FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND
Consolidated Bearings Company v. United States
Court No. 98-09-02799, Slip Op. 04-10 (January 30, 2004)

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to a remand order from the U.S. Court of International Trade (the Court) in Consolidated Bearings Company v. United States, Court No. 98-09-02799, Slip Op. 04-10 (January 30, 2004). In accordance with the Court's instructions, the Department has re-examined the remanded issues. Specifically, the Department has found that there has been a consistent past practice with respect to dealing with imports from unrelated resellers not covered by the administrative review and determined that there was not a departure from past practice in this case.

BACKGROUND

On June 5, 2001, the Court issued an order in Consolidated Bearings Company v. United States, Court No. 99-09-02799, Slip Op. 01-06 (June 5, 2001) (Consolidated I), remanding to the Department certain liquidation instructions that the Department had issued pursuant to the Final Results of Antidumping Duty Administrative Review of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 56 FR 31692 (July 11, 1991) (Final AFBs 1), as amended by Amended Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany, 62 FR 32755 (June 17, 1995) (Amended AFBs 1). In Consolidated I, the Court found that the Department had instructed the U.S. Customs Service to liquidate certain entries of antifriction bearings and parts thereof (AFBs) improperly at the rates required at the time of entry. Specifically, the Court

ruled that the Department's August 4, 1998, liquidation instructions (which applied to entries of AFBs during the period November 9, 1988, through April 30, 1990, for which earlier manufacturer-specific instructions had not been applicable) were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Consolidated I, Slip Op. 01-66, at 32. The Court ordered the Department to annul the August 4, 1998, liquidation instructions and take further actions not inconsistent with its opinion.

On November 5, 2001, we submitted to the Court the Final Results of Redetermination Pursuant to Court Remand (Remand Results) in which we indicated that the Remand Results would apply to entries by Consolidated of merchandise subject to the antidumping duty orders on AFBs from Germany which covered bearings produced by FAG Kugelfischer (FAG) and which were entered during the period November 9, 1988, through April 30, 1990. We also indicated that we reviewed sales that FAG had made to the United States during the period and, based on those sales, we determined weighted-average dumping margins and then converted those dumping margins to assessment rates based on entered values or quantities. Consequently, we explained, since FAG did not report that it had sold bearings directly to Consolidated, we calculated neither dumping margins nor assessment rates for Consolidated's entries and our FAG-specific liquidation instructions, which were issued on September 9, 1997, did not cover Consolidated's purchases of FAG-made bearings. Therefore, in order to respond to the Court's order, we suggested alternative means for determining rates for the U.S. Customs Service to use in liquidating entries of FAG-produced merchandise which Consolidated entered during the period November 9, 1988, through April 30, 1990.

On January 8, 2002, the Court issued an order in Consolidated Bearings Company v. United States, Court No. 99-09-02799, Slip Op. 02-03 (January 8, 2002) (Consolidated II), vacating the Remand Results and remanding this case to the Department, instructing it to liquidate all of Consolidated's imports of FAG merchandise imported during the period of review in accordance with the September 9, 1997, liquidation instructions. On April 1, 2002, we filed the Final Results of Redetermination Pursuant to Court Remand (Remand Results II) in which we outlined our plan to annul the August 4, 1998, liquidation instructions in message number 8216117 with respect to Consolidated's entries of merchandise produced by FAG and imported by Consolidated during the period November 9, 1988, through April 30, 1990. Also, pursuant to the Court's order in Consolidated II, we indicated that we would instruct the U.S. Customs Service to liquidate Consolidated's imports of FAG merchandise during the period of review (November 9, 1988, through April 30, 1990) using the *ad valorem* rates from the September 9, 1997, liquidation instructions which we calculated based on FAG's reported sales through its U.S. affiliate to various U.S. customers. These actions from Remand Results II were upheld by the Court in Consolidated Bearings Co. v. United States, Slip Op. 02-72 (July 9, 2002) (Consolidated IV).

The Department appealed Consolidated IV. In Consolidated Bearings Co. v. United States, 348 F.3d 997 (Fed. Cir. 2003) (October 29, 2003), rehearing denied, 2003 U.S. App. LEXIS 26770 (Fed. Cir. Dec. 30, 2003), the Court of Appeals for the Federal Circuit reversed and remanded the Court's decision in Consolidated IV. The Federal Circuit held that the Court erred in Consolidated IV by finding the August 4, 1998, liquidation instructions to be a modification to the instructions the Department issued on September 9, 1997. As the Department explained in Remand Results II and as

the Federal Circuit found, the purpose of the August 4, 1998, liquidation instructions was to cover imports not subject to the scope of the September 9, 1997, instructions. The Federal Circuit also held that, although "Consolidated's imports were not within the scope of the final results or the 1997 instructions" (348 F.3d at 1006), the record in this case is "insufficient to facilitate a determination of whether Commerce acted within its discretion or arbitrarily" with respect to its practice of applying the "cash deposit rates or the manufacture's rate in the final results to imports from a reseller not covered by the administrative review." See 348 F.3d at 1007.

On January 30, 2004, the Court remanded the case to the Department to examine the following questions: (1) whether the Department had a consistent past practice with respect to imports from unrelated resellers not covered by the administrative review; (2) whether there was any departure in this case from a consistent past practice; (3) whether any departure from an established practice was arbitrary.

DISCUSSION

The first issue that requires clarification is the Department's treatment of reviewed companies versus unreviewed companies. On August 13, 1985, the Department published an interim-final and final rule on 19 CFR Parts 353 and 355: Antidumping and Countervailing Duties; Administrative Reviews on Request; Transition Provisions, 50 FR 32556 (Final Rule). In Final Rule, the Department made it mandatory for interested parties to request an administrative review in order for such a review to take place. The Department explained that it could not "...afford to expend its limited resources collecting and analyzing information on entries that interested parties do not want reviewed." See 50 FR at 32556. As such, subject entries from those companies for which we did not receive a request

for review from an interested party are, by default, not covered by the administrative review. See 19 CFR 353.53a(e). Consolidated purchased subject merchandise from a foreign reseller unaffiliated with its supplier, FAG, but it did not request an administrative review for its reseller and so neither Consolidated nor its reseller/supplier was a participant in the administrative review we conducted of FAG.

Section 353.22(e)(1) of the Department's Regulations[1] outlines the procedure in assessing antidumping duties on entries of merchandise from companies for which the Department does not receive a request for an administrative review. This section states that:

> "If [Commerce] does not receive a timely request [for an administrative review], [Commerce] will instruct the Customs Service to assess antidumping duties on the merchandise...at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption."

Without a request for administrative review, it was the Department's practice to liquidate the merchandise at the cash-deposit rates (i.e., the deposit rates in effect at the time of entry). In Final AFBs 1, the Department reasoned that "(w)ith respect to companies not participating in this review, presumably all interested parties were satisfied with the previously published cash deposit rates for assessment purposes," with the implication that, if those interested parties had not been satisfied with

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[1] In 1989, the Department's Regulations were revised to conform them to the provisions of the Trade and Tariff Act of 1984. See Antidumping Duties; Final Rule, 54 FR 12742, 12756-57 (March 28, 1989), and 51 FR 29046 (August 13, 1986). The revision included a re-organization of the regulations. Consequently, section 353.53a(d) was re-numbered to 353.22(e). The substantive text of section 353.22(e) is substantially identical to the text of its predecessor, section 353.53a(d).

the previously published rates, they could have requested a review for their company to obtain a new rate. See 56 FR at 31700. If Consolidated had believed that the cash-deposit rate in effect on its entries during the period was unfair or inaccurate, it could have requested a review for its entries from a reseller, obtained a review, and, as a result, a different rate. Consolidated did not do so.

The next issue that needs to be addressed is the Department's treatment of entries that are exported by an unaffiliated reseller who sells the merchandise of a reviewed manufacturer. The Department's past practice has been to assess the reseller's sales separately from those of the manufacturer, provided that the manufacturer does not have knowledge that its sales to the reseller are ultimately destined for the United States. See 19 CFR Part 351 et al. Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27303 (May 19, 1997). If the request for review is made for a reseller and its supplier does not know that the reseller is exporting the merchandise to the United States, then the Department will calculate a rate for the reseller based on the reseller's pertinent sales made during the period of review. If a request for review is not made for the reseller, however, then the Department treats the reseller as any unreviewed company and assesses a duty at the rate required on the merchandise at the time of entry, pursuant to section 353.22(e)(1) of the Department's Regulations.

Section 353.22(e)(1) ensures that the antidumping duties assessed on imported merchandise are as accurate and importer-specific as possible. The Department initiated this administrative review for FAG based on requests it received and the Department's mandate was to review FAG's pricing practices with respect to its sales of subject merchandise. The mandate did not extend to other parties which may have acquired FAG-produced bearings second- or third-hand and then exported or resold

these bearings to the United States. It would be inappropriate to assess final duties on Consolidated's entries at the same rate as FAG's entries because FAG's rate was calculated based on importer-specific sales information which had no relationship to Consolidated's entries made during the period of review. Consolidated chose not to request a review and thus no information regarding Consolidated's imports of the subject merchandise was provided or analyzed during the administrative review. Without information on a reseller's sales of the subject merchandise where the reseller is the first party to make a sale for exportation to the United States, the Department is unable to calculate a specific rate for those reseller sales or an importer-specific liquidation rate for the associated imports of the subject merchandise.

The Department's practice of assessing antidumping duties on an importer-specific basis is described clearly in both the preliminary and final decision notices for this case. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 56 FR 11200 (March 15, 1991) (Preliminary AFBs 1), and Final AFBs 1. Under the "Assessment Rates" section of Final AFBs 1, the Department states that "...we (the Department) will calculate wherever possible an *exporter/importer-specific* (emphasis added) rate...this rate would be assessed uniformly on all entries of the class or kind of merchandise by that *particular importer* (emphasis added) during the review period." See 56 FR at 31694. Similar assessment language is also present in Preliminary AFBs 1. See 56 FR at 11203. Consolidated did not object to this language before the Department or by challenging Final AFBs 1. It is evident from the published results that the rates assessed to individual importers are based on the sales information

submitted by the reviewed party during the period of review. If Consolidated did not request an appropriate review, it cannot be assessed a rate which was calculated specifically for a different importer. As the Federal Circuit stated in its opinion, "[t]he simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties. Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties." See 348 F.3d at 1005.

Also in Final AFBs 1, the Department made it clear that it would establish importer-specific assessment rates in some of the positions it took on various comments. For example, the Department stated, "(t)he Department has determined that importer-specific assessment rates are appropriate for purposes of these reviews. As Torrington stated in its brief, importers that purchase at fair value or higher dumped prices should not be forced to subsidize the antidumping duty bill for importers who paid the lowest prices and whose imports were dumped to the greatest extent." See Final AFBs 1, 56 FR at 31700. The Department also made it clear that importer-specific assessment rates for a reseller would be governed by whether that reseller's supplier had knowledge that its sales to the reseller were destined for the United States. See Final AFBs 1, 56 FR at 31747. Therefore, the Department's practice concerning resellers was annunciated by the Department long before it issued the liquidation instructions in question.

On October 15, 1998, the Department published a notice which sought to clarify the assessment procedure for unreviewed resellers. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 63 FR 55361 (Assessment Proposal). This notice alerted interested parties of the Department's proposed clarifications and requested these interested

parties to submit their comments on the issues at hand. After receiving and reviewing these comments, the Department published a second notice putting these clarifications in effect. See Antidumping and Countervailing Duties: Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003) (Assessment Clarification). Since this clarification only became effective for reviews requested on or after May 1, 2003, its outlined policies have not been applied to the resolution of this case. As the Federal Circuit stated, however, "...Commerce's recent policy statements may help identify Commerce's consistent past-practice." See 348 F.3d at 1007.

The Department explained in its Assessment Proposal why it would not be appropriate to use a producer's rate for an unaffiliated reseller. "The longstanding principle behind the Department's assessment policy is that company-specific assessment rates must be based on the sales information of the first company in the commercial chain that knew, at the time the merchandise was sold, that the merchandise was destined for the United States...(i)f dumping is occurring, the company that sets the price of the merchandise sold in the United States is responsible for the dumping, and any importer-specific assessment rate must reflect that seller's sales prices to the United States." See 63 FR at 55362. From the information Consolidated presented in its brief to the Court and from the lack of any reference to Consolidated as a purchase-price customer in the information the Department received from FAG during the review, the Department surmised that Consolidated purchased the bearings from an intermediate party, Metallwaren, which had purchased the bearings from FAG (or perhaps even a second intermediate party) without FAG's knowledge. As such, it would be inappropriate to assign Consolidated's entries the final duty rate determined for entries from FAG because it has not been proven that FAG was "the first company in the commercial chain that knew...that the merchandise was

destined for the United States." See Assessment Proposal, 63 FR at 55632.

The Department's treatment of Consolidated is consistent with how the Department has assessed other unreviewed resellers in past instances. Similar liquidation instructions regarding unreviewed resellers were sent to Customs covering imports from all of the countries involved in the first review of AFBs. Further, the reseller instructions for France (message no. 8209114, 7/28/98), Japan (message no. 8203111, 7/23/98), Singapore (message no. 8195111, 7/14/98), Sweden (message no. 8210115, 7/29/98), and the United Kingdom (message no. 8190115, 7/9/98) were all sent prior to the contested August 4, 1998, liquidation instructions regarding imports from unreviewed companies from Germany. These instructions direct Customs to assess duties on unreviewed companies at the deposit rate required at the time of entry of the subject merchandise.

Any past deviations from the Department's standard practice of liquidating resellers' merchandise at the original cash-deposit rate (when no review was conducted of that reseller) have all been exceptions to the rule; i.e., there were special circumstances in each case that made the application of a rate other than the original cash deposit to the reseller more appropriate and accurate. For example, in a case involving televisions from Japan (ABC International v. United States, 19 CIT 787 (May 23, 1995) (ABC v. United States)), the Department chose to issue an unreviewed reseller the same rate as the rate assessed to the original manufacturer of the merchandise. ABC International (ABC) contested the Department's actions, and the Court ruled in favor of the Department. Based on the specifics of this case, the Court "...found that the importer's remedies were to request an establishment of a reseller's rate in the applicable administrative review." As the Court observed in its ruling, however, such a request would have to be accompanied by the establishment that the

manufacturer had no knowledge that its sales to the reseller were ultimately destined for the United States. The Court rejected ABC's attempts to establish that the Japanese manufacturers at issue had no knowledge that the ultimate destination of its merchandise was the United States. As such, the liquidation of ABC's entries at the manufacturer's rate was appropriate in this instance, but does not contradict the Department's consistent past practice of liquidating an unreviewed reseller at the original cash-deposit rate if the manufacturer did not have knowledge that the merchandise was being exported to the United States by the reseller in question.

The Department's actions in this case are upheld by its consistent past practice of liquidating unreviewed companies (including resellers) at the rate required at entry. This past practice is described clearly in the Department's regulations at section 353.22(e)(1) and in various documents published by the Department. Therefore, the Department's actions concerning Consolidated's entries are not arbitrary and are consistent with past practice.

COMMENTS

In comments received in response to the Department's Draft Results Pursuant to Remand, Consolidated Bearings Co. disagrees with the conclusion that the Department has liquidated entries of subject merchandise sold by an unrelated reseller consistently at the cash-deposit rate in effect at time of entry. Consolidated continues to contend that the Department's past practice in such situations was to liquidate the entries at the manufacturer's rate established in the administrative review.

Consolidated cites the Department's Assessment Clarification in support of its position. Consolidated claims that this clarification would not have been necessary if it had been the Department's past practice to liquidate at the cash-deposit rate. Consolidated states that "(t)he

clarification was required because Commerce's past practice had been to liquidate at the manufacturer's rate, not the cash deposit rate."

Consolidated contends further that the Department's assertion that past liquidations of entries of subject merchandise from resellers at the original manufacturer's rate had been based on special circumstances is erroneous. Specifically, Consolidated argues that, in ABC v. United States, "...the court in no way suggested that Commerce's decision to liquidate ABC's entries at the manufacturer's rate was dependent on the knowledge of the manufacturer, or any other special circumstance." Consolidated goes on to cite several other cases (Renesas Technology America, Inc. v. United States, Slip Op. 03-106, 2003 (August 18, 2003) (Renasas), and Nissei Sangyo America, Ltd. v. United States, Slip Op. 03-105 (August 18, 2003) (Nissei Sangyo)) which it claims illustrates that the Department's past practice had been to liquidate entries from an unrelated reseller at the manufacturer's rate rather than the cash-deposit rate regardless of whether the importer requested an administrative review.

DEPARTMENT POSITION

The Department disagrees with Consolidated's argument that the Assessment Clarification was needed to alter its past practice of liquidating reseller entries at the manufacturer's rate. Specifically, the statement that Consolidated makes in its comments, "...if Commerce's past practice had been consistent with the clarification, there would have been no need to issue it, or to emphasize that the clarification would only be applied prospectively," is erroneous. Admittedly, the Assessment Clarification is not consistent with the Department's past practice of liquidating resellers' merchandise at the cash-deposit rate in effect at time of entry. Rather, the clarification puts into effect the practice of

assessing the reseller's entries at the *all-others rate* if there was no company-specific review of the reseller and provided that, as a result of an administrative review, it becomes clear that the original producer did not know that the merchandise it sold to the reseller was destined for the United States. Therefore, the Assessment Clarification altered the Department's past practice of assessing certain unreviewed entries at the cash-deposit rate to assessing them at the all-others rate.

In addition, the liquidation of unreviewed entries in this case is governed by section 353.22(e) of the Department's regulations. In promulgating section 353.22(e), the Department explained:

> Paragraph (e) provides for the assessment of antidumping duties at the rate of the cash deposit of estimated antidumping duties required at the time of entry of the merchandise, when the Secretary has received no request, under subsection (a), for an administrative review. This implements Congressional intent that the Secretary provide by regulation for duty assessment on entries for which no review has been requested (Conference Report at 181).

Antidumping Duties; Proposed Rule, 51 FR 29046, 29051 (August 13, 1986) (emphasis added);[2] see also Antidumping Duties; Final Rule, 54 FR 12742, 12756-57 (March 28, 1989). Thus, since the final promulgation of section 353.22(e) in 1989, the Department has interpreted its regulation at this section consistently to mean that, regarding entries for which no administrative review is requested, the Department is to instruct the U.S. Customs Service to liquidate those unreviewed entries at the cash-

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[2] The Conference Report stated --

> The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the conversion of cash deposits of estimated duties, previously ordered.

H.R . Rep. No. 98-1156, at 181 (1984).

deposit rate in effect at the time of entry of the subject merchandise.

The Department also views Consolidated's citations of Nissei Sangyo and Renasas as contrary to Consolidated's arguments. First, the liquidation instructions in question for both of these cases were issued *after* the instructions issued in the instant case, making them irrelevant examples for determining the Department's past practice with regards to liquidating reseller merchandise. Furthermore, in both of these cases, the Department liquidated the subject merchandise from the reseller at the cash-deposit rates required at entry, not the unaffiliated manufacturer's rates established in subsequent reviews. These cases actually support the Department's position that liquidating reseller entries of subject merchandise at the original cash-deposit rate has been a consistent practice until the issuance of the Clarification Assessment. The Court's rulings against the Department in these cases do not alter the fact that the Department has since followed consistently the same procedures of automatic liquidation that it did in Consolidated's case.

Finally, in ABC v. United States and contrary to Consolidated's assertion that the knowledge test was not a factor in that case, the Court stated specifically that for a reseller's rate to be established "it must be established that the manufacturer had no knowledge" in accordance with the Department's practice. See ABC v. United States, 19 CIT at 791 (footnote 6).

In conclusion, we find that our actions regarding the liquidation of Consolidated's entries are in accordance with our consistent past practice.

FINAL RESULTS OF REDETERMINATION

Upon issuance of a final and conclusive court decision, we will instruct U.S. Customs and Border Protection to liquidate Consolidated's entries of merchandise produced by FAG and imported

by Consolidated during the period November 9, 1988, through April 30, 1990, according to the directions outlined in the August 4, 1998, liquidation instructions.

These final results of redetermination are pursuant to the remand order of the Court of International Trade in Consolidated Bearings Company v. United States, Court No. 98-09-02799, Slip Op. 04-10 (January 30, 2004).

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James J. Jochum
Assistant Secretary
for Import Administration

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Date