

April 8, 2011

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

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

SUBJECT: Laminated Woven Sacks from the People's Republic of China:
Issues and Decision Memorandum for the Final Results of the
Second Antidumping Duty Administrative Review

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the second administrative review of the antidumping duty order on laminated woven sacks from the People's Republic of China ("PRC"). As a result of our analysis, no changes have been made to the Preliminary Results.¹ We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments and rebuttal comments from interested parties in this review:

General Issues

Comment 1: Decision Regarding Country of Origin

- a. Procedures in Determining Country of Origin
- b. Authority to Issue Instructions to CBP

Comment 2: Whether to Reject AMS' Case Brief

BACKGROUND:

The merchandise covered by the Order² is laminated woven sacks as described in the "Scope of the Order" section of the final results issued concurrently with this memorandum. The period of review ("POR") is August 1, 2009, through July 31, 2010. In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our Preliminary Results.

On November 3, 2010, Aifudi³, the only mandatory respondent in this administrative review, informed the Department of Commerce ("Department") of its withdrawal from this proceeding

¹ See Laminated Woven Sacks From the People's Republic of China: Preliminary Results of the Second Administrative Review, 75 FR 81218 (December 27, 2010) ("Preliminary Results").

² See Notice of Antidumping Order: Laminated Woven Sacks From the People's Republic of China, 73 FR 45941, 45942 (August 7, 2008) ("Order").

³ Zibo Aifudi Plastic Packaging Co., Ltd. ("Aifudi").

and refused to further participate.⁴ Aifudi failed to respond to the Department's questionnaire and did not place any information on the record of this review. On January 27, 2011, AMS⁵ entered an appearance into this proceeding. On the same day, AMS filed a case brief. On February 1, 2011, Petitioners⁶ filed a rebuttal brief. The Department did not hold a public hearing pursuant to 19 CFR 351.310(d), because no party requested a public hearing.

DISCUSSION OF THE ISSUES:

Comment 1: Decision Regarding Country of Origin

1a. Procedures in Determining Country of Origin

AMS' Case Brief Arguments

- In the first administrative review, the Department failed to follow administrative procedures and should have initiated a scope inquiry, given notice of initiation, allowed for comments, and given notice to importers that they may have to pay cash deposits from the date of initiation of the scope inquiry.
- Because the Department did not initiate a scope inquiry, neither AMS nor Aifudi was alerted to the possibility of cash deposits being required, and thus did not have the opportunity to stop shipments to limit their liability.

Petitioners' Rebuttal Brief Arguments

- The Department followed proper procedures.
- The Department has previously determined substantial transformation issues as part of an investigation or administrative review.
- The Court of International Trade ("CIT") has previously upheld the Department's process for determining substantial transformation and upheld the Department's authority to decide whether an official scope inquiry is the correct avenue in which to complete the analysis.⁷

Department's Position:

We continue to follow the decision made by the Department in the first administrative review and find that the correct procedures were followed when determining the country of origin of laminated woven sacks.⁸ Although 19 CFR 351.225(b) states that the Secretary may self-initiate a scope inquiry, this is only necessary if the Secretary finds that an inquiry is warranted. The Department has the authority not only to define the scope of an antidumping investigation, but also to clarify the scope of antidumping or countervailing duty orders and findings.⁹ The

⁴ See Aifudi's letter titled "Laminated Woven Sacks from China; Withdrawal from Proceeding," erroneously dated August 26, 2010 and received on November 3, 2010.

⁵ AMS Associates, Inc., operating as Shapiro Packaging ("AMS"), importer of products produced by Aifudi.

⁶ Petitioners are the Laminated Woven Sacks Committee and its individual members, Coating Excellence International and Polytex Fibers Corporation.

⁷ See *E.I. Du Pont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 858 and 860 n.5 (CIT 1998).

⁸ See *Laminated Woven Sacks From the People's Republic of China: Final Results of First Antidumping Duty Administrative Review*, 76 FR 14906 (March 18, 2011) ("*Laminated Woven Sacks First AR Final Results*") and accompanying Issues and Decision Memorandum at Comment 1a and footnote 10.

⁹ See e.g., *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007) (quoting *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)); *Mitsubishi Heavy Industries, Ltd. v. United States*, 986 F. Supp. 1428, 1433 (1997) (quoting *Minebea Co., Ltd. v. United States*, 782 F. Supp.

Department may make scope decisions within the context of an administrative review and is not limited only to formal scope inquiries.¹⁰ Therefore, self-initiation of a scope inquiry is not necessary when it is decided that the country of origin can be determined through analysis of the information on the record in conjunction with the current administrative review. Furthermore, the Department has previously made country-of-origin determinations within an administrative review without initiating a separate scope proceeding.¹¹

Regarding AMS' argument that it was not notified prior to the suspension of liquidation, we note that AMS had the opportunity to participate in both the first and second administrative reviews. However, in this administrative review, AMS chose not to participate until January 27, 2011, one month after the Preliminary Results were published and the last day for filing case briefs.¹² Moreover, AMS did not choose to participate in the first administrative review until September 20, 2010, well after the issuance of the preliminary country-of-origin memorandum on May 25, 2010, and corresponding instruction accepted by U.S. Customs and Border Protection ("CBP") on July 23, 2010.¹³ Furthermore, we note that the Department is not required to give parties any special or separate "notice" of possible cash deposit liability arising from scope issues or to provide parties with an opportunity to stop shipments. Parties are aware of both the suspension of liquidation of, and the requirement of cash deposits for, subject merchandise from the publication of the Order in the Federal Register and, thus, are aware that if a product is (or later found to be) within the scope of the Order, then they are liable for cash deposits and any duties ultimately assessed.

1b. Authority to Issue Instructions to CBP

AMS' Case Brief Arguments

- The Department lacked the authority to issue instructions to CBP in the first administrative review following the preliminary decision made in the country-of-origin memorandum.
- The Department should have waited until after the final results of the first administrative review to issue the instructions, thus giving parties a chance to comment in their case briefs.
- Precedent establishes that the Department only has the authority to issue instructions to CBP following the publication of the final determination and no other regulations permit the Department to issue instructions to CBP based solely upon a preliminary decision in an administrative review.¹⁴

117, 120 (CIT 1992)); Wheatland Tube Co. v. United States, 973 F. Supp. 149, 158 (CIT 1997); Diversified Products Corp. v. United States, 572 F. Supp. 883, 887 (CIT 1983).

¹⁰ See Mukand Int'l, Ltd. v. United States, 412 F. Supp. 2d 1312, 1320 (CIT 2005).

¹¹ See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 844 (January 6, 2010) ("Tapered Roller Bearings") and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 3; and Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 69 FR 74495 (December 14, 2004) and accompanying Issues and Decision Memorandum at Comment 4.

¹² See Letter from AMS regarding entry of appearance, dated January 27, 2011.

¹³ See Laminated Woven Sacks First AR Final Results, and accompanying Issues and Decision Memorandum at Comment 1a.

¹⁴ See Tapered Roller Bearings and accompanying Issues and Decision Memorandum at Comment 1.

- The Department’s use of the word “clarification” in the instruction sent to CBP in the first administrative review is erroneous, as a substantial transformation analysis is needed in the form of a scope inquiry to properly determine the country of origin.

Petitioners’ Rebuttal Brief Arguments

- The Department had the authority to issue the clarification instructions in the first administrative review.
- The clarification instructions only served to clarify that the merchandise in question is covered by the scope of the Order.
- Both the CIT and precedent uphold the Department’s ability to issue clarification instructions.
- The Tapered Roller Bearings case cited by AMS is inapplicable because the final determination in that case showed that substantial transformation of subject merchandise did not occur and there was no threat of circumvention or liquidation due to an importer not declaring subject merchandise.

Department’s Position:

We continue to follow the decision previously made in the first administrative review and find that the Department had the authority to issue the instructions to CBP following the preliminary decision made in the country-of-origin memorandum.

Early in the first administrative review proceeding, it was apparent that the Department needed to address a scope issue to determine the country of origin of laminated woven sacks produced in the PRC from imported woven fabric and sold to the United States by the respondent during the POR. Such an examination is akin to that made in a separate scope inquiry, which provides a mechanism for interested parties to obtain a scope decision, without having to seek an administrative review. Both proceedings provide interested parties notice and opportunity to comment. The Department’s regulations governing an administrative review, however, do not specifically address the suspension of liquidation with respect to a product whose status is subject to a scope inquiry conducted in the context of an administrative review proceeding. Accordingly, when the Department makes a scope decision within the context of the review, the regulations governing scope inquiries provide relevant guidance. See 19 CFR 351.225. These regulations provide that the Department may order the suspension of liquidation of a product found to be included within the scope of an order to continue or to commence, as the case may be, following a preliminary scope determination. See 19 CFR 351.225(1)(2). The provision for suspension of liquidation is to preserve the ability to assess appropriate duties on the subject merchandise in the future. Therefore, consistent with the regulations governing scope inquiries, when making a scope decision in the context of an administrative review, the Department has the authority to issue instructions to CBP regarding the suspension of entries, as appropriate, after issuing a preliminary country of origin or scope decision conducted within that segment.

The Department notes that in order to prevent subject merchandise from being liquidated without regard to antidumping or countervailing duties and in order to ensure the collection of appropriate cash deposits on laminated woven sacks manufactured in the PRC, the Department issued an instruction to CBP to resolve confusion that might arise from differences between the Department’s and CBP’s respective country-of-origin classifications. Although no additional suspension of liquidation would normally be needed, as explained in 19 CFR 351.225(1), in this instance the Department issued an instruction to prevent liquidation of merchandise properly

subject to the Order and to implement the findings in its preliminary country-of-origin memorandum. We do not find the Tapered Roller Bearings case to be informative, as there is no discussion in that case of the Department's authority or need for suspension of liquidation. Therefore, notwithstanding Tapered Roller Bearings, the Department's issuance of instructions to CBP in this case, after a preliminary scope decision, was a reasonable exercise of its authority to properly administer and enforce the Order and prevent the liquidation of entries that are preliminarily found to be covered by the scope of the Order.

Finally, the Department notes that interested parties had ample opportunity to comment on the preliminary country-of-origin memorandum, as the memorandum was placed on the record approximately four months prior to the preliminary results of the first administrative review. In addition, because the preliminary country-of-origin decision was also announced in the preliminary results of the first administrative review¹⁵, interested parties had further opportunity to comment on the memorandum and related issues in their case briefs in that segment.

Comment 2: Whether to Reject AMS' Case Brief

Petitioners' Rebuttal Brief Arguments

- Following the precedent set by Deseado, which was confirmed by the CIT and upheld by the Federal Circuit, the Department should disregard or reject AMS' case brief on the basis that it improperly seeks to collaterally challenge a determination from a separate segment of this proceeding.¹⁶
- Any alleged impact by the Department's actions in the first administrative review on entries of laminated woven sacks during the second POR does not distinguish this case from any proceeding where agency action in one segment affects entries covered by another segment, which is common with scope issues.
- Judicial review of the record of this segment would not be possible in the future as no facts or legal arguments concerning the issues raised in AMS' case brief are on the record.

Department's Position

The Department has determined that it is not appropriate to reject AMS' case brief. AMS neither challenges the factual basis for the country-of-origin decision made in the first administrative review nor refutes the Department's determination in the first review to include Aifudi in the PRC-wide entity and assign an adverse facts available rate to the PRC-wide entity. Rather, AMS raises procedural arguments in this review and references publicly available information. Furthermore, the Department does not agree with Petitioners that AMS' challenge to the Department's determination in the first administrative review is akin to the improper collateral challenge addressed in Deseado. Unlike in Deseado, where a respondent sought to challenge a determination made in a prior segment of the proceeding to which it was not a party, AMS participated in both the first and second administrative reviews of this proceeding.

RECOMMENDATION

¹⁵ See Laminated Woven Sacks From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 75 FR 55568 (September 13, 2010).

¹⁶ See Deseado International, Ltd. v. United States, 602 F. Supp. 2d 1360 (CIT 2009), affirmed 600 F.3d 1377 (Fed. Cir. 2010) ("Deseado").

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

AGREE _____

DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date