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

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from the People's Republic of China for the Period of Review August 1, 2007, through July 31, 2008

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on polyethylene retail carrier bags from the People's Republic of China for the period August 1, 2007, through July 31, 2008. We recommend that you approve the positions described in this memorandum. The sole issue in this administrative review for which we received comments and rebuttal comments from parties concerns the valuation of the non-market-economy purchases of the calcium carbonate factor of production.

The respondent in this review is Zongshan Rally Plastics Co., Ltd. (producer), and Rally Plastics Co., Ltd (exporter). For the purposes of this decision memorandum we refer to Zongshan Rally Plastics Co., Ltd., and Rally Plastics Co., Ltd., collectively as Rally.

Background

On July 29, 2009, the Department of Commerce (the Department) published the preliminary results of review of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from the People's Republic of China (PRC). See Polyethylene Retail Carrier Bags from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 37694 (July 29, 2009) (Preliminary Results).

We invited interested parties to comment on the Preliminary Results. On August 31, 2009, we received case briefs from the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the

petitioners), and Rally. On September 3, 2009, we received a rebuttal brief from Rally.[1] Although Rally requested on August 28, 2009, that the Department hold a hearing, it withdrew its request for a hearing on September 4, 2009; therefore, as no other parties requested a hearing, we did not conduct a hearing.

Discussion of the Issue

Valuation of Calcium Carbonate

Comment: The petitioners claim that the Department selected an inappropriate Harmonized Tariff Schedule (HTS) subheading for valuing Rally's calcium carbonate factor of production. According to the petitioners, the Department should not have selected the HTS subheading for pure mined calcium carbonate (i.e., 2836.50.00), but instead it should have selected the HTS number for polymers of ethylene, in primary forms (i.e., 3901.90.90).

The petitioners argue that Rally does not use pure mined calcium carbonate as an input in the manufacture of PRCBs. They assert that Rally used a mixture of a highly refined calcium carbonate mineral and a carrier polyethylene resin which has been pelletized for use in the production of the subject merchandise (i.e., calcium carbonate masterbatch). The petitioners claim that sample purchase documents Rally submitted as part of its April 21, 2009, supplemental questionnaire response (SQR) at exhibit SD-5 clearly support their claim that Rally uses calcium carbonate masterbatch for the production of PRCBs. Specifically, the petitioners claim that the shipping documents Rally provided in exhibit SD-5 indicate that the product shipped by Rally's supplier to Rally is calcium carbonate masterbatch and that the untranslated description of the merchandise on the supplier's invoice Rally provided in exhibit SD-5 translates to calcium carbonate masterbatch. The petitioners claim that, according to articles from magazines dedicated to the plastics industry, reports, product-specification sheets, and excerpts from relevant websites, which the petitioners included in their August 18, 2009, post-preliminary results surrogate-value submission, manufacturers of plastic bags generally use calcium carbonate masterbatch for the manufacture of PRCBs.

The petitioners allege that, by definition, calcium carbonate masterbatch cannot be classified under HTS Chapter 28 because Note 1(a) states that the chapter heading applies to separate chemical elements and separate chemically defined compounds, whether or not containing impurities. The petitioners claim that calcium carbonate masterbatch is composed of a chemical compound (CaCO3) which is mixed with at least polyethylene resin and is therefore not a separate chemical element or a separate chemically defined compound. The petitioners cite Customs Ruling HQ 962505 (October 15, 1999) which states that calcium carbonate masterbatch should not be classified under subheading 2836.50.00 but rather should be classified under HTS heading 3901. The petitioners claim that, for the production of PRCBs, the calcium carbonate masterbatch is a mixture of primarily calcium carbonate and low-density resin and therefore should be categorized under HTS subheading 3901.90.90. The petitioners support their argument that subheading 3901.90.90 is appropriate by providing documentation demonstrating

[1] Rally submitted its rebuttal brief one day late. Based on information Rally included in its September 11, 2009 submission, we exercised our regulatory discretion to accept the late submission.

that Chinese suppliers of calcium carbonate masterbatch export it under that subheading. Citing Zhengzhou Harmoni Spice Co. Ltd. v. United States, 617 F. Supp. 2d 1281, 1322-1327 (CIT 2009), the petitioners conclude that, because subheading 2836.50.00 is allegedly not representative of the factor of production being valued, it cannot be the 'best available information" for valuing the calcium carbonate factor of production as required by 773(c)(1)(B) of the Tariff Act of 1930, as amended.

Citing Gleason Industrial Products, Inc. v. United States, 559 F. Supp. 2d 1364, 1370 (CIT 2008) (Gleason) (quoting Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262, 1308 (CIT 2006) (Dorbest)), and citing Hebei Metals & Minerals Import & Export Corporation v. United States, 366 F. Supp. 2d 1264, 1273 (CIT 2005) (Hebei), the petitioners claim that the Department is required to "articulate in what way the surrogate value chosen relates to the factor input." The petitioners argue that the Department can not meet the standard the court set in Gleason, Dorbest, and Hebei if it continues to use subheading 2836.50.00 for valuing the calcium carbonate input because Rally's own sample purchase documents allegedly support that the factor input is calcium carbonate masterbatch and because Customs Ruling HQ 962505 (October 15, 1999) allegedly confirms that calcium carbonate masterbatch should not be classified under subheading 2836.50.00 but under HTS heading 3901.

Rally argues that it uses calcium carbonate and not calcium carbonate masterbatch as a factor of production in the manufacture of PRCBs. Rally claims that the petitioners have translated the item description on the invoice Rally submitted in exhibit SD-5 incorrectly and that the correct translation of the untranslated item is calcium carbonate and not calcium carbonate masterbatch. Rally also claims that the Chinese description on the invoice of the product Rally purchased is followed by the words "$CACO_3$ CC 8011" {sic} which indicates the chemical composition of calcium carbonate ($CaCO_3$) and the industry code for calcium carbonate (CC), not CCM which is the industry code for calcium carbonate masterbatch.

Rally also argues that the documents in exhibit SD-5 indicate that the input was imported into the PRC under HTS 2836.50.00 which supports its argument further that the input is calcium carbonate, not calcium carbonate masterbatch, and Rally asserts that it is not appropriate to dismiss this alleged fact by concluding that the PRC customs misclassified the product under that subheading.

Rally also claims that the product description (i.e., calcium carbonate masterbatch) on the bill of lading which it submitted in exhibit SD-5 has little or no weight because neither Rally nor its supplier created the bill of lading. Rally claims that a clerk at the shipping company created the bill of lading and it is not clear whether by stating calcium carbonate masterbatch, the clerk's intentions were to write calcium carbonate masterbatch or calcium carbonate for masterbatch.

Department's Position: The Courts have consistently held that the burden rests with the respondent to create an accurate administrative record. See, e.g., Zenith Electronics Corporation v. United States, 988 F.2d 1573, 1583 (Fed. Circ. 1993) (explaining that the burden of the evidentiary production belongs "to the party in possession of the necessary information"). See also Tianjin Machinery Import & Export Corp. v. U.S., 806 F. Supp. 1008, 1015 (CIT 1992) ("The burden of creating an adequate record lies with respondents and not with Commerce.") (citation omitted). In its March 27, 2009, supplemental questionnaire, the Department requested that Rally submit sample documents for the purchase of each market-economy input it reported. Rally responded to the request by submitting purchase, shipping, and entry documents for each

of its reported inputs including the input at issue. See exhibit SD-5. The Department did not select specific purchases of each market-economy input; it simply requested that Rally provide sample documents for each input Rally reported it purchased from a market-economy source. Rally chose which documents it submitted to the Department in its SQR.

Among the sample documents Rally submitted for the purchase of the input at question are two bills of lading. It is Rally's responsibility to provide a submission with accurate information. Indeed, Rally certified the accuracy of the bills of lading when it included a certificate of accuracy as part of its submission of its SQR as required by our regulations. Specifically, 19 CFR 351.303(g) requires that any submission of factual information contain a certification regarding the accuracy of that information. Rally cannot claim after it has submitted the bills of lading that the statements in these documents bear little or no weight because they were not created by Rally or its supplier. The Department cannot disregard the clear indication on the two bills of lading that the product the supplier shipped to Rally is calcium carbonate masterbatch nor can it interpret a clear statement to have an alternative meaning based on possible and factually unsupported intentions of the clerk of the shipping company.

Another document Rally submitted as part of the package of sample documents for the input at issue is a partially translated invoice. See exhibit SD-5. The Department's regulations state:

> A document submitted in a foreign language must be accompanied by an English translation of the entire document or of only pertinent portions, where appropriate, unless the Secretary waives this requirement for an individual document. A party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department. See 19 CFR 351.303(e).

Our standard questionnaire instructs the respondent to include an original and translated version of all pertinent portions of non-English language documents that accompany the response. See, e.g., questionnaire dated October 16, 2008, at page G-4:

> Prepare your response in typed form and in English. Include an original and translated version of all pertinent portions of non-English language documents that accompany your response, including the financial statements. If this is impractical for certain of the documents, please contact the official in charge.

The respondent has the sole responsibility to assess which parts of each document it submits is pertinent or may become pertinent over the course of the review.

Rally did not provide a translation of the entire document. Rally submitted an invoice as a sample purchase document for the input at issue and decided that the product description was not or could not become pertinent over the course of the review. By disregarding the Department's explicit instructions with respect to providing a translated version of all non-English language, i.e., the product description on the invoice, Rally assumed all risk associated with not providing a full translation. After the preliminary results of the proceeding, the information in the untranslated portion of the invoice has become the central issue in this review. Because there was no translation, the untranslated portions of the invoice are open to different translations of the terms. In their briefs both parties have provided independent versions of a translation of the product description in Chinese on the invoice. Because their translations

contradict one another, the Department cannot rely on either of the two translations as accurate and definitive.

The Department also cannot give much credence to the HTS number under which the market-economy input at issue was imported into the PRC. The fact that a foreign authority allowed a shipment to be categorized under one HTS number does not provide irrefutable evidence that the product was categorized properly under the specific HTS number nor does it prove that the product imported into the PRC was indeed calcium carbonate and not calcium carbonate masterbatch.

The petitioners have provided documentation which indicates that the recent industry trend is to substitute resin with calcium carbonate masterbatch, a less expensive alternative. The respondent stated that it uses the calcium carbonate as a resin substitute. See verification report dated July 8, 2009, at 19. Because the parties' arguments, as supported by the record, contradict each other, we cannot definitively determine that the input at issue is indeed calcium carbonate masterbatch or calcium carbonate.

Rally reported that it purchased the input at issue from market-economy sources as well as domestically from non-market-economy sources. Rally did not distinguish between the domestically non-market-economy sourced calcium carbonate from the market-economy purchased calcium carbonate. Rally reported these inputs as identical inputs it used for the production of PRCBs regardless of the purchase source. We compared the weighted-average per-unit purchase price of Rally's market-economy purchases of the input at issue to the per-unit surrogate-value price of calcium carbonate falling under HTS subheading 2836.50.00 and found that the market-economy purchase price is more than three times the surrogate-value price. The large price difference between the market-economy price and the surrogate-value price suggests that these prices are for different products.

Taking into account the partially translated invoice, the inconclusive and contradicting translations of the product description of the input at issue as indicated on the invoice by the petitioners and Rally, the industry trend of substituting resin with calcium carbonate masterbatch, the product descriptions on the two bills of lading which state that the product Rally's supplier shipped to Rally is calcium carbonate masterbatch, and the large price difference between the market-economy purchase price of the input at issue and the surrogate-value price of calcium carbonate as categorized under HTS subheading 2836.50.00, we conclude that Rally used calcium carbonate masterbatch, not calcium carbonate, as a factor of production. Therefore, in our preliminary results, we did not select the appropriate HTS subheading for valuing the input at issue. For the final results, we find that we should value the input at the surrogate value of calcium carbonate masterbatch. According to the record evidence and relying on Customs Ruling HQ 962505 (October 15, 1999) for guidance, the appropriate surrogate-value price for the input at issue is categorized under HTS subheading 3901.90.90.

Recommendation

Based on our analysis of the comments received, we recommend adopting the position above. If this recommendation is accepted, we will publish the final results of the review and the final dumping margin for Rally in the Federal Register.

Agree _____ Disagree _____

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
Date