



A-570-008
NSR: 7/25/2014 - 6/30/2015
Public Document
E&C/V: AB

November 14, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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 Review of Calcium Hypochlorite
from the People's Republic of China: Haixing Jingmei Chemical
Products Sales Co., Ltd.

SUMMARY

The Department of Commerce ("Department") analyzed the case and rebuttal briefs submitted by interested parties in the new shipper review ("NSR") of Haixing Jingmei Chemical Products Sales Co., Ltd. ("Jingmei"), and Haixing Eno Chemical Co., Ltd., with respect to the antidumping duty order on Calcium Hypochlorite from the People's Republic of China ("PRC"). Based on this analysis, we have not revised our Preliminary Rescission¹ of the NSR of Jingmei. We recommend that you approve the positions described in the "Discussion of Issues" section of this memorandum. The issues for which we received comments from interested parties are listed below.

- Comment 1: Whether the Department Should Have Conducted a Bona Fide Analysis
Comment 2: Whether the Department has "Penalized" Jingmei for Its Unaffiliated Customers' Partial Cooperation

¹ See Calcium Hypochlorite From the People's Republic of China: Preliminary Intent to Rescind the New Shipper Review of Haixing Jingmei Chemical Products Sales Co., Ltd., 81 FR 41522 (June 27, 2016) ("Preliminary Rescission").



BACKGROUND

The Department published its Preliminary Rescission of this NSR on June 27, 2016.² On July 27, 2016, Jingmei submitted a case brief. On August 1, 2016, the Department rejected Jingmei's case brief because it contained untimely new factual information, and provided Jingmei an opportunity to resubmit its case brief.³ On August 2, 2016, Jingmei submitted a revised case brief.⁴ On August 4, 2016, Petitioner submitted a rebuttal brief.⁵ On August 10, 2016, the Department extended the time period for issuing the final results by 60 days until November 17, 2016.⁶ On September 13, 2016, the Department held a closed hearing and a public hearing, limited to the issues raised in the case and rebuttal briefs.

SCOPE OF THE ORDER

The product covered by the order is calcium hypochlorite, regardless of form (e.g., powder, tablet (compressed), crystalline (granular), or in liquid solution), whether or not blended with other materials, containing at least 10% available chlorine measured by actual weight. The scope also includes bleaching powder and hemibasic calcium hypochlorite.

Calcium hypochlorite has the general chemical formulation $\text{Ca}(\text{OCl})_2$, but may also be sold in a more dilute form as bleaching powder with the chemical formulation, $\text{Ca}(\text{OCl})_2 \cdot \text{CaCl}_2 \cdot \text{Ca}(\text{OH})_2 \cdot 2\text{H}_2\text{O}$ or hemibasic calcium hypochlorite with the chemical formula of $2\text{Ca}(\text{OCl})_2 \cdot \text{Ca}(\text{OH})_2$ or $\text{Ca}(\text{OCl})_2 \cdot 0.5\text{Ca}(\text{OH})_2$. Calcium hypochlorite has a Chemical Abstract Service ("CAS") registry number of 7778-54-3, and a U.S. Environmental Protection Agency ("EPA") Pesticide Code ("PC") Number of 014701. The subject calcium hypochlorite has an International Maritime Dangerous Goods ("IMDG") code of Class 5.1 UN 1748, 2880, or 2208 or Class 5.1/8 UN 3485, 3486, or 3487.

Calcium hypochlorite is currently classifiable under the subheading 2828.10.0000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The subheading covers commercial calcium hypochlorite and other calcium hypochlorite. When tableted or blended with other materials, calcium hypochlorite may be entered under other tariff classifications, such as 3808.94.5000 and 3808.99.9500, which cover disinfectants and similar products. While the HTSUS subheadings, the CAS registry number, the U.S. EPA PC number, and the IMDG codes

² Id.

³ See Letter to Jingmei from Catherine Bertrand, Program Manager, Office V, "New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Rejection of Untimely Filed New Factual Information in Case Brief" (August 1, 2016); see also Memorandum to the File, from Kabir Archuletta, Senior International Trade Analyst, Enforcement and Compliance, Office V, "Rejection of Untimely Filed New Factual Information" (August 2, 2016).

⁴ See Letter to the Secretary from Jingmei, "Calcium Hypochlorite from the People's Republic of China Refiling Case Brief" (August 2, 2016) ("Jingmei's Case Brief").

⁵ See Letter to the Secretary from Petitioners, "Antidumping Duty New Shipper Review: Calcium Hypochlorite from the People's Republic of China: Petitioner's Rebuttal Brief" (August 4, 2016) ("Petitioner's Rebuttal Brief").

⁶ See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through James Doyle, Office Director, Antidumping and Countervailing Duty Operations V, from Amanda Brings, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations V, "Calcium Hypochlorite from the People's Republic of China: Extension of Deadline for Final Results of New Shipper Review; 2014-2015" (August 10, 2016).

are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.⁷

DISCUSSION OF ISSUES:

Comment 1: Whether the Department Should Have Conducted a Bona Fide Analysis

Jingmei's Comments:

- The Department has ample information on the record to conduct a bona fide analysis and should make a rate determination in the final results based on the data Jingmei provided on the record.
- Jingmei provided a variety of sales documents (e.g., sales contract, purchase order, commercial invoice, packing list, freight bill of lading, US CBP entry summary for both sales, and PRC customs forms) that consistently identified the importer of record, the ultimate consignee, and the quantity and price of the sale.
- Jingmei also provided payment documentation and documentation demonstrating how and where these two sales were recorded in Jingmei's sales ledger and financial statements.
- Jingmei and its unaffiliated customers provided a variety of documentation (e.g., sales contracts stating sale and payment terms, commercial invoices and packing lists stating sales terms, brokerage and handling invoice, payment documentation of import duties, bank receipt for import duties, ocean freight invoice, air freight bill, Ocean Bill of Lading, and a picture of packaging materials) that consistently established which parties incurred and paid expenses.
- There is nothing so unusual in the sales terms that warranted the Department to doubt the veracity of the documents on the record, or to warrant the Department to demand Jingmei's unaffiliated customers to provide their confidential accounting systems.
- If the Department doubted the facts on the record, it should have elected to verify Jingmei rather than demand unaffiliated parties to surrender their confidential accounting systems.
- There is sufficient record evidence to demonstrate that both Jingmei's customer and its downstream U.S. customer resold the subject merchandise at a profit. The Department erred in its calculation because it only considered whether the downstream U.S. customer made a profit, and failed to consider whether Jingmei's customer made a profit.
- The Department also erred in its calculation because it aggregated the costs and prices of the two sales, when it should have looked at the two sales separately. The first sale was a small quantity shipped by more expensive means and is properly understood as a sample sale; thus, it is understandable that the downstream U.S. customer would not expect a profit from this sale. The second sale, a larger container purchase following the test sample, was shipped by ocean freight and the record demonstrates that both Jingmei's customer and the U.S. downstream customer made a profit from this sale.

⁷ See Calcium Hypochlorite From the People's Republic of China: Antidumping Duty Order, 80 FR 5085 (January 30, 2015).

- If the Department determines that the first sale was not bona fide, it can still determine the second sale is bona fide and review the sale.

Petitioner's Rebuttal Comments:

- Jingmei had an obligation to demonstrate that the sales in question were bona fide and did not meet that obligation.
- Jingmei's records and accounting system do not provide adequate information to enable the Department to confirm the terms of the sales. The terms of these sales were unusual compared to Jingmei's other sales of the subject product, and some of the documents on the record contradict the terms of sale.
- Because Jingmei's records were inadequate to fully substantiate the details of the sales or to determine whether the sales were reflective of Jingmei's likely sale behavior, the Department rightly requested information from the importer and U.S. customer.
- The Department could not confirm the price and terms of the sales or determine whether the subject merchandise was resold at a profit because the importer and the downstream U.S. customer refused to provide any information that confirmed that it had paid the expenses claimed. Nor did it explain the reason for the unusual sales terms, demonstrate that these sales were typical, or show that the product was resold at a profit in the United States.
- The Department correctly issued a preliminary decision to rescind the review because there were no sales on which an antidumping analysis could be conducted.
- Jingmei cherry-picks facts, misstates facts, manipulates the data, and makes bald-faced assertions lacking evidentiary support in a failed attempt to demonstrate that its unusual sales are bona fide and that the subject merchandise was resold at a profit.
- Jingmei's argument that its first sale was a sample sale lacks merit. When asked by the Department whether it had any sample transactions, Jingmei did not indicate that it had any sample sales in its October 16, 2015 response to the initial questionnaire, nor did it claim a sample sale in its December 23, 2015 response to the Department's supplemental questionnaire. Further, invoices on the record demonstrate that the downstream U.S. customer did not treat the first sale as a purchase of samples.
- In its case brief, Jingmei, for the first time, claims a new price per kilogram that appears to be the combination of the agreed upon price plus another line item on the invoice. This new price differs from the price Jingmei reported throughout the review and demonstrated on the record through purchase orders and line items on invoices. Jingmei has not previously indicated, documented, or discussed this new price so it should not be considered. Furthermore, the Department has not had the ability to confirm Jingmei's price because Jingmei's downstream customers have refused access to their accounts.
- The Department has no indication of profitability at any point in the transactions at issue. Jingmei's manipulation of the data in an attempt to show a profit ignores the key reality that these manipulations do not include all costs. Without information on the downstream customers' overhead expenses, it is impossible for the Department to determine whether the resale prices for either company were sufficiently high to generate a profit. Further, the Department could not know whether the downstream U.S. customer sold the entire product at a profit because the customer only provided a sample of the invoices of its sales of the subject merchandise.

Department’s Position: For the reasons detailed below, we continue to find that we are unable to make a determination based on the record information that the sales at issue are bona fide because a substantial portion of the requested information necessary to conduct the statutorily required bona fide analysis was not provided.

Section 751(a)(2)(B) of the Tariff Act of 1930 (“the Act”) was recently amended to curb what Congress viewed as abuse of the statute’s NSR provision.⁸ Congress expressed concern that NSRs, which allow new exporters and producers to obtain their own individual weighted-average dumping margin or individual countervailing duty rate from the Department on an expedited basis, had been abused by new exporters and producers to secure low cash deposit rates that are not reflective of their future commercial behavior.⁹ In particular, Congress expressed concern over the ability of new exporters or producers to enter into a scheme to structure a few sales to show little or no dumping when those sales are reviewed by the Department during a new shipper review, resulting in a low or zero antidumping or countervailing duty rate for that producer or exporter.¹⁰ An importer could then bring in that producer or exporter’s merchandise at highly dumped or subsidized prices but with little or no cash deposit.¹¹

To prevent this abuse, Congress amended the Act by adding Section 751(a)(2)(B)(iv), which creates the requirement that U.S. sales in an NSR be bona fide sales and sets forth criteria for identifying bona fide sales.¹² Thus, pursuant to Section 751 (a)(2)(B)(iv) of the Act, any weighted-average dumping margin determined in an NSR must be based solely on bona fide sales during the POR.¹³ This requires an affirmative determination, supported by substantial evidence, that a sale is bona fide before it can be reviewed.

To determine whether a sale in an NSR is bona fide, the Department is statutorily obligated to consider, “depending on the circumstances surrounding such sales”:

(I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor {it} determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.¹⁴

In light of this statutory mandated analysis, we are statutorily obligated to consider any factors that are relevant to assessing whether a sale is likely to be typical of a new shipper’s future sales. Although some bona fide issues may share commonalities across various administrative cases,

⁸ See Section 433 of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. Law 114-125 (Feb. 24, 2016) (adding a new section 751(a)(2)(B)(iv) entitled, “Determinations based on bona fide sales”); see also H. Rpt. No. 114-114 (2015) (May 14, 2015) at 89.

⁹ See H. Rpt. No. 114-114 (2015) (May 14, 2015) at 89.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ See Section 751(a)(2)(B)(iv) of the Act.

¹⁴ Id.

the Department examines the bona fide nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale.¹⁵ The CIT has affirmed the Department's practice of examining objective, verifiable factors in a bona fides analysis to ensure that a sale is not being made to circumvent an antidumping duty order.¹⁶ A prospective new shipper is therefore on notice that it is unlikely to establish the bona fides of a sale merely by claiming to have sold in a manner representative of its future commercial practices.¹⁷ As such, in order for a new shipper to prove under the statute that its sales are bona fide, it must provide the Department with objective, record evidence concerning "the circumstances surrounding such sales."¹⁸

The Record Lacks Requested Information Necessary to Conduct a Bona Fide Analysis

Regarding Jingmei's argument that the record contains the information necessary for the Department to conduct a bona fide sales analysis, we disagree. Jingmei argues that documentation on the record substantiates the purported price of sales because its bank notices show the names of the transacting parties, Jingmei's bank account, and the same prices listed in the sales documents.¹⁹ It argues that the details on its bank notices match the wire transfer sheets provided by its customer, and that it showed the Department how these sales values were clearly booked in the sales ledger and accounting vouchers.²⁰

However, as we explained in the Bona Fides Memo, we cannot substantiate the price of the sales based on Jingmei's manual sales ledger or the bank notices and wire transfer sheets because this documentation lacks details²¹ necessary to affirmatively determine that Jingmei's customer's purported payments were in fact related to the sales of subject merchandise.²² Thus, as a result of these inadequacies, we requested copies of Jingmei's customer's sales ledger and accounting vouchers, documenting all purchases of subject merchandise from Jingmei during the POR.²³ Despite being advised that information submitted by interested parties in antidumping duty

¹⁵ See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1340, n.5 (CIT 2005) ("New Donghua"), citing Tianjin Tiancheng Pharmaceutical Co. v. United States, 366 F. Supp. 2d 1246, 1263 (CIT 2005) ("TTPC"); 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.

¹⁶ See New Donghua, 374 F. Supp. 2d at 1339.

¹⁷ Id.

¹⁸ Section 751(a)(2)(B)(iv) of the Act; see also New Donghua, 374 F. Supp. 2d at 1339.

¹⁹ See Jingmei's Case Brief, at 2-4.

²⁰ Id.

²¹ See Memorandum to the File, through Catherine Bertrand, Program Manager, Office V, Antidumping and Countervailing Duty Operations, from Amanda Brings, International Trade Analyst, "Business Proprietary Information Memo for Final Rescission of the Antidumping Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Haixing Jingmei Chemical Products Sales Co., Ltd.," dated concurrently with this memorandum ("BPI Memo") at Note 1.

²² See Memorandum to James Doyle, Director, Office V, Antidumping and Countervailing Duty Operations, through Catherine Bertrand, Program Manager, Office V, Antidumping and Countervailing Duty Operations, from Kabir Archuletta, Senior International Trade Analyst, "Bona Fide Nature of the Sales in the Antidumping Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Haixing Jingmei Chemical Products Sales Co., Ltd." (June 20, 2016) ("Bona Fides Memo") at 8.

²³ Id.; see also Letter to the Secretary of Commerce from Jingmei, "Supplemental Section A and C Questionnaire Response" (April 11, 2016) ("Jingmei SuppAC") at 8.

proceedings is protected by an administrative protective order (“APO”), Jingmei’s customer explicitly refused to provide copies of its sales ledger and accounting vouchers.²⁴ Jingmei’s customer’s repeated refusals to provide its sales ledger and accounting vouchers has impeded our ability to examine fully claims as to who purchased the goods under review from Jingmei and at what price, as directed by section 751(a)(2)(B)(iv)(I) of the the Act.²⁵

Regarding Jingmei’s argument that its customer and the ultimate U.S. customer provided the necessary information to document certain expenses arising from the sales, we disagree. Jingmei argues that its customer submitted a brokerage and handling invoice documenting its customer’s payment of movement expenses; its customer submitted broker invoices and bank receipts documenting its customer’s payment of import duties; the ultimate U.S. customer submitted an ocean freight invoice, an air freight bill, and an Ocean Bill of Lading documenting its purported payment of international freight expenses; and the ultimate U.S. customer submitted a purchase order and a picture of packaging documenting other expenses.²⁶

However, the invoices provided to support the purported movement expenses and antidumping/import duties incurred by Jingmei’s customer and the purported movement expenses incurred by the ultimate U.S. customer do not fully account for all of the expenses claimed and remain unsubstantiated absent accounting documentation demonstrating which parties actually incurred these expenses, as reflected in the financial systems of Jingmei’s customer and the ultimate U.S. customer.²⁷ Similarly, the purchase order and image of the packaging provided to support the ultimate U.S. customer’s purported other expenses do not fully account for all of the ultimate U.S. customer’s other expenses²⁸ claimed and remain unsubstantiated absent accounting documentation demonstrating that these purported expenses were actually incurred.²⁹ Finally, the bank receipts submitted by Jingmei’s customer documenting the purported payment of import duties does not substantiate these expenses because these “receipts” appear to be two partial screen shots from a banking website that do not identify the remitter, do not appear to be a final transaction, and do not conclusively support payment.³⁰ Accordingly, we do not find persuasive Jingmei’s argument that the record contains ample, consistent documentation detailing which parties were responsible for which expenses, and that its customer and the ultimate U.S. customer provided documentation for each of their expenses. Therefore, without documentation from Jingmei’s customers, the Department could not evaluate the expenses arising from the sale as required by statute.³¹

As we explained in the Bona Fides Memo, as a general rule, documentation from a party’s accounting system, linked to its audited financial statements, represents the best evidence that expenses were actually incurred and revenue earned by the company and that such expenses/revenues were recorded in their financial records; absent such documentation we

²⁴ See Bona Fides Memo at 5-8.

²⁵ Id.

²⁶ See Jingmei’s Case Brief at 5-7.

²⁷ See Bona Fides Memo at 8.

²⁸ See BPI Memo at Note 2.

²⁹ See Bona Fides Memo at 6-8.

³⁰ Id. at 6.

³¹ Section 751(a)(2)(B)(iv)(IV) of the Act.

cannot be certain that the company actually incurred the purported expenses.³² Under Jingmei's purported sale terms, the movement expenses and antidumping/import duties were incurred by Jingmei's customer, and the movement and other expenses were incurred by the ultimate U.S. customer. Thus, it was necessary to request accounting records from Jingmei's customer and the ultimate U.S. customer to substantiate the veracity of the purported expense claims and to affirmatively determine which parties actually incurred these expenses. The repeated refusals of Jingmei's customer and the ultimate U.S. customer to provide their accounting records has impeded our ability to examine fully claims as to the expenses arising from the sales, as directed by section 751(a)(2)(B)(iv)(IV) the Act.

Jingmei references two cases in support of its argument that the Department took an extreme action by requiring the internal accounting documentation from the ultimate U.S. customer to substantiate the ultimate U.S. customer's purported other expenses.³³ We do not find Jingmei's analysis and application of these cases persuasive to our analysis. The Department examines the bona fide nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale.³⁴ By way of example, the cases cited by Jingmei contain an entirely different set of facts and concern administrative reviews that occurred before Congress amended Section 751(a)(2)(B)(iv) of the Act, which sets forth the bona fide analysis criteria that the Department is now statutorily obligated to examine in new shipper reviews. Further, contrary to Jingmei's assertion, it is not unreasonable or unprecedented for the Department to request internal accounting records from U.S. customers. Indeed, similar requests have been made in past new shipper reviews³⁵ and are reflected in the Department's standard practice.³⁶

Regarding Jingmei's argument that there is nothing so unusual in the sale terms that warranted the Department to doubt the veracity of the parties' statements and documentation on the record and to require the internal accounting documentation from Jingmei's unaffiliated customers, we disagree. Under Section 751(a)(2)(B)(iv) of the Act, we are obligated to examine objective, verifiable factors in a bona fide analysis to ensure that a sale is not being made to avoid the terms of an antidumping duty order.³⁷ Such an analysis requires confidence in the reported responsibilities of each party to the transaction and the reported expenses. As we explain above and in the Bona Fides Memo, the information submitted on the record does not allow such

³² See Bona Fides Memo at 9.

³³ See Jingmei's Case Brief at 5-7 (citing Chlorinated Isocyanurates Preliminary Results of Antidumping Duty Administrative Review; 2013-2014, 80 FR 39060 (July 8, 2015); Chlorinated Isocyanurates Preliminary Results of Antidumping Duty Administrative Review, 74 FR 27104 (July 8, 2009)).

³⁴ See New Donghua, 374 F. Supp. 2d at 1340, n.5.

³⁵ See, e.g., Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007) and accompanying Issues and Decision Memorandum ("[T]he Department examines the companies on both sides of the transaction"); Honey from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review, 72 FR 37715 (July 11, 2007) and accompanying Issues and Decision Memorandum.

³⁶ See The Department's Antidumping New Shipper Review Questionnaire available at <http://enforcement.trade.gov/questionnaires/questionnaires-ad.html> ("Appendix IX includes importer specific questions to be answered by the exporter or, if the exporter is unable to fully respond, forwarded to the importer, with the answers to be included in the exporter's response").

³⁷ Section 751(a)(2)(B)(iv) of the Act; see also H. Rpt. No. 114-114 (2015) (May 14, 2015) at 89.

confidence. Thus, in an effort to obtain information that would have provided the confidence necessary to conduct our statutorily obligated bona fide analysis, it was necessary in this case to request the internal accounting documentation from Jingmei's customer and the ultimate U.S. customer.

In footnote 1 of its case brief, Jingmei acknowledges that the PRC customs declaration form shows different sales terms than those reported by Jingmei but argues that, if the Department doubted Jingmei's explanation regarding this discrepancy, it was required to issue Jingmei a supplemental questionnaire and cannot use this discrepancy to draw an adverse inference against Jingmei.³⁸ As an initial matter, and as explained in greater detail in Comment 2, we have not drawn any adverse inferences against Jingmei in rescinding this review. Further, as we explained in the Bona Fides Memo, we made multiple requests for accounting documentation from Jingmei's customer and the ultimate U.S. customer in an effort to obtain information that would allow us to confirm their payment of certain expenses under the sales terms, and thus, the veracity of the purported sales terms.³⁹ Even if Jingmei had submitted evidence on the record providing support for its explanation of the discrepancy on the PRC customs declaration form, this would not have remedied the failure of Jingmei's customer and the ultimate U.S. customer to submit their accounting documentation.

Regarding Jingmei's argument that there is sufficient record evidence to demonstrate that both Jingmei's customer and its ultimate U.S. customer resold the subject merchandise at a profit, we disagree. We are not able to evaluate whether the ultimate U.S. customer resold the subject merchandise at a profit, as required by Section 751(a)(2)(B)(iv)(V) of the Act, because the ultimate U.S. customer only submitted a sample of invoices and failed to provide invoices demonstrating its resale of all of the subject merchandise.⁴⁰ Further, The Department cannot evaluate whether the U.S. customer resold the subject merchandise at a profit as an additional consequence of Jingmei's failure to provide information regarding the expenses arising from the sales to unaffiliated downstream parties, as previously described in this determination. In the Bona Fides Memo, we stated that even if we were to take the claims of the interested parties at face value without substantiation of veracity, based on the limited information we have, the goods could not have been resold at a profit.⁴¹ Jingmei argues that we erred in the hypothetical calculation we put forth in the Bona Fides Memo, but fails to cite to any authority to support its claims that our calculation was improper.⁴² Although Jingmei additionally argues that the Department's analysis of whether the goods were resold for a profit is flawed because Jingmei's first sale is "properly understood as a test or sample purchase," Jingmei's NSR Request was predicated, in part, on this sale and nowhere did Jingmei characterize it as a sample sale.⁴³ As properly noted by Petitioner, Jingmei did not portray this sale as a sample sale in multiple questionnaire responses.⁴⁴ Indeed, Jingmei did not make the claim that this sale was anything other than a normal transaction until April 2016, almost seven months after its initial Section A

³⁸ See Jingmei's Case Brief at 5-6, n.1.

³⁹ See Bona Fides Memo at 8.

⁴⁰ See Bona Fides Memo at 7.

⁴¹ Id. at 9.

⁴² See Jingmei's Case Brief at 14-15.

⁴³ See Jingmei's Case Brief at 15; Letter to the Secretary of Commerce from Jingmei "Entry of Appearance and Corrected Request/or New Shipper Review" (July 20, 2015) ("Jingmei's NSR Request").

⁴⁴ See Petitioner's Rebuttal Brief at 8.

response.⁴⁵ The initial questionnaire issued to Jingmei stated that sample sales will be excluded from our calculations as outside the ordinary course of trade provided that it can be demonstrated that such sales “were not for consideration (i.e., the sales price net of movement expenses is not greater than zero) and not in commercial quantities.”⁴⁶ Jingmei has not demonstrated that either of these conditions has been met. Further, invoices on the record demonstrate that the downstream U.S. customer did not treat the first sale as a sample sale.⁴⁷ As such, this argument likewise fails due to lack of evidentiary support. Moreover, Jingmei’s argument regarding our profit analysis is moot as the record lacks the critical objective information necessary to even calculate a profit margin.

We agree with the Petitioner that the record does not allow us to determine whether the sales were reflective of Jingmei’s likely sale behavior. As we explained in the Bona Fides Memo, Jingmei’s customer expressly refused to provide its sales ledger and accounting vouchers documenting all of its purchases of subject merchandise from Jingmei during the POR, and failed to provide a sales listing with invoice numbers documenting all sales from all suppliers to the ultimate U.S. customer during the POR.⁴⁸ The ultimate U.S. customer failed to provide documentation demonstrating its resale of all of subject merchandise during the POR, a sales listing of all purchases of subject merchandise that included invoice date, invoice number, supplier name and address, quantity, value, and sales terms, and any invoices, contracts, and sales negotiation documents related to purchases from Jingmei’s customer subsequent to this review.⁴⁹ Accordingly, we not only lack substantial evidence to confirm the details of the sales under review, we lack substantial evidence to examine whether the sales under review are reflective of Jingmei’s likely sales behavior, as directed by Section 751(a)(2)(B)(iv)(VII) of the Act.

In sum, we are unable to substantiate the price of the sales, which parties incurred expenses, whether the demonstrated sales were typical, and whether the subject merchandise was sold at a profit⁵⁰ because Jingmei’s customer and the ultimate U.S. customer only provided partial responses to a number of our requests for information and have explicitly refused to tie any of the reported expenses to their financial records. Because the record here does not allow us to substantiate these critical details, we are unable to conduct a statutory bona fide analysis as obligated by Section 751(a)(2)(B)(iv) of the Act, let alone make an affirmative determination that the sales in question are bona fide. Consequently, we must rescind this review.

Verification Would Not Have Provided an Opportunity to Submit New Information

Regarding Jingmei’s argument that the Department should have elected to verify Jingmei rather than demand unaffiliated parties to surrender their confidential accounting systems, we disagree. The purpose of verification is to verify the accuracy of information previously submitted on the

⁴⁵ See Jingmei SuppAC at 9. See also Letter to the Secretary of Commerce from Jingmei “Section A Response” (September 16, 2015).

⁴⁶ See Letter to Jingmei from Catherine Bertrand, Program Manager, Office V, regarding antidumping duty questionnaire at Appendix I, at 10.

⁴⁷ See Petitioner’s Rebuttal Brief at 8.

⁴⁸ See Bona Fides Memo at 5-7.

⁴⁹ Id.

⁵⁰ See 751(a)(2)(B)(iv) (listing the factors necessary to conduct a bona fide analysis).

record, not to continue the information-gathering stage of the review.⁵¹ Verification would not have provided an opportunity for Jingmei to submit new information on the record. Here, we are unable to conduct a bona fide analysis because the information submitted on the record either lacks sufficient detail to confirm, or simply does not provide sufficient support for, the details of the sales and payment of expenses. The Department repeatedly requested information necessary to complete its analysis regarding price, expenses, and duties. Jingmei's customer and the ultimate U.S. customer explicitly refused to provide the requested information necessary to verify Jingmei's purported claims. Thus, verification of Jingmei's records would have no effect on our decision to rescind because the information that would allow us to verify the accuracy of Jingmei's claims has been explicitly withheld, and Jingmei would not be permitted to submit new information at verification.

To the extent Jingmei suggests that the record deficiencies are the Department's fault, we disagree. We made repeated requests for the information that was not provided, and these requests contained warnings of the possible consequences for failing to respond. The Federal Circuit has held that it remains incumbent upon respondents to complete administrative records.⁵² The CIT has noted that axiom similarly applies in a new shipper review where a respondent fails to establish that it made a bona fide sale during the relevant review period and there remains little for the Department to do but rescind the review.⁵³

Comment 2: Whether the Department has "Penalized" Jingmei for Its Unaffiliated Customers' Partial Cooperation

Jingmei's Comments:

- In the Department's Bona Fide analysis memorandum, the Department did not state that Jingmei failed to cooperate or provide information. Rather, it stated that Jingmei's unaffiliated customers failed to provide adequate documentation to substantiate prices and expenses.
- Jingmei diligently and repeatedly worked to secure additional cooperation of the unaffiliated customers. However, Jingmei is not affiliated with these customers, cannot order them to cooperate, has no control over their responses, and should not be punished for their refusal to provide some of the information requested.
- Jingmei's unaffiliated customers provided an extraordinary amount of information (e.g., purchase orders, invoices, and bank transfers for subject merchandise sales; documentation related to the resell price of subject merchandise sourced from other suppliers during the POR; brokerage and handling invoices and payment documentation of import duties; purchase orders for packaging, pictures of packaging materials, ocean freight invoices, and resale invoices in relation to the sale of Jingmei's subject merchandise; and a list of purchases of subject merchandise made during the POR including a summary of country of origin, purchase quantity, and purchase price),

⁵¹ See 19 C.F.R. § 351.307(d) (2012) (The purpose of verification is to "verify the accuracy and completeness of submitted factual information.").

⁵² See Essar Steel Ltd. v. United States, 678 F.3d 1268, 1277 (Fed. Cir. 2012); QVD Food Co. v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (brackets, quotation marks and citations omitted) (explaining that in antidumping proceedings "the burden of creating an adequate record lies with interested parties and not with Commerce").

⁵³ See, e.g., Shandong Chenhe Trading Co. v. United States, No. 08-00373, 2010 WL 4924016, at *6 (CIT 2010); TTPC, 366 F. Supp. 2d at 1249.

which is more than adequate to substantiate the expenses incurred by various parties and to allow the Department to determine whether Jingmei's sales were bona fide.

- The Department requested an unprecedented level of highly confidential information from unaffiliated parties. The Department had no reason to doubt the veracity of the transactional documentation submitted by the unaffiliated customers. It was unreasonable for the Department to find that the unaffiliated customers' failure to provide their internal accounting documentation called into question the claims made by all parties as to expenses incurred.
- In the last supplemental questionnaire issued to Jingmei, the Department requested that Jingmei explain and document its effort to ensure cooperation from its downstream customer, which strongly implied that such documentation of efforts would be sufficient to continue the review.
- The Department's decision that it could not conduct a bona fide analysis due to the unaffiliated parties' less than total disclosure is akin to making an adverse inference against a cooperating party due to a non-cooperating non-party's failures. The CIT made clear in Shantou that the Department cannot punish cooperating parties.⁵⁴
- The Department's requirement that unaffiliated customers fully open their books and records before the Department can trust the transactional documentation to make a bona fide analysis creates an unreasonably high burden on new shippers.

Petitioner's Rebuttal Comments:

- Jingmei's claim that the Department is penalizing Jingmei for its unaffiliated customers' partial cooperation does not reflect either the Department's decision in this case, or what the courts have said about consequences from a party's failure to cooperate.
- The Department did not apply adverse inferences; instead it was unable to confirm from the record that the sales were reflective of typical behavior.
- Jingmei's customer, as both the importer and exporter of the subject merchandise, is an interested party to this review and the Department, in Wood Flooring and Stainless Steel Sinks, has found sales not to be bona fide when the importer refused to cooperate.⁵⁵
- Shantou does not stand for the proposition that the Department cannot draw adverse inferences against a non-cooperating party where those adverse inferences may have a negative impact on a cooperating party. Rather, in Shantou, the Department applied adverse facts available to the respondent on the basis that respondent had failed to supply information that the Department had not specifically requested.⁵⁶ Here, unlike the facts in Shantou, the Department requested the information the parties refused to provide on several occasions.

⁵⁴ See Jingmei's Case Brief at 12-13, (citing Shantou Red Garden Foodstuff Co. v. United States, 815 F. Supp. 2d 1311, 1323 (CIT 2012)).

⁵⁵ See Petitioner's Rebuttal Brief at 6, (citing Multilayered Wood Flooring From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review; 2013-2014, 81 FR 46906 (July 19, 2016); Drawn Stainless Steel Sinks From the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review; 2012-2013, 80 FR 4247 (Jan. 27, 2015)).

⁵⁶ See Petitioner's Rebuttal Brief at 6-7, (citing Shantou Red Garden Foodstuff Co. v. United States, 815 F. Supp. 2d 1311, 1319 (CIT 2012)).

- The Department’s actions were fully consistent with the law and the court has repeatedly confirmed in Mueller and Fine Furniture that the Department may make adverse inferences with respect to a non-cooperating party even where that may have a negative impact on a cooperating party.⁵⁷

Department’s Position: For the reasons detailed below, we find that Jingmei was not penalized for its customer’s and the ultimate U.S. customer’s failure to provide requested information. In Comment 1, we addressed Jingmei’s arguments that its customer and the ultimate U.S. customer provided sufficient information to substantiate their expenses, and that it was unprecedented and unreasonable for the Department to request the internal accounting documentation from its unaffiliated customers.

Regarding Jingmei’s argument that the Department’s decision that it could not conduct a bona fide analysis due to the unaffiliated parties’ less than total disclosure is akin to making an adverse inference against a cooperating party due to a non-cooperating non-party’s failure, we disagree. The facts otherwise available and adverse facts available (“AFA”) statutory provisions have not been applied in this case. In this case, we find, based on the above analysis, we are unable to determine that the sales in question are in fact bona fide sales. The record lacked the information necessary to fulfill our statutory obligations to conduct a bona fide analysis, which necessarily resulted in the end of the bona fide inquiry and, consequently, the rescission of this review.

Further, we agree with the Petitioner that Shantou is not applicable to this NSR. In Shantou, we applied AFA in an investigation when an exporter failed to secure FOP data from a noncomplying supplier.⁵⁸ The court remanded the issue because we had not requested that the exporter solicit the data from the supplier.⁵⁹ Here, unlike the facts in Shantou, we are not applying AFA, we made repeated requests to Jingmei and its customers for documentation that was not provided, and repeatedly warned of the consequences of failing to provide requested documentation. Accordingly, we could not conduct a bona fide analysis without this critical information.

⁵⁷ See Petitioner’s Rebuttal Brief at 6-7, (citing Mueller Comercial de Mexico v. United States, 753 F.3d 1227, 1236 (Fed. Cir. 2014), Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365, 1371 (Fed. Cir. 2014)).

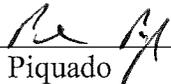
⁵⁸ See Shantou, 815 F. Supp. 2d at 1316.

⁵⁹ Id. at 1341.

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 of this NSR in the Federal Register.

AGREE ✓ DISAGREE _____


Paul Piquado
Assistant Secretary
for Enforcement and Compliance

14 NOVEMBER 2016
Date