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International Trade Administration
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May 6, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Decision Memorandum for Preliminary Results of the 2011/12
Antidumping Duty Administrative Review: Polyethylene Retail
Carrier Bags from Thailand

SUMMARY

In response to requests from the domestic interested parties, the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC and Superbag Corporation, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from Thailand.¹ The review covers eleven companies. The period of review (POR) is August 1, 2011, through July 31, 2012. We preliminarily find that subject merchandise has been sold at less than normal value by the companies subject to this review.

BACKGROUND

On August 9, 2004, the Department published in the *Federal Register* the Order. On September 26, 2012, we published a notice of initiation of an administrative review of 11 companies.² Since initiation of the review, we selected Trinity Pac Co., Ltd. (Trinity Pac) for individual examination.³

¹ See *Antidumping Duty Order: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 48204 (August 9, 2004) (the Order).

² See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 FR 59168 (September 26, 2012).

³ See Memorandum to Susan H. Kuhbach, regarding respondent selection dated October 22, 2012.



SCOPE OF THE ORDER

The merchandise subject to the antidumping duty order is PRCBs, which may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.*, grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the order excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, *e.g.*, garbage bags, lawn bags, trash-can liners.

As a result of changes to the Harmonized Tariff Schedule of the United States (HTSUS), imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the HTSUS. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

DISCUSSION OF THE METHODOLOGY

Selection of Respondents

Due to the large number of companies for which the Department initiated this administrative review, the Department exercised its authority to limit the number of respondents selected for individual examination. Where it is not practicable to examine all known exporters/producers of subject merchandise because of the large number of such companies, section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act) allows the Department to limit its examination to either a sample of exporters, producers, or types of products that is statistically valid, based on the information available at the time of selection, or exporters and producers accounting for the largest volume of subject merchandise from the exporting country that can be reasonably examined.

Accordingly, based on our analysis of U.S. Customs and Border Protection (CBP) import data on the record of this review and our available resources, we selected Trinity Pac for individual examination.⁴

⁴ See Memorandum to Susan H. Kuhbach, regarding respondent selection dated October 22, 2012.

Request for Duty Absorption Determinations

On October 26, 2012, the domestic interested parties requested that the Department determine, pursuant to 19 CFR 351.213(j), whether antidumping duties have been absorbed by all companies subject to this review. The statute only authorizes the Department to conduct duty absorption inquiries in the second and fourth administrative reviews after publication of an antidumping duty order.⁵ Pursuant to the court's decision in *FAG Italia*, we would not conduct a duty absorption inquiry in this review because it is the eighth administrative review of the Order.

Use of Facts Otherwise Available

For the reasons discussed below, we determine that the use of facts otherwise available with an adverse inference is appropriate for these preliminary results with respect to Trinity Pac.

A. Use of Facts Available

On November 2, 2012, we sent the antidumping duty questionnaire to Trinity Pac using two known addresses.⁶ We were notified by the carrier that neither of the shipments could be delivered. *Id.* This mirrored the Department's attempts during the 2010-2011 administrative review to contact Trinity Pac using the same addresses, to no avail.⁷ On November 13, 2012, we placed on the record of this review the registration documentation for Trinity Pac in effect during the calendar year 2008, filed with Thailand's Ministry of Commerce.⁸ This information revealed that one of the addresses to which we sent the questionnaire on November 2, 2012, is the same address that was used by Trinity Pac to register the company with Thailand's authorities. *Id.* The information also revealed the identity of the company's directors at the time of company's registration. *Id.*

On November 14, 2012, we sent the antidumping duty questionnaire to the addresses of Trinity Pac's two known directors who, according to Trinity Pac's registration documents, were, at that time, authorized to represent Trinity Pac and to bind the company to certain legal commitments.⁹ With respect to the attempted delivery of the questionnaire to one of the known directors of Trinity Pac, the carrier notified us that the intended receiver refused the delivery. *Id.* With

⁵ See *FAG Italia S.p.A. and FAG Bearings Corporation and SKF USA Inc. and SKF Industries S.p.A. v. United States and The Torrington Company*, 291 F.3d 806 (Fed. Cir. 2002) (*FAG Italia*).

⁶ See memorandum entitled "2011 – 2012 Administrative Review of Polyethylene Retail Carrier Bags from Thailand – Antidumping Duty Questionnaire for Trinity Pac Co., Ltd; Shipment Tracking and Delivery Status Details," dated November 26, 2012 (Shipment Tracking Memo).

⁷ See memorandum entitled "Polyethylene Retail Carrier Bags from Thailand – Placement of Certain Factual Information from the 2010/2011 Review on the Record of the Current Review," dated April 12, 2013.

⁸ See memorandum entitled "Polyethylene Retail Carrier Bags from Thailand – Placement of Factual Information on the Record," dated November 13, 2012.

⁹ See Shipment Tracking Memo.

respect to the attempted delivery of the questionnaire to the other known director of Trinity Pac, the carrier provided confirmation of delivery. *Id.* We did not receive a questionnaire response from Trinity Pac or any form of communication from its directors.

On January 17, 2013, we requested the domestic interested parties provide us with any updated/alternative information regarding the current location of and contact information for Trinity Pac. On January 31, 2013, the domestic interested parties submitted new factual information, comprising Trinity Pac's most recent corporate filing with Thailand's Ministry of Commerce. The filing revealed the following: Trinity Pac registered for dissolution on January 6, 2012, and for liquidation on September 3, 2012; the address of the company in liquidation is the same one that we used to attempt the delivery of the questionnaire to Trinity Pac; and, as of the time of dissolution, Trinity Pac had the same directorship that was reflected in company's 2008 registration materials, the same directors acted as Trinity Pac's liquidators, and the same directors remained authorized to bind the company in legal matters by signature.

As noted above, one of the directors of Trinity Pac accepted delivery of our questionnaire and did not respond to that questionnaire. In addition, one of the other directors refused delivery of our questionnaire altogether. In light of these facts, we find that Trinity Pac has failed to provide the Department with the information necessary to conduct an administrative review of the company. This determination is consistent with the Court of International Trade's (CIT's) finding in *Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp. 2d 865, 909 (CIT 1998), in which the court held the following:

Under these circumstances, where a questionnaire is acknowledged ... Commerce may reasonably conclude that the receiver will either respond or direct the questionnaire to the appropriate party. The burden is then on the respondent to provide evidence that service was defective... Moreover, any other policy would allow respondents to avoid answering Commerce's questionnaires by simply rearranging or reorganizing companies in order to evade service (internal citations omitted).¹⁰

Section 776(a)(1) of the Act states that the Department "shall use" facts available if necessary information is not available on the record. Further, section 776(a)(2) of the Act provides that the Department "shall use" facts available if it determines that an interested party withheld information requested by the Department, failed to provide such information by the deadlines for submission of the information or in the form and manner requested by the Department, or significantly impeded a proceeding. In this case, all of these factors apply. Accordingly the use of facts available is warranted in determining a weighted-average dumping margin for Trinity Pac.

B. Application of Adverse Inferences for Facts Available

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the

¹⁰ The Department notes that the Court made this determination even when the recipient was legally dissolved at the time of the attempted delivery of the questionnaire.

Department may use an inference adverse to the interests of that party in selecting the facts otherwise available.¹¹ In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, Vol. 1, 103d Cong. (1994) (SAA), explains that the Department may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹²

Although we provided Trinity Pac with notice informing it of the consequences of its failure to respond fully to our questionnaire, Trinity Pac and its directors refrained from participating in this review and failed to provide any response to our request for information.

In addition, the address Trinity Pac reported publicly for purposes of legal service proved unusable for delivery of the Department’s questionnaire for two consecutive years. Indeed, if the Department had been unable to obtain a copy of Trinity Pac’s 2008 registration documents on the record of the review, then the Department would have been unable to discern the address of two of the company’s directors and provide service at all. The failure of the directors to either accept or respond to the delivered questionnaire demonstrates a failure to cooperate by this exporter of merchandise to the United States.

We have, therefore, determined that Trinity Pac failed to cooperate to the best of its ability to comply with a request for information by the Department pursuant to section 776(b) of the Act. Consequently, in selecting from among the facts otherwise available, an adverse inference is warranted.¹³

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record.¹⁴ As AFA, we have preliminarily assigned Trinity Pac a weighted-average dumping margin of 122.88 percent, the highest rate found in the less-than-fair-value investigation.¹⁵ We applied this rate in the less-

¹¹ See *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005), and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

¹² See SAA at 870; and, e.g., *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663 (December 10, 2007).

¹³ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan*, 65 FR at 42986 (July 12, 2000) (where the Department applied total adverse facts available (AFA) because the respondent failed to respond to the questionnaire).

¹⁴ See also 19 CFR 351.308(c) and SAA at 868-870.

¹⁵ See *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122, 34125 (June 18, 2004) (*Final LTFV*).

than-fair-value investigation as well as in each successive administrative review.¹⁶ This rate achieves the purpose of applying an adverse inference, *i.e.*, it is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.¹⁷

When a respondent is not cooperative, such as Trinity Pac in this review, the Department has the discretion to presume that the highest prior dumping margin reflects the current weighted-average dumping margin.¹⁸ If this were not the case, the party would have produced current information showing its rate to be less.¹⁹ Further, by using the highest prior dumping margin, we offer the assurance that the exporter will not benefit from refusing to provide information.

Section 776(c) of the Act requires that, to the extent practicable, the Department corroborate secondary information from independent sources that are reasonably at its disposal. Secondary information is defined as “information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”²⁰ As clarified in the SAA, “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.²¹ To corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information.²² As emphasized in the SAA, however, the Department need not prove that the selected facts available are the best alternative information.²³ Further, independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review.²⁴

¹⁶ See *Final LTFV*, 69 FR at 34123-34124, *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review*, 72 FR 1982, 1983 (January 17, 2007), *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 64580 (November 16, 2007), *Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 2511, 2512 (January 15, 2009) (2006-2007 Final Results), and *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review*, 74 FR 65751 (December 11, 2009).

¹⁷ See *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010).

¹⁸ See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)).

¹⁹ See *Rhone Poulenc*, 899 F.2d at 1190.

²⁰ See SAA at 870.

²¹ See *id.*

²² See 2006-2007 Final Results and accompanying Issues and Decision Memorandum at Comment 1.

²³ See SAA at 869.

²⁴ See 19 CFR 351.308(d) and SAA at 870.

The 122.88 percent rate is derived from the petition in the investigation. Specifically, the petitioners calculated a dumping margin using a normal value and export price derived from a single large Thai producer and exporter.²⁵ In the investigation, the Department found the rate of 122.88 percent to be reliable because the rate was calculated in consideration of source documents from that large Thai producer and exporter, including a review of several other price quotes of various sizes of PRCBs commonly produced in Thailand, import statistics, and affidavits from managers of that Thai company.²⁶ With respect to the relevance aspect of corroboration, the Department determined that, because the price quote reflected commercial practices of the particular industry during the period of investigation, the information was relevant to mandatory respondents which refused to participate in the investigation.²⁷ Accordingly, the Department found the rate to be corroborated in the investigation.

The rate of 122.88 percent has been applied to other producers/exporters since the investigation. Indeed, it was affirmed by the Court of Appeals for the Federal Circuit (CAFC) in *KYD v. United States*, 607 F.3d 706, 765-767 (Fed. Cir. 2010) as corroborated for purposes of the second administrative review of the Order. For purposes of that review, the CAFC held that the rate was “well-grounded because...that margin was supported not only by the evidence submitted with the petition, but also by Commerce’s calculation of ‘high volume transaction-specific margins for cooperative companies which are both higher than the 122.88 percent petition rate and are close to that rate.’” *Id.* 607 F.3d at 766 (quoting, in part, from the CIT decision that also affirmed that rate as corroborated in the preceding, first administrative review, *Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284, 1300-01 (CIT 2008)).

Trinity Pac has not been individually examined in any of the prior segments of this proceeding. Trinity Pac provided the Department with no company-specific commercial information and no information has been presented in the current review that calls into question the relevance or reliability of this rate. Accordingly, by using information that was corroborated in the investigation and preliminarily determined to be relevant to Trinity Pac in this review, we have corroborated the AFA rate “to the extent practicable.”²⁸ We therefore preliminarily determine that the AFA rate is corroborated for purposes of this administrative review.

Preliminary Determination of No Reviewable Entries

We received timely submitted letter from TPN FlexPac Co., Ltd. (TPN), reporting to the Department that it had no exports, sales or entries of subject merchandise to the United States

²⁵ See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyethylene Retail Carrier Bags from Thailand*, 69 FR 3552, 3553-3554 (January 26, 2004) (*Prelim LTFV*) (unchanged in *Final LTFV*).

²⁶ See *id.*

²⁷ See *Prelim LTFV*, 69 FR at 3553-3554.

²⁸ See section 776(c) of the Act, 19 CFR 351.308(d), and *NSK Ltd. v. United States*, 347 F. Supp. 2d 1312, 1336 (CIT 2004) (stating, “pursuant to the ‘to the extent practicable’ language...the corroboration requirement itself is not mandatory when not feasible”).

during the POR.²⁹ We have received no comments on the submission from the domestic interested parties. We confirmed TPN's claim of no shipments by issuing a "No-Shipments Inquiry" message to CBP on December 12, 2012. Because the evidence on the record indicates that TPN did not export subject merchandise to the United States during the POR, we preliminarily determine that TPN had no shipments during the POR.

Our past practice concerning no-shipment respondents was to rescind the administrative review if the respondent certified that it had no shipments and we confirmed the certified statement through an examination of CBP data.³⁰ We would then instruct CBP to liquidate all entries of merchandise produced by the respondent at the deposit rate in effect on the date of entry. However, in our May 6, 2003, "automatic assessment" clarification, we explained that, where respondents in an administrative review demonstrated that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the cash deposit rate of the intermediary company, or if no such rate exists, at the all-others rate applicable to the proceeding.³¹ Because "as entered" liquidation instructions do not alleviate the concerns which the *Assessment Policy Notice* was intended to address, instead of rescinding the review with respect to TPN, we find it appropriate to complete the review and issue liquidation instructions to CBP concerning entries for this company following the final results of the review. If we continue to find that TPN had no shipments of subject merchandise in the final results, we will instruct CBP to liquidate any applicable entries of subject merchandise in accordance with the *Assessment Policy Notice*.³²

Rate for Non-Selected Companies

The statute and the Department's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department has limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins, or any margins based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero, *de minimis*, or based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents.

²⁹ See the letter from TPN, dated December 8, 2012.

³⁰ See 19 CFR 351.213(d)(3). See also *Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 41/2 Inches) From Japan: Final Results of Antidumping Duty Administrative Review*, 77 FR 27428, 27430 (May 10, 2012).

³¹ See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

³² See, e.g., *Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 26922, 26923 (May 13, 2010), unchanged in *Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 75 FR 56989 (September 17, 2010).

In this review, we determined a weighted-average dumping margin for Trinity Pac, the sole company that we selected for individual examination, on the basis of total AFA.

In previous cases, the Department has determined that a “reasonable method” to use when, as here, the rate of the respondent selected for individual examination is based on AFA, is to apply to those companies not selected for individual examination the average of the most recently determined rates that are not zero, *de minimis*, or based entirely on facts available (which may be from a prior review or new shipper review).³³ If any such non-selected company had its own calculated rate that is contemporaneous with or more recent than such prior determined rates, however, the Department has applied such individual rate to the non-selected company in the review in question, including when that rate is zero or *de minimis*.³⁴ However, all prior rates for this proceeding were calculated using the methodology the Department abandoned in its *Final Modification for Reviews*³⁵ pursuant to section 123 of the Uruguay Round Agreements Act. Therein, the Department stated that it will not use the prior zeroing methodology found to be WTO-inconsistent in administrative reviews with preliminary determinations issued after April 16, 2012. Consequently, we will not apply any rates calculated in prior administrative reviews to the non-selected companies in this review.

Based on this, and in accordance with the statute, we determine that a reasonable method for establishing the weighted-average dumping margin for companies not selected for individual examination in this review is to apply the all-others rate of 4.69 percent, established in the Section 129 Determination for the original antidumping investigation.³⁶ This rate was calculated based on the commercial experience of exporters of the subject merchandise during the investigation, and does not use the methodology abandoned by the Department in its *Final Modification for Reviews*.

³³ See *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 FR 52823, 52824 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 16.

³⁴ See *id.*

³⁵ See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

³⁶ See *Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Polyethylene Retail Carrier Bags From Thailand*, 75 FR 48940 (August 12, 2010) (Section 129 Determination).

RECOMMENDATION

We recommend applying the above methodology for these preliminary results.

✓

Agree

Disagree

Paul Piquado

Paul Piquado
Assistant Secretary
for Import Administration

6 MAY 2013

Date