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International Trade Administration
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June 4, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum: Administrative Review of
Honey from the People's Republic of China: Final Rescission of
Antidumping Duty Administrative Review

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the ninth administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC"). As a result of our analysis, we have not made changes to the preliminary finding regarding Honey from the People's Republic of China: Preliminary Rescission of the Administrative Review, 77 FR 79 (January 3, 2012) ("Preliminary Rescission") by the Department of Commerce ("Department"). We recommend that you approve the positions described in the "Discussion of the Issue" section of this Issues and Decision Memorandum. Below is a discussion of the issue in this antidumping duty administrative review for which we received comments and rebuttal comments from interested parties:

DISCUSSION OF THE ISSUE:

Company Specific Issues:

Comment 1: Bona Fide Analysis of Dongtai Peak's Sales

Comment 2: Validity of the Company Certification Provided by the Resale Customer

Comment 3: Alleged Undisclosed U.S. Affiliate D.T. Peak

BACKGROUND

The merchandise covered by the order is honey as described in the “Scope of the Order” section of the Final Rescission.¹ The period of review (“POR”) is December 1, 2009, through November 30, 2010. In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our Preliminary Rescission. On February 8, 2012, Dongtai Peak and Petitioners² both filed case briefs. On February 21, 2012, both Dongtai Peak Honey Industry Co., Ltd. (“Dongtai Peak”) and Petitioners filed rebuttal briefs.

Discussion of the Issues:

Comment 1: Bona Fide Analysis of Dongtai Peak’s Sales

Dongtai Peak’s Arguments:

- The proper evidentiary standard upon which the Department should base its conclusions is that of “substantial evidence,”³ which is defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴
- The Department failed to explain in its Preliminary Rescission why it disregarded the other evidence and factors of the bona fide sales analysis outlined in TTPC⁵ (such as the quantity and value (“Q&V”) of the sales) as it is required to by Court of International Trade (“CIT”) in Ethyl Corp.⁶
- TTPC states price is the critical factor of the bona fide analysis test, which “cannot necessarily be offset by a recitation of other factors by which the sale could be considered typical...”⁷ The record demonstrates that the prices, quantities, timing, transaction expenses and profits with Dongtai Peak’s sales were reflective of normal business practices, and the Department did not articulate any reasoning to the contrary in the Preliminary Rescission or Prelim Bona Fide Memo.⁸
- The CIT in New Donghua only established that the Department may consider the business practices of the U.S. customer (i.e., the importer), but the business practices of the importer’s

¹ See Honey from the People’s Republic of China: Final Rescission of Antidumping Duty Administrative Review, published concurrently with this memorandum (“Final Rescission”).

² The American Honey Producers Association and Sioux Honey Association, collectively “Petitioners.”

³ See Dongtai Peak Case Brief dated February 8, 2012, (“Dongtai Peak Case Brief”) at 5, citing Fujitsu Gen. Ltd. v. United States, 88 F. 3d 1034, 1038 (Fed. Cir. 1996).

⁴ See id. at 5, citing Slater Steels Corp. v. United States, Consol Ct. No. 02-00551, Slip. Op. 05-137 at 3 (Ct. Int’l Trade October 20, 2005).

⁵ See Dongtai Peak Case Brief at 5-6, citing Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States, 366 F. Supp. 2d 1246, 1249-50 (CIT 2005) (“TTPC”).

⁶ See id. at 6, citing Ethyl Corp. v. Environmental Protection Agcy., 541 F. 2d 1, 36 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976) (“Ethyl Corp.”) at 36.

⁷ See id. at 6.

⁸ See Memorandum to James C. Doyle, Director, Office 9; through Catherine Bertrand, Program Manager; from Josh Startup, International Trade Compliance Analyst; regarding Antidumping Duty Administrative Review of Honey from the People’s Republic of China: Bona fide Analysis of the Sales Under Review for Dongtai Peak Honey Industry Co., Ltd. (dated December 23, 2011) (“Prelim Bona Fide Memo”).

customer are not a factor to be considered. Therefore, Dongtai Peak's importer's customer's business practices should not be considered in the Department's bona fide analysis.⁹

- There was nothing unusual or irregular about Dongtai Peak's importer's business practices, and, therefore, the Department cannot rely on its observations concerning the importer in its bona fide analysis.
- In the antidumping analysis, the relevant business transaction is that to the first unaffiliated purchaser. Extending the analysis to further downstream customers places an undue burden on respondents and is an abuse of discretion in violation of 5 U.S.C. 706(2)(A) and 706(2)(c), because the Department has not articulated a rational basis for extending its analysis downstream from the first unaffiliated purchaser.
- Imported honey is processed honey, not raw honey, and does not need to be re-processed or re-packed for consumption, especially for consumption by industrial and commercial food/beverage manufacturers.
- The Department failed to articulate a rational connection between its observations about Dongtai Peak's U.S. sales and the channels of trade of the honey in its bona fide analysis, and there is no evidence that it is typical for only one broker to be involved in imported honey channels of trade.

Petitioners' Arguments:

- "Substantial evidence" is the proper evidentiary standard and has been defined to mean "more than a mere scintilla" such that a "reasonable mind might accept as adequate to support a conclusion."¹⁰
- The Department did not need to examine other factors of the bona fide analysis test because it found there was substantial evidence, based on the highly unusual business practices of the importer and its customer, that the sales would be non-bona fide even if the other factors appeared typical.
- TTPC allows the Department to consider any factor it finds relevant and weigh each factor based on the circumstances in each case.¹¹ None of the cases cited by Dongtai Peak dictates the Department must consider criteria such as price in every case. To do so would dictate the weight of that factor which the Department has the exclusive power to determine.
- Dongtai Peak made no detailed arguments in its case brief or rebuttal brief demonstrating how other factors such as Q&V support its claim of a bona fide sale, and therefore its argument must fail.¹²
- The unusual business practices of Dongtai Peak's importer and resale customer, such as failing to follow local and state registration requirements, the inability to account for the honey, and the unusual channels of trade, are atypical business practices.
- Given the unusual circumstances surrounding the business practices of both the importer and resale customers, it was reasonable for the Department to investigate the resale customer in order to determine the disposition of the honey.

⁹ See id. at 6, citing Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1343-44 (CIT 2005) ("New Donghua").

¹⁰ See Petitioners' Rebuttal Brief dated February 21, 2012 ("Petitioners' Rebuttal Brief") at 10, citing Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 985 (Fed. Cir. 1994).

¹¹ See Petitioners' Rebuttal Brief at 8, citing TTPC, 366 F. Supp. 2d at 1250 and 1263.

¹² See id. at 11, citing 19 CFR 351.309(C)(2).

- The record demonstrates that the normal channels of trade for all processed honey is through packers, and there are not multiple layers of brokers between legitimate honey imports and packers, as is the case with Dongtai Peak's sales. According to the International Trade Commission ("ITC"), honey brokers which purchase honey, regardless of raw or processed, purchase honey directly from international sources and maintain agent relationships with independent packers, but neither Dongtai Peak's importer or resale customer have shown such relationships here.¹³

Department's Position:

As explained in the Prelim Bona Fide Memo, the Department uses a "totality of the circumstances" analysis to determine whether a sale¹⁴ in a review is unrepresentative or extremely distortive.¹⁵ In doing so, the Department looks to whether or not the transaction is "commercially unreasonable" or "atypical,"¹⁶ meaning unrepresentative of normal business practices.¹⁷ Regarding the factors used in our bona fide analysis we explained that:¹⁸

"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.¹⁹ In TTPC, the court affirmed the Department's practice of considering that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant,"²⁰ and found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale."²¹ The Court stated that the Department's practice makes clear that the Department is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order."²²

¹³ See id. at 46, citing Honey From Argentina and China, Inv. Nos. 701-TA-402 and 731-TA-892 and 893 (Review), USITC Pub. 3929 (June 2007) at I-19.

¹⁴ The Department's bona fide analysis is not strictly limited to cases where the exporter has made only one sale. See e.g., Administrative Review of Honey from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review, In Part, 75 FR 24880 (May 6, 2010), and accompanying Issues and Decision Memorandum.

¹⁵ See Glycine From The People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd., 69 FR 47405, 47406 (August 5, 2004).

¹⁶ See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439, 1440 (January 10, 2003).

¹⁷ See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1339 (CIT 2005) ("New Donghua"), citing Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1313 (CIT 2002); see also TTPC, 366 F. Supp. 2d at 1249-50.

¹⁸ See Prelim Bona Fide Memo at 2.

¹⁹ See New Donghua, at 1340, n.5, citing TTPC, 366 F. Supp. 2d at 1260, and 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.

²⁰ See TTPC, 366 F. Supp. 2d at 1250.

²¹ See id. at 1263.

²² See New Donghua, 374 F. Supp. 2d at 1339.

The Department agrees with Dongtai Peak that it should consider all the evidence on the record pertaining to the bona fide nature of the sales under review including price and quantity. Due to the proprietary nature of this analysis, the details are discussed in an accompanying memorandum.²³ In this case we find the evidence pertaining to price is inconclusive and the evidence pertaining to quantity does not weigh against finding the sales bona fide.²⁴ However, in the end, and based on the totality of evidence pertaining to these sales, the Department finds that the overwhelming weight of evidence pertaining to the unusual business practices outweighs the evidence pertaining to quantity. That is, and as described in more detail below, the businesses practices are so unusual that these sales are not indicative of Dongtai Peak's future selling behavior.

Business Practices of the Importer and Resale Customer

Licensing Issues

We note Dongtai Peak's rebuttal arguments to the Department's analysis of the licensing issues surrounding its importer and resale customer.²⁵ Because of the BPI nature of certain of Dongtai Peak's arguments, we address those arguments in the Final Bona Fide Memo.²⁶

Dongtai Peak's Other Rebuttals Regarding the Business Practices of the Importer

Dongtai Peak argues that the Department failed to explain how its rationale for finding other issues surrounding the importer were indicative of non-bona fide sales. Because of the BPI nature of Dongtai Peak's arguments, we address those arguments in the Final Bona Fide Memo.²⁷

Petitioners' Other Evidence of the Resale Customers' Unusual Business Practices

Petitioners argue that other business practices of the resale customer are highly unusual and indicative of non-bona fide sales.²⁸ Because of the BPI nature of certain of Petitioners' arguments, we address those arguments in the Final Bona Fide Memo.²⁹

Alleged Relationship Between D.T. Peak and the Resale Customer

Regarding Petitioners' contention that there is a relationship between the resale customer and D.T. Peak,³⁰ we find this issue moot because we have not determined that an affiliation exists

²³ See Memorandum to James C. Doyle, Director, Office 9, Import Administration, from Josh Startup, International Trade Specialist, Office 9, through Catherine Bertrand, Program Manager, Office 9; regarding Antidumping Duty Administrative Review of Honey from the People's Republic of China: Final Bona Fide Analysis of the Sales Under Review for Dongtai Peak Honey Industry Co., Ltd., dated June 11, 2012. ("Final Bona Fide Memo") at 5. This memorandum also discusses extenuating circumstances which are proprietary pertaining to the availability of the sole officer of the resale customer. *Id.* at 4-6.

²⁴ *Id.* at 5.

²⁵ See Dongtai Peak Case Brief at 10-12.

²⁶ See Final Bona Fide Memo at 2.

²⁷ See Final Bona Fide Memo at 2.

²⁸ See Petitioners' Rebuttal Brief at 40-3.

²⁹ See Final Bona Fide Memo at 3.

³⁰ See *id.* at 43-5.

between Dongtai Peak and D.T. Peak, as discussed below. Additionally, we note that Petitioners have argued that the importer's resale price presented an unrealistic risk for the importer in light of the potential antidumping duties it could owe and are evidence of non-arms-length transactions.³¹ However, the Department has stated in previous decisions that it will not factor antidumping duties into its price analysis because the question is not what the U.S. price should be, but whether the price is an artificial one, largely for purposes of establishing a new cash deposit rate.³²

Relevancy of Analysis of the Resale Customer

Regarding Dongtai Peak's argument that that Department's analysis may not extend to the resale customer, we again note that TTPC allows the Department to examine any factor which it finds relevant to determining whether the sale under consideration is typical of those which the exporter will make in the future, and in the past the Department has found the inability of importers to prove that subject merchandise was resold to be evidence of a non-bona fide transaction.³³ Additionally, while in New Donghua the Court stated the Department may examine the business practices of the importer, it did not preclude the Department from extending its analysis downstream to the resale customer. In this case in order to determine the ultimate disposition of the honey we examined the sale to the importer's resale customer, and in doing so, analyzed its business practices as we had for the importer. The need to determine the ultimate disposition of the honey provided the basis for the examination of the resale customer and its business practices. In this case, we found that the resale customer was not able to provide any documentation on what happened to any of the honey under review.³⁴ We also found that the resale customer's business licensing irregularities, the fact that it had stopped operations, and the fact that it could not locate any of its business documents to be unusual business practices.³⁵

It is reasonable for the Department to consider these facts because they are indicative of whether Dongtai Peak's sales of honey during this POR are indicative of its future selling behavior. As noted in the Prelim Bona Fide Memo, the Department has in the past found the inability of importers to prove that subject merchandise was resold to be evidence of a non-bona fide transaction.³⁶ In this case the importer has resold the merchandise, however, the resale customer has been unable to demonstrate that it has resold the merchandise or even where the merchandise is currently located.³⁷ An exporter selling all of its U.S. merchandise within a sales chain resulting in no party being able to account for the ultimate disposition of any of the merchandise,

³¹ See Petitioners' Rebuttal Brief at 4 and 28.

³² See, e.g., Glycine From The People's Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd., 69 FR 47405 (August 5, 2004), and accompanying memorandum To: James J. Jochum, Assistant Secretary for Import Administration, From: Gary Taverman, Acting Deputy Assistant Secretary for Import Administration, Group I, Subject: The Bona Fides Analysis for Hebei New Donghua Amino Acid Co., Ltd.'s Sale in the New Shipper Review of Glycine from the People's Republic of China, at 12-13.

³³ See Uncovered Innerspring Units From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review, 76 FR 80337 (December 23, 2011).

³⁴ See Dongtai Peak's submission re-filed on December 23, 2011 at 2.

³⁵ See Prelim Bona Fide Memo at 4, and Final Bona Fide Memo at 2-3.

³⁶ See Prelim Bona Fide Memo at 4-5, citing Uncovered Innerspring Units From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review, 76 FR 80337 (December 23, 2011).

³⁷ See Dongtai Peak submission dated November 28, 2011 at 2.

is not indicative of the exporter's future selling behavior because there is no basis to conclude that this sales chain can or would be replicated in the future.

Furthermore, as discussed in the Prelim Bona Fide Memo, the honey would normally be sold to a packer for distribution to the consumer market.³⁸ While Dongtai Peak argues that the "Department has no idea whether or not a 'packer' was or was not ultimately involved in the chain of distribution,"³⁹ that is precisely the issue that makes this chain of transactions unusual. Further, while Dongtai Peak argues that it is not "abnormal" for honey to go through more than one broker,⁴⁰ it has not provided any evidence to support its claim, nor demonstrated that a packer was ever a part of the chain of transactions. Here, the honey was sold to both the importer and resale customer without any evidence that either entity was a honey packing operation.⁴¹ Indeed the importer does not appear to have ever before participated in the honey industry.⁴² These facts further demonstrate the atypical nature of the sales at issue. Thus, these sales are not bona fide and cannot serve as a proper basis for a dumping determination.

While any one of these irregularities taken in isolation might not necessarily lead to us to find highly atypical business practices, when taken as a whole and analyzed in the context of the totality of the circumstances--including, but not limited to, the fact that the Department has not been able to determine the ultimate disposition of any of the honey from any of the sales and the licensing irregularities of both the importer and resale customer--they are highly unusual compared to how a company would carry out its normal course of business, and provide substantial evidence of non-bona fide sales. We also note that Dongtai Peak did not directly address the fact that the ultimate disposition of the honey under review is unknown. We reiterate that this was a key element we took into consideration of the totality of the circumstances because, as stated above, without evidence the merchandise ended up being sold to an unaffiliated customer in a bona fide manner, the Department has no basis from which to determine these sales are indicative of bona fide future selling practices. Here, the highly unusual business practices of the importer and resale customer, including licensing issues and the unknown ultimate disposition of the honey, make it impossible for the Department to conclude that the sales under review are indicative of Dongtai Peak's future selling behavior.

In sum, given the totality of the circumstances surrounding Dongtai Peak's U.S. sales, the licensing inconsistencies surrounding the importer and resale customer and the fact that the ultimate disposition of the honey is unknown, the Department continues to find, as we did in the Preliminary Rescission, that Dongtai Peak's POR sales are not bona fide commercial transactions. Therefore, we will rescind the review.

³⁸ See Prelim Bona Fide Memo at 5, and Petitioners' submission dated October 14, 2011, at Exhibit 15; see also Honey from Argentina and China, at I-19.

³⁹ See Dongtai Peak case brief at 17.

⁴⁰ See id.

⁴¹ See Dongtai Peak's submission dated November 21, 2011, at 4-5, stating that the importer's office is a business office. See also Dongtai Peak's submission submitted November 28, 2011, at 3, stating the resale customer's office is only a business office.

⁴² See Dongtai Peak's submission dated May 19, 2011, at 12, where the owner of the importer explains that Dongtai Peak was the first and only company from which it purchased honey.

Comment 2: Validity of the Company Certification Provided by the Resale Customer

Petitioners' Arguments:

- The certification provided by the resale customer is not valid under 19 CFR 351.303(g) which requires submissions to be certified by an officer or employee of the company. The certification provided by the resale customer in this instance was not signed by an officer or employee of the company, and instead was signed by someone with no legal or operational role within the company. Therefore this submission should not be taken into consideration for the Department's analysis.
- The resale customer's inability to provide a properly certified questionnaire response when asked to do so by the Department precludes the Department from being able to find Dongtai Peak's sales bona fide.

Dongtai Peak's Arguments:

- The purpose of 19 CFR 351.303(g) is to ensure the signer of the company certification has the knowledge to vouch for the truthfulness of the information contained in the submission.
- While the certifier in this instance was not actually employed by the resale customer, he was able to communicate with the sole manager of the company as her medical guardian and was able to obtain certain information concerning the operation of the company while the sole manager was still able to communicate.
- In a recent court case, the Court found that if the Department construes its regulation in all cases to exclude non-payroll principles, it could make certification of factual submissions impossible for some companies.⁴³

Department's Position:

Due to the extenuating circumstances of this particular case, the Department has determined that it will exercise its discretion to make a reasonable accommodation and accept the submission of the resale customer with a non-employee certification under 19 CFR 351.303(g). Because of the BPI nature of the underlying facts, we address those in the Final Bona Fide Memo.⁴⁴

The Department finds that it is possible for the certifier to obtain certain knowledge from the sole manager even if the manager was in the care of a medical guardian. Therefore, given the extenuating circumstances of this case, and consistent with the intent of the Department's regulations, we will accept the certification.

Comment 3: Alleged Undisclosed U.S. Affiliate D.T. Peak

Petitioners' Arguments:

- Dongtai Peak has an undisclosed affiliate in Texas, D.T. Peak. Evidence on the record demonstrates that Liang Tao is both Dongtai Peak's managing director and shareholder, and was the managing director of D.T. Peak from October 2005 to May 21, 2010.⁴⁵ Therefore,

⁴³ See Hebei Foreign Trade and Advertising Corp. v. U.S., 807 F.Supp.2d 1317 (2011) at 1322.

⁴⁴ See Final Bona Fide Memo at 3-4.

⁴⁵ See Petitioners' Case Brief at 8-9.

Dongtai Peak and D.T. Peak are affiliated within the meaning of 19 U.S.C. 1677(33)(F) (2010) because they are controlled by the same person.⁴⁶

Dongtai Peak's Arguments:

- Petitioners' claim that Dongtai Peak and D.T. Peak are affiliated is based on one D.T. Peak document allegedly signed by Liang Tao, the general manager and shareholder of Dongtai Peak, which Dongtai Peak has rebutted with handwriting experts. All of Petitioners' other claims regarding affiliations between D.T. Peak, Dongtai Peak and National Commodities were created by Petitioners without any support from the evidence on the record.⁴⁷

Department's Position:

We do not find it necessary to reach a determination on whether or not Dongtai Peak and D.T. Peak were affiliated during this POR because this issue is rendered moot by our finding that Dongtai Peak's sales during this POR were non-bona fide. While we agree with Petitioners that the possibility of drawing inconsistent conclusions from evidence on the record does not prevent the Department from making a determination, the Department is also not compelled to make a determination on evidence when one is not required.

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 review in the Federal Register.

AGREE ✓ DISAGREE _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

4 JUNE 2012
Date

⁴⁶ For Petitioners' complete argument on this issue, see Petitioners' Case Brief at 8-43.

⁴⁷ For Dongtai Peak's complete argument on this issue, see Dongtai Peak's Rebuttal Brief at 3-10.