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International Trade Administration
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April 30, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
Antidumping Duty Administrative Review: Certain Cased Pencils
from the People's Republic of China; 2012-2013

SUMMARY

We analyzed the case and rebuttal briefs submitted by interested parties in the administrative review of the antidumping duty order on certain cased pencils (pencils) from the People's Republic of China (PRC) covering the period December 1, 2012, through November 30, 2013. We recommend that you approve the positions we have developed in the *Discussion of the Issues* section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties:

Comment 1 Whether Rongxin is Entitled to a Separate Rate

Comment 2 Whether Dixon is a U.S. Manufacturer of Pencils, and, therefore, Entitled to Request an Administrative Review of Rongxin

BACKGROUND

On December 31, 2014, the Department of Commerce (Department) published the preliminary results and the partial rescission of the administrative review of the antidumping duty order on pencils from the PRC.¹ We invited interested parties to comment on the *Preliminary Results*. We received a case brief from Shandong Rongxin Import & Export Co., Ltd. (Rongxin) on February 2, 2015.² The Dixon Ticonderoga Company (Dixon) submitted a rebuttal brief on February 4, 2015.³

SCOPE OF THE ORDER

Imports covered by this order are shipments of certain cased pencils of any shape or dimension (except as described below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of the order are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the order are pencils with all of the following physical characteristics: (1) length: 13.5 or more inches; (2) sheath diameter: not less than one-and-one quarter inches at any point (before sharpening); and (3) core length: not more than 15 percent of the length of the pencil.

In addition, pencils with all of the following physical characteristics are excluded from the scope of the order: novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches in circumference, composed of turned wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end.

Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

¹ See *Certain Cased Pencils From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission; 2012–2013*, 79 FR 78795 (December 31, 2014) (*Preliminary Results*) and accompanying “Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission: Certain Cased Pencils from the People’s Republic of China; 2012—2013” (Preliminary Decision Memorandum). Based on the timely withdrawal of the request for review of Orient International Holding Shanghai Foreign Trade Co., Ltd. (SFTC), we rescinded the review of SFTC.

² See letter from Rongxin, “Certain Cased Pencils from the People’s Republic of China: Rongxin Case Brief” dated February 2, 2015 (Rongxin Case Brief).

³ See letter from Dixon, “Certain Cased Pencils from the People’s Republic of China; Petitioner’s Rebuttal Brief” (Dixon Rebuttal Brief) dated February 4, 2015.

SEPARATE RATE/PRC-WIDE ENTITY

In the *Preliminary Results*, the Department determined that Rongxin was not eligible for a separate rate because it did not satisfy the criteria demonstrating an absence of *de jure* and *de facto* government control.⁴ Thus, we determined that it is part of the PRC-wide entity.⁵

Therefore, while the Department conducted this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (Act), we assigned to Rongxin the PRC-wide entity rate of 114.90 percent, the highest rate determined for the PRC-wide entity in this proceeding.⁶ Because this rate is the same as the PRC-wide rate from previous segments in this proceeding and nothing on the record of this review calls into question the reliability of the PRC-wide rate, we find it appropriate to continue to apply the rate of 114.90 percent to Rongxin.⁷

DISCUSSION OF THE ISSUES

Comment 1: Whether Rongxin is Entitled to a Separate Rate

Rongxin's Arguments

Rongxin argues that the Department incorrectly found that it did not meet the Department's *de facto* test regarding government control over its export pricing. Rongxin claims that, in its Preliminary Separate Rate Memorandum, the Department incorrectly noted that the Shandong International Trade Group (SITG), the government-owned company which owns a majority of Rongxin,⁸ has the ability to designate all the members of Rongxin's board of directors.⁹ Rongxin maintains that this is inaccurate, that SITG can only nominate one of the six directors.¹⁰ Rongxin further explains that its board members are elected by its 11 shareholders, which consist of SITG and 10 employees of Rongxin.¹¹ Rongxin contends the one SITG-appointed director can cast only one vote despite SITG's majority shareholding.¹²

⁴ See Preliminary Decision Memorandum and "Preliminary Separate Rate Analysis Memorandum for Shandong Rongxin Import & Export Co., Ltd." dated December 12, 2014 (Preliminary Separate Rate Memorandum).

⁵ *Id.*

⁶ See Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: *Certain Cased Pencils from the People's Republic of China*, 67 FR 59049 (September 19, 2002).

⁷ The Department's change in policy regarding conditional review of the PRC-wide entity is not applicable to this administrative review. See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65970 (November 4, 2013) (applying the change in policy in antidumping administrative reviews for which the opportunity notice to request a review was published after December 3, 2013).

⁸ For proprietary details about the government ownership of SITG, see Preliminary Separate Rate Memorandum and "Final Separate Rate Analysis Memorandum for Shandong Rongxin Import & Export Co., Ltd." dated April 30, 2015 (Final Separate Rate Memorandum).

⁹ See Rongxin Case Brief at 1.

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 7.

Rongxin notes that the Department found that Rongxin was not entitled to a separate rate based on both *de jure* and *de facto* considerations outlined in the Preliminary Decision Memorandum, pursuant to the reasoning outlined in the Preliminary Separate Rate Memorandum. Rongxin claims, however, that the Preliminary Separate Rate Memorandum discusses only why Rongxin does not meet the Department's *de facto* standard, but did not discuss how record evidence supports a conclusion that Rongxin was under *de jure* government control. Rongxin argues that the Department cannot state that Rongxin failed to meet any of its *de jure* tests because the Department did not find any of the following: 1) restrictive stipulations associated with Rongxin's business and export licenses; 2) legislative enactments centralizing control over Rongxin by the government; and 3) formal measures centralizing control of Rongxin by the government.

Rongxin alleges that the Department's decision was not based on substantial evidence on the record. Rongxin stipulates that the Department must make its decisions based on a fair and balanced comparison of the data. In support, Rongxin cites *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556 (Fed. Cir. 1984) at 1562, in which the Federal Circuit ruled that "substantial evidence" must be measured by the record as a whole, "including whatever fairly detracts from the substantiality of the evidence." Rongxin also cites *Yancheng Baolong Biochemical Products Co., Ltd. v. United States*, 406 F.3d 1377, 1380 (Fed. Cir. 2005) (*Yancheng Baolong Biochemical*), regarding its claim that the Department made a clear error in its understanding of the facts. In *Yancheng Baolong Biochemical*, Rongxin claims, the Court ruled that "an abuse of discretion will be found when there is an error in law, a clear error of judgment, or findings that were clearly erroneous." Rongxin contends that the Department made a clear error in its facts in this review and, therefore, its findings were erroneous.

For the reasons outlined above, Rongxin concludes that the Department's entire premise for denying Rongxin a separate rate is invalid and that, in the final results, Rongxin should receive a separate rate.

Dixon's Arguments

Dixon contends that the Department was correct in concluding that Rongxin does not qualify for a separate rate because Rongxin failed to demonstrate absence of *de jure* and *de facto* government control. Dixon claims that the fact that the Department incorrectly stated that SITG has the ability to designate all of Rongxin's board of directors is irrelevant. According to Dixon, the Department did reach the proper conclusion in the *Preliminary Results*. Dixon states that, according to antidumping and countervailing duty regulations and Department policy, the fact that SITG can nominate even one member of the board of directors demonstrates both *de jure* and *de facto* government control. Dixon believes that the Department should follow its analysis in *Pneumatic Off-The-Road Tires from the PRC* in which it concluded that "where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises or has the potential to exercise control over the company's operations generally, which may include control

over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate.”¹³

Dixon claims that Rongxin has not met its burden to rebut the presumption of *de jure* or *de facto* government control and that Rongxin in its case brief fails to provide evidence that Rongxin met any of the requirements demonstrating an absence of *de jure* government control. Dixon alleges that, although SITG nominates only one of Rongxin’s six directors and SITG is only one of the 11 shareholders of Rongxin, this is significant in effect and sufficient to establish *de facto* government control. Dixon contends that Rongxin’s board of directors makes critical decisions, including appointing and dismissing the top executives of Rongxin and the fact that SITG is involved in this process is significant. Dixon claims that Rongxin’s Articles of Association give its shareholders, including SITG, substantial influence in its operations. Dixon believes that the fact that SITG is involved in these critical decisions is enough to demonstrate that Rongxin fails the absence of *de facto* government control test because it is unable to prove its autonomy from government control in the selection of management.

Dixon contends that if the Department determines that Rongxin is entitled to a separate rate, the Department should issue supplemental questionnaires, conduct verification, and revise the preliminary results.

Department’s Position: As we stated in the *Preliminary Results*, in proceedings involving non-market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate. It is the Department’s policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company-specific rate, the Department analyzes each exporting entity in an NME country under the test established in *Sparklers*,¹⁴ as further developed in *Silicon Carbide*.¹⁵ In accordance with this separate rates test, the Department assigns separate rates to respondents in NME proceedings if respondents demonstrate the absence of both *de jure* and *de facto*

¹³ See *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 61291 (October 10, 2014) and accompanying Decision Memorandum at 9 (*Pneumatic Off-The-Road Tires from the PRC*), unchanged in *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015).

¹⁴ See *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*).

¹⁵ See *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585, 22586-89 (May 2, 1994) (*Silicon Carbide*).

government control over their export activities.¹⁶

The Department continues to evaluate its practice with regard to the separate rates analysis in light of the *Diamond Sawblades from the PRC* antidumping duty proceeding, and the Department's determinations therein.¹⁷ In particular, we note that in litigation involving the diamond sawblades proceeding, the U.S. Court of International Trade found the Department's existing separate rates analysis deficient in the specific circumstances of that case, in which a government-controlled entity had significant ownership in the respondent exporter.¹⁸ Following the Court's reasoning, in recent proceedings, we have concluded that where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations generally.¹⁹ This may include control over, for example, the selection of management, a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company.

¹⁶ See, e.g., *Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles From the People's Republic of China*, 72 FR 52355, 52356 (September 13, 2007); *Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the Fourth New Shipper Review and Rescission of the Third Antidumping Duty Administrative Review*, 66 FR 1303, 1306 (January 8, 2001), unchanged in *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of Fourth New Shipper Review and Rescission of Third Antidumping Duty Administrative Review*, 66 FR 27063 (May 16, 2001); *Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China*, 64 FR 71104 (December 20, 1999).

¹⁷ See *Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People's Republic of China* (May 6, 2013) in *Advanced Technology & Materials Co., Ltd. v. United States*, 885 F. Supp. 2d 1343 (CIT 2012), affirmed in *Advanced Technology & Materials Co., Ltd. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013). This remand redetermination is on the Enforcement and Compliance website at <http://enforcement.trade.gov/remands/12-147.pdf>. ("DSB Remand"). See also *Diamond Sawblades and Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 77098 (December 20, 2013) and accompanying Preliminary Decision Memo at 7, unchanged in *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014) and accompanying Issues and Decision Memorandum at Comment 1.

¹⁸ See, e.g., *Advanced Technology & Materials Co., Ltd. v. United States*, 885 F. Supp. 2d 1343, 1349 (CIT 2012) ("The court remains concerned that Commerce has failed to consider important aspects of the problem and offered explanations that run counter to the evidence before it."); *id.* at 1351 ("Further substantial evidence of record does not support the inference that SASAC's {State-owned Assets Supervision and Administration Commission} 'management' of its 'state-owned assets' is restricted to the kind of passive-investor de jure 'separation' that Commerce concludes.") (footnotes omitted); *id.* at 1355 ("The point here is that 'governmental control' in the context of the separate rate test appears to be a fuzzy concept, at least to this court, since a 'degree' of it can obviously be traced from the controlling shareholder, to the board, to the general manager, and so on along the chain to 'day-to-day decisions of export operations,' including terms, financing, and inputs into finished product for export."); *id.* at 1357 ("AT&M itself identifies its 'controlling shareholder' as CISRI {owned by SASAC} in its financial statements and the power to veto nomination does not equilibrate the power of control over nomination.") (footnotes omitted).

¹⁹ See *Carbon and Certain Alloy Steel Wire Rod From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part*, 79 FR 53169 (September 8, 2014) and accompanying Preliminary Decision Memorandum at 5-9.

Rongxin correctly notes that, in the *Preliminary Results*, the Department's separate rate analysis did not fully address the absence of *de jure* government control.²⁰ Upon further examination of Rongxin's responses, the Department finds that the evidence provided by the company demonstrates an absence of *de jure* government control based on the following: (1) an absence of restrictive stipulations associated with the individual exporters' business and export licenses; (2) the existence of applicable legislative enactments decentralizing control of the companies; and (3) the implementation of formal measures by the government decentralizing control of Chinese companies.²¹

However, as we stated in the *Preliminary Results*, the Department also considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and, (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.²²

Upon further review of Rongxin's submissions, and for the reasons explained below, the Department continues to find that Rongxin has not demonstrated an absence of *de facto* government control, and is therefore not entitled to a separate rate.

Rongxin is majority-owned by SITG, which is wholly-owned by the State-owned Assets Supervision & Administration Commission (SASAC).²³ Although SITG directly names only one of six directors, each director retains some power to make decisions with regard to key managers, and, therefore influences the day to day functions of the company.²⁴ Additionally, because the board of directors is elected by the shareholders, we conclude that, as the majority shareholder, SITG has effective control in the selection of directors.²⁵ Moreover, the directors appoint the key managers who influence the the day-to-day functions of the company.²⁶ Therefore, SITG has considerable influence over the day-to-day operations of the company, including its export activities.

Rongxin attempts to demonstrate that, even though SITG is the majority shareholder, SITG names only one director and does not have control over the selection of the five other directors. To support its claim, Rongxin cites to provisions in Rongxin's articles of association that outline voting rights and voting powers of the board of directors, shareholders, and stockholders.²⁷ Rongxin claims that each shareholder (11 in total) has one vote and each vote is equal.²⁸ In other

²⁰ See Preliminary Separate Rate Memorandum.

²¹ See letter from Rongxin, "Certain Cased Pencils from the People's Republic of China: Rongxin Section A Response" dated April 3, 2014 (Rongxin's Section A Response) at Exhibits A-3 and A-4.

²² See *Silicon Carbide*, 59 FR at 22586-89; *Notice of Final Determination of Sales at Less Than Fair Value; Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

²³ See Rongxin's case brief at 1 and 5.

²⁴ *Id.* at 5 and 13.

²⁵ *Id.* at 5.

²⁶ *Id.* at 5.

²⁷ See Rongxin Case Brief at 4 through 7.

²⁸ *Id.* at 11.

words, the percentage of shareholding does not affect the voting power of the shareholders. Rongxin postulates that because each shareholder has one vote, SITG does not have control over the selection of the other five board directors. Thus, it contends, SITG does not have control over Rongxin.

Contrary to Rongxin's claims, no information on the record supports a finding that each shareholder only has one vote. Rongxin fails to cite to any evidence to support its contention. In fact, record evidence supports a different finding. Because a majority of the information concerning this issue is business proprietary in nature, for a full discussion *see* the Final Separate Rate Memorandum.²⁹

In sum, SITG is the majority shareholder; it explicitly names one director and effectively has control over the appointment of the remaining five directors, who, in turn, appoint company management. These facts do not demonstrate that Rongxin has autonomy from the government in making decisions regarding the selection of management.³⁰ With this level of government ownership and control, Rongxin has failed to satisfy the criteria the Department evaluates when considering whether there is an absence of *de facto* government control, in particular whether the respondent has autonomy from the government in making decisions regarding the selection of management. Because of this level of government ownership, and the control that such ownership establishes, we conclude that Rongxin does not satisfy the criteria demonstrating an absence of *de facto* government control over export activities.³¹ As such, we continue to find that Rongxin is ineligible for a separate rate.

We acknowledge that, in the *Preliminary Results*, we misinterpreted the parties' arguments and incorrectly stated that SITG has the ability to name all of Rongxin's directors, when in fact SITG has the explicit authority to name only one of the six directors.³² This was due, in part, to the parties' failure to outline, in their prior submissions, a clear story concerning Rongxin's ownership and corporate governance. However, based on our corrected analysis of the record, as discussed above and in the Final Separate Rate Memorandum, we continue to find that SITG has the influence of a majority shareholder, and the shareholders appoint the directors, who in turn appoint key company management. Therefore, SITG's majority shareholding constitutes *de facto* government control.

The Department continues to find that Rongxin has not demonstrated that it is absent of *de facto* government control. Therefore, Rongxin remains ineligible for a separate rate for these final results.

²⁹ See Final Separate Rate Memorandum.

³⁰ See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 77098 (December 20, 2013) and accompanying Preliminary Decision Memo at 7, unchanged in *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723 (June 24, 2014) and accompanying Issues and Decision Memorandum at Comment 1.

³¹ *Id.*

³² See Preliminary Separate Rate Memorandum.

Comment 2: Whether Dixon is a U.S. Manufacturer of Pencils, and, therefore, Entitled to Request an Administrative Review of Rongxin

Rongxin's Arguments

Rongxin claims that Dixon has presented no evidence that it was a domestic producer of pencils during the POR. Rongxin purports that, in Dixon's request for an administrative review of Rongxin, Dixon claims that it is a U.S. importer and manufacturer of pencils, but that Dixon is actually a Chinese exporter of pencils. Therefore, Rongxin maintains that the initiation of the administrative review of Rongxin was void *ab initio* and the review should be rescinded.

Dixon's Arguments

Dixon states that it is a domestic producer of pencils and was one of the petitioners in the investigation filed on November 10, 1993.³³ Dixon argues that it has been producing pencils in the United States since 1827.³⁴ Moreover, Dixon claims that historical evidence and public knowledge of its domestic activity support this fact.³⁵ Moreover, Dixon claims that its status as a producer is confirmed by its receipt of disbursements under the Continued Dumping and Subsidy Offset Act, which the Department can independently confirm.³⁶

Dixon contends that, in all of the administrative reviews in which it has participated, it has disclosed that it is an importer and a producer of domestic products. Dixon believes that its participation as a respondent, as a related importer for its Chinese producer and exporter, does not preclude Dixon, as a U.S. producer, from participating in this review as a petitioner. Dixon states that it has standing to request this review of Rongxin. Therefore, it concludes that the Department may not rescind this review.

Department's Position: Dixon has certified that it is a domestic producer of pencils.³⁷ Rongxin's assertion is unsupported by factual information. Therefore, there is no evidence on the record that undermines or calls into question Dixon's certification. As a result, the Department finds no reason to revisit Dixon's interested party status and determines that Dixon is a domestic producer of pencils with standing to request an administrative review³⁸.

³³ See Dixon Rebuttal Brief.

³⁴ *Id.* at. 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See letter from Dixon re: "Certain Cased Pencils from the People's Republic of China: Request for Administrative Review" dated December 20, 2013.

³⁸ See 19 CFR 351.213(b) (specifying that a "domestic interested party. . . may request in writing that the Secretary conduct an administrative review").

RECOMMENDATION

We recommend applying the above methodology for these final results.

✓
Agree

Disagree

Paul Piquad
Paul Piquad
Assistant Secretary
for Enforcement and Compliance

30 APRIL 2015
(Date)