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August 7, 2015

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Potassium Permanganate from the People's Republic of China:
Issues and Decision Memorandum for the Final Results

Summary

The Department of Commerce (the "Department") analyzed the case brief submitted by the respondent, Pacific Accelerator Limited ("PAL"), and the rebuttal brief submitted by the petitioner, Carus Corporation ("Carus"), in the 2013 administrative review of the antidumping duty order on potassium permanganate from the People's Republic of China ("PRC").¹ Following the *Preliminary Results*,² and the analysis of the comments received, we have not made changes for the final results. We recommend that you approve the position described in the "Discussion of the Issues" section of this memorandum.

Background

This review covers one producer/exporter of potassium permanganate from the PRC, PAL.³ On February 10, 2015, the Department published the *Preliminary Results* of this administrative review. On March 12, 2015, PAL submitted a case brief.⁴ On March 17, 2015, Carus submitted a rebuttal brief.⁵

¹ See *Antidumping Duty Order; Potassium Permanganate from the People's Republic of China*, 49 FR 3897 (January 31, 1984).

² See *Potassium Permanganate from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013*, 80 FR 7413 (February 10, 2015) ("*Preliminary Results*") and accompanying Preliminary Decision Memorandum ("PDM").

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 FR 11401 (February 28, 2014) ("*Initiation Notice*").

⁴ See PAL's March 12, 2015 submission.

⁵ See Carus' March 17, 2015 submission.



Scope of the Order

Imports covered by this order are shipments of potassium permanganate, an inorganic chemical produced in free-flowing, technical, and pharmaceutical grades. Potassium permanganate is currently classifiable under item 2841.61.00 of the Harmonized Tariff Schedule of the United States (“HTSUS”). Although the HTSUS item number is provided for convenience and customs purposes, the written description of the merchandise remains dispositive.

Comment: Finding of No Reviewable Transactions

PAL’s Comments

- The Department should complete the review by calculating an antidumping duty rate for PAL based on record information.
- The language of the antidumping statute mandates that a review must be conducted based on sales during the period of review. The statute specifically establishes that it is a sale or likely sale of goods that is the subject of the law. Nowhere does the law discuss entries or envision that a review be based on entries. The practice of the Department to use a sale to determine whether a transaction is within the period of investigation or review is well established.⁶ Moreover, reviews based on the date of sale have also been approved by the courts.⁷ Also, the Department’s regulations are clear that reviews may be on the basis of “entries, exports, or sales.”⁸
- The language of the antidumping statute mandates that upon conclusion of a review the Department must publish a notice in the *Federal Register* for one or more of three subjects, one of which is the cash deposit rate.⁹ Issuing a cash deposit rate is a separate action from that of issuing assessment instructions to be applied to entries.

Carus’ Comments

- There exists no statutory authority, let alone a mandate, to conduct a review without an entry. The subsection of the statute cited by PAL which states that “{t}he determination under this paragraph shall be the basis for assessment...and for deposits of estimated duties;” also states that the determination under this paragraph is based on the “normal value and export price (or constructed export price) of each *entry* of the subject merchandise, and the dumping margin for each such *entry*.”¹⁰ PAL appears to have ignored the central mandate of the statute and is focused instead on the post-review reporting requirement for the Department to “publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.”¹¹
- Situations in which there are sales but no reviewable entries are precisely why the Department’s regulations uses the terms “normally” and “as appropriate” in discussing the

⁶ See *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 FR 38166, 38182 (July 23, 1996).

⁷ See *Koenig & Bauer-Albert AG v. US*, 15 F. Supp. 2d 834, 842-43 (CIT 1998).

⁸ See 19 CFR 351.213(e)(1)(i).

⁹ The second is to provide notice of any duty to be assessed. The third is to determine whether an investigation is to be resumed. The statutory mandate is not that all three of these tasks be performed in each review, but only that at least one of them be performed. See 19 USC 1675 (a)(1)(B).

¹⁰ See 19 USC 1675(a)(2) (emphasis added).

¹¹ See 19 USC 1675(a)(1).

scope of an administrative review: “an administrative review under this section normally will cover, as appropriate, entries, exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month.”¹²

- While PAL notes the non-controversial fact that separate liquidation and cash deposit instructions are routinely issued to Customs and Border Protection (“CBP”) at the conclusion of administrative reviews, this does not mean that where there are no entries (and hence no possibility of assessment of duties), the Department is nonetheless required to conduct a review so as to be able to assign a new cash deposit rate.

Department’s Position: PAL’s questionnaire response indicated that it made only one sale on the last day of the period of review (“POR”), which entered the United States five months after the end of the POR.¹³ In response to a supplemental questionnaire,¹⁴ PAL reported having no entries during the POR,¹⁵ which was confirmed by a CBP data query.¹⁶

PAL argues that the Department’s regulations and practice require us to review sales during the POR, even when there is no entry of subject merchandise during the POR. We disagree. According to section 751(a) of the Tariff Act of 1930, as amended (“the Act”), upon the receipt of a request for administrative review and the publication of an initiation notice in the *Federal Register*, the Department will conduct a review and determine the amount of antidumping duties due. Section 751(a)(2) of the Act directs the Department to determine the normal value and export price (“EP”) or constructed export price (“CEP”) of each entry of the subject merchandise and the dumping margin for each such entry. Section 751(a)(2)(C) of the Act provides that the “determination under this paragraph {i.e., determination of antidumping duties} shall be the basis for the assessment of countervailing or antidumping duties on *entries* of merchandise covered by the determination and for deposits of estimated antidumping duties” (emphasis added).

Consistent with this statutory scheme, the Department’s policy is to conduct an administrative review for a company only where that company has at least one POR entry of subject merchandise.¹⁷ Simply put, while the Department has the discretion to calculate the weighted-average dumping margin on the basis of POR sales, there must be suspended POR entries on which duties may be assessed consistent with section 751(a)(2)(C) of the Act.¹⁸ Here we note that PAL has no suspended POR entries on which duties may be assessed. The CBP data

¹² See 19 CFR 351.213(e)(1)(i).

¹³ See PAL’s May 16, 2014, submission at Exhibit C-6.

¹⁴ See the Department’s letter to Pacific Accelerator Limited entitled, “Antidumping Duty Administrative Review of Potassium Permanganate from the People’s Republic of China: Supplemental Section C Questionnaire,” dated July 10, 2014.

¹⁵ See PAL’s July 17, 2014, submission at 11.

¹⁶ See Memorandum to the File, from Alexander Montoro, International Trade Compliance Analyst entitled, “CBP Data Query Results,” dated February 2, 2015.

¹⁷ In cases where a respondent made sales on a constructed export price (“CEP”), the Department’s normal practice is to use the date of sale, rather than entry date, to define the universe of CEP sales. See, e.g., *Carbon and Certain Alloy Steel Wire Rod from Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 28190 (May 14, 2013) and accompanying Issues and Decision Memorandum at Comment 2 (“*Wire Rod from Mexico*”). See also *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27314 (May 19, 1997) (“*Preamble*”). Distinguishable from the CEP context, in this case, PAL reported its sale on an export price (“EP”), not a CEP, basis.

¹⁸ See, e.g., *Steel Threaded Rod from the PRC*.

examined by the Department show the entry date of PAL's merchandise¹⁹ as being long after the end of the POR.²⁰ This date is consistent with the information provided by PAL in its response.²¹

The policy of not conducting a review where there is no entry has been upheld by the courts. In *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368 (Fed. Cir. 2003) ("*Allegheny*"), for example, the Court of Appeals for the Federal Circuit ("CAFC") held that the plain language of Section 751(a)(2) of the Act "provides for annual review of antidumping duties with respect to entries."²² Thus, the CAFC held "lawful Commerce's regulatory policy of rescinding annual administrative reviews where there are no entries during the period of review and where all in-period sales can be linked to pre-period-of-review entries."²³ In this case, similarly, the only in-period sale by PAL is linked to an entry outside the POR. While, previously, the Department has rescinded a review in similar circumstances,²⁴ as described below, our current practice is to continue the review and make a finding of no reviewable transactions, if appropriate.

The regulation at 19 CFR 351.213(e)(1) further gives the Department the discretion to base a review on either entries, exports, or sales, as appropriate.²⁵ In determining that a respondent has no reviewable transactions subject to a given review, the Department must find that there was at least one of the following: no entries, no exports, or no sales. The Department does not need to find that all three did not occur during the POR in order to make a finding of no reviewable transactions. Thus, the fact that PAL reported its date of sale as within the POR does not necessarily require the Department to conduct a review if there is no POR entry to which to apply the assessment rate calculated in a review.

In addition, the *Preamble* imposes no preference for reviewing sales during the POR. Although the *Preamble* identifies a limitation applicable to CEP sales – the "inability to tie entries to sales" – and notes, because of this limitation, "the Department normally must base its review on sales made during the period of review," the *Preamble* further states that, where a respondent "can tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis."²⁶ In this review, PAL reported its sale on an EP

¹⁹ For the business proprietary information regarding the entry date in question, see PAL's May 16, 2014 submission at Exhibit C-6.

²⁰ See Memorandum to the File, from Alexander Montoro, International Trade Compliance Analyst entitled, "CBP Data Query Results," dated February 2, 2015.

²¹ See PAL's May 16, 2014, submission at Exhibit C-6.

²² *Id.* at 1373 (emphasis in original).

²³ See also *Chia Far Indus. Factory Co. v. United States*, 343 F. Supp. 2d 1344, 1369 (CIT 2004) (stating "Commerce correctly decided to rescind Ta Chen's review based on the fact that there were no entries of the merchandise during the POR, regardless of whether there were sales").

²⁴ See, e.g., *Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review*, 67 FR 21634, 21635 (May 1, 2002) (where the Department rescinded the administrative review for an exporter which had a POR sale of subject merchandise but no POR entries), unchanged in *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 66110 (October 30, 2002).

²⁵ See, e.g., *Allegheny*, 346 F.3d at 1373.

²⁶ See *Preamble*, 62 FR at 27314.

basis.²⁷ For that same reason, prior determinations cited by PAL as establishing an agency practice for conducting a review based on the date of sale are inapposite because the sales in those cases were CEP sales.²⁸

With respect to conducting a review to calculate cash deposits, section 751(a)(2)(C) of the Act specifically provides that the “determination under this paragraph {i.e., determination of antidumping duties} shall be the basis for the assessment of countervailing or antidumping duties on *entries* of merchandise covered by the determination and for deposits of estimated antidumping duties” (emphasis added).

The Department’s practice to require a reviewable entry in conducting an administrative review and establishing a new cash deposit rate was upheld by the CAFC in *Allegheny*. In that case, the CAFC concluded that “the statutory commands that an annual review ‘shall’ take place where requested, . . . and that the review ‘shall be the basis for . . . deposits of estimated duties,’ . . . do not preclude {the Department’s} policy here.”²⁹ The statute indicates that where requested, Commerce must initiate a review. However, where, as here, there are no POR entries or unlinked sales, there is “nothing to review and no basis for revising cash deposit rates.”³⁰

In summary, it is not the Department’s practice to conduct a review solely for the purpose of revising an existing cash deposit rate. Section 751 of the Act establishes a process for keeping cash deposit requirements accurate and current, and we are statutorily required to follow this process. Consistent with section 751 of the Act, the Department conducts an administrative review when a respondent has entries during a POR and requests a review. Indeed, PAL’s single sale during the POR, which entered after the POR, is currently under review in the administrative review covering the next review period.³¹ For purposes of the instant administrative review, however, we determine that PAL had no reviewable transactions during the POR for the reasons noted above.

We note that in 2011 the Department refined its assessment practice in non-market economy (“NME”) cases.³² Consistent with the refinement in practice, if the Department determines that an exporter had no shipments of the subject merchandise, any suspended entries that entered under that exporter’s case number (i.e., at that exporter’s rate) will be liquidated at the PRC-wide rate. While we have in the past rescinded reviews, in full or in part, when a company under review indicated that it had no shipments, our current practice in NME antidumping duty cases is to make a determination of no reviewable transactions, consistent with the *NME Reseller Policy*

²⁷ See PAL’s May 16, 2014 submission at Exhibit C-17; PAL’s April 24, 2014 submission at A-1.

²⁸ See *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from India: Notice of Final Determination of Sales at Less Than Fair Value*, 74 FR 10543 (March 11, 2009); see also *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 FR 38166, 38182 (July 23, 1996).

²⁹ See *Allegheny*, 346 F.3d at 1372 (internal citations omitted).

³⁰ *Id.*

³¹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 FR 11166 (March 2, 2015).

³² See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011) (“NME Reseller Policy”).

and recent determinations.³³ Because record evidence indicates that PAL had no reviewable transactions during the POR (January 1, 2013, through December 31, 2013), and consistent with our refinement in practice, we are making a determination of no reviewable transactions rather than rescinding this review.³⁴ Therefore, for these final results, we have completed the review with respect to PAL and intend to issue appropriate instructions to CBP based on the final results of the review.³⁵

RECOMMENDATION

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

AGREE DISAGREE



Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

August 7, 2015
Date

³³ See *NME Reseller Policy*. See also, e.g., ; *Certain Steel Threaded Rod from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 21101* (April 9, 2013), unchanged in *Certain Steel Threaded Rod from the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2011-2012, 78 FR 66330* (November 5, 2013)

³⁴ See *NME Reseller Policy*.

³⁵ *Id.*