar, labour etc.	80	80	80
B	Lease rent	50	0	0
C	Interest on borrowing	0	70	0
D=A+B+C	Total cost of sales	130	150	80
E	Selling Price	155	155	155
F=E-D	Profit	25	5	75
G=F/D	Profit % on cost	19%	3%	94%
H	Per unit Capital employed	100	800	800
I=F/H	ROI	25%	1%	9%

58. Thus, while profit computed for Café 1 or Café 2 would give a reasonable indication of the health of the company, it does not give the accurate picture of viability of Café 3 as though profit as % of cost is 94%, the business is in fact able to generate only 9% return on investment, which the owner was even otherwise earning from the banks. As such, no return towards production or investor's risk is earned and, therefore, the business is not financially viable.

59. Profit as a % of cost of sales, or as a % of return on investment are two 'alternate' factors for examining the financial health of a company. It would have to be seen, basis facts of each case, which method would be more accurate and would correctly record the health of the company. In the present facts, considering that the appellant is a capital intensive unit, Return on Investment would be a more pertinent criterion for deciding financial viability of the appellant.

60. A comparison of cost of sales of the appellant and its capital employed, as verified and confirmed by the designated authority, is as below:

S. N.	Particulars	Unit	2017-18	2018-19	2019-20	Period of investigation
1.	Cost of sales	Rs/MT	*****	*****	*****	*****
	Trend	Indexed	100	126	104	87
2.	Capital Employed	Rs/MT	*****	*****	*****	*****
	Trend	Indexed	100	59	71	67
3.	Return on CE	%	*****	*****	*****	*****
	Trend	Indexed	100	108	45	61

61. The appellant has submitted a confidential version. It is seen that the cost of sales is merely about 30% of the total capital employed. Thus, for such a capital intensive unit, to remain viable it has to not only recover its cost but also earn reasonable return on its investments. As such, return on investment, and not profit on cost, is the relevant parameter in the present facts to judge the profitability of the domestic industry.

62. Learned counsel for the appellant also submitted that since the appellant uses captive input (ethylene), if the designated authority was of the view that only profit as a % of 'cost of sales' or 'selling price' was the relevant criteria, it should have considered the market price of ethylene while computing cost of sales of the appellant.

63. In this connection, reliance was placed on the judgment of the Supreme Court in **Reliance Industries Ltd. vs. Designated Authority and others**¹⁰.

10. 2006 (202) E.L.T. 23 (S.C.)

64. In the aforesaid matter, it was held by the Supreme Court that since the determination of injury is made for the entire domestic industry and not just one company, it is the market price of the inputs that should be considered for injury determination. The relevant paragraphs of the said judgment are reproduced below:

"26. In our opinion, the DA has clearly erred in law because the Authority was required to carry out the determination of injury and computation of NIP for the domestic industry as a whole, and not in respect of any particular company or enterprise. The above is apparent from the definition of "domestic industry" under Rule 2(b) of the Anti Dumping Rules. Rule 2(b) states:

"2(b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers shall be deemed not to form part of domestic industry:

Provided that in exceptional circumstances referred to in sub-rule (3) of rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the procedures within each of such market a separate industry, if-

- (i) the producers within such a market sell all or almost all of their production of the article in question in the market, and
- (ii) the deemed in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory;"

27. The provisions relating to injury analysis in Annexure II to the Antidumping Rules are also clear that the injury determination is always for the domestic industry as a whole and not for individual companies.

28. In our opinion, since the NIP is for the industry as a whole, it is immaterial if a particular company produces some of its inputs captively. In our opinion, for the purpose of determination of NIP, the DA is always required to take into consideration the transfer price (market value) of the inputs and not their actual cost of captive production. This is because the entire investigation, analysis, recommendation and imposition are for the product under consideration for the whole domestic industry and not for the individual companies and inputs captively manufactured which may be involved in the production and sales of the goods.”

65. Though subsequent to the said judgment, an amendment was made in the Anti-Dumping Rules, and Annexure-III was introduced for NIP determination but as regards determination of injury under Annexure-II, the law laid down by the Supreme Court would apply. Thus, if the designated authority was of the view that there is no injury as the domestic industry is able to sell at prices higher than its cost, it should have determined the cost of sales of the domestic industry on the basis of market price of ethylene.

66. The contention of the appellant is that on account of dumped imports coming below market prices of ethylene, the domestic industry has been forced to sell MEG at prices at which raw material (ethylene) is sold in the market.

Finding on “Ability to raise capital”

67. In the final findings, with respect to ability of the domestic industry to raise capital, it has been held:

“125. The Authority notes that the domestic industry has already increased capacity. From the examination of facts on record, it cannot also be

considered that the ability of the domestic industry to raise further capital investment has been hampered.”

68. From the above, it can be seen that seemingly for the reason that the domestic industry had already increased its capital, the authority concluded that its ability to raise future capital has not been hampered.

69. The contention of learned counsel for the appellant is that the designated authority should have appreciated that the capacities were increased by the domestic industry in September 2017 itself, when admittedly there was no dumping. Learned counsel also pointed out that since 2019-20, consequent to increase in dumped imports, the financial condition of the domestic industry has significantly declined and it was in cash losses post period of investigation and in any case, the designated authority should have appreciated that the domestic industry was earning a meagre return of capital employed of 8-9% in the period of investigation, which otherwise can be easily earned from more secured sources as well. The ability of the domestic industry to raise future investments had been significantly hampered.

70. These are factors which were required to be considered by the designated authority.

Finding on factors affecting prices and magnitude of dumping margin

71. The designated authority concluded that there is no conclusive evidence to show that imports have adversely affected the price of domestic industry.

72. The submission of learned counsel for the appellant is that such a conclusion has been drawn without appreciating that there is not only positive price undercutting but also positive price depression, and the dumped imports have forced the domestic industry to reduce its prices by offering significant discounts. Learned counsel also submitted that even though the designated authority concluded that the magnitude of dumping margin is '**positive and significant**', no reason whatsoever has been given to support the conclusion of absence of 'material injury' despite such significant dumping.

73. The submission advanced by the learned counsel for the appellant has substance. It was necessary for the designated authority to have examined these facts.

Viability of the domestic industry ought to be examined as a whole

74. Learned counsel for the appellant, in the alternate, also submitted that the anti-dumping duties are imposed not only to protect the current manufacturing facilities but also ensure that the industry as a whole remains viable for future investments.

75. The designated authority should have appreciated that the cost benefit available to the appellant on account of captive manufacturing of the main raw material (ethylene), may not be available to other companies or any new company that may be set up. As such, while conducting the profitability analysis for examining impact of dumped imports on the condition of the "**domestic industry**", the designated authority should have considered the market price of ethylene while determining the cost of sales of the domestic industry. In this regard,

reliance can be placed on the decision of the Supreme Court in the own case of the appellant in **Reliance Industries**, wherein while examining what would be relevant criteria for injury examination, the Supreme Court observed:

"29. The approach adopted by the DA, in our opinion, will lead to a situation where an artificial discrimination will be created between the integrated and non-integrated companies to the peril of the smaller plants with no backward integration (backward integration means a factory which also produces its own raw materials etc). In such situations, the result will be that the companies with no backward integration will suffer adversely. In our opinion, this was neither envisaged under the law nor can be considered as a desired result. The Antidumping legislation is meant for protection of the domestic industries as a whole against unfair practice of dumping, irrespective of whether they are backwardly integrated or not."

No finding on "threat of injury" and "post period of investigation" data

76. Learned counsel for the appellant also submitted that the designated authority completely ignored the submissions made by the domestic industry with respect to 'threat of material injury' as also the post period of investigation data, which clearly shows material injury. According to the learned counsel for the appellant the final findings are cryptic.

77. The decision of the Tribunal in **Bridge Stone Tyre Manufacturing (Thailand) vs. Designated Authority**¹¹, has to be read and interpreted in the context of judgment of Supreme Court in the **Reliance Industries**, where it has been clearly laid down that the

11. 2011 (270) E.L.T. 696 (Tri. - Del.)

impact of the industry has to be examined in the context of the industry existing today as a whole as also that, which may be set up in the future and not with reference to the integrated domestic industry on a standalone basis.

78. Learned counsel for the respondent also submitted that notional interest cost cannot be added to cost of sales.

79. It is not the contention of the appellant that a notional interest cost is required to be added to the cost of sales of the domestic industry to compute the profit. What was submitted by the appellant is that in the present case, since the capital employed by the domestic industry is largely self-financed, the cost of sales of the appellant does not factor in any interest cost and is, therefore, significantly depressed. It was, therefore, submitted that in the present case, profit as a percentage of cost does not give the correct picture of the financial health of company and profit as a % of capital employed should be considered.

80. Learned counsel for the respondent also submitted that the low return on capital employed is on account of new investment.

81. With respect to the return of capital employed, the designated authority in paragraph 120 of the final findings made the following observations:

"120. *****

Return on capital employed has also improved during the POI as compared to 2019-20. Due to extensive capital investment, the ROCE is about ***% during POI; which happens **during initial period investment as the fixed market size of the product cannot absorb such huge burden of investment during the initial years.** For conducting wholistic and objective assessment of

economic parameters, Authority is also required to consider intervening trends during the injury investigation period and cannot rely merely only on end-to-end comparison.”

(emphasis supplied)

82. It needs to be remembered that capacity expansion can result in a low return on capital employed only in a situation where an industry may have expanded its capacity but is unable to increase its sales, and consequently its production and capacity utilization remain low. In such a situation, since the production is low, the capital employed per unit production i.e. total money invested/total production would become very high. Consequently, return of capital employed, which is profit/per unit capital employed, would become significantly depressed.

83. It has, therefore, to be examined whether the appellant has been able to increase its production and sales after capacity expansion.

84. In cases where there is an increase in the capacity but the utilization is not commensurate with the increase, there can be a situation where return on investment reduces due to increase in capital employed. The contention advanced on behalf of the appellant is that the decline in the return of capital employed (i.e. profit/per unit capital employed) is not on account of increase in capital employed but on account of decrease in profits and so the reasoning given by the designated authority that the low return on investment is on account of new investment made is not correct.

85. Learned counsel for the respondent also submitted that return on investment of 9% being earned by the domestic industry is sufficient.

86. The domestic industry earned a return of 9% during the period of investigation and it is submitted on behalf of the appellant that a 9% return cannot be considered as sufficient to cover for interest, tax and profit.

87. It is also the contention of the appellant that the designated authority has consistently considered 22% of return of capital employed as a benchmark for computing the non injurious price of an industry. Non-injurious price is determined as per Annexure III read with the rule 17 of the 1995 Rules to determine the price at which injury of domestic industry would be considered removed.

88. In this regard, reliance can be placed by the learned counsel for the appellant on decisions of the Tribunal in **M/s SI Group India Pvt. Ltd vs. Designated Authority¹²** and **Qingdao Doublestar Tire Industrial & Co. Ltd. and Ors. vs. Designated Authority¹³**, where the 22% benchmark has been considered for determination of injury under Annexure II.

89. In **Qingdao Doublestar Tire**, the Tribunal observed:

“10. We note one more aspect for analysis regarding the return on capital employed. **In common parlance return on investment should be benchmarked with possible income when capital is deployed in other secured field of investment like banks etc.** Further, the cost of borrowing varies from country to country. It is necessary to note that ROCE of 22% is generally considered as reasonable and adequate for DI. These findings have been upheld in appeals also.”

90. In **SI Group India**, the Tribunal observed:

12. 2020-TIOL-849-CESTAT-DEL
13. 2018(364) E.L.T. 852 (Tri. - Delhi)

"22. In this back drop, we find that the Appellant domestic industry could reasonably establish through present and past evidence that most of these parameters are satisfied in the present case. The dumping margin is in the range of 10-15% and is positive and above de-minimis. Despite anti dumping duty, the earning of domestic industry is meagre 2% and return of capital is around 5% against the normal return of 22%."

91. The submission of the learned counsel for the appellant is that in any case a return of 9% cannot be considered sufficient for a capital intensive business. Such a return can alternately be earned easily through more secured risk-free sources, and does not account for any return for the entrepreneur's risk. This would disincentives future investments in the industry and would significantly affect the ability of the domestic industry to raise further investments.

92. Thus, when the designated authority has been considering 22% return of capital employed as a benchmark that an industry should be earning to be not in injury, then the designated authority should have considered whether 9% return of capital employed was sufficient.

93. Learned counsel for the designated authority also submitted that **Reliance Industries Ltd.**, is otherwise also earning a company level return of capital employed of 10%. Thus, return of capital employed of 9% cannot be considered insignificant.

94. The final findings do not suggest that the return of capital employed earned by the domestic industry is significant. On the contrary, in paragraph 120 of the final findings, the designated authority noted that 9% return of capital employed earned by the domestic industry is on account of new investment made in a fixed sized market. Thus, even according to the designated authority the

return of capital employed was low. In any case, since the final findings do not rely on the overall return of capital employed of the appellant, a new ground cannot now be taken to supplement the findings.

95. The respondents have relied upon the decision of the Gujarat High Court in **Nirma Limited vs. Union of India**¹⁴ to submit that determination of injury margin is required to be made only after it is found that the domestic industry is facing material injury. As such, it has been submitted that a determination as to whether there is material injury or not cannot be based on the fact that the injury margin is positive.

96. The decision of the Gujarat High Court in **Nirma Limited** was rendered in the context of a mid-term review conducted by the designated authority at the insistence of importers therein, seeking withdrawal of duties already imposed on the imports of Soda Ash (PUC therein). The designated authority in that case had held absence of positive injury margin as one of the factors to conclude that the domestic industry was not facing any injury warranting continuation of duties. Unlike original investigation, where the designated authority examines existence of material injury or threat of material injury, in a review investigation the designated authority is concerned with whether there is a likelihood of continuation or recurrence of injury if the duties are removed. Since the requirement and the purview of a review investigation is significantly different from an original investigation, the decision of the Gujarat High Court **Nirma Limited** given in a different factual backdrop cannot be applied in the present

14. 2017 E.L.T. 146 (Guj.)

facts. While in a review investigation, negative injury margin (considering duties are already imposed) may not necessarily warrant a finding that the industry is not suffering any material injury or that there is no likelihood of continuation of injury if duties are withdrawn, in an original investigation the fact that the imports are coming at a price below the fair selling price or non-injurious price of domestic industry is a strong indicator of material injury being faced by the domestic industry.

97. Learned counsel for the respondents also submitted that intervening trend was rightly considered by the designated authority to conclude that there is no material injury. Learned counsel for the respondents also submitted that more focus should be attached to trend from 2019-20 and the period of investigation.

98. The consistent claim of the appellant is that the dumping had begun from 2019-20 itself. This is clear from the application submitted by the domestic industry wherein it was stated:

“b. Period over which injury suffered

106. It is submitted that the domestic industry has been suffering injury due to subject imports since 2019-20. Such injury has continued into the period of investigation.

c. It is a settled law that for injury examination the trends over previous three years and the POI is required to be viewed as a whole to ascertain the existence of injury. Referring only to one particular year, and ignoring the overall trend for the entire period chosen for trend analysis would be incorrect.”

99. The respondents have also relied upon the findings of the WTO Panel in **Russian-Commercial Vehicles** (WT/DS479/R), to submit

that examination of intervening trend holds more significance over the end point to end point analysis.

100. The submission of the appellant is that a selective examination with respect to only one period cannot be made basis for determination of injury.

101. In the present case, evidently all price parameters have been evaluated only with reference to the preceding year. In other words, whereas the designated authority considers that the comparison cannot be limited only between the base year and period of investigation, the comparison has been limited between the period of investigation and the preceding year. The base year has been completely ignored.

102. In this regard, reference may be made to the 'overall assessment of injury' made in paragraph 130 of the final findings, which is reproduced below:

"J. OVERALL ASSESSMENT OF INJURY

130. On the basis of information on record and detailed analysis conducted hereinabove, the Authority concludes the following as regards injury to the domestic industry

- a. There is decline in volume of imports of subject goods in absolute terms and in relation to production and consumption in India.
- b. The landed price of the subject imports as well as cost of sales of the domestic industry have declined during the injury investigation period.
- c. There is no conclusive evidence to show that the imports have had a significant depressing effect on the prices of the domestic industry.

- d. The production, capacity utilization and market share of the domestic industry have increased over the injury period.
- e. Profits, Cash profits and Return on Capital Employed of the domestic industry have increased in the POL. There is no impact on the ability of the domestic industry to raise fresh investment.”

103. Thus, it is seen that with respect to the factors relevant for assessing the price injury of the domestic industry, the designated authority has relied only on the increase in profit and return on investment in the period of investigation as compared to 2019-20, and has ignored the fact that the profit and return on investment has remained significantly below 2017-18 and 2018-19 level.

104. Reliance on the WTO Panel report in **Russian-Commercial Vehicles** (Paragraph 7.41) is misplaced. The said paragraph deals with splitting of the period of investigation in two half year period and the trend examination made with respect to one half of the period of investigation as compared to the other. In these facts, the panel held that examination of intervening trend within the period of investigation is not precluded but in fact, at times necessary to examine the injury being faced by the domestic industry.

105. The designated authority, in the present case, has exclusively relied upon the marginal improvement in the period of investigation as compared to 2019-20 and has ignored the trends over the years before that. Such selective examination, particularly in the present facts where the domestic industry itself has claimed injury since 2019-20, may defeat the entire purpose of injury assessment.

106. The inevitable conclusion, therefore, is that the designated authority would have to re-examine the matter in the light of the

observations made above. For this purpose, the designated authority shall give an opportunity to both the appellant and the respondents for submitting their written submissions and after examination of the submissions and after considering the observations made hereinabove, give its final findings.

107. The final findings of the designated authority contained in the Notification dated 27.10.2022 are, accordingly, set aside and the matter is remitted to the designated authority to give final findings in the light of the observations made above. The appeal is allowed to the extent indicated above.

(Order Pronounced on **29.09.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)