

FINAL RESULTS OF DETERMINATION PURSUANT TO COURT REMAND

Sinopec Sichuan Vinylon Works v. United States
Court No. 03-00791, Slip Op. 06-191 (CIT December 28, 2006)

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade (the Court) in Sinopec Sichuan Vinylon Works v. United States, Court No. 03-00791, Slip Op. 06-191 (CIT December 28, 2006) (Sinopec III). The Court affirmed the Department's evaluation of Sinopec Sichuan Vinylon Works' (SVW) acetic acid inputs and remanded the Department's treatment of SVW's overhead costs.

The Court "remands the calculation of SVW's overhead costs for adjustments that comport with Commerce's estimation of double counting, if any, that may have occurred." See Sinopec III, Slip Op. 06-191 at 10. Additionally, the Court states that, "Commerce is to provide the court with a well-reasoned explanation for its final decision." See id. In accordance with the Court's instructions, we have analyzed the information on the record, and we find no evidence on the record establishing the existence of double counting. Therefore, we find that double counting did not occur. Thus, for these final remand results we have applied Jubilant's¹ financial ratios to SVW's costs without any adjustment. As discussed in greater detail below, we have provided the Court with further explanation with regard to our final decision, which is based upon the following findings: I) there is no evidence on the record establishing that the Department's application of Jubilant's financial ratios resulted in double counting; and II) the Department's decision to use Jubilant's data in the calculation of SVW's overhead costs without

¹ Jubilant Organosys Ltd.'s (Jubilant).

adjustment is consistent with its decision to apply a by-product credit for SVW's acetic acid recovery into its figures. The recalculated margin for these final remand results is 5.51 percent.

Analysis

I. There is no Evidence on the Record Establishing That the Department's Application of Jubilant's Financial Ratios Resulted in Double Counting

In Sinopec III, the Court "remands the calculation of SVW's overhead costs for adjustments that comport with Commerce's estimation of double counting, if any, that may have occurred." See Sinopec III, Slip Op. 06-191 at 10. In accordance with the Court's instructions, we have revisited our calculation of SVW's overhead costs and examined the record of this investigation to determine whether, by applying Jubilant's financial ratios to SVW's costs, double counting actually occurred. We have found no information on the record, nor do we have the authority to obtain any such information, establishing that our method for calculating SVW's overhead costs resulted in double counting. Therefore, we have applied Jubilant's financial ratios without adjustment.

Both SVW and the Defendant-Intervenors² have argued over the possible impact that Jubilant's self-production of acetic acid had on the calculation of SVW's costs. However, neither party placed information on the record demonstrating conclusively that Jubilant's acetic acid production resulted in higher or lower overhead costs than those experienced by SVW.

We cannot make an adjustment to the financial ratios to reflect the fact that Jubilant self-produces acetic acid, while SVW purchases the input. We are unable to quantify the impact on the financial statement from this structural difference. Furthermore, it would be inappropriate to adjust for only one known difference in the production processes between these two companies

² Celanese Chemicals, Ltd., and E.I. Dupont de Nemours & Co.

without taking into account all potential differences in production between SVW and Jubilant. However, the Department does not have information on all of the potential differences in Jubilant's, or any surrogate's, production processes because, as a surrogate company, Jubilant is not an interested party to the proceeding. Consequently, we do not have the authority to obtain additional information regarding its production of acetic acid, or any other production processes. Thus, the Department does not have the information on the record, nor is it able to obtain such information, that would permit it to establish that differences exist, or to make adjustments for any claimed differences, in production processes between SVW and Jubilant.

It is reasonable to assume that differences, other than the production of acetic acid, existed between the two entities as well. In selecting the proper surrogate in a given non-market economy (NME) case, the statute provides that we use the best available information on the record. See Section 773(c)(1) of the Tariff Act of 1930 (the Act). The Department's surrogate methodology is only an approximation of the respondent's actual production experience because no two companies operate in an identical fashion. As a result, in the majority of NME antidumping duty cases, the surrogate producer selected by the Department, as the one selected here, likely produces a mix of same or similar products and/or incurs different types of costs than the NME respondent. In these situations, our practice has been to rely in toto on the financial statements of "comparable" surrogate producers, rather than attempt to adjust these statements to conform them to an NME respondent's exact production experience. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 Fed. Reg. 49347 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 2; Persulfates from the People's Republic of China; Final Results of Antidumping Administrative Review, 64 Fed. Reg. 69494, 69497 (Dec. 13, 1999); Notice of Final

Determination of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation, 60 Fed. Reg. 16440, 16446-7 (Mar. 30, 1995). The Department takes this approach because it does not know all of the components that make up the costs of the surrogate producer, and any attempt to adjust these costs may not make them any more accurate. Indeed, such adjustments may only provide the illusion of precision. See Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262, 1269 (Oct. 31, 2006) (“parties and courts may aspire to, but cannot demand, perfection.”); Geum Poong Corp. v. United States, 26 CIT 991, 995 (2002) (recognizing that the Department has limited resources and is under time constraints and, therefore, a certain level of imprecision is not unreasonable). Thus, the surrogate methodology laid out in the Act is imprecise by its very nature.

Therefore, in accordance with the Court’s order, after carefully searching the record, we find that the surrogate producer’s financial statement contains insufficient information that would allow us to determine whether double counting has occurred. Accordingly, as we find that Jubilant’s production experience formed a reasonable basis for valuing SVW’s costs, Jubilant’s cost figures, as reported in its financial statement, constituted the best available information for calculating a final dumping margin for SVW.

II. The Department’s Decision to Use Jubilant’s Unadjusted Data in the Calculation of SVW’s Overhead Costs is Consistent With its Decision to Apply a By-Product Credit for SVW’s Acetic Acid Recovery Into its Figures

In making our determination to apply Jubilant’s financial ratios without adjustment to the surrogate value of acetic acid, it is necessary to address a concern raised by the Court in Sinopec II. See Sinopec Sichuan Vinylon Works v. United States, Court No. 03-00791, Slip Op. 06-78 (CIT May 25, 2006) (Sinopec II). The Court in Sinopec II asserted, “While Commerce’s refusal to adjust its calculations to compensate for SVW’s and Jubilant’s differing levels of vertical

integration has basis in both statutory and case law, its reasoning rings hollow in light of its willingness to incorporate a by-product credit for SVW's acetic acid recovery into its figures." See Sinopec II, Slip Op. 06-78 at 14. Although the Court has already upheld our determination to incorporate a by-product credit for SVW's acetic acid recovery in Sinopec I,³ the Court appears to be concerned that the Department is making an adjustment to reflect the fact that SVW generates and recovers acetic acid during the final stage of production, while Jubilant does not, but the Department is not making an adjustment to Jubilant's financial ratios before applying them to SVW's costs. The Department's application of a by-product credit and its application of Jubilant's financial ratios, however, are wholly unrelated to each other. The issue addressed in Section I, above, deals with the use of a surrogate's (i.e., Jubilant's) financial records; the issue addressed in this section deals with a known difference between the production process for Jubilant and that for SVW.

As explained above, because Jubilant is a surrogate company, we do not have the authority to obtain further detail on Jubilant's cost and revenue data. Consequently, without such information, we are unable to make any adjustments to Jubilant's financial ratios to reflect that it self-produces acetic acid in contrast to the fact that SVW purchases the input. If we were to adjust for one known difference, we would need to account for all potential differences in production between these companies, which we do not know. However, this level of detail cannot be obtained because a surrogate's publicly available financial information by its very nature is imprecise and can only serve as an approximation of the production experience of the respondent. See Dorbest Ltd., 462 F. Supp. 2d at 1269. Consequently, the Department is limited

³ See Sinopec Sichuan Vinylon Works v. United States, 366 F. Supp. 2d 1339, 1350-1351 (CIT Apr. 4, 2005). (Sinopec I). "Commerce's decision to apply financial ratios calculated from Jubilant's data to Plaintiff's cost before applying the by-product credit will not be disturbed by the Court."

to selecting a surrogate that best approximates the respondent's production process using the best available information. See Section 773(c)(1) of the Act.

On the other hand, as the Court previously upheld in this case,⁴ the Department can make an adjustment to its method of applying a by-product credit for a known difference in the nature of a respondent's production process. Our determination to apply Jubilant's financial ratios to SVW's data before deducting the by-product credit for the acetic acid SVW recovered during its production of PVA was based on our finding that: 1) SVW and Jubilant are at equivalent levels of integration, and 2) SVW generates and recovers acetic acid during the final stage of its production process, and it uses acetic acid as a by-product, but Jubilant (the surrogate) does not recover acetic acid at its final stage of production. See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China, 68 Fed. Reg. 47538 (Aug. 11, 2003) ("Final Determination"), and accompanying Issues and Decision Memorandum at Comment 9; see also Memorandum entitled "Treatment of Self-Produced Inputs in the Less Than Fair Value Investigation on Polyvinyl Alcohol from the People's Republic of China," dated March 14, 2003, at 13. Because Jubilant's production process, unlike SVW's, does not result in the recovery of acetic acid, it is necessary to apply Jubilant's financial ratios to SVW's costs before making any offset for the recovery of acetic acid in order to avoid understating SVW's factory overhead, SG&A, and profit. See Memorandum entitled "Acetic Acid Recovery Process in the Antidumping Duty Investigation of Polyvinyl Alcohol from the People's Republic of China," dated June 23, 2003.

⁴ See Sinopec I, 366 F.Supp. 2d at 1350 ("The court notes from the outset that the statute and regulations are silent with respect to how Commerce is to account for by-product credits. Commerce's decision, however must be supported by substantial evidence on the record...In the case at bar, Commerce's calculation properly accounts for SVW's recovery of acetic acid.").

The salient difference between using the unadjusted surrogate financial ratios and our chosen by-product offset application is that when we apply a by-product credit, we are dealing with a specific factor of production provided by the respondent, which permits the Department to accurately reflect and quantify the respondent's production process. Because we are applying the respondent's factors of production, we need to calculate its margin with as much precision as possible. See Lasko Metal Prods., Inc. v. United States, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (Lasko) (the Department has a statutory duty to make its dumping calculation as accurate as possible). Unlike a surrogate company, the respondent is a party to the proceeding. Therefore, a respondent has an incentive to provide the Department with information regarding its production process because, if it fails to comply with the Department's request for information, the Department will resort to the use of the facts otherwise available in rendering its determination. See Section 776 of the Act. Thus, where the Department is applying the respondent's information, the Department's paramount concern is determining the respondent's margin as accurately as possible. See Lasko, 43 F.3d at 1446.

As we have demonstrated above, our inability to adjust Jubilant's financial ratios is due to the lack of record evidence regarding Jubilant's business proprietary cost and revenue data. In contrast, public information regarding Jubilant's physical production is available and on the record. Consequently, we are able to compare SVW's production process to Jubilant's and, in this instance, apply the by-product credit for acetic acid recovery after applying Jubilant's financial ratios. In short, the two different applications are wholly independent and non-related to each other. Because the Department is constrained by the evidence it receives or is able to obtain, it is unable to make, or constrained in making, certain adjustments in its efforts to

calculate the most accurate margin possible, particularly in the context of an NME proceeding. Thus, for the reasons established above, this Court should affirm the Department's remand determination.

Comments from Interested Parties

On March 23, 2007, SVW and the Defendant-Intervenors submitted comments on our draft remand results. These comments are addressed below.

Comment: Calculation of SVW's By-Product Offset as Related to the Application of a Surrogate's Financial Ratios

SVW argues that since the Court, in Sinopec I, approved of the Department's decision to apply financial ratios calculated from Jubilant's data to SVW's costs before applying the by-product credit, then presumably the Department also has the authority to undo this decision and "apply the by-product offset as an adjustment to production costs prior to the application of the surrogate financial ratios to production costs, rather than as an adjustment to normal value after the application of the financial ratios to production costs." See SVW's Comments to Draft Results: Sinopec III (March 23, 2007) (SVW's Comments) at 7. SVW asserts that calculation of normal value in this manner will lead to a zero margin for SVW, and thus, it will be excluded from the antidumping duty order.

Defendant-Intervenors assert that our "decision to apply a by-product credit for SVW's recovery of acetic acid after applying the surrogate financial ratios to the surrogate production cost base," is consistent with Department practice, the Court's prior decisions in this case, and evidence on the record. See Defendant-Intervenors Comments to Draft Results: Sinopec III (March 23, 2007) ("Defendant-Intervenors Comments") at 2. Defendant-Intervenors recommend, however, that the Department emphasize the qualitative difference between the use

of surrogate financial ratios, which must be applied without adjustment where the surrogate and the NME producer are at equivalent levels of integration, and the application of a by-product credit, in its final remand results.

Department's Position:

We first note that the Court has previously affirmed our treatment of the by-product offset in this case. See Sinopec I, 366 F. Supp. 2d at 1351; see also Sinopec III, Slip Op. 06-191, at 8, n. 7. Contrary to SVW's argument, we cannot, nor do we have any reason to, change our judicially sanctioned decision to apply the by-product offset after the application of Jubilant's financial ratios to SVW's production costs.

As SVW and Defendant-Intervenors recognize, both the lack of information on the record and established case law prevent the Department from making any adjustments to Jubilant's financial ratios. SVW, however, argues that the Department can account for production processes experienced by the surrogate, Jubilant, but not by SVW, by applying the by-product offset as an adjustment to production costs prior to the application of surrogate financial ratios. SVW presumes that, because the Court, in Sinopec I, approved of the Department's decision to apply Jubilant's financial ratios to SVW's costs before applying the by-product credit, the Department must also have the authority to undo this decision and apply the by-product offset before applying Jubilant's financial ratios. The Court, however, has determined that "applying the by-product credit before applying Jubilant's financial ratios would, as Commerce argues, mischaracterize SVW's cost of production because Jubilant's production process does not include the hydrolysis step where acetic acid is recovered." See Sinopec I, 366 F. Supp. 2d, at

1350. Furthermore, the Court found that SVW's approach would "misapply the by-product credit." Id.

Nevertheless, SVW continues to argue that we can right this alleged wrong by simply negating our initial by-product credit application (i.e., apply the by-product offset to production costs prior to, rather than after, the application of the surrogate financial ratios). Thus, it appears that SVW believes that if we can "adjust" where in our calculation we apply the by-product offset, based on our finding that SVW recovers and reuses acetic acid, while Jubilant does not, then presumably we can do the same to account for production differences experienced by the surrogate, but not by the respondent.

We note again that the Court has affirmed our by-product offset methodology in this case. As we have discussed at length above, our application of a by-product offset relates to a specific factor of production provided by the respondent, who is a party to the proceeding. SVW's arguments, however, relate to production processes experienced by the surrogate, Jubilant. As discussed above, in contrast to a respondent company, with a surrogate company, we do not have, nor do we have the authority to obtain, its detailed cost and revenue data. Consequently, without such information, we are unable to make any adjustments to Jubilant's financial ratios to reflect that it self-produces acetic acid in contrast to the fact that SVW purchases the input. As explained above, if we were to adjust for one known difference, we would need to account for all potential differences in production between these companies, which we do not know. This we cannot do because we do not have, nor can we obtain, the surrogate's (Jubilant's) business proprietary financial data. Therefore, consistent with the

Court's prior decisions in these proceedings, we continue to apply the by-product credit for SVW's acetic acid recovery after applying Jubilant's unadjusted financial ratios to SVW's costs.

Conclusion

The Department hereby complies with the remand order as directed by the Court in Sinopec III and assigns a final dumping margin of 5.51 percent to SVW. Upon a final and conclusive court decision, we will publish an amended final determination to that effect.

David M. Spooner
Assistant Secretary
for Import Administration

Date