



A-570-831
New Shipper Reviews
11/01/2010-10/31/2011
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DATE: March 19, 2013

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 Rescission of the
Antidumping Duty New Shipper Reviews of Fresh Garlic from the
People's Republic of China

SUMMARY

We have analyzed the comments of the interested parties in the above-referenced antidumping duty new shipper reviews (NSRs) of fresh garlic from the People's Republic of China (PRC). The two companies subject to these NSRs are: Foshan Fuyi Food Co., Ltd. (Fuyi) and Qingdao May Carrier Import & Export Co., Ltd. (Maycarrier). Based on our analysis of the comments, we recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On October 25, 2012, the Department of Commerce (Department) published the Preliminary Rescission,¹ and on October 31, 2012, as explained in the memorandum from the Assistant Secretary for Import Administration, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days.² On December 10, 2012, the Department extended the deadline for the final results to no later than March 19, 2013.

On November 28, 2012, the Department issued supplemental questionnaires to Fuyi and Maycarrier; Fuyi and Maycarrier provided their responses on December 10 and December 13,

¹ See Fresh Garlic From the People's Republic of China: Preliminary Rescission of Antidumping Duty New Shipper Reviews; 2010-2011, 77 FR 65171 (October 25, 2012) (Preliminary Rescission).

² See Memorandum to the Record from Paul Piquado, Assistant Secretary for Import Administration, regarding "Tolling of Administrative Deadlines as a Result of the Government Closure During Hurricane Sandy" (October 31, 2012).



2012, respectively. The Department issued an additional supplemental questionnaire to Maycarrier on January 17, 2013, with Maycarrier filing its response on January 22, 2013. Additionally, on January 25, 2013, Maycarrier filed comments on factual information on the record. Subsequently, on February 6, 2013, Fuyi and Maycarrier each timely filed case briefs. At the request of the Department, Maycarrier filed a redacted case brief on February 9, 2013. Following these submissions, Petitioners³ timely filed rebuttal briefs on February 13, 2013; Petitioners filed a revised rebuttal brief in response to Maycarrier's redacted case brief on February 22, 2013.

The Department placed factual information regarding Fuyi's NSR on the record on January 9, 2013. Based on a request from Maycarrier, on January 30, 2013, the Department placed on the record the surrogate country selection and surrogate value memorandum, intermediate input methodology memorandum, and surrogate value data used in the concurrent administrative review of fresh garlic from the PRC. Finally, Maycarrier submitted comments on February 20, 2013, requesting that, if the Department were to conduct a bona fides analysis of the price and quantity of Maycarrier's sales, it should have an opportunity to submit comments on such analysis. As discussed in more detail below, the Department has not conducted a bona fides analysis of Maycarrier's sales.

No party requested a hearing following the Preliminary Rescission.

Based on our analysis of the comments we received, we have not revised our Preliminary Rescission decision to rescind these NSRs.

SCOPE OF THE ORDER

The products covered by the order⁴ are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of the order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0000, 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, 0711.90.6500, 2005.90.9500, 2005.90.9700, 0703.20.0005, 2005.99.9700 and 0703.20.0015 of the Harmonized Tariff Schedule of the United States (HTSUS).⁵ Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive. In order to be excluded from the order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for

³ Petitioners are the Fresh Garlic Producers Association and its individual members: Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

⁴ See Antidumping Duty Order: Fresh Garlic From the People's Republic of China, 59 FR 59209 (November 16, 1994).

⁵ Since the Preliminary Rescission, this scope has been updated to include two additional HTSUS subheadings. See Memorandum to the File regarding "Request to Update the ACE Case Reference File's HTS Tab for Garlic from China (A-570-831)," dated January 10, 2013.

non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to U.S. Customs and Border Protection (CBP) to that effect.

DISCUSSION OF THE ISSUES

Comment 1: Whether Maycarrier is a New Shipper

Maycarrier's Arguments

- No shareholder of Maycarrier has, or ever had, an ownership interest in Weifang Naike/Nick Foodstuffs Co. Ltd. (collectively, Naike) nor does any shareholder in Naike have an interest in Maycarrier. As shown on the business registration, Naike's legal representative is not Maycarrier's legal representative.
- Maycarrier did not find any evidence that a company by the name of Weifang Naike Group (Naike Group) exists and Naike's business registration indicates it is not a group company. If Maycarrier and Naike are affiliated, the affiliation would have to be through the Naike Group.
- Information posted on the business-to-business websites that demonstrated the connection between Maycarrier and Naike is false. Even a "business-to-business market place" does not mean access to a site is restricted to the business in whose name the information is being added.
- While Maycarrier did conduct business related to ginger with Naike, the fact that Naike Group includes Maycarrier in its online company profile is an exaggeration of the business relationship by Naike.
- Maycarrier's general manager is not a shareholder of Maycarrier and is free to conduct her own affairs outside Maycarrier. Any link between Maycarrier's general manager and a Hong Kong affiliate of the Naike Group does not represent an affiliation between Maycarrier and Naike.

Petitioners' Rebuttal Arguments

- Maycarrier has not provided a rational explanation of why Naike directs potential customers to Maycarrier's phone number. No rational business person would upload a competitor's contact information and refer potential customers to an unaffiliated entity.

Department's Position

In the Preliminary Rescission, the Department determined that Maycarrier did not meet the Department's requirements for conducting an NSR because we found Maycarrier and another exporter that had shipments of subject merchandise prior to the POR to be part of the same entity. The NSR provisions of the Department's regulations require that the entity making a request for an NSR must document and certify, among other things: (1) the date on which subject merchandise of the exporter or producer making the request was first entered or withdrawn from warehouse, for consumption, or, if it cannot establish the date of first entry, the date on which the exporter or producer first shipped the merchandise for export to the United States; (2) the volume of that and subsequent shipments; and (3) the date of the first sale to an

unaffiliated customer in the United States.⁶ We noted in the Preliminary Rescission that, if these provisions, among others, are met, the Department will initiate an NSR to establish an individual weighted-average dumping margin for the new shipper.⁷ Further, an exporter or producer must request an NSR within one year of the date of entry (or if appropriate, first shipment for export to the United States).⁸ We continue to find a significant connection between Maycarrier and Naike, a garlic producer/exporter that exported subject merchandise to the United States more than one year prior to Maycarrier's request for this NSR. As discussed in more detail below and in the Maycarrier final analysis memorandum,⁹ because the weight of the evidence supports a finding that there is a significant connection between Maycarrier and Naike, we conclude that Maycarrier has not established its entitlement to an NSR.

As an initial matter, Maycarrier contends that no shareholder has ever had any ownership in Naike and vice versa. Additionally, Maycarrier contends that the two companies do not have the same legal representative. Maycarrier also claims that the only way it could be affiliated with Naike is through the Naike Group, and that it could find no business registration for a Naike Group and Naike's business registration does not designate it as a group company. Notwithstanding, direct ownership is not the only manner in which two companies can have a close business relationship in exporting subject merchandise. For example, parties can have, among other interactions, corporate and joint ventures. Furthermore, companies can share common management or boards of directors, or enter into other types of business relationships that link the companies together. While Maycarrier and Naike may not share a legal representative, or have direct ownership ties that the Department has been able to identify, the record indicates numerous significant and unexplained connections to one another that undermine Maycarrier's claim to be a new shipper.

Subsequent to the Preliminary Rescission, additional information was placed on the record which further affirmed the Department's preliminary decision that Maycarrier was not a new exporter of subject merchandise to the United States. Specifically, numerous business-to-business websites were placed on the record which linked Maycarrier through management and contact information to Naike. As detailed in the Maycarrier Final Analysis Memorandum, Maycarrier's sales contact information is found on Naike's web profiles and Naike's sales contact information is found on Maycarrier's web profiles. While Maycarrier claims that its only prior relationship with either Naike or the Naike Group¹⁰ was through past business related to ginger, it has not provided a reasonable explanation for the numerous instances where the Department found interchangeable sales and/or contact information in each company's profile on various business-to-business websites, particularly since the evidence shows that both companies are exporters of garlic.

The only explanation Maycarrier provided is that the information on the business-to-business websites is false and that it cannot control the information that is posted on such business-to-

⁶ See 19 CFR 351.214(b)(2)(iv).

⁷ See generally 19 CFR 351.214(b)(2).

⁸ See 19 CFR 351.214(c) referring to the date in 19 CFR 351.214(b)(iv)(A).

⁹ See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, "New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Analysis of Qingdao May Carrier Import & Export Co., Ltd." dated March 19, 2013 (Maycarrier Final Analysis Memorandum).

¹⁰ See Memorandum to File regarding "Fresh Garlic from the People's Republic of China: Information Related to Qingdao May Carrier Import & Export Co., Ltd.," dated June 25, 2012 at Attachment II.

business websites. However, as discussed in detail in the Maycarrier Final Analysis Memorandum, record evidence, including information posted by the business-to-business websites themselves, indicates that each company creates its own online profile on the business-to-business websites, and that each company is entirely in control of the specific information included in its profile. A review of Maycarrier's profiles on these business-to-business websites clearly demonstrates overlapping contact information between Maycarrier and Naike. Maycarrier contends that, on these business-to-business websites, access is not restricted to the registered user and, therefore, any other user on the website has the ability to supplement Maycarrier's online information. Notwithstanding this claim, as noted, the record, including the policies of the business-to-business websites themselves, contradicts this statement.¹¹ Specifically, the record includes information from the business-to-business website "tradevv.com,"¹² which shows that the companies listed on the websites control the information posted. Any registered company using another's contact information for online sales would be using its own resources to help a competitor generate sales. There is no plausible reason why Maycarrier would post information for Naike's sales team on its own web profile other than the fact that the two companies are associated with one another, significantly with respect to their selling operations. Likewise, there is no other reason for Maycarrier's contact information to be posted on Naike's web profiles. Moreover, there is no reason whatsoever why any third party would want to alter the contact information on the web profiles of either of these two companies to direct their sales to each other. The Department therefore can only conclude that Maycarrier and Naike share sales operations, and thus appear to operate as the same entity for selling purposes to independent third parties seeking information on their businesses.

Evidence on the record about management roles held by the same individuals in both companies further supports the Department's determination that the two entities have connected or intertwined operations. Maycarrier claims that its general manager is not a shareholder of Maycarrier, and that she is therefore entitled to conduct her own affairs, including holding two jobs, even if another of those jobs is with a competitor. The Department finds this explanation unreasonable. We cannot believe that Maycarrier's general manager just happens to "moonlight" as the primary sales contact at a supposedly "unrelated" competitor.

Taken together, these facts lead the Department to a reasonable conclusion that the companies are essentially the same, operating as a connected group of exporters. Maycarrier and Naike share sales contact information and key personnel. The web profiles under their control and under their names appear to be almost interchangeable. Furthermore, Maycarrier's tax record cannot be found on the website of its tax authority, as we conclude it should be (discussed in detail in the Maycarrier Final Analysis Memorandum), and there are discrepancies in the business registration information submitted by Maycarrier.

Given Maycarrier's apparent lack of transparency and denial regarding its connection with Naike, the Department cannot determine the exact nature of its relationship with Naike. We understand that Naike Group constitutes a group of companies. Maycarrier may be a part of that group, a current or former division of Naike or another group member, a new company created by Naike, or both companies may be part of some third entity. Regardless, the nature of their relationship is such that they appear indifferent to which of the two companies makes a sale and

¹¹ See Maycarrier's January 22, 2013 Supplemental Questionnaire Responses at Exhibit 2.

¹² *Id.*

receives the associated sales revenue. Because of this significant and unexplained connection, and because Naike had shipments of subject merchandise to the United States prior to the POR of the NSR and subsequent to the period of investigation, the Department continues to find that Maycarrier is not eligible for an NSR. As such, the Department recommends rescinding the NSR for Maycarrier.

Comment 2: Whether Maycarrier's Sales are Bona Fide

Maycarrier's Arguments

- Its prices were based on prevailing seasonal prices in the PRC, the customer's requirements regarding the destination market, and whether it would be liable for antidumping duties if the prices were too low.
- This must be taken into consideration for the bona fides analysis because it is not a market that simply reflects an average unit value (AUV) during the period of review (POR).
- Given the Ukrainian prices, Maycarrier's price is well within a reasonable price range for garlic during the NSR's POR.
- Its quantities were less than a full container load because sales were made and shipped with non-subject merchandise.
- Maycarrier explained that its tax returns were not available on the Shandong Tax Bureau's website because Qingdao City Tax Bureau exempted enterprises located in Qingdao City from random internet searches.
- Maycarrier and the importer have a personal relationship to which Maycarrier relied on to make the sales.

Petitioners' Rebuttal Arguments

- The fact that Maycarrier's customers purchased products other than fresh garlic does not provide a justification that would support a finding that the small quantities of Maycarrier's sales are reflective of bona fide transactions. The Department's framework for analyzing the bona fide nature of a new shipper's sales is focused on evaluating whether the reported transactions are "typical of {a sale} which the producer will make in the future."
- Maycarrier points to no evidence on the record to substantiate its assertions that its small quantities were a reflection of a possible liability of antidumping duties.
- Contrary to Maycarrier's statement, all U.S. importers of fresh garlic from the PRC face the prospect of an antidumping duty liability; the record shows that, even so, Maycarrier's average quantity was significantly higher. Therefore, the concern over potential antidumping duties provides no basis for a finding that Maycarrier's small sales quantities are reflective of typical normal business practices.
- Maycarrier has submitted no information regarding prevailing Chinese garlic prices or prevailing U.S. market prices to demonstrate that its prices were based on those prices. The average quantity and unit value derived from the CBP data, which the Department relied upon, reflect all U.S. entries during the POR.
- Maycarrier's statement in its case brief that the sales between Maycarrier and the importer were based on a personal relationship and would not have happened absent this relationship indicates that Maycarrier's sales were not made on an arm's length basis.

Department's Position

As explained in Comment 1 and in the Maycarrier Final Analysis Memorandum, the Department has found that Maycarrier does not qualify as a new shipper and, therefore, we are rescinding its review. Thus, the issue as to whether Maycarrier's sales are bona fide is moot.

Comment 3: Whether the Department Should Deduct the VAT from the Surrogate Value for Raw Garlic Bulb

Maycarrier's Arguments

- The Department's practice is to use surrogate value prices that exclude taxes and duties. The annual report from Kernel Holding S.A. (Kernel) that is on the record demonstrates that agricultural products are subject to valued-added tax (VAT) in Ukraine. Maycarrier has not found the specific VAT rate on the record, but the applicable rate can be easily found online.

Petitioners' Rebuttal Arguments

- The circumstances under which Kernel purchases agricultural inputs are fundamentally different and distinct from those under which purchases are made of garlic bulbs in various wholesale markets throughout Ukraine.
- There is nothing on the record that supports the conclusion that because Kernel paid VAT on its substantial purchases of agricultural inputs, either: (a) VAT is also collected on purchases for raw garlic bulbs sold on wholesale markets in Ukraine; or (b) the raw garlic wholesale prices on the record from Fruit-Inform and other sources includes VAT.
- The record does not contain specific information addressing the VAT collected in Ukraine or if and how the VAT pertains to wholesale vegetable markets. There is long-standing judicial precedent that makes clear it was Maycarrier's responsibility to provide information supporting its adjustment claim but, because it did not, there is no basis for the Department to make the adjustment.

Department's Position

As explained in Comment 1 and in the Maycarrier Final Analysis Memorandum, the Department has found Maycarrier does not qualify as a new shipper and, therefore, we are rescinding its NSR. Additionally, as explained in the Fuyi final analysis memorandum,¹³ the Department has found that Fuyi's sales are not bona fide and, therefore, we are rescinding its NSR as well. Since the reviews of both entities are being rescinded, issues regarding surrogate values are moot.

Comment 4: Whether the Department's Policies on Handling Import Statistics Distort Surrogate Values

Maycarrier's Arguments

- The Department has not cited to any basis, besides language in the legislative history, to justify its policy of excluding non-market economy (NME) import data from import

¹³ See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, Import Administration regarding "New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Analysis of Foshan Fuyi Food Co., Ltd.," dated March 19, 2013 (Fuyi Final Analysis Memorandum).

statistics; this policy results in excluding a major portion of suppliers and substantially different surrogate values.

- The Department’s policy of excluding import data of countries with generally-available export subsidies (i.e., India, Indonesia, South Korea, and Thailand) from import statistics distorts the surrogate values and does not satisfy the statutory requirements.
- The Department’s practice should, and has precedent to, exclude import data from countries which have an aberrationally high AUV in relation to other countries’ calculated AUVs for the same factors of production, for obtaining the best available information.

Petitioners’ Rebuttal Arguments

- The U.S. Court of International Trade (CIT) has determined that “{C}ommerce reasonably may infer, that import data on goods from an NME country are inferior to import data for goods from a market economy country.”¹⁴
- The Department has a well-established policy of excluding import values from NME countries and countries that maintain non-specific export subsidies on numerous occasions.
- Maycarrier’s arguments that this policy distorts the surrogate prices in the surrogate country fails to account for the distortion caused by improperly low values that are reflected in the import statistics as a result of the export subsidies.

Department’s Position

As explained in Comment 1 and in the Maycarrier Final Analysis Memorandum, the Department has found Maycarrier does not qualify as a new shipper and, therefore, we are rescinding its NSR. Additionally, as explained in the Fuyi Final Analysis Memorandum, the Department has found that Fuyi’s sales are not bona fide and, therefore, we are rescinding its NSR as well. Since the reviews of both entities are being rescinded, issues regarding surrogate values are moot.

Comment 5: Whether Maycarrier is Entitled to a Separate Rate

Maycarrier’s Arguments

- The Department has not cited to any basis to deny Maycarrier separate rate status based on the Preliminary Rescission.

Petitioners’ Rebuttal Arguments

- Maycarrier cites no authority that would allow the Department to assign it a separate rate in this NSR.

Department’s Position

As explained in Comment 1 and in the Maycarrier Final Analysis Memorandum, the Department has found Maycarrier does not qualify as a new shipper and, therefore, we are rescinding its NSR. As a result, because the Department is not conducting an NSR of Maycarrier, the

¹⁴See Jinan Yipin Corp. v. United States, 637 F. Supp. 2d 1183, 1189 (CIT 2009).

Department has no basis on which to make a determination of Maycarrier's separate rate status and this issue is moot.

Comment 6: Whether Fuyi's Sales Were Bona Fide

Fuyi's Arguments

- The Department's preliminary totality of circumstances test was incomplete as the Department did not present a detailed analysis of the six issues that must be considered nor was there any explanation provided regarding the absence of analysis.
- It was improper for the Department, in the Preliminary Rescission, to approach the totality of circumstances test with the unreasonable supposition that Fuyi's sales were suspect solely on the basis that the company only has a "small number" of sales. The CIT has stated that a single sale is not inherently commercially unreasonable and will be carefully scrutinized.¹⁵
- Fuyi has provided sufficient details, including documentation regarding its Food and Drug Administration (FDA) registration and taxpayer identification number, for the Department to determine that its processor underwent a name change well before the POR.
- The comparison of its individual sales quantity to all other CBP entry quantities over the POR is an inappropriate comparison. There is no evidence on the record to indicate that these quantities are in any way atypical or not commercially reasonable for individual arm's-length sales.
- If the Department disregards certain aberrational data from Company X,¹⁶ the overall POR AUV would then result in a number that is more similar to the average price of Fuyi's two entries.
- Its sales are arm's length transactions; the CBP entry data used for comparison are different than arm's-length sales and is therefore not a reasonable basis for analysis as the CBP entry values commonly reflect transfer prices between exporters and their affiliated U.S. importers (e.g., constructed export prices (CEP) sales).

Petitioners' Rebuttal Arguments

- Fuyi's claim that the Department must articulate a position on all six factors considered in a totality of circumstances analysis is incorrect; each factor is unique to each sale and is largely a result of information provided by each respondent.
- As noted in the Department's Preliminary Rescission analysis of TTPC, a single sale or small number of sales are not inherently commercially unreasonable but are more easily manipulated than a large number and do leave open the possibility that the limited number of sales may not be a typical business practice.
- Fuyi did not provide sufficient details regarding its transactions and operations, specifically regarding its producer, Jinxiang Shenglong Trade Co., Ltd. (Shenglong), to provide any degree of certainty regarding its future selling practices. On this basis, the Department should conclude that the transactions are not bona fide and rescind the instant review.

¹⁵ See Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States, 366 F. Supp. 2d 1246, 1263 (CIT 2005) (TTPC).

¹⁶ The name of this company is derived from the CBP data which is proprietary in nature, thus precluding the Department from divulging the name publicly.

- Fuyi is incorrect in contending that there is no evidence on the record which would indicate that its sales quantities are atypical or commercially unreasonable; by extension, the company is also incorrect in arguing that any reasonable person can see the sales quantities are commercially reasonable.
- The CBP entry data on the record make clear that the quantity of Fuyi’s first sale is not “commercially reasonable” and that the sale is clearly aberrant in being at an extreme percentile in both relative price and relative size.
- It is completely reasonable and appropriate for the Department to compare the AUV information from the CBP entry data with the volume and value reported by Fuyi in evaluating the bona fides of those two sales.
- There is no evidence to support Fuyi’s claim that all other entry prices in the CBP data are CEP and therefore different from Fuyi’s transaction values.
- Recent CIT precedent makes clear that it is inappropriate for the Department to disaggregate AUV information in the CBP entry data,¹⁷ and instead should rely on the largest possible sample when evaluating the AUV.

Department’s Position

The Department maintains that its preliminary decision to rescind Fuyi’s NSR was reasonable based on the totality of circumstances surrounding Fuyi’s transaction. In the Preliminary Rescission, the Department noted numerous inconsistencies in the information provided in Fuyi’s responses that warranted enhanced scrutiny, in addition to questioning the bona fides of Fuyi’s sales quantities and prices during the POR. Fuyi has not provided a reasonable explanation for the discrepancies with regard to its producer’s actual operations, nor has Fuyi demonstrated that its sales are indicative of future commercial behavior.

Totality of Circumstances Analysis

To determine whether a sale in an NSR is unrepresentative or extremely distortive, and therefore excludable as not bona fide, the Department employs a totality of circumstances test.¹⁸ In examining the totality of circumstances, the Department looks to whether or not the transaction is “commercially unreasonable” or “atypical of normal business practices.”¹⁹ Subsequent to the Preliminary Rescission, the Department has again conducted a totality of circumstances examination of Fuyi’s sales on the basis of all information that has been provided on the record of the proceeding. Because much of the information relied upon in this totality of circumstances analysis is business proprietary, a more detailed explanation of the Department’s entire analysis for the final determination to rescind the NSR is included in the Fuyi Final Analysis Memorandum.²⁰

¹⁷ See Shandong Chenhe Int’l Trading Co. v. United States, Slip Op. 10-129 at 17 (CIT 2010).

¹⁸ See, e.g., Glycine From The People’s Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd., 69 FR 47405, 47406 (August 5, 2004).

¹⁹ See Hebei New Donghua Amino Acid Co. v. United States, 374 F. Supp. 2d 1333, 1339 (CIT 2005) (Hebei) (citing Windmill Int’l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1313 (CIT 2002)); see also TTPC, 366 F. Supp. 2d at 1249-50.

²⁰ See Fuyi Final Analysis Memorandum.

In the Preliminary Rescission, we noted that, while the Department's cases may share commonalities regarding bona fides analysis, the Department examines each on a case-by-case basis. The totality of circumstances analysis may vary with the facts surrounding each sale.²¹ In TTPC,²² the court recognized that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant," and found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale." The Department's practice makes clear that we examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. By extension, Fuyi's arguments that the Department's analysis in the Preliminary Rescission was not complete because we did not specifically analyze all six factors in a totality of circumstance analysis is not accurate because the Department is not bound to provide a specific analysis of each of the six factors as argued by Fuyi, but is instead required to analyze those NSR-specific factors that are determined to be important vis-à-vis the circumstances of the proceeding at hand.

Fuyi's Sales Price and Quantity

Based on the Department's totality of circumstances analysis of Fuyi's sales, including the numerous discrepancies regarding its producer's true business activities, and results of the comparison between the Fuyi sales prices and quantities with the average price and quantity of the CBP entries of subject merchandise, the Department continues to find it appropriate to rescind Fuyi's NSR. Fuyi's sales are not reflective of normal business practices, nor are they indicative of future selling practices. Instead we find the following atypical: (1) the quantities in both sales; (2) the AUV in Fuyi's first sale; and (3) the price difference between its two POR sales.

Fuyi disputes the Department's preliminary finding that the CBP entry data does not contain any aberrational prices by arguing that Company X's AUVs during the POR are aberrational. By extension, Fuyi argues that the Department should exclude Company X's CBP entries that have an AUV below a specific amount; excluding these entries will result in an AUV that is more comparable to that of Fuyi's sales. The Department's practice is to use an AUV derived from CBP entry data, and only in truly exceptional circumstances will we depart from our long-standing practice. Moreover, the CIT has consistently affirmed the Department's reliance on this practice as the CBP data provide a large sample from which to evaluate the sales.²³ The Department's analysis of Company X's entries, as reported in the CBP entry data, indicates that Company X's AUVs cannot be considered aberrational and, therefore, the Department has continued to include them in the bona fides analysis of Fuyi's POR sales. Due to the proprietary nature of the CBP entry data and the detailed nature of the discussion that is required to respond

²¹ See Hebei, 374 F. Supp. 2d at 1340, n.5 (citing TTPC, 366 F. Supp. 2d at 1260, and Certain Preserved 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 accompanying Issues and Decision Memorandum at Comment 2).

²² See TTPC.

²³ See Shandong Chenhe Int'l Trading Co. v. United States, Slip Op. 10-129 (CIT 2010)(Chenhe) at *19-20; TTPC, 366 F. Supp. 2d at 1256; Hebei, 374 F. Supp. 2d at 1339. Larger sample sizes are generally preferable when the goal is, as here, to generalize from a sample to a population, because the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance." TTPC, 366 F. Supp. 2d at 1256 (citing Laurence C. Hamilton, Data Analysis for Social Scientists 203 (Duxbury Press 1996)).

to these comments, the Department has provided the discussion in the Fuyi Final Analysis Memorandum.

Furthermore, we agree with Petitioners that there is significant precedent that it is inappropriate to disaggregate the CBP data. Not only is it inappropriate for the Department to exclude Company X's entries as requested by Fuyi but it is also inappropriate to look only at those sales that have similar AUVs as Fuyi's sales at or near the time of their entry. To remove Company X's entries would involve eliminating a significant proportion of entries during the POR, with the resulting data no longer being representative of the subject merchandise exported to the United States during the POR. Therefore, rather than cherry-picking certain CBP entry data, the Department continues to determine that it is more appropriate to use all entries in the CBP entry data for our analysis.

As the CIT noted in TTPC, “{t}he Court agrees with Commerce that disaggregation of the data is not required. Larger sample sizes are generally preferable when the goal is, as here, to generalize from a sample to a population, because the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance.”²⁴ This opinion is based on arguments in TTPC that the Department should disaggregate the CBP data into a monthly AUV.²⁵ Accordingly, it is even more inappropriate for the Department to limit its analysis of Fuyi's AUVs to the AUVs of sales entering at or near the same date as Fuyi's sales. In spite of that, the Department has evaluated the CBP data based on some of Fuyi's arguments but, because of the proprietary nature of the CBP data, we have included a more detailed analysis on this topic in the Fuyi Final Analysis Memorandum.

The Department does recognize that the AUV of Fuyi's second sale is more comparable to the POR AUV but, as described in greater detail in the Fuyi Final Analysis Memorandum, the Department continues to have concerns about the second sale AUV. Specifically, the Department finds that the difference in the AUVs between Fuyi's two sales calls into question the commercial reasonableness and bona fide nature of the sales. Fuyi disputes the Department's conclusion that the price fluctuations between its two sales does not specifically indicate the sales are not bona fide but, in conducting a bona fides analysis, the Department may compare a respondent's selling price during the POR to sales made by other exporters during the POR, or a respondent's own sales, whether these sales were made to third country markets or to the United States after the POR.²⁶ Fuyi has pointed to no record evidence that this comparison is not appropriate in this case. Likewise, our own review of the record evidence does not demonstrate that the garlic or the garlic prices related to the CBP entry data or to the shipper were in any way complicated and/or unique products, nor were they basket tariff categories that made matching the entity's sales to the CBP entry data problematic.²⁷ As such, it is not unreasonable for the

²⁴ See TTPC, 374 F. Supp. 2d at 1256.

²⁵ Id.

²⁶ See TTPC, 374 F. Supp. 2d at 1250-58; see also Notice of Final Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China, 68 FR 62053 (October 31, 2003) and accompanying Issues and Decision Memorandum at Comment 1.

²⁷ See, e.g., Stainless Steel Sheet and Strip in Coils from Japan: Final Results of Antidumping Duty Administrative Review, 75 FR 6631 (February 10, 2010) and accompanying Issues and Decision Memorandum; Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review, 75 FR 9581 (March 3, 2010), unchanged in Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 75 FR 44764 (July 29, 2010) and accompanying Issues and

Department to evaluate the two Fuyi sales vis-à-vis each other because, in an NSR, the Department's responsibility is to evaluate whether the sales made by the shipper are typical of its normal commercial practices, and whether the sales can serve as an indication of future commercial behavior.

Finally, where Fuyi contends that its sales prices cannot be compared to the rest of the CBP AUVs because its sales are arm's length transaction values while the rest of the CBP sales are not, no evidence on record supports a conclusion that the CBP sales were not conducted at arm's length. What is more, Petitioners have argued that CBP requires importers to report the actual transaction value of each entry (i.e., importers are not to report transfer prices between affiliated parties, but rather the actual value of the transaction), thus supporting an argument that the CBP POR entries are more likely to be transaction values similar to those of Fuyi.

As Petitioners point out, there is a statutory presumption that the entry data reported to CBP by U.S. importers reflects the transaction value of the merchandise at issue.²⁸ Therefore, making a comparison between the quantities and AUVs from the CBP entry data with those reported by Fuyi is appropriate in evaluating the bona fides of Fuyi's two sales. In this review, the Department continued to use its reasonable practice, as affirmed by the CIT, of comparing the shipper's entries to CBP entry data obtained for the POR, and specifically, averaging the values contained within that data.²⁹ In all these cases, the CIT affirmed the Department's decision to rescind the NSR based on a comparison of the alleged new shipper's price and quantity to the AUV for all the CBP entries of the subject merchandise.

Contrary to Fuyi's argument, the Department's interpretation of TTPC is not erroneous. TTPC does state that the quantity of a sale is not enough to find a sale not bona fide; however, the CIT's ruling goes on to state that when analyzed in the totality of circumstances, the amount of a sale can be one of many factors in the Department's analysis. Therefore, the Department considered a number of factors in its analysis, all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.³⁰

Since the Preliminary Rescission, Fuyi has provided no additional evidence to the Department that indicates that the quantities of its sales are in any way indicative of normal or future business practices. Despite Fuyi's contention that there is nothing on the record that indicates that its sales are atypical or not commercially reasonable, the CBP entry data clearly supports a finding that Fuyi's sales quantities and prices are atypical in comparison to the large volume of other entries of garlic throughout the entire POR. A review of the CBP entry data demonstrates that the quantity of Fuyi's two shipments is noticeably inconsistent with the average quantity of garlic shipped during the POR.³¹ This is an indication that the quantities of Fuyi's shipments are likely not commercially reasonable for garlic exports from the PRC into the United States.

Decision Memorandum; Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 11349 (July 28, 2008) and accompanying Issues and Decision Memorandum.

²⁸ See Petitioners' February 13, 2013 Rebuttal Brief on Foshan Fuyi at 6 (citing to 19 U.S.C. § 1484(a)(1)(B) and 19 U.S.C. § 1401(a)(1)(A), (b)(1)).

²⁹ See Chenhe; see also TTPC, 366 F. Supp. 2d at 1255-1257; Hebei.

³⁰ See Hebei, 374 F. Supp. 2d at 1342, citing Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002).

³¹ See Fuyi Final Analysis Memorandum.

Furthermore, the fact that the average shipment quantities are significantly different than Fuyi's shipment quantities is a likely indication that Fuyi's quantities are not indicative of future behavior. Taken together, a review of the quantities and prices, in comparison to the AUV of the other entries of subject merchandise during the POR raises significant questions about whether the shipments are in fact commercially reasonable, or indicative of normal business practice and future behavior.

With respect to Fuyi's argument that its sales quantities are commercially reasonable on the basis that, unlike other companies in the CBP data, its importer did not sell to a distributor, there is no record evidence which supports this contention. Despite Fuyi's statement that the Department has not shown that it performed an analysis of a transaction in the CBP data that it considers to have been done at arm's length, there is no evidence on the record with which to conduct such an analysis. In an NSR, the Department reviews those sales that correspond to the alleged new shippers in question; the Department does not gather information regarding other exporters and their entries beyond what is revealed in the CBP data. Despite being aware of the Department's reliance on CBP data to use as a basis of comparing new shipper sales following the Preliminary Rescission, Fuyi did not place any alternative data on the record for the Department to consider. As such, there is no evidence on the record that would allow us to analyze Fuyi's claim that its shipments are in any way different from other shipments during the POR. Moreover, Fuyi has provided no basis to support its conclusion that the Department's comparison to other shipments during the POR is inappropriate. The Department has a well-established practice of evaluating, in part, new shipper sales using the information contained in CBP entry data and Fuyi has not cited to nor provided any factual information which supports a deviation from this practice.

The Department has provided additional proprietary discussions about the quantities and prices of Fuyi's entries as they relate to the totality of circumstances evaluation in the Fuyi Final Analysis Memorandum.

Unresolved Discrepancies in the Documentation on the Record

The Department finds that Fuyi has not provided any additional evidence or explanation that fully addresses the issues identified in the Preliminary Rescission with respect to the business documents of Fuyi and its producer. The Department finds that Fuyi has not sufficiently addressed concerns regarding the FDA registration issue, the proprietary details of which are fully discussed in the Fuyi Final Analysis Memorandum. Furthermore, Fuyi has not sufficiently addressed the other concerns, as discussed below, which leads us to question whether Fuyi has been entirely forthcoming in its responses to the Department. As a result, the Department's concerns regarding Fuyi and its producer have contributed to our totality of circumstances evaluation that Fuyi's sales are not bona fide.

First, Fuyi stated that Shenglong was the producer of the subject merchandise under review.³² Later, in response to questions from the Department regarding Shenglong, Fuyi clarified that Shenglong's name had been changed, and that its original name had been Jinxiang Runda Trade Co. Ltd. (Runda).³³ The Department has analyzed all information on the record of this NSR, including research conducted by the Department, and has identified numerous inconsistencies

³² See Request for New Shipper Review dated November 16, 2011.

³³ See Fuyi's supplemental response dated July 23, 2012 at 5 and Exhibit SA-7.

with the statements regarding the reported producer, Shenglong. The individual inconsistencies are described in detail in the Fuyi Final Analysis Memorandum.

Second, Fuyi did not provide sufficient documentation regarding the name change of its producer. According to Articles 26 and 28 of the “Business Name Registration and Management Implementation Measures (Decree No. 10 of the State Administration for Industry and Commerce of the People’s Republic of China),” a legal entity that plans to change its name must file a name change application at the registration administration. In addition, the registration administration uses pre-approval, approval, and rejection notices which are designed by the State Administration for Industry and Commerce (AIC). Further, the business cannot use the new name for its operation before the administration’s approval.³⁴ Fuyi did not provide any of the documentation that the Department’s research indicates would have been provided by the Chinese government to Shenglong once the name change had been approved.³⁵

Next, Fuyi contends that, on the basis that the local government accepted the tax returns filed in Shenglong’s name but with Runda’s taxpayer identification number (TIN), Runda’s tax returns are valid and support the argument that Shenglong and Runda are the same company. However, according to the Department’s research, the online records at Jining AIC and the National Taxation Bureau of Shandong indicate that Shenglong and Runda are two independent legal entities that each had its own registration number and TIN. The record evidence supports a finding that Runda continues to be in operation, and that Shenglong is a separate entity; this is inconsistent with Fuyi’s statements that Shenglong is simply Runda renamed. Based on the Department’s research, had Runda simply changed its name and corresponding administrative records, the Chinese government would list Runda as no longer an active company and the date that Runda ceased operations would align with the date that Shenglong reportedly began operations. Instead, Chinese government tax records indicate that Runda continues to be an actively-operating company that is separate from the also actively-operating Shenglong, and Chinese government records indicate that Shenglong went into operation after the POR.

Finally, we note that the burden of creating an adequate record lies with interested parties and not with the Department.³⁶ It was Fuyi’s responsibility to place information on the record to explain the inconsistent information presented to the Department, which was relevant to its bona fides analysis. Fuyi did not provide a reasonable explanation regarding the numerous discrepancies, which were also not initially disclosed by Fuyi, but discovered through the Department’s own investigative analysis. Moreover, where Fuyi contends that the Department should have conducted further analysis by looking at information not on the record, it was Fuyi’s responsibility to provide any information it deemed important to the review.

Conclusion

Based on the Department’s analysis of the totality of the circumstances surrounding Fuyi’s sales transactions, including issues identified not only with its prices and quantities of sales, but also inconsistencies in sales documentation and in documentation concerning its producer, the

³⁴ See Memorandum to the File regarding “Fresh Garlic from the People’s Republic of China: Information Related to Foshan Fuyi Food Co., Ltd.,” dated January 9, 2013 at Attachment 5.

³⁵ Id.

³⁶ See QVD Food Co., Ltd. v. United States, 658 F.3d 1318, 1326-27 (Fed. Cir. 2011).

Department continues to find it appropriate to rescind Fuyi's NSR. Fuyi's sales are not reflective of normal business practices nor are they indicative of future commercial behavior due to the: (1) atypical quantities in both sales; (2) atypical AUV of the first sale; (3) percent change between the two sales prices, (4) inconsistencies in various documents on the record regarding Fuyi's reported producer, and (5) inconsistencies in certain information in Fuyi's sales documentation. Based on these factors, the Department continues to find that its Preliminary Rescission was appropriate. For a full discussion of the bona fides of Fuyi's NSR sales, including a discussion of the business proprietary information, see the Fuyi Final Analysis Memorandum.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final rescission in the Federal Register.

AGREE ✓ DISAGREE _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

19 MARCH 2013
Date