

Representation received from some of the domestic producers on the Antidumping Rules on determination of Non-injurious Price (NIP)

Government vide Notification No.15/2011-Customs (N.T.) dated 1.3.2011 have published 'Principles for determination of non-injurious price' by way of Annexure III to the Custom Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. Some of the domestic producers have submitted representation to the Government that the principles for determination of NIP specified in the antidumping rules do not protect their interest adequately against the onslaught of dumping. These domestic producers have suggested certain amendments to Annexure III to the Antidumping Rules for the consideration of the Designated Authority. A note on the issues raised by them and an amended copy of Annexure III submitted by them is attached with this note.

All interested parties viz domestic producers, exporters, importers and their associations and consultants are requested to go through the suggestions made by a section of the domestic industry and offer their comments/suggestions on the proposed amendments by 15th March, 2015. The comments/suggestions may please be sent to the following address:

**The Designated Authority
Directorate of Antidumping & Allied Duties
4th Floor, Jeevan Tara Building
5, Parliament Street
New Delhi-110001**

Note submitted by certain domestic producers on the difficulties with the present non-injurious price law and its interpretation

The present NIP law as it exists is grossly against the larger interests of Indian industry and has become a major hurdle in sufficiently protecting the Indian industry from the onslaught of dumping. While appreciating that it might have been appropriate to codify a practice into rules and notify the same, unfortunately, these rules were finalized and notified without any interaction whatsoever with the trade and industry. Surprisingly, even when the trade and industry was consulted on so many amendments, such an important rule has been notified without any interaction whatsoever with the trade and industry. Resultantly, the rules have a number of flaws and require to be amended immediately. While some of the amendments are necessary to accord proper interpretation to the objective of the rules, some provisions are grossly inappropriate and lack sufficient business and economic basis. We have enclosed the present NIP law with our suggestions on amendments that are necessary in the present law. We are willing to have detailed discussions to justify these proposed amendments.

(a) Treatment of freight from factory to depot:

The NIP law states that since NIP is to be computed at ex-factory level, post manufacturing expenses such as commission, discount, freight-outward, etc. at ex-factory level shall not to be considered while assessing non-injurious price. The rule, however, fails to appreciate that it may not be appropriate to determine NIP at ex-factory level in all situations. Thus, the rules presume without any basis why NIP should be at ex-factory level. Indeed, there is no business and economic basis for considering that the non injurious price should invariably be determined at ex-factory level. On the contrary, it may be all the more important to determine non injurious price at a level other than ex-factory level. For example, in Soda Ash, practically entire soda ash in the country is produced in Saurashtra region, while the supplies are made throughout the country. Being a product priced in the range of Rs.14000 -18000 PMT, the incidence of freight could be as high as Rs.8000-10000 PMT in the extreme Southern region in the Country. Thus, by determining non injurious price at ex-factory level, the law has caused a situation which will lead to extinction of domestic industry in southern/eastern regions. In fact, the industry is

gradually heading towards becoming a regional industry, in effect the industry volume in the interim period in Eastern & Southern part of the country from a level of approximately 20 % (ie.3 Lac MT/ annum) of total domestic sale to less than half that volume. The balance market share has gone to imports.

It could certainly not have been the intent of the law to distort the industry in the country in such a significant manner and clearly shows introduction of rules without full appreciation of business realities. Significantly, the Designated Authority has been rejecting the claims of the domestic industries on this account without giving any reasons for such rejection.

(b) Valuation of captive inputs:

The Designated Authority was considering such captive inputs at market price after the orders of the Hon'ble Supreme Court in the matter of Reliance Industries Ltd. vs. Designated Authority. With the introduction of NIP law, there is no uniform practice. In some cases, the Designated Authority has considered captive input at cost, while in some cases, it has been considered at market price, and yet in some case, it has been considered as per records. In any case, in the larger interests of the Indian Industry, it would not be appropriate to consider the captive inputs at their costs. The rationality given by the Supreme Court may kindly be taken into account – (i) consideration of captive input at their costs would result in discrimination between backward integrated and non-integrated plants and would discourage industrialization in the Country, and (ii) anti-dumping investigations are product specific investigations and therefore should not be made company specific investigations.

India is not the only WTO member country practicing anti dumping. No other country in the world has considered it appropriate to bring this kind of law. It cannot certainly be the case that other countries are unconcerned about their consuming industries of the products attracting anti dumping duties.

(c) Presumption about utilization of inputs and production facilities:

Even when the Rules clearly provide that the Designated Authority shall segregate injury suffered by the domestic industry because of inefficient utilisation of inputs and production facilities, the Directorate has equated “*bonafide differences in consumptions and capacity utilisation*” with “*inefficient utilisation of the inputs and production facilities*”. The Rules in this regard are attracted only if the Designated Authority comes to a conclusion that the domestic industry has inefficiently utilized the inputs and production facilities. However, the practice being followed by the Directorate is to presume that any increase in consumption is inefficient utilisation and any decline in capacity utilisation is inefficient utilisation of production facilities.

(d) Treatment of interest bearing credit purchase in determination of NIP:

Working capital is the amount of funds required by a business enterprise for running day to day operations. The working capital is determined by deducting current liabilities from current assets. The current liabilities so deducted are interest free funds/credits available to the business enterprises and to this extent, a business enterprise is not required to deploy funds (and incur a cost on such funds). It is for this reason that interest free funds/credits are treated as current liabilities and deducted from current assets in order to determine working capital. However, if current liabilities include interest bearing loans, the same is required to be excluded for determining working capital. In fact, the established practice of the Directorate is to exclude interest bearing loans included in current liabilities for determining working capital. Supplier’s credit extended on raw materials purchases by the business enterprises is akin to short term loans availed by the companies from financial institutions. Instead of borrowing funds from banks (which attracts significantly higher interest cost), the companies prefer to avail maximum possible credit from international suppliers for the reason that these international suppliers are able to provide extended credit at much lower interest rates as compared to the interest rate payable to Banks in India. Thus, this interest bearing credits for raw material purchases are akin to short-term loans and in fact attracts interest cost.

In view of the above, in those situations, where a company has interest bearing credit purchases, such interest bearing creditors should be excluded from current liabilities on the lines of treatment given by the Directorate to short term interest bearing loans.

ANNEXURE III

[See rule 17(1)]

Principles for determination of non-injurious price

(1) The designated authority is required under sub-rule (1) of rule 17 to recommend the amount of anti-dumping duty which, if levied, would remove the injury where applicable to the domestic industry.

(2) For the purpose of making recommendation under clause (1), the designated authority shall determine the fair selling (notional) price or non-injurious price of the like domestic product taking into account the principles specified herein under.

(3) The non-injurious price is required to be determined by considering the information or data relating to cost of production for the period of investigation in respect of all the producers constituting domestic industry. Detailed analysis or examination and reconciliation of the financial ~~and cost~~ records maintained by the constituents of the domestic industry are to be carried out for this purpose.

(4) The following elements of cost of production are required to be examined and considered for working out the non-injurious price, namely: —

- i. The best utilisation of raw materials by the constituents of domestic industry, over the past three years period and the period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilisation of raw materials. There shall be no presumption that mere increase in consumption implies inefficient utilisation of raw materials.
- ii. The best utilisation of utilities by the constituents of domestic industry, over the past three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of utilities. There shall be no presumption that mere increase in consumption implies inefficient utilisation of utilities.
- iii. The best utilisation of production capacities, over the past three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of production capacities. There shall be no presumption that mere decline in capacity utilisation implies inefficient utilisation of utilities.

- iv. The Designated Authority shall record a reasoned finding that the increase in consumption of raw materials & utilities or decline in capacity utilisation is due to inefficient utilisation of raw materials, utilities or capacities, as applicable.
- v. The Propriety of all expenses, grouped and charged to the cost of production may be examined and any extra-ordinary or non-recurring expenses shall not be charged to the cost of production and salary and wages paid per employee and per month may also be reviewed and reconciled with the financial and cost records of the company.
- vi. To ensure the reasonableness of amount of depreciation charged to cost of production, it may be examined that no charge has been made for facilities not deployed on the production of the subject goods, particularly in respect of multi-product companies and the depreciation of re-valued assets, if any, may be identified and excluded while arriving at reasonable cost of production.
- vii. The expenses to the extent identified to the product are to be directly allocated and common expenses or overheads classified under factory, administrative and selling overheads may be apportioned on reasonable and scientific basis such as machine hours, vessel occupancy hours, direct labour hours, production quantity, sales value, etc., as applied consistently by domestic producers and the reasonableness and justification of various expenses claimed for the period of investigation may be examined and scrutinised by comparing with the corresponding amounts in the immediate preceding year.
- viii. The expenses, which shall not to be considered while assessing non-injurious price include, —
 - a) research and development provisions (unless claimed and substantiated as related to the product specific research);
 - b) ~~since~~ the non-injurious price is required to be determined at the same ex-factory level at which the import price has been determined for the purpose of injury margin, the post-manufacturing expenses such as commission, discount, freight-outward etc. at ex-factory level;
 - c) excise duty, sales tax and other tax levies on sales shall be considered at the same level as of import price;
 - d) expenses on job work done for other units;
 - e) royalty, unless it is related to technical know-how for the product;
 - f) trading activity of product under consideration; or
 - g) other non-cost or abnormal items like ~~bad debts~~, donations, loss on sale of assets, loss due to fire, flood, etc.
- ix. A reasonable return (pre-tax) on average capital employed for the product may be allowed for recovery of interest, corporate tax and profit. The average capital employed is the sum of "net gross fixed assets and net working capital", which shall be taken on the basis of average of the same

as on the beginning and at the end of period of investigation. For assessment of reasonable level of working capital requirement, all the elements of net working capital shall be scrutinised in detail. Any interest bearing liabilities shall not be reduced from net current assets. The impact of revaluation of fixed assets shall not be considered in the calculation of capital employed, unless the financial records kept by the company includes the same. Interest is allowed as an item of cost of sales and after deducting the interest, the balance amount of return is to be allowed as pre-tax profit to arrive at the non- injurious price.

- x. Reasonableness of interest cost may be examined to ensure that no abnormal expenditure on account of interest has been incurred. Details of term loans, cash credit limits, short term loans, deposits and other borrowings taken by the company and interest paid thereon may be examined in detail along with the details of assets deployed.
- xi. In case there is more than one domestic producer, the weighted averages of non-injurious price of individual domestic producers are to be considered. The respective share of domestic production of the subject goods may be taken as basis for computation of weighted average non-injurious price for the domestic industry as a whole.

Note:- The principal rules were notified vide Notification No. 2/95-Customs (N.T.) dated the 1st January, 1995, vide G.S.R.1 (E) dated 1st January, 1995 and was last amended vide Notification No.1/2002 – Customs (N.T.) dated the 4th January, 2002 vide G.S.R.11 (E) dated the 4th January, 2002.
