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DATE: September 20, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the New Shipper Review of Seamless Refined Copper Pipe and Tube from Mexico

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the new shipper review of the antidumping duty order on seamless refined copper pipe and tube from Mexico. As a result of our analysis, we have made changes from the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties.

Comment 1: Date of Sale
Comment 2: Adjustment to U.S. Price
Comment 3: Entitlement to New Shipper Review

BACKGROUND

On April 27, 2012, the Department of Commerce (the Department) published the preliminary results of the new shipper review of the antidumping duty order on seamless refined copper pipe and tube from Mexico.¹ The review covers shipments of subject merchandise to the United States for the period of review ("POR"), November 22, 2010, through April 30, 2011, by Golden Dragon.²

¹ See Seamless Refined Copper Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty New Shipper Review, 77 FR 25136 (April 27, 2012) (Preliminary Results).

² The Department uses the name Golden Dragon when we refer to the collective group of Golden Dragon companies, which includes 1) GD Copper Cooperatief U.A.; 2) Hong Kong GD Trading Co. Ltd. ("HKGD"); 3) Golden Dragon Holding (Hong Kong) International, Ltd.; 4) GD Copper U.S.A. Inc. ("USGD"); 5) GD Affiliates Servicios S. de R.L. de C.V.; and 6) GD Affiliates S. de R.L. de C.V. ("MXGD").



Comment 1: Date of Sale

The Petitioners³ argue that the date of invoice, as used by the Department in the Preliminary Results, is not the appropriate date of sale because the price is not fixed at that time. The Petitioners argue that the gross unit price as reported will be adjusted pursuant to agreements with its customers. Therefore, the price cannot be considered fixed, nor can the sales be considered *bona fide*. Because the Petitioners argument is primarily proprietary, we have addressed this comment more fully in a separate memorandum.⁴ The Petitioners cite to section 351.401(i) of the Department's regulations as support, which states that the "Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." Moreover, the Petitioners point to the Statement of Administrative Action which states that the date of sale is the "date when the material terms of sale are established."⁵ The Petitioners also claim that a party must establish that the material terms of sale undergo no meaningful change.⁶

Finally, the Petitioners argue that a recent Alabama law calls into question whether the sales are *bona fide*, given that the [REDACTED]. Specifically, the Petitioners contend that the law provides for an offset on state income taxes for two years in the form of a credit equivalent to the amount of antidumping and countervailing duties incurred in the importation of merchandise which would be produced in a manufacturing facility within the state of Alabama.⁷ Therefore, the Petitioners argue that the Department should rescind the review because (1) the sales occurred outside the period of review because the material terms remain subject to on-going negotiation, or (2) Golden Dragon's sales prices are not *bona fide* because they are subject to a rebate. See the Proprietary Issues and Decision Memorandum for further detail of the comments submitted by the Petitioners with regards to this comment.

In Golden Dragon's rebuttal comments, Golden Dragon counters that, consistent with the Department's regulations, the presumed date of sale is the invoice date and that the Petitioners have the burden of producing sufficient evidence that a "different date better reflects the date on which the exporter or producer establishes the material terms of sale."⁸ Golden Dragon contends that it provided evidence of the components on the invoice and proof of payment which is tied to its general ledger and audited financial statements. Golden Dragon provided further arguments about the sales agreement, cited by the Petitioners, which are proprietary in nature.⁹

Moreover, Golden Dragon contends that the Petitioners make inferences that bypass the factual record of this new shipper review. Citing support from *Allied Tube*, Golden Dragon

³ The Petitioners include Cerro Flow Products, LLC, Wieland Copper Products, LLC, Mueller Copper Tube Products, Inc. and Mueller Copper Tube Company, Inc.

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⁴ Memorandum to Melissa Skinner, Director, AD/CVD Operations Office 3, from Dennis McClure entitled "Seamless Refined Copper Pipe and Tube from Mexico: Proprietary Issues and Decision Memorandum for the Final Results of the New Shipper Review," dated contemporaneously with this notice ("Proprietary Issues and Decision Memorandum").

⁵ Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-316.

⁶ *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) ("*Allied Tube*").

⁷ Ala. Code §40-18-205, et seq., State of Alabama, Act 2011-648.

⁸ *Allied Tube* at 1089.

⁹ See Proprietary Issues and Decision Memorandum.

argues that the Petitioners must take “the steps necessary to ensure the placement of such evidence on the record, for example, by requesting the Department to obtain the documentation from the respondents.”¹⁰ In this case, Golden Dragon argues that the Petitioners were silent while Golden Dragon developed the factual record pursuant to the Department’s questionnaires.

Golden Dragon contends that there is no evidence in this case that the price charged by Golden Dragon was outside the appropriate market range.¹¹ Furthermore, Golden Dragon argues that the Petitioners have not made any allegation of fraud or that the price was distortive.¹²

Finally, Golden Dragon contends that the Petitioners say on the one hand that Golden Dragon will offer an adjustment to the U.S. price and on the other hand that Golden Dragon will receive a tax credit. Golden Dragon asserts that the Petitioners present conflicting arguments when they say that prices are not final because of Golden Dragon’s agreements with its customer, while arguing that Golden Dragon will pay all antidumping duties with the understanding that the State of Alabama will refund those duties. Golden Dragon states that there is no record evidence that Golden Dragon has – or ever will – receive credit under the Alabama statute. Furthermore, Golden Dragon argues that the Alabama law is not an entitlement and is not explicitly enacted for Golden Dragon. Golden Dragon argues that the Department should reject the Petitioners’ reliance on innuendo and instead find that its sales prices are *bona fide*. See the Department’s proprietary Issues and Decision Memorandum issued concurrently with this memorandum for a complete explanation of these comments.

DOC Position:

We disagree with the Petitioners that Golden Dragon’s sales prices are not fixed on the date of invoice or are not *bona fide*.

In regard to the proper date of sale, the Department has reviewed the information on the record and continues to determine that the appropriate date of sale is the date of invoice because that is the date on which the material terms of sale are set. Pursuant to 19 CFR 351.401(i), the Department normally will use the date of invoice, as recorded in the producer’s or exporter’s records kept in the ordinary course of business, as the date of sale. The regulation provides further that the Department may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the material terms of sale are established. The Court of International Trade has held that a party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to satisfy the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.¹³

In this particular review, Golden Dragon provided its sales reconciliation which clearly demonstrates that Golden Dragon records the invoice date as the date of sale in the ordinary course of business.¹⁴ Moreover, as argued by Golden Dragon, Golden Dragon submitted detailed information and exhibits,¹⁵ reviewed by the Department, regarding the components of the price on its invoices, several examples of proof of payment of the exact amount on the corresponding

¹⁰ *Id.* at 1091 and 1092.

¹¹ *Chang Tieh Indus. Co., Ltd v. United States*, 840 F. Supp. 2d. 958, 146 (CIT 2002).

¹² *Windmill v. United States*, 193 F. Supp. 2d. 1303, 1307 (CIT 2002).

¹³ See *Allied Tube* at 1090.

¹⁴ Original Response, August 22, 2011, Exhibit C-2.

¹⁵ Citing to, e.g., Golden Dragon’s Supplemental Section B Response, Oct. 12, 2011, at Exhibit SB-1 (submitted to support an adjustment); Golden Dragon’s Supplemental Section B Response, Oct. 12, 2011, at Exhibit SB-5; Golden Dragon’s Supplemental Section C Response, Oct. 12, 2011, at Exhibit SC-4.

invoices, and then tied its received payments to its general ledger and audited financial statements thereby confirming that Golden Dragon's records indicate that invoice date is the date when the material terms of sale are established.¹⁶

In addition, the Department finds that the fact that an adjustment is forthcoming does not imply that the material terms of sale are not established on the date of invoice. Rather, we note that 19 CFR 351.401 directs that to arrive at the "starting price" for export price, the Department adjusts reported gross prices for discounts, rebates and certain post-sale adjustments. The Department finds nothing in the Petitioners' arguments or in the record evidence that indicates that the invoice date is not the proper date of sale or that the sales are not final and not within the POR.

Finally, with respect to the Petitioners' argument that the enactment of a law in Alabama provides a basis to determine that Golden Dragons' sales were not *bona fide*, we note that, in its *bona fides* analyses, the Department generally considers three factors: 1) the price and quantity of the transactions, 2) the sales process, and 3) other circumstances.¹⁷ The central question is whether the sales are legitimate commercial transactions between unaffiliated parties. Nothing about the Petitioner's argument calls this into question. The Department routinely accounts for a variety of post-sale adjustments, e.g., Rebates and Warranties. We agree with the Petitioner that this adjustment should be made, but we disagree that this adjustment somehow renders these transactions as not *bona fide*.

Therefore, based on the Department's analysis of the evidence on the record, we continue to find that Golden Dragon's U.S. sales are made during the POR and are *bona fide* sales.

Comment 2: Adjustment to U.S. Price

The Petitioners argue that, if the Department does not rescind the review, the Department should not use the reported gross price. Specifically, the Petitioners argue that the margin must be recalculated to account for adjustments to the gross price. The Petitioners point to various documents on the record to support their argument. The Petitioners argue that if the margin remains at zero, as determined in the Preliminary Results, the ultimate price will be reduced by a [REDACTED], thereby overstating the price relied on by the Department and understating the level of dumping.

As support for their argument, the Petitioners provide sample calculations to demonstrate that after adjusting the U.S. price, Golden Dragon's U.S. prices are below normal value. The Petitioners also argue that the Department's statutory obligation is to calculate the dumping margins as accurately as possible and especially so in new shipper reviews where a shipper may unfairly benefit from the ability of its importers to post a bond in lieu of a cash deposit. See the Proprietary Issues and Decision Memorandum for further detail of the comments submitted by the Petitioners with regards to this comment.

Golden Dragon claims that the Petitioners did not provide a single court case or past Department practice to support their request for such an adjustment. Moreover, Golden Dragon contends that the statute and regulations do not allow for such an arbitrary adjustment, as suggested by the Petitioners. Golden Dragon asserts that the Department should not alter the price, since the reported U.S. sales prices involve delivered goods, goods paid for long ago, and

¹⁶ Original Response, August 22, 2011, A-16 – A-19

¹⁷ Memorandum to James Terpstra, Program Manager, AD/CVD Operations Office 3, from Dennis McClure entitled, "Bona Fides Analysis Memorandum," dated April 23, 2012

transactions which are closed. Finally, Golden Dragon contends that the sales agreement with its customer supports its contention that Golden Dragon is not trying to fictitiously alter its U.S. sales prices.

DOC Position:

We are adjusting the gross unit price based upon the record evidence as explained in the business proprietary version of our position to this comment. We have made this adjustment to ensure that the net U.S. price we use in our calculations reflects what the U.S. customer actually paid.

The Department makes adjustments to the starting price in accordance with section 351.402(a) of the Department's regulations. Section 351.102(b) further defines price adjustments. Furthermore, the Act also requires the Department to make specific adjustments before the U.S. price can be compared to normal value.¹⁸ Therefore, in accordance with our regulations, the Act, and the evidence on this record, we have made an adjustment to U.S. sales prices in the final results. Due to the fact that many of the details pertaining to this issue are business proprietary information, we have addressed the parties' arguments stated in their respective briefs in more detail in a separate memorandum.¹⁹

Comment 3: Entitlement to New Shipper Review

The Petitioners assert that during the period of review, Golden Dragon was neither the producer nor exporter of the subject merchandise and, therefore, the review should be rescinded. Specifically, the Petitioners contend that Golden Dragon was "merely a toller and, in limited instances, a producer of the foreign like product" and that HKGD was the relevant producer and exporter of the subject merchandise. The Petitioners cite to Golden Dragon's original questionnaire where Golden Dragon comments that HKGD owns the raw material and sells the subject merchandise to USGD. Furthermore, the Petitioners note that HKGD has a tolling arrangement with MXGD to process raw material into subject merchandise under a tolling arrangement. The Petitioners contend that the Department's practice is to not consider a toller or subcontractor, who does not acquire ownership and does not control the relevant sale, the relevant producer for review.²⁰ The petitioners claim that the facts establish that HKGD was the producer and exporter and that HKGD should have requested the review.

Golden Dragon rebuts that it cannot be seriously contested that Golden Dragon produces the subject merchandise in Mexico and exports the merchandise to the United States. Golden Dragon claims that it meets the threshold requirements for a new shipper review under 19 CFR 351.214(a). Golden Dragon cites to Exhibit C-4 of its original response which confirms that MXGD is the shipper of the subject merchandise to the United States. Golden Dragon also notes that it did not ship to the United States during the investigation. Next, Golden Dragon argues that the Department often conducts new shipper review for exporters under the plain language of 19 CFR 351.214(a).²¹

¹⁸ Section 772 of the Act.

¹⁹ Proprietary Issues and Decision Memorandum.

²⁰ Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations), 73 FR 16517 (March 28, 2008).

²¹ *Final Certain Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 FR 41304 (July 11, 2003), and *Notice of Final Results of Antidumping Duty New Shipper Review: Honey From the*

Furthermore, Golden Dragon contends that they provided invoices and entry documentation in Exhibits 2-3 of their New Shipper Review Request, dated May 31, 2011, which supports its request for review. Also, Golden Dragon argues that the Petitioners contradict themselves because they already made clear that they believe Golden Dragon is a Mexican producer in their Post-hearing Briefs which were submitted to the ITC.²² Finally, Golden Dragon maintains that the Department correctly treated Golden Dragon as a producer based on MXGD's participation with its wholly owned subsidiaries in the production, distribution, and sale of subject merchandise.²³ Moreover, Golden Dragon asserts that the Department's "treatment of the affiliated Golden Dragon companies in this review is consistent with its past practice."

DOC Position:

We agree with Golden Dragon that it produced subject merchandise in Mexico and exported it to the United States during the period of review. As we discussed in the Preliminary Results, Golden Dragon is comprised of various subsidiaries involved in the production and sale of subject merchandise in Mexico and exported to the United States, which operate as a single entity. The Petitioners arguments are mistaken in that they focus exclusively on the affiliate's (MXGD) operating the plant in Mexico. Our analysis is not limited to the operations of the one entity operating in Mexico covered by the Petitioners' argument, rather our analysis covers all of the affiliated parties we find to be operating as a single entity.

In our initiation checklist and Initiation Notice,²⁴ we cite to section 751(a)(2)(B) of the Act and 19 C.F.R. 351.214, noting that MXGD identifies itself as the producer and exporter of subject merchandise and meets the requirements for initiation of a new shipper review. MXGD has a plant that produces subject merchandise in Mexico which is then exported from Mexico to the United States for sale to an unaffiliated U.S. customer.²⁵ As noted by Golden Dragon, the supporting documentation identifies MXGD as the producer and exporter to the United States.²⁶ In our *bona fide* analysis²⁷, we specifically reviewed the sales process, import documentation, and affiliation between each of GD's companies. Moreover, as we noted in the Preliminary Results and the accompanying analysis memorandum²⁸, MXGD is a wholly owned subsidiary of its parent company. In our Preliminary Results we state:

Specifically, {GD} identified the following affiliated parties, which are all wholly owned subsidiaries of Golden Dragon Precise Copper Tube Group, Inc., the corporate parent located in the People's Republic of China: 1) GD Copper Cooperatief U.A.; 2) Hong Kong GD Trading Co. Ltd.; 3) Golden Dragon Holding (Hong Kong) International, Ltd.;

People's Republic of China, 69 FR 24128 (May 3, 2004).

²² GD's Response to Request to Rescind, Exhibit 5, November 4, 2011.

²³ Preliminary Results of the Antidumping Duty New Shipper Review of Seamless Refined Copper Pipe and Tube from Mexico: Analysis Memorandum from Dennis McClure, dated April 23, 2012, at 2.

²⁴ Seamless Refined Copper Pipe and Tube From Mexico: Notice of Initiation of Antidumping Duty New Shipper Review, 76 FR 39850 (July 7, 2011).

²⁵ New Shipper Review Request, May 31, 2011 at Exhibit 3.

²⁶ *Id.*

²⁷ Copper Pipe and Tube from Mexico: New Shipper Review of GD Affiliates S. de R.L. de C.V. (GD Affiliates), *Bona Fide* Analysis Memorandum from Dennis McClure, April 23, 2012.

²⁸ Preliminary Results of the Antidumping Duty New Shipper Review of Seamless Refined Copper Pipe and Tube from Mexico: Analysis Memorandum from Dennis McClure, April 23, 2012.

4) GD Copper U.S.A. Inc.; 5) GD Affiliates Servicios S. de R.L. de C.V.; and 6) GD Affiliates. In questionnaire responses, these companies are collectively referred to as Golden Dragon.²⁹

In *Atar* and *Taiwan Semiconductor* the matter before the court relates to unaffiliated parties involved in tolling arrangements, where as in this new shipper review, the MXGD is wholly owned by Golden Dragon Precise Copper Tube Group, Inc., and affiliated with other Golden Dragon companies such as HKGD.³⁰ Furthermore, as noted in the *Withdrawal of Regulations Governing the Treatment of Subcontractors*,

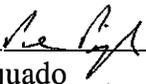
The Department regulation, 19 CFR 351.401(h), was intended to ensure, in calculating a dumping margin on merchandise determined to be within the scope of an antidumping order, that the Department's analysis is focused on the party setting the price of subject merchandise when the manufacture of such merchandise is *subcontracted to another company* {emphasis added}.³¹

In this particular review, we do not treat MXGD as separate company. Instead, we treat MXGD as a wholly owned subsidiary of its parent company, Golden Dragon Precise Copper Tube Group, Inc. Therefore, the Department determines that the record of evidence indicates that MXGD is the producer and exporter of the subject merchandise and not a toller, as defined for the Department's purpose of administering the antidumping law.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the positions above. If accepted, we will publish the final results of review and the final weighted-average dumping margin in the Federal Register.

Agree Disagree



Paul Piquado
Assistant Secretary
for Import Administration

20 SEPTEMBER 2012

Date

²⁹ GD's Original Response, at A-5 through A-8 and Exhibit A-2 "Corporate Structure", August 22, 2011; GD's Original Response to Section D, at D-4 through D-5 and D-17.

³⁰ GD's Original Response, Exhibit A-2 "Corporate Structure", August 22, 2011.

³¹ *Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling" Operations)*, 73 FR 16517.