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ASSOCIATES

WEEKLY TRADE UPDATE

Legislative Amendments by the Union Budget 2020-2021 of International Trade Laws

Budget 2020 has announced amendments to the existing Anti-dumping Rules and the Countervailing Duty Rules. Part 3 (Tariff-rate Quota) and Part 4 (Rules of Origin) are proposed to be included vide Finance Bill, 2020.

PART 1: ANTI-DUMPING RULES

Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Amendment Rules, 2020.

1. 'Related parties' Explanation restructured.

The Explanation to Rule 2(b) that defines 'domestic industry', has been amended with its subclause (ii) being converted to a Note. This clarifies that a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the latter, for the limited purpose of identifying 'related' parties. This is to bring the Anti-dumping Rules at par with the WTO Anti-dumping Agreement.

2. 'Period of Investigation' defined.

The Period of Investigation is now defined in clause (da) of Rule 2 as the period during which the existence of dumping is examined.

3. New Shipper Rule is amended and the period of investigation is regulated upon.

Rule 22 providing for New Shipper Review has been amplified to add a new sub-rule (3) inspired from the EU anti-dumping law. The new sub-rule provides that an anti-dumping duty already imposed for co-operative un-sampled exporters or producers in the original investigation may be extended to 'new shippers'.

The *Explanation* to the new sub-rule prescribes the determination of the period of investigation to be not more than six months old as on the date of initiation of investigation and to be for a period of twelve months. The period of investigation can be altered to a minimum of six months or maximum of eighteen months for reasons to be recorded in writing.

4. Anti-circumvention Rules revamped.

Rule 25, the provision for anti-circumvention duties, is amended, taking cue from EU Circumvention law with modification. This change has been warranted by the challenge to the interpretation of the erstwhile Rule 25 that is pending consideration in the Supreme Court.

With the amendment, '*Circumvention*' is defined as:

> *Circumvention shall be considered as a change in the pattern of trade between any country and India or between individual companies in any country subject to measures and India, as a result of a practice, process or work for which there is insufficient cause or economic justification other than the imposition of the duty; and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices or quantities or both of the like product; and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary with appropriate changes or adjustments or in accordance with the provisions of Rule 10.*

The concept of value addition for purposes of determination of circumvention has also been further explained to exclude expenses on account of procurement of technology, such as patents, copyright, trademark, royalty, technical know-how, consultancy charges, etc., in the valuation of the parts brought in.

Finally, a catch-all circumvention clause is added to cover any other manner whereby the anti-dumping duty so imposed is rendered ineffective.

5. The process for cumulative assessment of the effect of imports amended.

Vide the amendment to paragraph (iii) of Appendix II of the Anti-dumping Rules, where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the authorities may cumulatively assess the effects of such imports only if they determine that the margin of dumping established in relation to the imports from each country is more than de minimis. Further, a cumulative assessment of the effects of the imports must also be appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

PART 2: COUNTERVAILING DUTY RULES

Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for Determination of Injury) Amendment Rules, 2020.

1. Definition of 'domestic industry'.

The definition of the 'domestic industry', under Rule 2(b), is tweaked to align it with the definition of 'domestic industry' under Article 16 of the WTO Subsidy Agreement.

Further, the concept of 'related' parties is introduced, similar to the Anti-dumping Rules Explanation and the footnote to Article 16 of the WTO Subsidy Agreement.

2. Definitions of 'like articles' and 'period of investigation' introduced.

Rule 2(ca) has been inserted to define 'like article':

> *Like article means an article which is identical or alike in all respects to the article under investigation or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the article under investigation.*

Further, Rule 2(cb) has been inserted to define 'period of investigation':

> *Period of investigation means the period during which the existence of subsidisation is examined.*

3. Receival of application not to be publicised until decision to initiate.

Rule 6 has been amended to provide that the Authority must avoid any publicising of the application for the initiation of an investigation, unless a decision has been made to initiate an investigation. This aligns the Rule with Article 11.5 of WTO Subsidies Agreement.

4. Period of Investigation.

Determination of the period of investigation has been provided for by way of an *Explanation* to Rule 6(5). This change is the same as in the Anti-dumping Rules.

5. Consultation with the government of the exporting country.

Consultation with the government of the exporting country, as soon as an application for initiation of an investigation is accepted, and in any event, before the initiation of any investigation, to arrive at a mutually agreed solution, has been made mandatory pursuant to Rule 6A. This aligns the Rules with Article 11.5 of WTO Subsidies Agreement.

Further, the Government of the exporting country must be afforded a reasonable opportunity to continue consultations throughout the period of investigation.

6. Conditions for determination of nature of subsidy.

Under Rule 11, subsidy must now be conferred on enterprises or industries or designated geographical regions (along with the existing specified limited number of persons), engaged in manufacturing, producing or exporting the article.

Further, the exceptions to subsidy applicable to the following activities has been removed.

i. research activities conducted by or on behalf of persons engaged in the manufacture, production or export; or
ii. assistance to disadvantaged regions within the territory of the exporting country; or
iii. assistance to promote adaptation of existing facilities to new environmental requirements.

This to align the provision with the WTO Subsidy Agreement and Section 9(3)(c) of the Customs Tariff Act, 1975, as amended in 2017.

7. Powers of the Authority to investigate and ensure compliance with any Price Undertaking extended.

The Authority is now empowered under Rule 17(6) to do the following with respect to ensuring compliance with Price Undertaking.

i. Obtain information periodically to monitor the Undertaking;
ii. Take steps for onsite verification for the same;
iii. In case of any violation of an Undertaking, recommend immediate application of provisional measure under Rule 22(2), after informing the Central Government of the violation of the undertaking, who may thereafter levy definitive duties in accordance with the Rules.
The duty can be levied on product that entered for consumption not more than ninety days before the application of such provisional measures but no such retroactive assessment shall apply to imports entered before the violation of the undertaking.

This amendment is proposed to bring the Rules at par with anti-dumping law and also to align it to the provisions of Article 18.6 of the WTO Subsidy Agreement.

8. Provisions for Review of an imposed measure amended.

The Review process has been amended. With this amendment, the Authority can now initiate the review either on its own initiative or upon request by any interested party.

The party must submit necessary information substantiating the need for such Review, and a reasonable period of time must have elapsed since the imposition of the definitive countervailing duty.

Following this Review, the Authority will then recommend to the Central Government for its withdrawal, when it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur if the said countervailing duty is removed or varied and is therefore no longer warranted.

It is now provided that any countervailing duty imposed shall remain in force so long as and to the extent necessary, to counteract subsidisation which is causing injury. However, any definitive countervailing duty levied is effective for a period not exceeding five years from the date of its imposition which can be extended by the aforementioned Review process.

9. Powers of the Authority to examine circumvention of a countervailing measure imposed extended.

Rules 25 to 28 have been inserted to provide for anti-circumvention of a countervailing measure. The provision is inspired from EU law and is similar to the anti-circumvention provision under the Anti-dumping Rules. Some key points to note are as follows:

i. Definition of Circumvention has been introduced and includes the following practices:
   - where an article is in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India or in any other country such that the consequent value is less than thirty-five percent of the cost of the final article.
   - where an article is imported into India after being subjected to any process involving alteration of the description, name or composition of an article, if the alteration is in minor forms regardless of the variation of tariff classification, if any;
   - where an article subject to countervailing duty is imported into India through any exporter or producer or country not subject to countervailing duty;
   - any other manner where the countervailing duty so imposed is rendered ineffective.

ii. The Authority may, *suo moto*, or upon application, initiate the anti-circumvention investigation, following notification to the Government of the exporting country.

iii. The investigation shall be concluded within twelve months and in no event later than eighteen months of the date of initiation.

iv. Upon determination that circumvention of countervailing duty exists, the Authority may recommend imposition of existing countervailing duty and such levy may apply retrospectively from the date of initiation of the investigation, as imposed by the Central Government.

v. The Authority may also review the need for the continued imposition of the countervailing duty on circumventing product on its own or by an application by an interested party.

PART 3: SAFEGUARD DUTY LAW

Amendments to section 8B of the Customs Tariff Act, 1975 concerning imposition of Safeguard measures.

1. Safeguard measures are to now include application of tariff-rate quota or such other measure, apart from the imposition of safeguard duty, as the Central Government may consider appropriate to curb the increased quantity of imports of an article to prevent serious injury to domestic industry.

2. Where tariff-rate quota is used as a safeguard measure, the Central Government must not fix a quota lower than the average level of imports in the last three representative years, unless a different level is deemed necessary to prevent or remedy serious injury.

3. The Central Government may allocate such tariff-rate quota to supplying countries having a substantial interest in supplying the article concerned.

4. The Central Government is empowered to make Rules to the manner in which tariff-rate quota on identified article may be allocated among supplying countries; the manner of implementing tariff-rate quota as a safeguard measure; and any other safeguard measure and the manner of its application.

PART 4: RULES OF ORIGIN

A detailed process is proposed to be inserted into the Customs Act, 1962, with the insertion of section 28DA to ensure compliance with Rules of Origin under the Free Trade Agreements. A Trade Agreement for this purpose, means an agreement for trade in goods between the Government of India and the Government of a foreign country or territory or economic union. The key points are:

1. An importer making claim for preferential rate of duty in terms of any trade agreement, must make a declaration that the goods qualify as originating goods for preferential rate of duty under the agreement with sufficient information and reasonable care as to the accuracy and truthfulness of the information.

2. The fact that the importer has submitted a certificate of origin issued by an Issuing Authority under the Agreement, shall not absolve the importer of the above obligation.

3. Where the Customs has reason to believe that country of origin criteria is not met, he may require the importer to furnish further information or may cause verification consistent with the trade agreement.

4. Pending verification, the preferential tariff treatment may be suspended.

5. The Importer has an option to relinquish the claim for preferential rate of duty due to which Customs may disallow the claim for preferential rate of duty, without further verification.

6. In case of suspension, Customs may, on the request of the importer, release the goods subject to furnishing of a security amount equal to the difference between the duty provisionally assessed and the preferential duty claimed.

7. If the information is furnished within the specified time, Customs may restore the preferential tariff treatment.

8. If the information is not furnished within the specified time, Customs may disallow the preferential tariff treatment for reasons to be recorded in writing.

9. Unless otherwise specified in the trade agreement, any request for verification shall be sent within a period of five years from the date of claim of preferential rate of duty.

10. The preferential tariff treatment may be refused without verification in the following circumstances:
    i. the tariff item is not eligible for preferential tariff treatment;
    ii. complete description of goods is not contained in the certificate of origin;

iii. any alteration in the certificate of origin is not authenticated by the Issuing Authority;
iv. the certificate of origin is produced after the period of its expiry.

11. Where the verification establishes non-compliance with the country of origin criteria, Customs may reject the preferential tariff treatment to the imports of identical goods from the same producer or exporter as well.

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