

Shandong Chenhe International Trading Co., Ltd et al. v. United States
CIT Consol Court No. 09-00246

FINAL RESULTS OF REDETERMINATION
PURSUANT TO VOLUNTARY REMAND

A. Summary

The Department of Commerce (“Department”) has prepared these results of redetermination pursuant to the voluntary remand order of the U.S. Court of International Trade (“Court”) on April 22, 2010, in Shandong Chenhe International Trading Co., Ltd et al. v. United States, Consol. Court No. 09-00246. This remand concerns the Department’s final results of the administrative review of the antidumping duty order on fresh garlic from the People’s Republic of China (“PRC”). See Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 29174 (June 19, 2009) (“13th Final Results”), and accompanying Issues and Decision Memorandum. The Department has analyzed the record and reconsidered the Final Results and has determined to rescind the reviews of Shandong Chenhe International Trading Co., Ltd. (Chenhe) and Shenzhen Greening Trading Co., Ltd. (Greening).

B. Background

On December 27, 2007, the Department initiated the 13th administrative review (“AR”) of fresh garlic from the PRC, for the one-year period of review (“POR”) November 1, 2006 through October 31, 2007. See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 72 FR 73315 (December 27, 2007) (“Initiation Notice”). The Initiation Notice named Chenhe and Greening, among others, as companies subject to the AR. Meanwhile, the Department was concurrently conducting a new shipper review (“NSR”) of Chenhe and Greening. See Fresh Garlic from the People’s Republic of China: Initiation of Antidumping Duty New Shipper Reviews, 72 FR 38057 (July 12, 2007). The NSR POR was

November 1, 2006 through April 30, 2007, which overlapped with the first six months of the POR of the 13th AR.

On April 4, 2008, the Department issued separate rate application and certification forms to all companies which had not been selected as mandatory respondents in the AR. The separate rate applications and certifications specified that an exporter may only qualify for a separate rate if it made shipments to the United States in a commercial quantity during the POR. See Office of AD Enforcement Separate-Rate Application and Required Supporting Documentation, dated April 7, 2008, and Office of AD/CVD Enforcement Separate-Rate Certification for Firms Previously Awarded Separate Rate Status dated April 7, 2008. The due dates for submitting the separate rate certifications and applications were May 5, 2008 and June 3, 2008, respectively.

Shortly after issuing the separate rate applications and certifications, the Department found that it had sent Chenhe's and Greening's separate rate applications and certifications to undeliverable addresses. Therefore, on April 23, 2008, the Department sent a letter to the Fresh Garlic Producers Association and its individual members (Christopher Ranch L.L.C., the Garlic Company, Valley Garlic, and Vessey and Company, Inc.) (collectively, Petitioners), requesting that Petitioners provide correct address information by April 28, 2008. The list of companies for which the Department requested updated addresses included both Chenhe and Greening. Petitioners did not provide the requested updated addresses. Subsequently, neither Chenhe nor Greening submitted a separate rate application or certification, and neither company informed the Department that they had no shipments of subject merchandise during the POR.

On December 8, 2008, the Department published its preliminary results in the AR of the antidumping duty order on fresh garlic from the PRC. See Fresh Garlic from the People's

Republic of China: Preliminary Results of the Antidumping Duty Administrative and New Shipper Reviews and Intent to Rescind, In Part, the Antidumping Duty Administrative and New Shipper Reviews, 73 FR 74462 (December 8, 2008) (“Preliminary Results”). In the Preliminary Results, the Department found that both Chenhe and Greening, among others, had failed to establish their separate rate status, and, as such, were assigned the PRC-wide antidumping duty rate of 376.67 percent. On December 12, 2008 and December 31, 2008, Chenhe submitted letters to the Department explaining that it only had one sale during the POR of this AR, and that that sale had already been reviewed during the concurrent NSR. See Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews, 73 FR 56550 (September 29, 2008) (“Chenhe and Greening NSRs”). On December 15, 2008, Greening submitted a letter explaining that it, too, had no sales during the POR, other than its NSR sale, which was made during the six-month POR of the NSR and which had also already been reviewed during the NSR. However, Greening’s letter failed to include a certification of factual accuracy as required by 19 C.F.R. 351.303(g). On January 19, 2009, Greening submitted a letter further explaining that it had one sale during the POR which was made during the POR of the NSR. This letter included the requisite certification. Both Chenhe and Greening argued that because they had no other sales during the POR, the Department should rescind their respective ARs.

On June 19, 2009, the Department issued its Final Results, where it continued to apply the PRC-wide rate to Chenhe and Greening. The Department stated that the separate rate applications and certifications had been sent to both companies, the separate rate applications and certifications clearly instructed exporters to state whether they made a shipment of merchandise during the POR, and that neither company submitted a separate rate application or

certification, and neither company had informed the Department that they had no shipments of subject merchandise during the POR within the deadlines provided in the separate rate applications and certifications. With regard to Chenhe, the Department concluded that because Chenhe had not submitted a separate rate application, there was no basis upon which to assign it anything but the PRC-wide rate that it had been assigned in the Chenhe and Greening NSRs.

With regard to Greening, the Department determined that Greening's December 15, 2008 letter stating that it did not export subject merchandise was untimely and deficient (although Greening subsequently resubmitted the no shipments letter without deficiencies). The Department further stated that, because of the extremely late and deficient claim of no shipments, the Department was unable to complete all the steps necessary to make a decision, namely, the opportunity to inquire with CBP, to consider verifying the claim, or to allow parties to comment. Accordingly, for the six months of the AR POR not covered by the NSR, we determined that Greening had not established that it was entitled to a separate rate, and without a timely filed no shipment certification, Greening should be deemed to be part of the PRC-wide entity.

On July 7, 2010, the Department issued its draft remand in the Memorandum to the File, through Barbara E. Tillman, Office Director, AD/CVD Operations, Office 6, from Thomas Gilgunn, Program Manager, AD/CVD Operations, Office 6: Draft Remand Redetermination: Fresh Garlic from the People's Republic of China (Draft Remand Results). The Petitioners submitted timely comments on the Department's Draft Remand Results on July 12, 2010 (Petitioners' Comments). On July 15, 2010, Chenhe and Greening both submitted timely rebuttal comments (Chenhe's Rebuttal Comments and Greening's Rebuttal Comments, respectively). On July 21, 2010, the Department requested an extension of time to file its remand redetermination.

C. Analysis

Acceptance of Chenhe's and Greening's No-Shipment Certifications

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective POR. It is the Department's current practice that, if a producer or exporter named in the notice of initiation had no exports, sales, or entries during the POR, it should notify the Department within 30 days of publication of the notice of initiation in the Federal Register.¹ The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review. All no-shipment submissions must be made in accordance with 19 CFR 351.303 and are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended.

However, at the time the 13th AR was initiated, the Department did not include in the Initiation Notice notification to the parties of the filing requirements for submitting a no-shipment certification. Also, upon further review of the separate rate applications and certifications, these documents did not clearly instruct Chenhe and Greening to file no-shipment certifications. Furthermore, the separate rate application and certification documentation were not properly delivered to Chenhe and Greening. Therefore, for the purposes of this remand, the Department is accepting Chenhe's December 12, 2008 letter, and Greening's January 19, 2009 letter, as no-shipment certifications for the portion of the AR POR not covered by the NSR POR.

¹ See e.g., Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 73 FR 79055 (Dec. 24, 2008).

Examination of Customs and Border Protection Data and No-Shipment Inquiry

It is the Department's practice to confirm a no-shipment certification by both examining electronic Customs and Border Protection ("CBP") data and to issue a no-shipment inquiry to CBP. Both the examination and no-shipment inquiry are designed to determine whether there is any information contradicting the no-shipment certification. The Department has now completed its examination of the electronic CBP data for both Chenhe and Greening, and finds that there were no entries of subject merchandise exported by both companies during the portion of the AR POR not covered by the NSR POR. Moreover, the Department has received no response from CBP regarding our no shipment inquiry, which continues to corroborate Chenhe's and Greening's no-shipment certifications.

Therefore, because there is no evidence on the record to indicate that Chenhe and Greening had sales of subject merchandise under this order during the AR POR, except for the entry covered by the NSRs, we intend to amend the Final Results to incorporate Chenhe's and Greening's status change, and accordingly rescind their inclusion in the AR.

D. Comments from the Parties

Comment 1: Notification of Inclusion in AR

In its July 12, 2010 comments on the Draft Remand Results, Petitioners argue that the Department should substantially revise its redetermination and continue to apply the PRC-wide rate to Chenhe and Greening. Specifically, Petitioners assert that the Department's justifications in the Draft Remand Results for departing from the 13th Final Results all relate to the notice provided to Chenhe and Greening in connection with the AR. Those justifications, Petitioners contend, fail to account properly for the standard that must be met by the Department in notifying interested parties that they are subject to an administrative review, as well as

significant events in the underlying proceeding that put Chenhe and Greening on notice that they were subject to the AR. See Petitioners' Comments at 3. Petitioners argue that, after examining these issues, it is clear that both Chenhe and Greening were on notice that they were subject to the AR and, thus, that the Department's determination in the Draft Remand Results to rescind the administrative reviews of Chenhe and Greening should be reversed.

Petitioners contend that the Department met its burden to notify Chenhe and Greening that they were subject to the AR. Primarily, Petitioners contend that the inclusion of Chenhe and Greening in the Initiation Notice served to notify them of their required participation in the AR. See Petitioners' Comments at 3. Further, the Petitioners assert that the administrative record makes clear that copies of the Petitioners' request for an administrative review were served on Chenhe and Greening at addresses that are nearly identical to the addresses reported by those two companies during the course of the underlying administrative proceeding. See Petitioners' Comments at 7. In addition, Petitioners note that copies of its request for an administrative review were served on counsel representing Chenhe and Greening in the then on-going Chenhe and Greening NSRs. See Petitioners' Comments at 8. Also, Petitioners point out that the Department mailed separate rate applications and separate rate certifications forms² to Chenhe and Greening at addresses that are nearly identical to those supplied by the companies during the course of the underlying administrative proceeding. See Petitioners' Comments at 7. While Chenhe and Greening have both highlighted that the packages sent by the Department were returned undelivered, Petitioners allege that the similarity of the addresses reported by the

² Petitioner argues that a review of the separate rate application and certification forms distributed by the Department in this proceeding makes clear that they are consistent with the criteria of 19 C.F.R § 351.301(c)(2)(ii). In particular, the forms: (1) make a written request for information to an interested party; (2) contain a clear deadline for the filing of a response; (3) specifically identify the information requested; (4) detail the form and manner in which the information must be submitted; and (5) make clear that a respondent will not be assigned a separate rate unless a completed form is submitted by the relevant deadline.

respondents and the addresses used by the Department raise the question of whether Greening and Chenhe refused delivery of the Department's packages. See Petitioners' Comments at 8. Further, Petitioners argue that because the Department sent paper or electronic copies of the separate rate application and separate rate certification forms to counsel that represented Chenhe and Greening in the then on-going Chenhe and Greening NSRs, and that these counsel eventually represented Chenhe and Greening in this proceeding, their counsel could have (and should have) notified the companies of their receipt of those documents. Id. Lastly, Petitioners claim that the Department posted copies of the separate rate application and separate rate certification forms on its website and identified them as being associated with the Department's AR.³ See Petitioners' Comments at 9.

Thus, Petitioners argue, the administrative record in this proceeding makes clear that both Chenhe and Greening received actual and constructive notice that they were subject to the Department's AR, consistent with the applicable statutory and regulatory requirements and the judicial decisions interpreting them. While the Department's Draft Remand Results notes that the Department's April 4, 2008 letter was not delivered to the companies (despite being sent to addresses nearly identical to those self-reported by the companies in the course of the administrative review), Petitioners assert that this circumstance is irrelevant given that both companies received actual and constructive notice that they were subject to the AR. Id. Accordingly, Petitioners contend that the administrative record before the Department and relevant judicial precedent make clear that both Chenhe and Greening were on notice that they were subject to the AR.

³ See Petitioners' Dec. 23, 2008 Letter at 3-4 (citing <http://ia.ita.doc.gov/ia-highlights-and-news.html>).

On July 15, 2010, Chenhe and Greening each submitted rebuttal comments. Chenhe and Greening both argue that Petitioners' arguments regarding notification of the inclusion of Chenhe and Greening in the administrative review, established in the Initiation Notice, is not at issue in this remand. See Chenhe's Rebuttal Comments at 3-5 and Greening's Rebuttal Comments at 3. Instead, Chenhe and Greening explain, the issue is whether either of them had received notice from the Department they were required to submit no-shipment inquiries within 30 days of the Initiation Notice. Both Chenhe and Greening point out that, as the Department determined in the Draft Remand Results, the Department failed to notify them of this requirement in the Initiation Notice, and also failed to deliver the separate rate application and separate rate certification to either Chenhe or Greening. See Chenhe's Rebuttal Comments at 4 and Greening's Rebuttal Comments at 3. Therefore, Chenhe and Greening argue that the Petitioners arguments regarding notification are misplaced and do not materially impact this remand redetermination.

The Department's Position

The Department agrees with Petitioners that the Initiation Notice does serve as notification to Chenhe and Greening of their inclusion in the 13th AR. However, the issue at hand is whether Chenhe and Greening were informed of the 30-day deadline for submitting a no-shipment certification. As stated in the Draft Remand Results, the Department never notified Chenhe and Greening of this deadline, because 1) the Initiation Notice did not contain these instructions,⁴ 2) the Department failed to deliver copies of the separate rate application and separate rate certification to either Chenhe or Greening, and 3) even if the Department had successfully delivered the separate rate application and separate rate certification forms, these

⁴ The Department now has a consistent practice of including in initiation notices specific instructions and deadlines for a company wishing to claim it had no-shipments of subject merchandise during the POR.

documents did not contain clear instructions for companies to file a no-shipment certification. Therefore, the Department continues to accept Chenhe's December 12, 2008 letter, and Greening's January 19, 2009 letter, as no-shipment certifications for the portion of the AR POR not covered by the NSR POR.

Comment 2: Legal and Administrative Precedent Cited by Chenhe and Greening

In their comments to the Department, Petitioners address legal and administrative precedents cited by Chenhe and Greening in their Rule 56.2 briefs submitted prior to the Department's request for voluntary remand because they "may not have an opportunity to address those issues on rebuttal in the event that neither Chenhe nor Greening submit comments" on the Department's Draft Remand Results. See Petitioners' Comments at 10-19. In addressing Chenhe's and Greening's analyses of Decca Hospitality Furnishings, LLC v. United States, 391 F. Supp. 2d 1298 (Ct. Int'l Trade 2005), Petitioners argue that Decca does not apply to this case and that "Decca also makes clear the importance of respondents coming forward in a timely manner during an administrative proceeding" See Petitioners' Comments at 10-13. In its rebuttal comments, Greening simply contends that Decca is "directly on point" and that the "court ruled that Commerce cannot penalize a respondent that never received a questionnaire." See Greening's Rebuttal Comments at 9. Chenhe did not respond to Petitioners' argument regarding Decca.

Petitioners further respond to various administrative decisions cited by Chenhe and Greening in their briefs. See Petitioners' Comments at 13-19. Neither Chenhe nor Greening responded to Petitioners' arguments regarding these administrative decisions.

The Department's Position:

The Petitioners' arguments regarding various legal and administrative decisions cited to by Chenhe and Greening in their Rule 56.2 briefs do not provide argument with respect to the Department's conclusion in or reasoning underlying the Draft Remand Results. Accordingly, the Department does not consider those arguments pertinent to this remand and will not address them here.

Comment 3: No Shipment Inquiry

In its Draft Remand Results, the Department stated that it has issued a no shipment inquiry to CBP regarding whether Chenhe and Greening were responsible for any shipments of subject merchandise that entered the United States during the POR (other than the shipments at issue in each company's new shipper review). See Draft Remand Results at 5. The Draft Remand Results also makes clear that the Department has not received a response from CBP to its inquiry. See id. Petitioners argue that while the Department concludes that the absence of a response from CBP to its no shipment inquiry "corroborate{s} Chenhe's and Greening's no-shipment certification," this conclusion is misplaced. See Petitioners' Comments at 19-20. Petitioners contend that there is no information on the administrative record confirming whether CBP received the Department's inquiry, much less whether CBP has undertaken the work necessary to confirm whether Chenhe and Greening were responsible for any shipments of subject merchandise that entered the United States during the POR for the AR that were not identified in the electronic entry data that CBP provided to the Department at the outset of this proceeding. Until the Department receives a response from CBP confirming that neither Chenhe nor Greening was responsible for any shipments of fresh garlic to the United States during the POR (other than their respective shipments that were at issue in the NSR), Petitioner argues the

Department should not presume that the absence of a response from CBP reflects a lack of shipments. Id. Accordingly, Petitioner argues that the Department should not finalize its remand redetermination until it is able to confirm with CBP whether Chenhe and Greening made any further shipments of fresh garlic to the United States during the AR.

Chenhe and Greening both argue that as CBP has not responded to the Department's no-shipment inquiry, there continues to be no evidence on the record indicating that either Chenhe nor Greening had any shipments (other than their NSR shipments) during the POR. See Chenhe's Rebuttal Comments at 9-10 and Greening's Rebuttal Comments at 10. As such, Chenhe and Greening contend that the Department should deny Petitioners' request to extend the completion of this remand redetermination until CBP is able to confirm whether there are any other shipments.

The Department's Position:

The Department's no-shipment inquiries to CBP, regarding Chenhe and Greening, were posted on July 1, 2010. See Memorandum to the File, from Scott Lindsay, Case Analyst, AD/CVD Operations, Office 6: Placing No-Shipment Inquiries on the Record, July 20, 2010. As it does in all no-shipment inquiries it sends to CBP, the Department asked CBP to respond to its requests within 10-days of the receipt of the inquiries, or July 11, 2010. As CBP did not report that it possesses information contradicting Chenhe's and Greening's no-shipment certifications, the Department presumes that CBP did not find evidence of shipments from Chenhe or Greening during the period in question. As such, the Department considers the no-shipment inquiry to be complete and the record devoid of evidence conflicting with Chenhe's or Greening's no-shipment certifications. Therefore, the Department sees no reason to postpone the completion of this remand redetermination for further confirmation with CBP.

E. Results Pursuant to Remand

Pursuant to the Court's order, we have reconsidered Chenhe's and Greening's no-shipment certifications. Based on this reconsideration, Chenhe's and Greening's status from the Final Results has changed from being considered part of the PRC-wide entity and subject to the PRC-wide rate to having their reviews for this POR rescinded. Should the Court affirm this remand redetermination in full, and once the time limit for appeal has passed, the Department will issue instructions to CBP in accordance with the results of this redetermination.

Additionally, the Department notes that the Department's reconsideration of Chenhe's and Greening's status in this case is drawn from the specific circumstances surrounding the 13th Final Results and the Initiation Notice and the Chenhe and Greening NSRs. The Department continues to require timely no-shipment certifications as noted in each notice of initiation.

/S/ Ronald K. Lorentzen

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

July 30, 2010

Date