

January 7, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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, 2006, through July
31, 2007

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 August 1, 2006, through July 31, 2007. 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. Adverse Facts Available
2. Unreported Sales by Poly Plast

Background

On September 9, 2008, 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, 73 FR 52288 (September 9, 2008) (Preliminary Results), in the Federal Register.

We invited parties to comment on the Preliminary Results. On October 15, 2008, we received case briefs from the petitioners, Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation, and KYD Ltd., an importer of subject merchandise. On October 23, 2008, we received rebuttal briefs from the petitioners and KYD. At the request of KYD, we held a public hearing on October 29, 2008.

Abbreviations

The Act - The Tariff Act of 1930, as amended

AFA - adverse facts available

CAFC - Court of Appeals for the Federal Circuit

CIT - Court of International Trade

I&D Memo - Issues and Decision Memorandum adopted by a Federal Register notice of final determination of an investigation or final results of review

King Pac - King Pac Industrial Co., Ltd.

KYD - KYD, Inc.

Master Packaging - Master Packaging Co., Ltd.

The petitioner - Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation

POR - period of review

PRCBs - polyethylene retail carrier bags (subject merchandise)

PRCBs LTFV - Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand, 39 FR 34122 (June 18, 2004)

PRCBs 1 - Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 FR 1982 (January 17, 2007)

PRCBs 2 - Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580 (November 16, 2007)

SAA - Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040

Court Cases

World Finer Foods - World Finer Foods v. United States, 24 CIT 541 (CIT June 26, 2000)

Universal Polybag - Universal Polybag Co., Ltd. v. United States, 577 F. Supp. 2d 1284 (CIT 2008)

Rhone Poulenc, Inc. - Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (CAFC 1990)

Shandong - Shandong Huarong General Group Corp. v. United States, Slip Op. 07-04 (CIT January 9, 2007)

Exxon - Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008)

Shanghai Taoen - Shanghai Taoen International Trading Co. v. United States, 360 F. Supp. 2d 1339, 1348 (CIT 2005)

Discussion of the Issues

Issue 1: Adverse Facts Available

KYD argues that, because it is an “interested party” pursuant to section 771(9) of the Act, it is subject to the facts-available provisions of section 776 of the Act. KYD acknowledges that necessary information is not included in the record and that the Department is required to calculate a margin using “facts available.” KYD argues that, because the Department has not made a determination that KYD failed to act to the best of its ability, the Department is precluded from using an adverse inference against KYD. Moreover, KYD argues, rather than merely acting to the best of its ability, its cooperation was extraordinary and should be rewarded.

Specifically, KYD asserts, not only did it provide detailed information about a possible relationship between King Pac and Master Packaging, it provided all of the information in its possession concerning its purchases from these suppliers.

Citing World Finer Foods, KYD argues that the limited precedent supports KYD in its efforts to submit information when its supplier did not respond to the Department's request for information. Moreover, citing Universal Polybag (quoting Rhone Poulenc, 899 F.2d 1185, 1190 (CAFC 1990) ("the presumption in favor of the highest prior rate reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less)), KYD argues that it has done as the courts have suggested and provided current information to demonstrate that the margin for its imports was less than 122.88 percent. KYD suggests several alternatives that the Department could use to calculate an importer-specific assessment rate for KYD.

KYD also argues that policy considerations support the calculation of an importer-specific assessment rate for KYD. For example, KYD argues, the assignment of a separate assessment rate will encourage U.S. importers to provide information to the Department. Citing 19 CFR 351.212(b)(1) and the SAA at page 870 ("one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation"), KYD argues that the calculation of an importer-specific rate would adhere to the Department's practice of calculating importer-specific assessment rates while not benefiting the uncooperative foreign producer. KYD also suggests that the calculation of an importer-specific assessment rate will provide an incentive for foreign manufacturers to cooperate and will reduce harm to the domestic industry because uncooperative exporters will be frustrated in their attempts to circumvent the antidumping laws. Citing the SAA at 868-869, KYD asserts that, because the policy behind the AFA provisions was to encourage exporters and producers to comply with requests for information, the use of AFA against KYD is not in line with legislative intent.

KYD asserts that the Department's respondent-selection practice created a disincentive for King Pac to respond. Specifically, KYD suggests, if the Department had initiated a review of all respondents for which a review had been requested rather than deprive KYD of its Constitutional right to equal protection and treatment, King Pac would have had an incentive to respond to the Department's antidumping questionnaire. Further, KYD asserts, because King Pac shifted its U.S. exports to Master Packaging and Master Packaging was not selected for individual examination originally, King Pac had no incentive to respond to the Department's questionnaire.

KYD argues that, if the Department does not calculate an importer-specific assessment rate for KYD, it must calculate a new AFA rate for King Pac and Master Packaging. Specifically, KYD argues, the 122.88 percent AFA rate is uncorroborated and unreasonable. KYD asserts that, while section 776(b)(1) of the Act permits the Department to use secondary information such as the petition as a source of AFA, section 776(c) of the Act requires that the Department use information from independent sources to corroborate the rate and show that it is both relevant and reliable. KYD asserts that the fact that the AFA rate was applied to King Pac in a previous administrative review is irrelevant because KYD did not become aware of the risk associated with purchasing from King Pac until September 2006.

Citing Shandong, KYD argues that an AFA rate must reasonably reflect the rate that would have applied had the party cooperated with a reasonable additional amount to deter non-compliance. Moreover, citing PAM, S.p.A. v. United States, 495 F. Supp. 2d 1360, 1372 (CIT 2007), KYD asserts that the AFA rate must reflect a company's dumping activity during the period of review rather than that of an unrelated party over an amorphous period of time. KYD asserts that it has proposed several alternative rates that would satisfy Shandong.

KYD argues that a rate of 122.88 percent is punitive. KYD also argues that the rate of 122.88 percent not only exceeds rates in other Federal statutes but also, citing Exxon, exceeds the judicial cap placed on punitive damages. Specifically, citing Firth Rixson Special Steels Ltd. v. United States, 27 CIT 873, 891 (CIT 2003) (quoting Krupp Thyssen Nirosta GmbH v. United States, 25 CIT 793, 797 (CIT 2001)), KYD states that the AFA rate must be "rationally related to sales, indicative of customary selling practices, and not unduly harsh or punitive." KYD posits that any amount determined to be excessive under an excessive standard must also be considered under the lesser "unduly harsh or punitive" standard. Accordingly, KYD asserts, the Department should consider the Exxon statement that "the penalty scheme they face ought to threaten them with a fair probability of suffering in like damage when they wreak like damage," citing Exxon, 128 S. Ct. at 2610.

The petitioner explains that the Department assigned AFA margins to King Pac and Master Packaging, not KYD, and that the Department may not establish either a separate dumping margin or assessment rate for KYD. Citing section 777A(c)(1) of the Act, the petitioner asserts that the Act does not permit the calculation of an importer-specific dumping margin. Concerning KYD's arguments that it should not be penalized for its suppliers' non-compliance, the petitioner explains that section 777A(c)(1) of the Act requires the Department to calculate margins for producers and exporters and that, pursuant to section 738(b)(4) of the Act, the liability for paying duties falls on the importers. Moreover, citing Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand, 63 FR 43661 (August 14, 1998), and accompanying I&D Memo at Comment 2E, the petitioner explains that in other proceedings the Department has rejected arguments similar to those which KYD presents in this review. The petitioner suggests that KYD raise its complaints with Congress rather than with the Department.

The petitioner explains that, because sections 736(c)(3) and 751(a)(2)(C) of the Act require that the assessment of duties be based upon the final dumping margins calculated in a review, there is no legal basis to assign an importer-specific assessment rate that differs from the rate for King Pac and Master Packaging. Moreover, the petitioner argues, World Finer Foods does not stand for the proposition that the Department may calculate an importer-specific assessment rate for a "cooperative" importer that differs from the AFA margin assigned to an uncooperative foreign respondent. The petitioner also explains that, unlike the respondent in World Finer Foods, because neither King Pac nor Master Packaging made a good-faith effort to cooperate section 782(c) of the Act does not provide an impediment to the application of total AFA. The petitioner posits that, while KYD's proposed policy concerns are irrelevant, the calculation of importer-specific assessment rates in instances where the foreign producer/exporter refused to participate would serve as a disincentive for future producer/exporter participation because

producers/exporters would not risk losing customers which were unhappy with high assessment rates.

The petitioner asserts that KYD's arguments that the AFA rate of 122.88 percent is uncorroborated and punitive are without merit. Citing Universal Polybag, the petitioner states that the CIT has upheld the Department's method of corroboration. Additionally, citing Universal Polybag, the petitioner argues that, because King Pac and its known affiliates have been subject to the 122.88 percent AFA rate since the investigation, the rate is relevant. The petitioner also explains that, because the rate has been corroborated, the AFA rate is reliable.

The petitioner argues that KYD's reliance on Exxon is misplaced because this proceeding involves neither maritime law nor punitive damages. Moreover, citing PAM, S.p.A. v. United States, 577 F. Supp. 2d 1318 (CIT 2008), the petitioner states that the CIT has held that Exxon "does not undermine or overrule the validity of Ta Chen" and has no bearing in the context of corroborating AFA margins. Additionally, the petitioner not only distinguishes the current situation from that in Shandong but also argues that a rate of 122.88 percent or higher is likely the rate that would have applied had King Pac and Master Packaging cooperated; otherwise, the petitioner asserts, they would have produced current information showing that their actual rates were lower. Finally, citing the SAA at 870, the petitioner explains that the Department must select an AFA rate which ensures that a respondent does not benefit from its own lack of cooperation.

The petitioner concludes that assigning a rate lower than 122.88 percent to either King Pac or Master Packaging, which appears to have been created for the purpose of allowing King Pac to circumvent the antidumping law, would allow these firms to benefit from their own non-cooperation.

Department Position: KYD is neither a producer nor an exporter but an importer of subject merchandise.¹ Section 777A(c)(1) requires that the Department determine an individual dumping margin "for each known *exporter and producer* of the subject merchandise" (emphasis added). As discussed below, the only exception to this mandate is section 777A(c)(2) of the Act (which authorizes the Department to determine individual dumping margins for fewer than all exporters and producers when it is not practical to determine individual dumping margins for all exporters and producers).

After determining that King Pac and Master Packaging did not respond to our requests for information and impeded the proceeding significantly because they failed to cooperate to the best of their ability and pursuant to sections 776(a) and (b) of the Act, we applied total AFA to merchandise produced and/or exported by King Pac and Master Packaging. See Preliminary Results, 73 FR at 52289-52290. We did not apply AFA to KYD. Id. at 52291.

While KYD argues that it should not be punished for its suppliers' lack of cooperation, the Act not only states explicitly that dumping margins are calculated for producers and exporters but that, pursuant to section 738(b)(4) of the Act, liability for the resultant antidumping duties rests

¹ There is no dispute that, pursuant to section 771(9) of the Act, KYD's status as an importer of subject merchandise qualifies it as an interested party to the proceeding.

solely with the importer. In other words, KYD's liability for antidumping duties which will be assessed based on King Pac's and Master Packaging's dumping margins is the result of the statutory scheme rather than either an adverse inference against KYD or some form of punishment for its suppliers' non-cooperation.

The Department has responded to similar claims in other proceedings. See Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand, 63 FR 43661, 43666 (August 14, 1998), at Vita Comment 2E and Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 40492 (July 15, 2008), and accompanying I&D Memo at Comment 10. Moreover, the CIT has recognized the nature of the statutory provisions. See JCM, Ltd. v. United States, 23 CIT 121, 125 (CIT 1999) ("because it was an importer of the subject merchandise, not a producer or exporter, it would not be assigned a dumping margin in the investigation phase of the proceeding, although it would be responsible to pay the increased duty"). See also Union Camp Corp. v. United States, 8 F. Supp. 2d 842, 852, n7 (CIT 1998) ("when a U.S. importer deals with a foreign company that is subject to an antidumping duty order, the importer must realize that the dumping margin could change to its benefit or detriment").

The Act does not authorize the Department to do as KYD suggests and calculate an importer-specific assessment rate that is based on anything other than the dumping margins the Department determines and applies to King Pac and Master Packaging for the period of review. Sections 736(c)(3) and 751(a)(2)(C) of the Act require that the assessment of duties be based upon the final dumping margins. While KYD is correct that the Department's practice is to calculate importer-specific assessment rates as explained at 19 CFR 351.212(b), the importer-specific assessment rates are calculated "by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise." Because King Pac and Master Packaging did not provide responses to our questionnaire as discussed above, we do not have the necessary information to calculate importer-specific rates as contemplated in the regulations.

KYD's reliance on World Finer Foods for the proposition that the Department may calculate an importer-specific assessment rate that is not based on its non-cooperative supplier's dumping margin by using the importer's information about its purchases is misplaced. In World Finer Foods, the CIT concluded that, because the Department had not fulfilled its obligation under section 782(c) of the Act to assist an Italian pasta producer (which was a respondent in the underlying administrative review of the antidumping duty order on certain pasta from Italy) with its reporting difficulties, the Department was precluded from applying an adverse inference to that respondent for not cooperating in the administrative review. See World Finer Foods at 542-546. Additionally, the CIT directed the Department to consider the information provided by the importer in determining the appropriate facts-available rate. Id. at 546.

On remand, the Department concluded that it could not use the limited information supplied by the importer, World Finer Foods, to calculate a dumping margin for the respondent and instead used the respondent's verified weighted-average margin from the less-than-fair-value investigation as neutral facts available. See Redetermination on Remand, Certain Pasta from

Italy (September 15, 2000). In upholding the Department’s remand redetermination, the CIT recognized that, while the margin had been assigned to the respondent, the liability for duties remained with the importer. See World Finer Foods v. United States, 120 F. Supp. 2d 1131, 1132 (November 3, 2000) (“World Finer Foods, Inc., which will be liable for duties at the 19.09 percent fact available rate assigned to {the respondent}, accepts the remand results”).

The current situation is distinguishable because the Department complied with all statutory requirements prior to assigning margins based on total AFA to King Pac and Master Packaging. King Pac chose not to respond to the Department’s initial questionnaire. See Preliminary Results, 73 FR at 52289. While Master Packaging responded to the Department’s initial questionnaire, Master Packaging neither responded to the Department’s supplemental questionnaire nor requested an extension of time to do so. The Department had allowed Master Packaging to correct its filing deficiencies previously, had granted Master Packaging a partial extension of time to respond to the original questionnaire, and had responded to Master Packaging’s requests for guidance with filing requirements. See, e.g., Preliminary Results, 73 FR at 52289-90, and Memorandum to the File entitled “Attempts to Contact Master Packaging,” dated June 23, 2008. Indeed, KYD acknowledges that “King Pac’s and Master Packaging’s conduct, on its face, appears to be of the highest degree of culpability.” See KYD Case Brief at 37-38.

Concerning KYD’s suggestion that it was harmed by our decision to limit the number of respondents examined individually by creating a disincentive for King Pac to respond to our questionnaire,² we explained in the Memorandum to the File entitled “Polyethylene Retail Carrier Bags from Thailand – Respondent Selection,” dated December 6, 2007, that section 777A(c)(2) of the Act authorizes the Department to limit its examination of individual respondents if the number of exporters or producers involved in the review make it impracticable to make individual margin determinations. We also explained that section 777A(c)(2) of the Act authorizes the Department to review (A) a sample of exporters, producers or types of products that is statistically valid based on the information available at the time of selection or (B) 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 three companies. Accordingly, we selected the three largest exporters/producers in order to cover the largest possible export volume as directed by section 777A(c)(2)(B) of the Act.³ Because King Pac chose not to respond to our requests for information, we revisited our respondent-selection decision and selected Master Packaging, the sole remaining respondent, for individual examination. See Memorandum entitled “Polyethylene Retail Carrier Bags from Thailand: Selection of Master Packaging as a Mandatory Respondent,” dated March 27, 2008. Accordingly, even though section 777A(c)(2) of the Act authorizes the Department to limit the

² Although KYD asserts that we did not initiate a review for all of the respondents for which we had received a request for review, we presume that KYD meant that we did not select all of the respondents for individual examination. We initiated a review of all respondents for which we received a request for administrative review. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 72 FR 54428 (September 25, 2007).

³ While KYD suggests that section 77A(c)(2) of the Act raises Constitutional issues, KYD has not advanced any legal arguments or analysis in support of such claims. See KYD Case Brief at 5, 12, and 20.

number of respondents it examines individually, pursuant to section 777A(c)(1) of the Act the Department has determined an individual dumping margin for each exporter and producer of subject merchandise for which it received a request for administrative review. The Department does not control whether a respondent chooses to participate in an administrative review once selected for individual examination.

Concerning KYD's argument that the 122.88 percent rate is uncorroborated, we explained in detail in the Preliminary Results that we had corroborated the 122.88 percent rate with independent sources. Specifically, we corroborated the petition rate with import statistics, a price quotation for various sizes of PRCBs commonly produced in Thailand, and affidavits from company officials from different Thai producers of the like product. 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, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. See SAA at 870 and 19 CFR 351.308(d). See also Stainless Steel Wire Rod from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 32074, 32076 (June 11, 2007), unchanged in Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 72 FR 46035 (August 16, 2007). Moreover, the CIT has upheld the Department's use of these same price quotations and affidavits to corroborate the 122.88 percent petition rate. See Universal Polybag, 577 F. Supp. 2d at 1300 ("Commerce's determination that these price lists are different from information based on lists from market research because they are accompanied by affidavits from company officials is not outside of the agency's discretion in finding adequate corroboration"). Thus, we corroborated the AFA rate with independent sources.

Section 776(c) of the Act requires that, to the extent practicable, the Department must corroborate 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. Id. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. See SAA at 869. In accordance with these standards, as explained below, 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 original investigation. See PRCBs Final LTFV. There, the Department stated that the rate was calculated from 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. Because the information is supported by 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. Recently, in Universal Polybag, the CIT upheld the Department's selection of 122.88 percent as the AFA rate for an earlier segment of this proceeding. See Universal Polybag, 577 F. Supp. 2d at 1300-01. Further, as stated in Shanghai Taoen at 1348 (citing D&L Supply Co. v. United States, 113 F. 3d 1220, 1221 (CAFC 1997)), “{t}he 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.”

Regarding the relevance of this rate to King Pac, the Department provided King Pac with an opportunity to provide current information showing that its margin was less than that of the AFA rate. The rate of 122.88 percent is King Pac's current rate. See PRCBs 1, 72 FR at 1983, and PRCBs 2, 72 FR at 64581. King Pac provided no information to refute the relevance of the AFA rate. Accordingly, the continued application of the 122.88 percent rate to King Pac “reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less.” Rhone Poulenc, 899 F.2d at 1190 (emphasis in original). Indeed, in Universal Polybag, the CIT upheld the application of 122.88 percent to King Pac in an earlier segment of this proceeding and explained that “{t}his is appropriate because the company upon which the rate is based, Zippac, is closely related to King Pac.” See Universal Polybag, 577 F. Supp. 2d at 1300. Further, because we have applied AFA to King Pac and its affiliates in the PRCBs Final LTFV and in the first and second administrative reviews, there are no alternatives for King Pac that are more probative. See PRCBs Final LTFV, 69 FR at 34122-24, PRCBs 1 and accompanying I&D Memo at Comment 11, and PRCBs 2 and accompanying I&D Memo at Comment 2.

Regarding the relevance of this rate to Master Packaging, the Department provided Master Packaging with an opportunity to provide information showing that its margin was less than that of the AFA rate which, as discussed above, is another respondent's current rate. Master Packaging did not provide the information we requested to refute the relevance of the AFA rate. In other words, Master Packaging's decision not to respond to the Department's supplemental questionnaire has left the Department with an “egregious lack of evidence on the record to suggest an alternative rate.” Shanghai Taoen, 360 F. Supp. 2d at 1348 (CIT 2005). It is “the Department's practice to select, as AFA, the highest rate determined for any respondent in any segment of the proceeding.” See Porcelain-on-Steel Cooking Ware from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review, 73 FR 52021, 52023 (September 8, 2008). See also Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 68 FR 19504, 19506 (April 21, 2003).

The CIT and the CAFC have upheld the Department's practice consistently. See, e.g., Rhone Poulenc, 899 F.2d at 1190, and NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in the less-than-fair-value investigation). Further, the CIT has upheld the Department's practice in relation to King Pac in a prior segment of this proceeding. See Universal Polybag, 577 F. Supp. 2d at 1300. Moreover, we have found high-volume transaction-

specific margins in this review for a cooperating company that are close to 122.88 percent. See Memorandum to the File entitled “Polyethylene Retail Carrier Bags from Thailand – Transaction-Specific Company Margins,” dated January 7, 2009. See also Universal Polybag, 577 F. Supp. 2d at 1300-01. Accordingly, because Master Packaging has left us with an “egregious lack of evidence” and we have determined that the rate of 122.88 percent is applicable to another respondent in the current review, we determine that the rate is relevant with respect to Master Packaging.

We disagree with KYD’s argument that the petition rate is punitive in nature. The rate has been upheld as satisfying the requirement that it be reasonable. See Universal Polybag, 577 F. Supp. at 1301 (“{t}he law makes clear that Commerce’s determination of rates must be legal, reasonable, and supported by substantial evidence . . . Commerce’s chosen {122.88} AFA rate was sufficiently corroborated.”). Moreover, the CIT has held that Exxon has no bearing in the context of corroborating AFA margins. See PAM, 577 F. Supp. 2d at 1320-21. Accordingly, by using information that was corroborated in the LTFV investigation and determined to be relevant to King Pac and Master Packaging in this review, we have corroborated the AFA rate to the extent practicable. See section 776(c) of the Act and 19 CFR 351.308(d).

Issue 2: Unreported Sales by Poly Plast

The petitioner contends that the Department found during the sales verification that Poly Plast did not report certain U.S. sales of in-scope product even though, the petitioner asserts, Poly Plast maintained all the necessary documentation to do so. The petitioner argues that it is the Department’s practice to use AFA in such instances. In support of its argument, the petitioner cites, among others, Certain Tissue Paper Products from the People’s Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 72 FR 58642 (October 16, 2007), and accompanying I&D Memo at Comment 7. The petitioner contends that such behavior constitutes a failure as defined by section 776(b) of the Act, by Poly Plast.

The petitioner urges the Department to assign an AFA rate of 122.88 percent based on the information in the petition in the original investigation to U.S. sales which Poly Plast did not report and asserts that the Department found this rate to be reliable, relevant, and corroborated in the preliminary results of this review.

Poly Plast did not comment on this issue.

Department’s Position: Section 776(a) of the Act provides that, if necessary information is not available on the record or if an interested party (1) withholds information that has been requested by the Department, (2) fails to provide such information by the deadlines established, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, (3) significantly impedes the proceeding, or (4) provides such information but the information cannot be verified, the Department shall use, subject to section 782(d) of the Act, the facts otherwise available in reaching the applicable determination.

The antidumping duty questionnaire requires that a respondent report all U.S. sales relevant to

the review. See questionnaire issued to Poly Plast on December 6, 2007, at, e.g., Section C. II. (“prepare a separate computer data file containing each sale made during the POR of the subject merchandise”). During the course of verification of the U.S. sales information submitted by Poly Plast in this review we found that Poly Plast did not report U.S. sales of small-sized merchandise bags (of the dimensions specified in the scope of the order) that contained a store logo and finger-sized punch-out handles. At verification Poly Plast provided invoices for the unreported U.S. sales. See June 23, 2008, verification report at 7.

By not reporting all of its U.S. sales, Poly Plast withheld requested information and failed to provide information within the deadlines established. Because the administrative record lacks price adjustments applicable to these sales necessary to calculate dumping margins for these sales, we find it appropriate to rely on partial facts available pursuant to section 776(a) of the Act. Further, as evident by our ability to obtain invoices specific to unreported U.S. sales, it is clear that Poly Plast possessed the necessary records to provide a complete U.S. sales list.

Therefore, we find that, in its failure to report all U.S. sales of in-scope product during the period of review, the information over which it maintained control at all times, Poly Plast did not act to the best of its ability to comply with our request for information.

Because Poly Plast failed to cooperate in this regard, we find that the use of information that is adverse to the interests of Poly Plast pursuant to section 776(b) of the Act, as facts otherwise available, is appropriate. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62134 (October 3, 2002), and accompanying I&D Memo at Comment 1 and Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People’s Republic of China, 71 FR 53079 (September 8, 2006), and accompanying I&D Memo at Comment 8 (in both cases the Department relied on AFA to establish a margin for unreported U.S. transactions). For the final results of this review, we assigned as partial AFA a rate that reflects the highest transaction-specific margin we calculated for Poly Plast in this review, based upon information reported by Poly Plast, to the quantity and value of Poly Plast’s unreported U.S. sales.

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 _____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date