

A-570-901
2nd Administrative Review
Period of Review (POR):
09/31/2007-08/31/2008
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DATE: November 23, 2009

MEMORANDUM TO: Carole A. Showers
Acting Deputy Assistant Secretary
for Policy and Negotiations

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Certain Lined Paper Products from the People's Republic of China

SUBJECT: Issues and Decisions for the Final Results of the Second
Administrative Review of the Antidumping Duty Order on Certain
Line Paper Products from the People's Republic of China (Final
Results)

I. Summary

We have analyzed the case brief submitted by Watanabe Paper Products (Shanghai) Co., Ltd., Watanabe Paper Products (Linging) Co., Ltd., and Hotrock Stationery (Sennzhen) Co., Ltd., (collectively, "Watanabe"),¹ and a rebuttal brief submitted by the Association of American School Paper Suppliers ("petitioner"). Based on our analysis of the comments received, we have made no changes from the preliminary results. We recommend that you approve the positions we have developed in the Comments section of this memorandum.

¹ On August 25, 2009, Watanabe filed its case brief ("Watanabe Case Brief"). On August 31, 2009, petitioner filed its rebuttal brief ("Petitioner Rebuttal Brief").

II. Background

The Department of Commerce (“the Department”) initiated this administrative review of the antidumping duty order on certain lined paper products (“CLPP”) from the People’s Republic of China (“PRC”) on October 29, 2008, for Watanabe and Shanghai Lian Li Paper Products Co., Ltd. (“Lian Li”). See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review, 73 FR 64305 (October 29, 2008) (“Notice of Initiation”). On July 23, 2009, we rescinded this review with respect to Lian Li for no shipments. See Certain Lined Paper Products from the People’s Republic of China: Notice of Rescission, in Part, of Antidumping Duty Administrative Review, 74 FR 36457 (July 23, 2009). On July 24, 2009, the Department published the preliminary results of the antidumping duty administrative review for CLPP from the PRC. See Certain Lined Paper Products from the People’s Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 74 FR 36662 (July 24, 2009) (“Preliminary Results”).

On August 24, 2009, Watanabe requested a hearing regarding the second administrative review of CLPP from the PRC. The Department conducted the hearing on September 16, 2009.

III. List of Comments

Below is the complete list of issues for which we received comments.

Comment 1: Whether Subject Merchandise Produced by Watanabe is Subject to the 2007-2008 Review

Comment 2: Whether the Department Correctly Applied Adverse Facts Available (“AFA”) to Watanabe

Comment 3: Whether the Use of the PRC-Wide Rate is Proper

IV. Comments

Comment 1: Whether Subject Merchandise Produced by Watanabe is Subject to the 2007-2008 Review

Watanabe argues that the Department inappropriately required Watanabe to fully respond to the Department's antidumping questionnaire based on Customs data which indicated that merchandise produced by Watanabe entered the United States during the POR. Watanabe maintains that it certified on the record that it did not sell scope products for export to the U.S. during the POR. Watanabe further argues that if the Department believes that the facts were otherwise it could have verified Watanabe. See Watanabe Case Brief at 3. Watanabe alleges that the Department's use of entry date to define the universe of sales subject to the administrative review is contrary to law, because the law "only requires reporting of scope merchandise sold during the period of review." Id. at 4. Citing section 351.401(i) of the Department's regulations regarding the date of sale, Watanabe maintains that the Department's preference is to use invoice date as the date of sale, and that because Watanabe's invoice shows that the material terms of sale for the shipment at issue were set prior to the POR, no Watanabe merchandise is subject to the 2007-2008 review period. Watanabe also cited the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, which defines date of sale as the "date when the material terms of sale are established." See Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-316, at 810 (1994). Watanabe further argues a review of the sale in this POR would be double-counting, because Watanabe was a respondent in the previous administrative review.

Petitioner argues that Watanabe's claim that the Department may not define the universe of sales by entries is inconsistent with the Act, the Department's regulations, and decisions of the Court of International Trade ("CIT"). Petitioner contends that the Department's determination

to conduct the instant review on the basis of entries, rather than sales, is reasonable and in accordance with law. Petitioner states that although the Act is silent, the Department's regulations state that an administrative review will cover "entries, exports, or sales of the subject merchandise." 19 C.F.R. §213(e)(1)(i). According to petitioner, "the date of sale, while important to the Department's calculations, does not normally define the universe of sales." Petitioner Rebuttal Brief at 11. Petitioner further argues that the CIT has upheld the Department's use of entry date to define the universe of sales, citing Helmerich & Payne v. United States, where the Court found that the Department has the authority to define the "universe of sales" based on entries.²

With respect to Watanabe's claim that a review of its POR entry would lead to double-counting because the sale was subject to the 2006-2007 administrative review, petitioner argues that it would not lead to double-counting because the Department conducts its reviews on the basis of entries and the sale at issue here could not have entered the United States until the 2007-2008 POR had begun. Furthermore, petitioner asserts that none of Watanabe's sales were actually reviewed by the Department in the prior review, as Watanabe was not a mandatory respondent in the first administrative review.

The Department's Position:

We disagree with Watanabe's claim that the Department has no legal authority to conduct a review on the basis of entry date. The Department's normal preference and practice is to identify the merchandise subject to a given review period by entry date. The statute does not

² See Helmerich & Payne v. United States, 22 CIT 928, 937-39, 24 F. Supp. 2d 304, 313-14 (1988) ("Helmerich & Payne").

direct the Department how to define the universe of sales.³ Section 351.213(e) of the Department's regulations gives the Department discretion to select the sales subject to a given review on the basis of "entries, exports, or sales of the subject merchandise," as appropriate. 19 C.F.R. §351.213(e)(1)(i). The Department's use of entry date has been affirmed by the CIT.⁴ In Helmerich & Payne, the Court considered arguments put forth by a respondent in almost an identical position to Watanabe whose date of sale of the merchandise occurred outside of the review period, but which entered the United States during the review period. The Court concluded that the Department is authorized to define the "universe of sales" based on entries because it is a reasonable interpretation of the statute, and that this is consistent with Commerce's practice in prior determinations.⁵

Similarly, in Corus Staal, the Plaintiff argued that the Department should not have identified sales subject to a review period on the basis of entry date, but should have used the date of sale. The court disagreed, finding that the Department could reasonably identify the sales subject to a review by entry date.⁶

With respect to Watanabe's argument that the Department could have verified the company, we note that though we have U.S. Customs and Border Protection ("CBP") entry data that indicated that Watanabe had entries of subject merchandise during the POR, which were subject to the review, Watanabe provided very few responses which the Department could have

³ See Helmerich & Payne, 24 F. Supp. 2d at 310 (stating that the Act "does not limit Commerce to using sales within a specified period in determining the export price").

⁴ Id.; see also Corus Staal BV v. United States, 387 F. Supp. 2d 1291 (CIT 2005) ("Corus Staal").

⁵ See Helmerich & Payne, at 310-312.

⁶ See Corus Staal, 29 CIT at 789, 387 F. Supp. 2d at 1302.

verified. We required Watanabe to respond to the Department's questionnaire, but Watanabe refused to answer the vast majority of the questions.

In this case, the Department properly defined the universe of sales by entries during the POR, as in Helmerich & Payne. Therefore, the Department's decision in the preliminary results that subject merchandise produced and/or exported by Watanabe which entered the United States during the 2007-2008 review period is subject to the 2007-2008 review is reasonable and in accordance with law. Therefore, we have not changed our position in these final results.

We disagree with Watanabe's claims that a review of its POR entry would lead to double-counting because the sale took place prior to the POR, which, Watanabe argues, made it subject to the 2006-2007 administrative review. However, the Department conducts its reviews on the basis of entries. The Watanabe sale at issue could not have entered the United States until the 2007-2008 POR had already begun.⁷ Moreover, Watanabe's sales were not individually examined by the Department in the prior review, because Watanabe was not a mandatory respondent in the 2006-2007 administrative review. Therefore, there is no possibility of overlapping or missing sales with regard to Watanabe. Accordingly, we find it reasonable to use date of entry to define the universe of sales for the 2007-2008 administrative review as this method will not create distortions or cause double-counting.

Comment 2: Whether the Department Correctly Applied Adverse Facts Available ("AFA") to Watanabe

Watanabe argues that because it had no sales of subject merchandise during the POR, the Department's use of the facts available at the preliminary results was not justified. Watanabe asserts that the record of this case does not support the application of facts available. In

⁷ See Letter from James Terpstra, Program Manager, AD/CVD, Office 3, Import Administration to Watanabe, dated March 26, 2009.

particular, Watanabe claims that the facts available should not be used because it: (1) has provided all relevant information, (2) has done so by the deadlines requested, (3) has not impeded the proceeding, and (4) has provided verifiable information.

In addition, Watanabe avers that if the Department determines to apply facts available it may not make an adverse inference as the statutory criteria do not support such a finding. Reiterating that it sold no subject merchandise during the POR, Watanabe claims that the Department cannot reasonably find that it failed to produce information which Watanabe was not required to keep. Watanabe also argues that, because Watanabe itself could not view confidential Customs data regarding the shipment at issue, “Watanabe had to guess exactly what the Department meant in supplemental questionnaires.” See Watanabe Case Brief at 13. Watanabe argues that the Department cannot “punish” a respondent for being unable to guess the information required by the Department.

Petitioner argues that the Department’s application of adverse inferences to Watanabe is justified. Petitioner points out that the Department requested that Watanabe provide responses to the antidumping questionnaire with respect to merchandise entered during the POR, but Watanabe failed to provide the requested information. Petitioner rebuts Watanabe’s claim that Watanabe could not view confidential CBP data regarding the shipment at issue and argues that Watanabe itself was able to identify the merchandise through its own records. According to petitioner, the Department warned Watanabe of the possibility of the application of adverse inferences, explained to Watanabe its preference and practice of identifying reviewable sales based on entry date, and provided Watanabe with additional opportunities to respond to unanswered questions. Yet, Watanabe failed to provide the information. Petitioner contends that

Watanabe's refusal to provide a response after such explanation and warning warrants the application of adverse inferences under 19 U.S.C. § 1677e(b) and 1677m(d).

The Department's Position:

As discussed in the preliminary results, we determined that, in accordance with section 776(a)(2)(A) of the Act, the use of facts available was appropriate as the basis for the dumping margins for Watanabe. See Preliminary Results, 74 FR at 36662-67. Section 776(a) of the Act provides that the Department will apply "facts otherwise available" if, inter alia, necessary information is not available on the record or an interested party: (1) withholds information that has been requested by the Department; (2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department; (3) significantly impedes a proceeding; or (4) provides such information, but the information cannot be verified.

Contrary to Watanabe's claim that it provided all relevant information, the case history demonstrates that Watanabe failed to provide requested information. On December 2, 2008, the Department issued an antidumping questionnaire to Watanabe Group. On January 8, 2009, Watanabe submitted a letter stating that it did not export for consumption in the United States lined paper products subject to the scope of the antidumping order of CLPP during the POR. See Watanabe's January 8, 2009, submission at 1. On February 2, 2009, the Department released the results of the Department's internal CBP data query with respect to Watanabe's shipments of subject merchandise to the United States during the POR, and requested that Watanabe respond to the Department's antidumping questionnaire. On March 11, 2009, the Department released to the interested parties, under Administrative Protective Order, CBP entry documentation covering Watanabe's shipments, which indicated entries of subject merchandise during the POR for which Watanabe was the producer and/or exporter. In response, Watanabe argued that the date of entry

was irrelevant, and claimed that the shipment was outside the scope of review due to its having been sold and shipped prior to the start of the POR. See Watanabe's March 18, 2009, submission at 3.

In a letter to Watanabe on March 26, 2009, the Department explained that its antidumping questionnaire requires respondents to report sales of subject merchandise that entered for consumption during the POR, and that because there were entries of Watanabe's merchandise during the POR, Watanabe is required to fully respond to the Department's antidumping questionnaire. See Letter from James Terpstra, Program Manager, AD/CVD, Office 3, Import Administration to Watanabe, dated March 26, 2009. Watanabe submitted a response on April 9, 2009, in which Watanabe only answered three questions of Section C of the Department's multi-faceted antidumping questionnaire with respect to the date of sales, claiming that Watanabe "is responding to the best of its ability for the relevant parts of the antidumping questionnaire." Watanabe reiterated that it did not export subject merchandise to the United States during the POR. See Watanabe's April 9, 2009, submission at 2. Watanabe stated that its certification of no sales was based on the date of the invoice for export sales. Id. at 2-3.

On April 22, 2009, the Department sent a letter to Watanabe reiterating its request that Watanabe respond fully to the Department's antidumping questionnaire. The letter explained again the authority under which the Department is requiring responses. See Letter from James Terpstra, Program Manager, AD/CVD, Office 3, Import Administration to the Watanabe Group, dated April 22, 2009, (the Department's April 22, 2009, letter) at 1. The letter instructed that for sales based on export price ("EP"), if Watanabe did not know the entry dates, Watanabe should report each transaction involving merchandise sold and/or shipped during the period June 1, 2007, through August 31, 2008. Id. at 2. The letter further advised Watanabe that information

submitted after the deadline may result in the use of facts available pursuant to section 776(c) of the Act. On May 1, 2009, Watanabe requested an extension of time to respond to the Department's questionnaire. See Watanabe's May 1, 2009, submission at 1. On May 5, 2009, the Department granted Watanabe's request in full; specifically, an extension until May 20, 2009, to file its Section A response and an extension until June 3, 2009, to file its Sections C and D responses.

On May 20, 2009, counsel for Watanabe informed the Department that Watanabe had decided that it would not submit a response to the Department's questionnaire. See Memorandum to the File from James Terpstra titled "Watanabe Telephone Call," dated June 1, 2009. On June 3, 2009, Watanabe notified the Department in writing that it was not responding to Sections A, C and D of the antidumping questionnaire in full because it had explained and certified on the record that it did not sell subject merchandise for export to the United States during the POR based on its understanding of the term "sales" as defined under antidumping law. See the Watanabe Group's June 3, 2009, submission at 2.

As noted above, the Department requested that Watanabe respond to the Department's standard Sections A, C, and D antidumping questionnaire. Watanabe answered only three of the questions contained in the Section C questionnaire. The Department pointed out Watanabe's deficient responses, explained the scope of the review and the Department's legal authority to require responses covering entries made during the POR, and provided Watanabe with multiple opportunities to provide complete responses. Nevertheless, Watanabe chose not to respond to the Department's questionnaire. By failing to respond to the Department's requests, Watanabe withheld requested information and significantly impeded the proceeding.

Further, Watanabe claims that it had to guess what the Department meant with respect to

the identity of its POR entry, due to its counsel's inability to share confidential CBP data with Watanabe. We do not find this claim persuasive. There was no possible guesswork here because the Department requested that Watanabe report any and all sales to the U.S. market that could have possibly entered the United States during the POR and the Department specified all sales or shipments made between June 1, 2007, and August 31, 2008. See the Department's April 22, 2009, letter at 1. The Department clearly specified what information Watanabe was to report, and there is no indication that Watanabe was not in possession of the relevant information.

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action accompanying the Uruguay Round Agreements Acts, H. Doc. No. 103-316, at 870 (1994).

It is clear on the record of this case that Watanabe failed to cooperate to the best of its ability in this administrative review. The Department's use of facts available, and application of adverse inferences, is warranted in accordance with section 776(b) of the Act. Therefore, we have not changed our position in these Final Results.

Comment 3: Whether the Use of the PRC-Wide Rate Is Proper

Watanabe argues that the Department has failed to show that the PRC-wide rate of 258.21 percent is applicable to Watanabe. Watanabe states that "the Court of Appeals for the Federal Circuit has held that a 'total facts available proxy rate should ... have probative value of a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.'" See Watanabe Case Brief at 13 (citing F. Lii de

Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

Watanabe also cites Tianjin Mach. Imp. & Exp. Corp. v. United States, 2007, No. 05-00522, 2007 Ct. Int'l Trade LEXIS 137 *44 (August 28, 2007), as well as other decisions regarding the proper application of adverse facts available, to support its contention that a total AFA rate must “bear a rational relationship to the respondent, not just the industry as a whole.” Watanabe claims that the 258.21 percent rate is uncorroborated, and was incorrectly calculated, and that a rate of 22.35 percent that Watanabe received from the previous review would bear “a closer relationship to the actual rate for the company than an uncorroborated rate from the petition” which Watanabe claims was not properly calculated. Id. at 16.

Petitioner argues that the cases that Watanabe cite do not apply to Watanabe because they all involve market economy respondents or respondents that otherwise demonstrated their eligibility for a separate rate. Petitioner argues that the Department’s application of the PRC-wide rate to Watanabe is warranted “because in this proceeding, Watanabe failed to provide any response to the Department’s separate rate questions, or to otherwise submit information demonstrating that the company was free of *de jure* and *de facto* governmental control.” See Petitioner Rebuttal Brief at 19-20. Citing Shandong Mach. Imp. & Exp. Co. v. United States,⁸ petitioner states that the CIT has upheld the Department’s application of the PRC-wide rate to respondents that did not demonstrate their independence from a Non-Market Economy (“NME”) government. Petitioner argues that Watanabe chose not to provide information demonstrating its eligibility for a separate rate. Therefore, application of the PRC-wide rate to Watanabe is warranted.

⁸ See Shandong Mach. Imp. & Exp. Co. v. United States, No. 07-00355, 2009 Ct. Int'l Trade LEXIS 76 (June 24, 2009) (“Shandong”).

With respect to Watanabe's claims that any AFA rate must relate to Watanabe itself, petitioner argues that because "Watanabe has properly been found to be part of the PRC-wide entity," the AFA rate need bear only a rational relationship to the PRC-wide entity. Further, by pointing out the fact that Watanabe has never come forth with any evidence questioning the reliability of the 258.21 percent rate, which was used in the original investigation, petitioner contends that the use of that rate is reasonable, and should be used in the final results.

The Department's Position:

As discussed in the Preliminary Results, it is the Department's policy to assign all producers/exporters of subject merchandise in an NME country a single PRC-wide rate unless a producer/exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. See Preliminary Results, 74 FR at 36665. The Department requires a party to submit evidence that it operates independently of the state-controlled entity in each segment of a proceeding in which it requests separate rate status. Watanabe, which was selected as a mandatory respondent in this review, did not respond to the Department's request for a separate rate certification on the record of this review, nor did it respond to the Department's Section A questionnaire with respect to separate rates. Thus, Watanabe has not demonstrated that it operates free from government control. Thus, we find that for purposes of this review, Watanabe is part of the PRC-wide entity.

Watanabe cites numerous cases in its case brief in support of its argument that the PRC-wide rate is not a reasonable proxy rate for Watanabe. See Watanabe case brief at 13-16. We find that none of the cases is applicable to this situation. The key issue here is that Watanabe failed to demonstrate that it is eligible for separate rate status, and that it chose not to answer the

vast majority of the Department's questions, including the Section A questionnaire on separate rates. Therefore, the Department properly found Watanabe to be part of the PRC-wide entity.

As explained above, the PRC-wide entity, which includes Watanabe, withheld necessary information by failing to provide the requested information regarding its shipments of subject merchandise to the United States. Therefore, it is appropriate to apply a dumping margin for the PRC-wide entity using facts available on the record. See section 776(a) of the Act. In addition, because the PRC-wide entity failed to cooperate to the best of its ability, we find that an adverse inference is appropriate. See section 776(b) of the Act.

Generally, the Department finds that, when selecting an adverse rate, the highest rate from any segment of the proceeding is appropriate. See, e.g., Certain Cased Pencils from the People's Republic of China; Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 70 FR 76755, 76761 (December 28, 2005), unchanged in Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 38366 (July 6, 2006). The CIT and the Court of Appeals for the Federal Circuit have affirmed decisions to select the highest margin from any prior segment of the proceeding as the AFA rate on numerous occasions. See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990); NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding the application of an AFA rate which was the highest available dumping margin from a different respondent in an investigation); see also Kompass Food Trading Int'l v. United States, 24 CIT 678, 689 (July 31, 2000) (upholding the application of an AFA rate which was the highest available dumping margin from a different, fully cooperative respondent); and Shanghai Taoen International Trading Co., Ltd. v. United States, 360 F. Supp 2d 1339, 1348 (CIT 2005)

(upholding the application of an AFA rate which was the highest available dumping margin from a different respondent in a previous administrative review). We continue to find that selecting a rate of 258.21 percent, the highest rate from any segment of the proceeding as AFA is appropriate. This rate was calculated based on information contained in the petition, which was corroborated for the final determination. See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia, 71 FR 56949 (September 28, 2006). No additional evidence has been presented in the current review which calls into question the reliability of the information relied on in corroborating this rate. See Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 FR 17160 (April 14, 2009). Therefore, we find that the information continues to be reliable. In addition, the AFA rate we are applying is the rate currently in effect for the PRC-wide entity.

V. Recommendation

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

Carole A. Showers
Acting Deputy Assistant Secretary
for Policy and Negotiations

Date