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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review of Polyethylene Retail Carrier Bags from
Thailand for the Period of Review August 1, 2005, through July
31, 2006

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand for the period of review (POR) August 1, 2005, through July 31, 2006. We recommend that you approve the positions described in this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties:

1. Selection of Respondents
2. Adverse Facts Available
3. General and Administrative Expenses and Interest Expenses

Background

On July 11, 2007, the Department of Commerce (the Department) published Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 72 FR 37718 (July 11, 2007) (Preliminary Results), in the Federal Register.

We invited parties to comment on the Preliminary Results. On August 13, 2007, we received case briefs from the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the petitioners), CP Packaging Co., Ltd. (CP), and KYD Ltd. (KYD), an importer of subject merchandise. On

August 22, 2007, we received rebuttal briefs from the petitioners, CP, and KYD. At the request of KYD, we held a hearing on August 29, 2007.

Other Company Abbreviations

King Pac - King Pac Industrial Co., Ltd., Dpac Industrial Co., Ltd., Zippac Co., Ltd., and King Bag Co., Ltd.

Other Abbreviations

CIT - Court of International Trade

SAA - Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, at 870 (SAA), reprinted in 1994 U.S.C.C.A.N. 4040

SG&A - selling, general, and administrative expenses

The Act - The Tariff Act of 1930, as amended

LTFV - Less-Than-Fair-Value Investigation (Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand, 69 FR 34122-24 (June 18, 2004))

Discussion of the Issues

1. *Selection of Respondents*

Comment 1: KYD argues that the Department should not have selected King Pac as a respondent for individual examination when it determined not to examine all entities for which a review was requested. Specifically, KYD argues that the Department should have selected as respondents all foreign manufacturers that both requested a review and were the subject of a request for review by the domestic industry. KYD argues further that only if the quantity and value of imports were insufficient and the Department had more resources, then the Department could have added additional respondents for which a review was requested by only one party. According to KYD, if the Department had done this, it would have protected the due-process rights of all parties that requested a review by ensuring that the companies on which all appropriate parties agreed were reviewed.

In addition, KYD argues that the circumstances surrounding King Pac and the previous administrative review were already known to the Department at the time the Department selected King Pac as a respondent. KYD contends that, because the Department had assigned adverse facts available to King Pac in the prior administrative review, it would have been reasonable for the Department to conclude that King Pac would not respond to the Department's questionnaire in this review, that King Pac's future volumes would be significantly reduced, and that including King Pac in the list of "mandatory" respondents would not assist the Department in calculating a margin for the non-selected respondents. Thus, according to KYD, the Department should have selected the respondent with the fifth largest volume as a mandatory respondent if it deemed that the volume of the sales without King Pac would be insufficient.

The petitioners state that they do not know why KYD is raising this issue at the briefing stage. They comment that neither King Pac nor KYD filed any comments on this issue at the time the Department selected individual respondents and argue that it is too late to select a different set of respondents at this point of the review. The petitioners argue that, if KYD wanted to have its views considered during the respondent-selection phase of the review, it should have participated in this process from the very beginning.

The petitioners argue that KYD makes no claim that the Department abused its discretion or acted arbitrarily in selecting King Pac as a respondent for individual examination. In other words, according to the petitioners, KYD presents no legal theory that would require the Department to reconsider its decision or that would cause the courts to force the Department to reconsider its respondent-selection decision.

The petitioners assert that, where the Department is able to examine only four respondents, its normal practice is to select the four largest exporters. They observe that in this case the Department did select the four largest exporters, which is consistent with its normal practice. The petitioners argue that KYD does not cite to any precedent for its alternative theory that the Department should have selected only those producers or exporters which also self-requested a review. In short, the petitioners argue that KYD presents no valid basis for the Department to reconsider its respondent-selection decision in this review.

Department's Position: As we stated in our November 9, 2006, Respondent-Selection Memorandum from Thomas Schauer to Laurie Parkhill, if the number of exporters or producers involved in the review make it impracticable to make individual margin determinations, section 777A(c)(2) of the Act authorizes the Department to limit its examination when selecting respondents in one of two ways. Specifically, section 777A(c)(2) of the Act authorizes the Department to review either (1) a sample of exporters, producers or types of products that is statistically valid based on the information available at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise that can reasonably be examined.

In this case, we determined that we had the resources to examine a maximum of four companies. We selected the four largest exporters/producers in order to cover the largest possible export volume, as directed by section 777A(c)(2)(B) of the Act. Because King Pac was one of the four largest exporters or producers during the POR, it was selected for individual examination. The statute does not provide authority to the Department to select respondents in the manner KYD recommends. Therefore, we decline to follow KYD's suggestion. We find that our respondent-selection methodology is reasonable and consistent with the statute and our practice.

2. *Adverse Facts Available*

Comment 2: KYD argues that, if the Department decides to apply a rate based on adverse facts available, it cannot use the rate of 122.88 percent because it is uncorroborated and unreasonable. According to KYD, the 122.88 rate was derived from uncorroborated information submitted by petitioners in the original petition. KYD argues that the lack of corroboration renders the rate inherently unreliable; thus, it cannot be used as a rate based on the application of

adverse facts available.

KYD observes that section 776 of the Act authorizes the Department to use information derived from the petition as a source of information when deciding which facts to use as adverse facts available. According to KYD, however, the petition rate is not the only, or even the primary, source of information which the Department may use when deciding which facts to use as adverse facts available. KYD argues that the petition rate is only a source and, while the Department has the discretion in selecting sources, the discretion provided to the Department is not unfettered. KYD argues that, when the Department relies on secondary information such as the petition rate, it must corroborate this information from independent sources, citing the SAA at 870. According to KYD, the Department did not do so in this case. KYD asserts that the Department corroborated the secondary information with the same information in the petition which, according to KYD, formed the basis for the allegation.

KYD argues that, at the time of the investigation and first administrative review, the Department had access to independent information in the form of actual calculated margins for other interested parties but chose not to use that information for reasons not specified. KYD contends that, had the Department compared such independent information with the petition rate, it would have found that the petition rate is aberrational and thus not corroborated. Accordingly, KYD argues, because the petition rate was not corroborated from independent sources, it must be viewed as unreliable.

Specifically, KYD argues, although the rate alleged in the petition was based on a document, there was no examination of how this rate was accurate in light of the rates actually calculated in the investigation or review. KYD argues that, as part of the corroboration process, the Department should have re-examined the petition data and compared the prices and values with those that were verified in the original investigation and subsequent reviews to determine whether the petition rate has been discredited.

KYD argues that the fact that the highest rate ever found by the Department based on an administrative review of actual data in any segment of the proceeding is approximately one seventh that of the selected rate establishes a *prima facie* case that the selected rate is aberrational. KYD argues that an adverse facts-available rate must reasonably reflect the rate that would have applied had the party cooperated with reasonable additional amount to deter non-compliance, citing Shangdong Huarong General Group Corporation v. United States, Slip Op. 07-04 (July 2, 2007) (Shangdong).

KYD argues that, in Shangdong, the respondent made inaccurate statements to the Department and received the multiple of the rate which was from 1.3 to 2.5 times the duty.¹ According to KYD, in this instance the multiple of the margin is in excess of 108 times the duty.

KYD argues that the Department should use as adverse facts available a weighted-average rate of 1.13 percent, which it calculates from the rates of respondents that cooperated in the administrative review. According to KYD, this rate would reasonably reflect the margin King Pac would have had if it had participated in the administrative review.

KYD argues that the 122.88 percent rate would never induce cooperation. KYD argues

¹ KYD refers to the word “duty” in its argument but does not clarify the duty to which it is referring or what it means when it uses the word “duty” in its argument.

that, if the Department's purpose is to induce cooperation of King Pac, then the Department must select another rate which places King Pac at a competitive disadvantage but which does not preclude King Pac from the market and which does not destroy the unrelated U.S. entities that purchased products from King Pac.

The petitioners respond that KYD makes the same argument the Department has considered and rejected in both the investigation and first administrative review of this proceeding. According to the petitioners, KYD presents no reason why the Department should reconsider its position with respect to this issue.

According to the petitioners, the SAA states that "corroborate" means that "the agencies will satisfy themselves that the secondary information to be used has probative value." The petitioners argue that, because the petition rate has been "corroborated" as required by the statute, it is the appropriate adverse facts-available rate.

The petitioners assert that the reason for applying adverse facts available is not to encourage respondents to export to the United States. Rather, the petitioners claim, the reason is to ensure that, if respondents do export to the United States, they cooperate with the Department's procedures for reviewing entries. The petitioners contend that it is not the Department's role to create an incentive for King Pac to continue shipping to the United States.

Citing the SAA at 870, the petitioners argue that the Department must ensure that a respondent does not benefit from its own non-cooperation. According to the petitioners, if the Department were to assign a rate lower than King Pac's current rate, it would undermine the goal of the adverse facts-available provision, as described in the SAA and send a message to future respondents that they may benefit from such non-cooperation.

Department's Position: As we explained in detail in the Preliminary Results, we have corroborated, to the extent practicable, the 122.88 percent rate with independent sources. We corroborated the petition rate with import statistics, a price quotation for various sizes of polyethylene retail carrier bags (PRCBs) commonly produced in Thailand, and affidavits from company officials from different Thai producers of the like product. See Preliminary Results, Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 FR 1982, 1983 (January 17, 2007), and accompanying Issues and Decisions Memorandum at Comment 11, and LTFV. The fact that these source documents were included in the petition does not disqualify them as independent sources. To the contrary, the SAA states specifically that independent sources used to corroborate such evidence may include published price lists, official import statistics, customs data, and information obtained from interested parties during the particular investigation. See 19 CFR 351.308(d) and the SAA at 870. The price quotation and affidavits are similar to items listed in the SAA and, thus, qualify as independent sources. See, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews and Determination To Revoke in Part, 64 FR 2173, 2176 (January 13, 1999) ("the price lists and price quotes that support the petition margin are independent sources"). Thus, we have corroborated, to the extent practicable, the adverse facts-available rate with independent sources.

Further, we disagree with KYD's argument that we should not use the petition rate as the

adverse facts-available rate. Section 776(c) of the Act requires that the Department corroborate, to the extent practicable, secondary information from independent sources that are reasonably at its disposal. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.” See SAA at 870. The SAA clarifies that “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. See SAA at 869. As explained below and in accordance with these standards, the Department finds that the petition rate is relevant and reliable.

With respect to the reliability aspect of corroboration, the Department found the 122.88 percent rate to be reliable in the investigation. See LTFV. There, the Department stated that the rate was calculated from independent source documents included with the petition, namely, a price quotation for various sizes of PRCBs commonly produced in Thailand, import statistics, and affidavits from company officials, all from a Thai producer of subject merchandise. See Memorandum to the File from case analyst dated June 19, 2007. Because the information is supported by independent source documents, we determine that the information is still reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where the selected rate is not appropriate as adverse facts available because it has been discredited, the Department will disregard the discredited adverse facts-available rate and determine an appropriate adverse facts-available rate. See D&L Supply Co. v. United States, 113 F. 3d 1220, 1221 (CAFC 1997) (the Department will not use a margin that has been judicially invalidated). In this case, the selected adverse facts-available rate has not been judicially discredited. In addition, no interested party, including Zippac, contested the application of that rate in the LTFV. Furthermore, as stated in Shanghai Taoen International Trading Co. v. United States, 360 F. Supp. 2d 1339, 1348 (CIT 2005) (citing D&L Supply Co. v. United States, 113 F. 3d 1220, 1221 (CAFC 1997)), “the purposes of using the highest prior antidumping duty rate are to offer assurance that the exporter will not benefit from refusing to provide information, and to produce an antidumping duty rate that bears some relationship to past practices in the industry in question.”

In this case, the Department provided King Pac with an opportunity to provide current information showing that its margin is lower than the adverse facts-available rate applied in earlier segments of the proceeding. King Pac elected not to cooperate at all in this review, providing no information to refute the relevance of the adverse facts-available rate the Department selected. The CAFC has held:

In the case of uncooperative respondents, the discretion granted by the statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences. See 19 U.S.C. § 1677e(b). In cases in which the respondent fails to provide Commerce with the most recent pricing data, it is within Commerce's discretion to presume that the highest prior margin reflects the current margins.

See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1338-1339 (CAFC 2002) (citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (CAFC 1990)).

Consequently, we conclude that King Pac has not altered its past pricing practices and that its previous rate is reflective of its current pricing practices and, therefore, has relevance in this administrative review.

We disagree with KYD's argument that the petition rate is punitive in nature. The fact that the Department assigned the petition rate to King Pac's affiliate, Zippac, in the LTFV and that King Pac knew the 122.88 percent rate would be its rate if it remained uncooperative in subsequent administrative reviews demonstrates that the petition rate not only is not punitive but was insufficient to induce King Pac's cooperation.

We do not agree with KYD's argument that we should apply to King Pac the weighted-average rate we calculated for the cooperative companies. Doing so would allow King Pac to benefit significantly from its failure to cooperate in the instant review, contrary to the intent of the Act as described in the SAA. See section 776 of the Act and SAA at 870.

Further, because King Pac has not cooperated with the Department in this or prior segments of the proceeding, the Department has been unable to calculate a margin for King Pac based on its own data. See LTFV, 69 FR at 34122-24, and Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 FR 1982, 1983 (January 17, 2007), and accompanying Issues and Decision Memorandum at Comment 11. As such, the circumstances in this case are distinguishable from those found in Shandong cited by KYD, wherein the plaintiffs had previously received their own calculated rates. King Pac has not provided, nor does the record contain, a justification for a rate lower than the rate currently applicable to King Pac. King Pac's own behavior has left the Department with "no probative alternatives to the highest available margin." See Shanghai Taoen International Trading Co. v. United States, 360 F. Supp. 2d 1339, 1348 (CIT 2005). Accordingly, by using information that was corroborated in the LTFV and determined to be relevant to King Pac in this review, we have corroborated the adverse facts-available rate to the extent practicable. See section 776(c) of the Act and 19 CFR 351.308(d).

3. *General and Administrative Expenses and Interest Expenses*

Comment 3: The petitioners argue that the Department should calculate CP's G&A and interest expenses based on the CP's 2006 financial statements. They assert that it is the Department's practice to base G&A and interest expense upon those financial statements that are most contemporaneous with the POR, citing Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 68 FR 69996 (December 16, 2003), and accompanying Issues and Decision Memorandum at Comment 6. The petitioners observe that the POR encompasses five months in 2005 (August through December) and seven months in 2006 (January through July). Because CP's financial statements are reported on a calendar-year basis, the petitioners assert, CP's 2006 financial statements are more contemporaneous with the POR than its 2005 financial statements. The petitioners provide a calculation of CP's G&A and interest expenses based on CP's 2006 financial statements which they assert the Department should use.

CP does not rebut the petitioners' argument that the Department should calculate CP's G&A and interest expenses based on the CP's 2006 financial statements. CP asserts that the

Department should modify the petitioners' G&A calculation to avoid double-counting certain expenses. CP contends that personnel expenses reported in its 2006 financial statements include the salary and bonuses of sales and marketing staff which have been used to calculate the ratios reflecting CP's indirect selling expenses. CP asserts further that the petitioners used the full amount of personnel expenses reported in the 2006 financial statements in their calculation of G&A based on the 2006 financial statements. To avoid double-counting, CP argues, the Department should adjust the personnel expenses not to capture those reported as indirect selling expenses. CP provides a calculation of its G&A expense ratio based on the segregation of expenses it reported, using its 2005 data.

CP argues further that the petitioners' interest-expense calculation is also in error because the petitioners relied on CP's financial statements. CP states that it is the Department's policy to calculate financial expenses based on the consolidated audited financial statements of the highest consolidation level. CP contends that it calculated its original interest-expense ratio based on the CP Public Company Limited's (CPPC's) consolidated 2005 financial statements, which is the highest consolidation level. Accordingly, CP contends, the Department should calculate CP's interest expenses based on CPPC's consolidated 2006 financial statements.

Department's Position: We agree with the petitioners that we should calculate CP's G&A and interest expenses using the financial statements for the year most contemporaneous with the POR. The Department's practice is to use the financial statements of the year that overlaps most with the POR. See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 67 FR 78417 (December 24, 2002), and accompanying Issues and Decision Memorandum at Comment 8, as amended by Notice of Amended Final Results of Antidumping Duty Administrative Review: Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 68 FR 4763, 4764 (January 30, 2003). For this review, seven months of the POR fall in 2006; accordingly, we have recalculated CP's G&A and interest expenses using the 2006 financial statements.

We agree with CP that we should not double-count salaries and bonuses that are captured elsewhere in the response. See 19 CFR 351.401(2)(b). We used a methodology similar to that which CP has suggested; we were not able to recreate the proportion of salaries and bonuses attributable to G&A that CP stated in its case brief. Because of the proprietary nature of our calculation of that proportion as well as our recalculation of CP's G&A expenses, please see the final-results analysis memorandum for CP dated November 8, 2007, for our calculations.

We also agree with CP that we should calculate CP's interest expenses using the group's consolidated financial statements. As CP argued, our practice is to calculate financial expenses based on the consolidated audited financial statements of the highest level of consolidation. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472 (December 15, 2000), and accompanying Issues and Decision Memorandum at Comment 7. Because we did not ask CP to submit the group consolidated financial statements for 2006, we have relied on CP's reported expenses, which are based on the group consolidated financial statements for 2005.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for all of the reviewed firms in the Federal Register.

Agree _____

Disagree _____

David M. Spooner
Assistant Secretary
for Import Administration

Date