FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND
Shanghai Eswell Enter. Co., Ltd. v. United States
Court No. 05-00439, Slip Op. 07-138 (CIT September 13, 2007)

Summary

The U.S. Department of Commerce (the "Department") has prepared these results of redetermination pursuant to the remand order from the U.S. Court of International Trade (the "Court") in Shanghai Eswell Enter. Co., Ltd. v. United States, Court No. 05-00439, Slip Op. 07-138 (CIT September 13, 2007) ("Shanghai Eswell"). The Court affirmed the Department's valuation of raw honey using data maintained by EDA Rural Systems Pvt. Ltd. ("EDA data"), as well our valuation of factory overhead, selling, general and administrative expenses ("SG&A expenses") and profit using Mahabaleshwar Honey Producers Cooperative Society, Ltd.'s ("MPHC") financial statement. The Court remanded the following issues to the Department for further administrative proceedings consistent with its opinion and Order: 1) the calculation of the raw honey surrogate value; 2) the calculation of surrogate financial ratios with respect to (a) the treatment of honey sales commissions and (b) the treatment of jars, corks and honey machine purchases; and 3) the use of export price sales for Jinfu Trading Co., Ltd.'s ("Jinfu PRC") U.S. sales. See Shanghai Eswell, Slip Op. 07-138 at 8, 11, 16, 21, 26, 30 & 34.

Background

On September 13, 2007, the Court remanded to the Department the second administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC"). See Shanghai Eswell, Slip Op. 07-138; Final Results in the 2002/2003 Administrative Review of Honey from the People's Republic of China, 70 FR 38872 (July 6, 2005), and accompanying Issues and Decisions Memorandum ("Final

Results"). The period of review covers the period December 1, 2002, to November 30, 2003 ("POR"). In its order, the Court directed the Department to:

1. Address the evidence cited by plaintiffs regarding the decline in prices during the second half of the POR and explain whether and how the observed decline in prices during the second half of the POR is reflected in the raw honey value calculation; or recalculate the value to reflect a reasonable interpretation of the record evidence concerning the decline;

2. Explain in more detail the Department's determination not to deduct honey sales commissions from the SG&A ratio;

3. Explain why jars, corks and honey machines are not treated as direct materials in the production of finished honey; and

4. The Department must find Jinfu USA[1] and Jinfu PRC affiliated prior to October 25, 2003, or provide other record evidence to support its conclusion that the companies were not affiliated.

The Department issued its draft results of redetermination pursuant to the remand order from the Court in Shanghai Eswell, Slip Op. 07-138 ("Draft Remand Results") to all interested parties on January 15, 2008. On January 22 and January 24, 2008, respectively, we received comments on the draft remand results from plaintiffs [2] and petitioners.[3] These comments are addressed below.

In accordance with the Court's instructions we have: 1) addressed record evidence cited by plaintiffs as indicating a decline in export prices during the second half of the POR and explained why we have refrained from considering these data in calculating a surrogate value for raw honey; 2) (a) discussed evidence, which plaintiffs[4] insist reflects an exact correlation between the selling commission expenses incurred by Shanghai

[1] Yousheng Trading (U.S.A) Co., Ltd. ("Younsheng"), which later became Jinfu Trading (U.S.A.) Co., Ltd. ("Jinfu USA").
[2] Shanghai Eswell Enter. Co., Ltd. ("Shanghai Eswell"); Jinfu PRC; and Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. ("Zhejiang")-(collectively "plaintiffs" or "respondents").
[3] American Honey Producers Association and the Sioux Honey Association ("petitioners").
[4] Plaintiffs only challenge the Department's deduction of honey sales commissions from Shanghai Eswell and Zhejiang's U.S. price calculations.

Eswell and Zhejiang, and those incurred by the surrogate, MHPC, and further explained our decision in the Final Results that the record evidence was insufficient to permit a circumstances of sale ("COS") adjustment, or to make a COS adjustment, as well as (b) revised our financial ratio calculations to include MHPC's reported expenses for jars and corks as direct materials used for producing finished honey and provided further explanation regarding our finding that honey machine purchases do not constitute direct expenses; and 3) addressed the Court's findings with respect to operational control, and explained our continued finding, in accordance with our decision in the Final Results of Redetermination Pursuant to Court Remand: Jinfu Trading Co., Ltd. v. United States, Court No. 04-00597, Slip Op. 07-95 (CIT June 13, 2007) ("Jinfu II Final Remand Results"), that record evidence supports the conclusion that Jinfu PRC and Jinfu USA were not affiliated prior to October 25, 2003.

Analysis

Issue 1: Calculation of the Raw Honey Surrogate Value

As explained in the Final Results, the Department, using EDA data, calculated a period of review ("POR") average raw honey value of 74.90 rupees ("Rs") per kilogram ("kg"). The time periods and types of honey employed in calculating the raw honey value were derived from an EDA Data Memo available on the EDA Rural Systems Pvt Ltd. ("EDA") website, at http://www.litchihoney.com, as well as from information provided by an EDA Rural Systems staff member. More specifically, we utilized a weight averaged price to value the factor of raw honey, which was based on the price and quantity for each type of honey produced and sold by EDA for each month from December 2002 through June 2003. In order to arrive at a raw honey value for October

2003 we adjusted EDA's October 2002 reported raw honey price for inflation using the wholesale price index ("WPI"). After deriving the weighted-average price of raw honey, we converted the price per rupee to U.S. dollars and made adjustments to the unit of measure when appropriate. See Memorandum to the File from Case Analysts: Factors of Production Valuation Memorandum for the Final Results, dated June 25, 2005 ("FOP Memo"). See also Final Results at Comment 1.

The Court remands the Department's surrogate value calculation for raw honey in order for the Department to explain how inflating the price of raw honey takes into consideration WTA export data, placed on the record by plaintiffs, which reflect that honey prices declined in the second half of the POR (July 2003 to November 2003). Specifically, the Court instructs the Department to either: (1) address the evidence cited by the plaintiffs and explain whether and how the observed decline in prices during the POR is reflected in its calculation of raw honey; or (2) recalculate the value to reflect a reasonable interpretation of the record evidence concerning this decline. See Shanghai Eswell, Slip Op. 07-138 at 11.

In accordance with the Court's instruction on remand, and after careful examination of the record, as discussed below, we find that the evidence cited by plaintiffs are insufficient to serve as a basis to conclude that a decline in prices occurred for raw honey within India during the second half of the POR. Therefore, we have determined, as we did in the Final Results, that EDA data are the best available information and that inflating EDA's reported price of raw honey for October 2002 is an appropriate means by which to arrive at a raw honey value for October 2003. Accordingly, we find that our

calculation of the raw honey surrogate value should remain unchanged from the Final Results.

As an initial matter, we would like to acknowledge we did not use WTA export data or any trends stemming there from in calculating a surrogate value for raw honey. Further, we neither addressed, nor disputed on the record, plaintiffs' allegations of a price decline because of the type of evidence cited by plaintiffs as indicating a decline in honey prices in India during the second half of the POR. See Shanghai Eswell, Slip Op. 07-138 at 10. The Department's rationale for declining to rely on the WTA export data in the calculation of the surrogate value for raw honey is stated below.

Plaintiffs placed on the record of this administrative review WTA export data, which it argues indicate a decline in prices of Indian honey during the second half of the POR. See Pls. Br. Supp. R. 56.2 mot. J. Agengy R. at 11. ("Pls.' Mem.") (citing Respondent's Second Surrogate Value Submission (January 18, 2005), Pub. Doc. 257, Ex 1 ("Respondent's Second Surrogate Value Submission"). First, we note that the WTA export data represent export prices of honey from India to other countries. The Department normally does not use export data to value inputs, because export data may not accurately reflect the market value of the goods within the country of exportation. For instance, the Department has no way of knowing if export prices mimic or even reflect domestic prices in the marketplace. As such, we believe that export data are not a reliable source for either valuing inputs or serving as an indicator of internal pricing trends. See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 15, 2005), and accompanying Issues and Decision Memorandum, at

Comment 4; see also Sebacic Acid From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 69 FR 75303 (December 16, 2004), and accompanying Issues and Decision Memorandum, at Comment 4.

Even if, contrary to our practice, we were to accept export data in this instance for purposes of evaluating domestic pricing trends, we do not find the WTA export data to constitute an acceptable source for such because the category of merchandise covered by the data is much broader than the merchandise covered by the scope of the order. For the same reasons, we do not find WTA export data to be an acceptable source of information for purposes of evaluating domestic pricing trends for honey within India. When valuing respondents' factors of production ("FOPs") the Department prefers product specific tariff classifications rather than basket tariff provisions, unless there is no other available information. See Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China, 71 FR 16116 (March 30, 2006), and accompanying Issues and Decision Memorandum at Comment 4, and Freshwater Crawfish Tail Meat From the People's Republic of China; Final Results of New Shipper Review, 64 FR 27961, 27962 (May 24, 1999). The WTA export data placed on the record by plaintiffs are based on Harmonized Tariff Number ("HTS") 0409.00.00, which is a basket category that includes exports of both raw honey and processed honey, and may include specialty forms of honey in jars, bottles, etc. In fact, we note that the POR price reflected by the WTA export data are 1 1/3 times greater than the Department's surrogate value for raw honey during the POR, suggesting that processed honey may account for a significant portion of the WTA Indian honey exports. See Respondent's Second Surrogate Value Submission at Exhibit 1. Thus, we did not consider evidence

stemming from WTA export data to value raw honey. See Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 26589 (May 10, 2007) at Comment 1.

As a result of the above, namely our practice not to rely on export data and the broad, expansive nature of the HTS category upon which the WTA export data for honey are based, the Department declines to use the WTA export data or any trends stemming there from, in the calculation of the surrogate value for raw honey in this administrative review. Because the Department finds it inappropriate under these circumstances to rely on export data, even as a benchmark, for market prices within India, we continue to find that the EDA data are the best available information for valuing raw honey. Moreover, we find that adjusting EDA's October 2002 reported raw honey value for inflation was an appropriate means by which to determine a raw honey value for October 2003, as our consistent practice is to inflate all surrogate values to the current POR using an economy wide inflation index. Thus, we have left the POR raw honey value calculated in the Final Results unchanged.

Issue 2: The Calculation of Surrogate Financial Ratios

(a) The treatment of honey sales commissions

In the Final Results, the Department determined, consistent with our past practice of not making COS adjustments in non-market economy ("NME") proceedings, that honey sales commissions should be included in the surrogate SG&A calculation. Specifically, we explained, because the Department does not does not modify surrogate financial ratios to match the particular circumstances of the NME respondent, whether the respondent actually incurred commissions is irrelevant to the Department's surrogate SG&A

calculation. Therefore, we stated, in NME proceedings, sales commissions represent standard selling expenses, irrespective of any sales commissions the respondents incurred on the sale of subject merchandise. We also addressed plaintiffs' theory that because the Department adjusts constructed value ("CV") in market economy ("ME") proceedings, it must make a parallel adjustment to the surrogate CV for commissions in NME proceedings. We explained that while the Department is required to make adjustments to CV for commissions in ME proceedings (i.e., COS adjustments), we are precluded from making parallel adjustments to the surrogate CV in the NME context because it is not known whether there is an exact correlation between the NME producer's and the surrogate producer's expenses. Therefore, it is not possible to deconstruct surrogate financial ratios at the level of detail that would be necessary to make COS adjustments in such proceedings. Thus, we concluded, because the honey sales commissions in this administrative review are an aspect of the surrogate company's home market standard sales expense, their inclusion is consistent with the Department's past practice of including sales commissions as standard selling expenses in the surrogate SG&A calculation. See Final Results at Comment 3.

The Court has remanded the Department's decision not to deduct honey sales commissions from the SG&A ratio in order to allow the Department to further explain how the record evidence was insufficient to permit a COS adjustment, or to make a COS adjustment. Specifically, the Court has observed that the Department, in relying upon its past practice of not making COS adjustments in NME cases, did not discuss evidence on the record, which plaintiffs allege reflect an exact correlation between the NME producer and the surrogate producer expense (i.e., commission on honey sales expense).

Therefore, the Court has remanded this matter to the Department to explain in more detail its decision not to deduct commissions from the SG&A ratio. See Shanghai Eswell, Slip Op. 07-138 at 20 & 21.

In accordance with the Court's instruction on remand, and after careful examination of the record, as discussed below, we have addressed record evidence, cited by plaintiffs, related to honey sales commissions and further explained our decision in the Final Results that the record evidence of this administrative review was insufficient to permit a COS adjustment. The Department's rationale for continuing to find that honey sales commissions should be included in the surrogate SG&A calculation is articulated below.

Plaintiffs assert that there is sufficient evidence on the record of this NME administrative review to make a COS adjustment. Specifically, plaintiffs insist that record evidence reflect an "exact correlation" between the commissions incurred by Shanghai Eswell and Zhejiang, and those incurred by the surrogate producer MHPC. See Pls.' Mem. at 30. At the heart of plaintiffs' challenge is their contention that ME cases and NME cases should be treated similarly with respect to the deduction of commissions. Specifically, plaintiffs theorize that in calculating normal value ("NV") in the NME context, the Department is required to apply the same rules it does when adjusting for differences in COS when the NV is based on CV. See Pls.' Mem. at 28-29. Therefore, plaintiffs argue, because it is known in this administrative review that there is an exact correlation between the NME producers' and the surrogate producer's experience with respect to commissions, an adjustment, akin to that which is applied in ME CV proceedings (i.e., make a COS adjustment), is permissible in this NME proceeding.

First, and foremost, we find plaintiffs assertion of an "exact correlation" to be factually incorrect. The record evidence cited by plaintiffs reveals that neither Shanghai Eswell, nor Zhejiang, paid commissions on sales to the United States as the exporter. Rather, the commissions paid on U.S. sales were paid in the United States by Shanghai Eswell's and Zhejiang's U.S. affiliates. See Shanghai Eswell's March 25, 2004, Section C Response at 24-25 and Exhibits 1 & 7; see also Zhejiang's March 25, 2004, Section C Response at 24 and Exhibits 1 & 6. MHPC's financial statement does not contain activity for overseas affiliates; therefore it is reasonable to conclude that the commissions reflected on MHPC's financial statement were incurred and paid by MHPC itself within India. As explained below, we find that the record of this administrative review does not support the conclusion that an "exact correlation" exists with respect to the commission experience of Shanghai Eswell, Zhejiang, and MHPC. Therefore, we have declined to deduct the honey sales commissions from the SG&A ratio.

The Statement of Administrative Action ("SAA") to the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, H. Doc. 103-316, vol. 1 at 826-831 (1994), provides guidance regarding the Department's authority to make adjustments for differences in the COS used to establish NV, and those used to establish export price ("EP") and constructed export price ("CEP") pursuant to section 773(a)(6)(C) of the Tariff Act, of 1930, as amended ("the Act"). Accordingly, it is the Department's practice to "employ the circumstances-of-sale adjustment to adjust for differences in direct expenses and differences in selling expenses of the purchaser assumed by the foreign seller," between NV and both EP and CEP. See SAA at 828. With respect to CEP situations, the Department's practice is to "deduct direct expenses incurred in the United

States in calculating the CEP price." Id. Further, "direct expenses and assumptions of expenses incurred in the foreign country on sales to the affiliated importer will form a part of the circumstances of sale adjustment." Id. Thus, it is the Department's practice that expenses incurred by the exporter, not expenses incurred by the affiliate in the United States, form the basis of COS adjustments.

As noted above, plaintiffs reported commission expenses incurred and paid by affiliates of Shanghai Eswell and Zhejiang operating in the United States. Therefore, in the Final Results, these expenses were properly deducted from the starting price for U.S. sales to arrive at CEP. See FOP Memo at Attachment 2. Thus, as the commissions at issue were incurred in the United States by the U.S. affiliates of Shanghai Eswell and Zhejiang and were properly deducted from the price used to establish CEP, they do not constitute direct expenses incurred by the foreign exporter on sales to the United States. As a result, the commissions paid by the U.S. affiliates of Shanghai Eswell and Zhejiang are not a proper basis for a COS adjustment.

While not argued specifically by plaintiffs, we note, however, that the statute and regulations do allow for COS adjustments when the exporter incurs certain expenses in either the U.S. or comparison market that it does not incur when selling to the other. See 19 C.F.R. 351.410(e). See also Torrington Co. v. United States, 156 F.3d 1361, 1363 (Fed. Cir. 1998). Although the Department's regulations provide for a COS adjustment for commissions paid in one market and not the other, we find that the record contains insufficient information to make such an adjustment in this administrative review. As the Department explained in Shandong Huarong, while a respondent may pay a commission to an agent for performing certain duties, the respondent itself may perform the same type

of duties in another. See Shandong Huarong Machinery Co., Ltd. et. al., v. United States, Slip Op. 07-169 at 30, 31, & 33 (CIT November 2007) ("Shandong Huarong"). When this situation arises in a ME proceeding, the Department, in calculating NV, will make a COS adjustment by offsetting these commissions incurred by the exporter on sales to one market with the indirect selling expenses incurred by that same exporter on sales to the other. Id. at 31. In other words, if an exporter paid commissions on its sales in the home market but not on its sales to the United States, the Department would deduct the home market commissions from NV but add in the exporter's indirect expenses incurred on its sales to the United States.

In this NME administrative review, however, in order to make a COS adjustment for commissions paid by the surrogate producer MHPC, but not by Shanghai Eswell or Zhejiang, the Department would have to collect and rely on data with respect to Shanghai Eswell's and Zhejiang's indirect selling expenses incurred in the foreign market (PRC) for sales to the United States. Such expenses, however, would be based on internal PRC pricing, which the Department does not utilize for purposes of antidumping calculations because such pricing reflect internal transactions in an NME country which are considered unreliable. See section 771(18)(A) of the Act. See also Shandong Huarong, Slip Op. 07-169 at 34. Thus, while plaintiffs assume that the Department's practice of making COS adjustments in ME CV cases can be replicated in the NME context, we find we are precluded from making parallel adjustments in this case because the necessary data to calculate such adjustments cannot be relied upon due to the fact that the relevant expenses are incurred and priced under non-market economy conditions.

Therefore, for the reasons cited above, we continue to find that the record evidence is insufficient to permit a COS adjustment, or make a COS adjustment, in this administrative review. Thus, we continue to find that our SG&A calculation should remain unchanged from the Final Results.

(b) The treatment of jars, corks and honey machines

In the Final Results the Department did not include "jars and corks" and honey machine expenses as direct material costs in the calculation of the materials, labor and energy ("MLE") denominator. We explained our finding, noting that the line items for "jars and corks" and honey machines each appear separately in both the "Sales" and "Purchase" columns, independent of the "Honey Collection" and "Honey Sale" line items of the 2003/2004 MHPC surrogate financial statement. See Respondent's Second Surrogate Value Submission at Exhibit 1. We acknowledged that the costs and revenues associated with "jars and corks" and honey machines are independently itemized on the MHPC financial statements-specifically apart from the line item labeled "honey sales." We explained, however, that without supporting evidence reflecting that that these items are associated with or incorporated into the sale of subject merchandise, we must treat the financial statement line items as they were reported in the MHPC financial statement-independent of sales and packaging. Thus, in the application of the surrogate financials we did not adjust the MLE denominator to include the expenses for "jars and corks" and honey machines. See Final Results at Comment 3.

The Court has remanded for further explanation, the Department's finding that jars, corks and honey machines were not direct materials in the production of finished honey. See Shanghai Eswell, Slip Op. 07-138 at 24-26. Specifically, the Court raises questions

in its opinion regarding the chart on page 15 of the MHPC financial statement containing the line items for jars, corks and honey machines, which it instructs the Department to address on remand. For example, the Court notes that the chart: 1) specifically pertains to honey sale and collection; and 2) contains line items for 250 gram, 500 gram and 1 kilogram jars; 53 millimeter and 38 millimeter corks; and honey machines in both the "Sale" and "Purchase" column and that the line item for 100 gram jars appears only in the "Sale" column. Id. at 24. Based on these observations, the Court finds the chart ambiguous and void of any evidence which supports a conclusion that, based on the fact that the line items for jars and corks are separate from other line items, MHPC buys and sells jars and corks that are either empty of filled with something other than honey. In addition, the Court notes that the Department's assertion that "honey machines are a productive asset, not a direct expense, for which Commerce would calculate depreciation," is raised for the first time in its papers before the Court and cannot take the place of its own reasoning on this issue in the Final Results. See Shanghai Eswell, Slip Op. 07-138 at 25. Therefore, the Court states, in light of the questions raised in the opinion, the Department shall explain its decision not to include expenses for jars, corks and honey machines as direct expenses used for producing finished honey. Id. at 26.

In accordance with the Court's instruction, and after careful examination of the record, as discussed below, we have revised our financial ratio calculations to include, as direct materials used to producing finished honey, MHPC's reported expenses for jars and corks. See Attachment I. In addition, we have provided further explanation regarding our continued finding that honey machine purchases do not constitute direct expenses. The Department's rationale for revising the financial ratio calculation to

include expenses for jars and corks, as well as our rationale for not including expenses for honey machines is articulated below.

As discussed above, we determined that jars and corks were not direct materials in the production of finished honey in the Final Results. Therefore, we did not adjust the surrogate revenue and the MLE denominator to include those expenses reported for jars and corks. See Final Results at Comment 3. Our finding that jars and corks were not direct materials, as well as our subsequent decision not to include these expenses in our financial ratio calculation, was based on our observation that these two line items are independently itemized on MHPC's financial statement. Therefore, we explained, without further evidence that jars and corks were part of MHPC's finished product; we could not adjust the financial ratio calculation to include, as direct materials, expenses associated with these line items. Id. Upon further consideration of the record evidence, and in light of the questions raised and observations made by the Court in its opinion, we agree with the Court that the chart on page 15 of the MHPC financial statement, which we cited as a basis for our conclusion in the Final Results that jars and corks are not direct materials, is specific to purchases and sales of honey and as such, are relevant. Therefore, because the chart is unclear with respect to this issue, on remand we have determined it more appropriate to adjust the MLE denominator to include expenses for jars and corks and deduct the amount for jars and corks from the net revenue. See Attachment I.

As stated above, we continue to find, however, that honey machines should not be treated as direct materials. In the Final Results we observed that honey machines, like "jars and corks", are listed separately from other line items. We then concluded that "jars

and corks" and honey machines are not direct materials associated with finished honey. See Final Results at Comment 3. Because, in the Final Results, we addressed these three financial line items collectively, rather than singularly, we articulated in our brief before the Court the distinct reasoning which led to our finding that honey machines do not constitute direct materials. Thus, we explained that "honey machines are a productive asset, not a direct expense, for which Commerce would calculate depreciation." See Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 34 ("Def.'s Mem."). As the Court observes, this assertion was raised for the first time in our papers before the Court and cannot take the place of our own reasoning in the Final Results. See Shanghai Eswell, Slip Op. 07-138 at 25. Therefore, on remand, we have provided additional explanation with respect to our finding that honey machines are unequivocally a productive asset and, thus, do not constitute a direct expense.

The Department, in accordance with generally accepted accounting principles ("GAAP"), treats property, plant and equipment, as productive assets. Productive assets are defined as tangible property to be used in a productive capacity that will benefit the enterprise for greater than one year. Productive assets are then allocated to the periods benefitted through depreciation. See Balance Sheet Wiley GAAP 2005: Interpretation and Application of Generally Accepted Accounting Principles (2005). Thus, in addition to finding that honey machines are independently itemized on the MHPC financial statement, we determined that honey machines, as equipment, are a productive asset. Therefore, in the Final Results we concluded that honey machines are not direct materials. On remand we continue to find that honey machines should not be treated as

direct materials and have not adjusted the surrogate financial ratio to include expenses related to this productive asset.

In conclusion, for the reasons cited above, we have determined on remand that "jars and corks" are direct materials in the production of finished honey. We continue to find, however, that honey machines are not direct materials. Therefore, we have revised our surrogate financial ratios to include expenses for "jars and corks"; however, we continue to find that honey machine expenses should not be included in this calculation. See Attachment I.

Issue 3: The Department's Determination That Jinfu PRC Did Not Control Jinfu USA's Pricing Decisions

In the Final Results the Department continued to find that the record evidence submitted by Jinfu,[5] with respect to its claim that Jinfu PRC was affiliated with Jinfu USA prior to October 25, 2003, is not credible and does not support its contention that Jinfu PRC and Jinfu USA were affiliated prior to this date. Therefore, we determined that Jinfu PRC is "affiliated" with Jinfu USA as of October 25, 2003, within the meaning of section 771(33)(F) of the Act. Thus, we treated any sales made between Jinfu PRC and Jinfu USA prior to October 25, 2003, on an EP basis, while all sales made after this date were treated on a CEP basis. See Final Results at Comment 8.

The Court, citing its findings in Jinfu I[6] and Jinfu II,[7] has remanded this matter to the Department and has directed the Department to either find that Jinfu PRC and Jinfu USA were affiliated prior to October 25, 2003, or to provide other record evidence to support

[5] Collectively, Jinfu PRC and Jinfu USA.
[6] Jinfu Trading Co., Ltd. v. United States, Court No. 04-00597, Slip Op. 06-137 (CIT September 7, 2006) (Jinfu I).
[7] Jinfu Trading Co., Ltd. v. United States, Court No. 04-00597, Slip Op. 07-95 (CIT June 13, 2007) ("Jinfu II").

its conclusion that the companies were not affiliated. See Shanghai Eswell, Slip Op. 07-138 at 34.

In accordance with the Court's instruction and after careful examination of the record, as discussed below, we continue to find that Jinfu PRC and Jinfu USA were not affiliated prior to October 25, 2003. Further, our continued finding, with respect to control, follows the same reasoning and directs the same results articulated in Jinfu II Final Results, which is currently pending before this Court.[8] Specifically, we continue to find that there is no record evidence to support a finding that Jinfu PRC controlled Jinfu USA's pricing decisions. Therefore, we have determined, as we did in the Final Results, that Jinfu PRC is "affiliated" with Jinfu USA as of October 25, 2003, within the meaning of section 771(33)(F) of the Act.

As noted above, the Court, in remanding this matter to the Department, cites its findings, with respect to control, in both Jinfu I and Jinfu II. Specifically, in Jinfu I the Court examined the verification report, as well as correspondence between CEO B and Mr. A. and determined that record evidence indicated that Jinfu PRC controlled Jinfu USA's pricing decisions. See Jinfu I, at 28-30. On remand the Department, finding the faxes exchanged between Mr. A and CEO B to be incredible, continued to find that Jinfu PRC was not affiliated with Jinfu USA. See Jinfu II, at 21. The Jinfu II Court found the Department's analysis wanting and remanded the matter to the Department a second time, instructing the Department to explain "why the contents of the faxes exchanged

[8] The Department's finding that Jinfu PRC was not affiliated with Jinfu USA prior to October 25, 2003, in this administrative review is the same finding that formed the basis of the Department's decision to rescind Jinfu's new shipper review. See Honey from the People's Republic of China; Notice of Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029 (November 2, 2004) (Jinfu NSR Final Results), and accompanying Issues and Decision memorandum (Decision Memo) at Comment 2.

between Mr. A and CEO B, if credible and reliable, do not support a conclusion that CEO B controlled Jinfu USA," and to "reopen the record to allow plaintiff to put on the record new evidence regarding the credibility and reliability of the faxes…" See Jinfu II, at 22.

In the Final Results we addressed Jinfu's claim that Jinfu PRC controlled Jinfu USA's pricing decisions. We explained that when determining whether control over another person exists, we normally look for such factors as corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships, etc. Moreover, we noted, the Department does not find affiliation on the basis of these factors unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. Id. Further, we explained, a mere business relationship does not demonstrate control. See TIJID, Inc. v. United States, 366 F. Supp. 2d 1286 (CIT 2005). Id. Thus, after reviewing Jinfu's narrative, as well as documents submitted on the record, we determined that Jinfu failed to establish that Jinfu PRC's CEO exerted control over Jinfu USA until at least October 25, 2003. See Final Results at Comment 8. Further, we noted that Jinfu failed to provide evidence of other types of control recognized by the Department in other proceedings. Id. citing Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Magnesium Metal From the People's Republic of China, 70 FR 9037 (February 24, 2005), and accompanying Issues and Decision Memorandum at Comment 3 (looking at principal/agent relationships as an element of control) and Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan; Final Results of Administrative Review, 65 FR 2116 ((January 13, 2000), and accompanying Issues and Decisions Memorandum at Comment 1 (considering, inter alia,

computer access and control of disbursements)). Therefore, we found that the record evidence submitted by Jinfu with respect to its claim that Jinfu PRC was affiliated with Jinfu USA prior to October 25, 2003, is not credible and does not support its contention that Jinfu PRC and Jinfu USA were affiliated prior to October 25, 2003. See Final Results at Comment 8.

In the Jinfu II Final Remand Results, in accordance with the Court's instructions, the Department reopened the record on July 31, 2007, to provide Jinfu PRC an opportunity to place thereon further evidence of: a) the credibility and reliability with respect to the facsimile transmissions; and b) to provide an explanation of that evidence. See Letter from Angelica L. Mendoza, Program Manager, to Jinfu Trading Co., Ltd, dated July 31, 2007. Jinfu PRC, however, failed to submit the requested evidence and did not provide any explanation for its failure to place the new evidence on the record. See Jinfu II Final Remand Results, at 2. Therefore, the Department explained, as instructed by the Court, we took into consideration the Court's opinion and reviewed all record evidence and determined that the record evidence supports the conclusion that Mr. A negotiated the U.S. price of the subject new shipper sale without requiring the approval of CEO B. Id. at 13. In reaching this conclusion, the Department examined the timing of the shipment, the price negotiations for the honey sold by Mr. A to the U.S. customer, the independent business decisions made by Mr. A, and the credibility of the facsimiles exchanged between Mr. A and CEO B. Id. Thus, the Department concluded that its finding that Jinfu PRC did not have the potential to, or actually control, Yousheng USA (predecessor to Jinfu USA) with respect to pricing decisions should remain unchanged. Id.

In conclusion, we have taken into consideration the Court's opinion and reviewed all record evidence and, for the reasons explained above, have not changed our finding that

Jinfu PRC and Jinfu USA were not affiliated prior to October 25, 2003. Specifically, we agree with our finding in the Final Results of Redetermination Pursuant to Jinfu II, that the record evidence supports the conclusion that Mr. A negotiated the U.S. price of the subject new shipper sale without requiring the approval of CEO B. Therefore, we continue to find that Jinfu PRC is "affiliated" with Jinfu USA as of October 25, 2003, within the meaning of section 771(33)(F) of the Act and have continued to treat any sales made between Jinfu PRC and Jinfu USA prior to October 25, 2003, on an EP basis, while treating all sales made after this date on a CEP basis.

Comments From Interested Parties

On January 22 and 24, 2008, respectively, petitioners and plaintiffs submitted comments on our Draft Remand Results. These comments are addressed below.

Comment 1: The Calculation of the Raw Honey Surrogate Value

Plaintiffs argue that, contrary to the Department's conclusion in the Draft Remand Results, WTA export data reflect that raw honey prices clearly declined during the second half of the POR. Further, plaintiffs contend, the Department's reliance on EDA data constitutes an impermissible double standard because it is less reliable, less complete and less contemporaneous than the rejected WTA export data. Finally, plaintiffs insist that the Department's decision to inflate EDA's October 2002 reported raw honey price is especially egregious in light of the substantial evidence on the record supporting a decline in the price of raw honey during this period.

Petitioners agree with the outcome and substance of the Department's raw honey price analysis. However, in addition to the WTA export data specifically cited by the

Court, petitioners address evidence from three other sources,[9] which plaintiffs cite in their case brief to bolster their claim that the honey price chosen by the Department was incorrect. With respect to the *Tribune* article, petitioners note that it was rejected as a source of surrogate value data, that it covers an entire year and does not state within which months the prices declined, and that it reflects a range of prices, demonstrating the reasonableness of the Rs. 74.9 raw honey valuation. Thus, petitioners assert, this source supports, not undercuts, the Department's choice of surrogate value for raw honey.

With respect to the prices from the journalist, petitioners note that, as with the *Tribune* article, the surrogate value chosen by the Department falls within the range of prices reported by this source (i.e., Rs. 45 and Rs. 75 rupees) and thus, does not undermine the Department's decision not to take into account the WTA export data in deriving a surrogate value. Petitioners explain, however, that this information should be viewed as unreliable for purposes of determining or adjusting the surrogate value of raw honey because there is no evidence as to the means by which these data were collected or the source of the information on which the journalist relied. Thus, petitioners argue, the prices cited by the journalist do not constitute substantial evidence that a price decline occurred in the second half of the POR. Finally, petitioners note that the Court has already deemed the Indiainfoline article an unreliable source for surrogate value data and that the Department was, therefore, correct not to rely on any trends stemming from this information.

Thus, petitioners assert, in these Final Results of Redetermination the Department

[9] i.e., "Honey Sweet Despite Price Fall," published by the *Tribune (of India)* on December 15, 2003 ("*Tribune* article"); "Prospects of Bee Keeping in Rubber Plantations of Kerala" from India Infoline ("Indiainfoline article"); and the author of the *Tribune* srticle who also advised the Department that in September 2003, honey prices were between Rs. 45 and Rs. 75 rupees ("prices from the journalist").

should address the WTA export data, as well as the *Tribune* article, the prices from the journalist and the Indiainfoline article, and explain why none of this evidence supports plaintiffs' claims that raw honey prices declined during the second half of the POR, or that the surrogate honey price chosen by the Department was incorrect.

Department's Position:

In the Final Results we evaluated various honey source data for surrogate value purposes, including the *Tribune* article, the prices from the journalist and the Indiainfoline article. We did not, however, specifically address whether these sources support plaintiffs' argument that the WTA export data reflect that honey prices declined during the second half of the POR because, as explained above, the WTA export data cited by plaintiffs were insufficient to serve as a basis to conclude that a decline in prices occurred for raw honey within India during the second half of the POR. We agree with petitioners, however, that the evidence contained in these articles and prices from the journalist fail to demonstrate that raw honey prices fell during the second half of the POR, or that our calculation methodology resulted in an inappropriate surrogate value for raw honey. In other words, this evidence fails to substantiate plaintiffs' argument that the surrogate honey price chosen by the Department was incorrect. See Final Results at Comment 1. See also Shanghai Eswell, Slip Op. 07-138 at 32-33. Thus, we continue to find that the EDA data are the best available information for valuing raw honey and that adjusting EDA's October 2002 reported raw honey value for inflation is appropriate. Therefore, we have left the POR raw honey value calculated in the Final Results unchanged.

Comment 2: The Calculation of Surrogate Financial Ratios: *Treatment of honey sales commissions*

Plaintiffs state that the Department's refusal to adjust NV to include sales commissions reported by MHPC is contrary to law and unfairly penalizes respondents in NME cases. Plaintiffs argue that the Department's policy of deducting commissions from CEP, while refusing to deduct commissions from NV, is contrary to its obligation to calculate margins in a fair and equitable manner.

Department's Position:

We disagree with plaintiffs. As discussed above, the statute requires that all direct selling expenses incurred in the United States by the exporter's U.S. affiliate be deducted from starting price in order to arrive at CEP. With respect to plaintiffs' argument that we should adjust NV, as stated above, such an adjustment would require reliance on indirect selling expenses incurred in the PRC at NME prices. The Department cannot rely on internal PRC prices due to the fact that such prices are not reflective of free market conditions. Therefore, our determination that honey sales commissions should not be deducted from the SG&A ratio is supported both in law and fact.

Comment 3: The Calculation of Surrogate Financial Ratios: *Treatment of jars and corks*

Petitioners disagree with the Department's finding that a lack of clarity in the chart showing jar and cork expenses leads to the conclusion that such items should be treated as direct expenses. Petitioners contend that while the costs for these two items may be linked to MHPC's honey operations, there is nothing on the record supporting a conclusion that jars and corks are used by MHPC in bottling honey. Noting that the chart

reflects both the "Purchase" and "Sale" of jars and corks, and that the financial statement shows that jars and corks are listed as separate line items and are shown in terms of sale, rather than consumption, petitioners argue, it is reasonable to assume that these items are sold separately.

Petitioners assert, however, that if the Department continues to treat jars and corks as part of the cost of honey sales, than they should be treated as *packing* materials because they are no different than the steel drums used by the Chinese honey exporter to sell honey to U.S. importers. And, petitioners contend, if the Department continues to treat jars and corks as direct materials for the production of honey in retail, then it must treat steel drums as part of the direct materials rather than packing costs, because there is no difference between the function of the jars and corks and drums, and thus, no basis exists for treating them differently.

Department's Position:

As discussed above, upon further consideration of the record evidence, and in light of the questions raised and observations made by the Court in its opinion, we have revised our financial ratios to include costs for jars and corks as direct expenses. While we noted in the Final Results that the chart on page 15 of the MHPC financial statement specifically pertains to honey sale and collection, we also observed that jars and corks were listed separately from other line items on the chart, and therefore, concluded that they were not direct materials. After further evaluation, however, we agree with the Court that the chart on page 15 of the MHPC financial statement is ambiguous and void of any evidence which supports a conclusion that MHPC buys and sells jars and corks that are filled with something other than honey. Thus, because the chart is specific to

purchases and sales of honey, we find that jars and corks are relevant and should be included as direct expenses used for producing finished honey. Therefore, on remand, we have determined it more appropriate to adjust the MLE denominator to include expenses for jars and corks and deduct the amount for jars and corks from the net revenue. See Attachment I.

We disagree with petitioners, however, that jars and corks, as part of the cost of honey sales, should be treated as a *packing* expense, rather than a direct production cost. Specifically, petitioners posit that jars and corks are to retail customers as steel barrels are to packer importers that buy Chinese honey in the U.S. We find, however, that jars and corks are more akin to *packaging* materials than *packing* materials. For example**,** jars and corks are an integral part of the raw honey, which helps to extend its shelf life. As noted in Chilean Salmon, when a products' shelf life is extended by the packaging, the product is transformed and thus the materials used in the process are direct materials. See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR at 31415 (June 9, 1998) ("Chilean Salmon"). Steel drums, on the other hand, are incidental to shipping raw honey and are appropriately included as *packing* costs. Thus, because jars and corks are an integral part of the raw honey they are more appropriately classified as direct materials associated with finished honey. Accordingly, we have revised our financial ratio calculations to include MHPC's reported expenses for jars and corks as direct expenses used for producing finished honey.

Comment 4:

Plaintiffs argue that the Department erred in continuing to find that Jinfu PRC and Jinfu USA were not affiliated during the POR.

Petitioners agree with the Draft Remand Results; however, they suggest providing, in full, the same arguments provided to the Court in the Jinfu II remand, with cites to the record of this administrative review.

Department's Position:

Based on the record evidence, we continue to find that Jinfu PRC and Jinfu USA were not affiliated prior to October 25, 2003. Specifically, there is no record evidence to support a finding that the facsimiles exchanged between Mr. A and CEO B demonstrate that CEO B had the potential to control or actually controlled Mr. A on November 2, 2002, the date of the relevant U.S. sale. Rather, record evidence supports the conclusion, similarly decided in Jinfu II Final Results, that Mr. A negotiated the U.S. price of the relevant U.S. sale without requiring the approval of CEO B. See Final Results at Comment 8.

In evaluating the validity of that authorization, in order to determine whether CEO B had the potential or actually controlled the pricing of the subject merchandise at the time of the relevant sale, the Department must examine the nature of the relationship between CEO B and Mr. A. The Department's determination in these remand results is based upon sections 19 U.S.C. § 1677(33)(F) or (G), which provides that affiliation exists, where one party is in a position to exercise control over another party. The statute further provides that a person shall be considered to control another person if a party "is legally or operationally in a position to exercise restraint or direction over another." See 19 U.S.C. § 1677(33)(F) or (G). The Department's regulations clarify that a finding of control over another person will not be found unless the relationship has the potential to impact decisions concerning, inter alia, pricing of the subject merchandise. See 19 CFR

§ 351.102(b). For example, in another case where the Department did find evidence of affiliation by way of operational control, the Department determined that the chief executive of the foreign producer not only established, but also owned the property, and had regular access to the computerized accounting systems of two allegedly unaffiliated U.S.-based companies. Additionally, the chief executive of the foreign producer also negotiated the sales prices of all sales to be made by the two U.S. companies. See Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan; Final Results of Administrative Review, 65 FR 2116, 2117-2139 (January 13, 2000) (Taiwan Stainless). While the fact pattern in Taiwan Stainless may not exist in every case, it does indicate the kind of circumstances and evidence the Department may rely upon in reaching a determination regarding operational control on the part of the foreign producer.

Though substantially all of the documents submitted by Jinfu PRC during the administrative review relate to the formation of Jinfu USA, the documents also provide objective evidence of the relationship between Mr. A and CEO B and demonstrate that in substantive, operational matters, Mr. A operated with little or no direction or supervision by CEO B.[3] For example, record evidence indicates that Jinfu PRC's CEO did not own Jinfu USA or Yousheng USA prior to October 25, 2003. See Final Results at Comment 8. The Certificate of Transfer of Stocks ("CTS") was dated on October 25, 2003, by the relevant parties – well after the date that Jinfu claims Jinfu PRC's CEO purchased what was then Yousheng USA, *i.e.*, October 25, 2002. We also note that the CTS does not provide Jinfu PRC's CEO with any legal or operational authority to exercise restraint or direction over Jinfu USA prior to the date of execution of this agreement. Id.

[3] As noted in Jinfu I, the Court has stated that CEO B did not legally own Yousheng USA/Jinfu USA at the time of the relevant U.S. sale.

Further, the documents from the state of Washington appear to indicate that Jinfu USA's sole employee was acting independently of Jinfu PRC or Jinfu PRC's CEO, despite respondent's claims in its brief that Jinfu's narrative responses clearly show that Jinfu USA's sole employee was acting with authorization from Jinfu PRC and its CEO. See Final Results at Comment 8. We note that Jinfu USA's sole employee alone filed the documents to form Yousheng USA on October 4, 2002, and later listed himself as the owner, and that he amended the company name himself from Yousheng USA to Jinfu Trading (U.S.A.) Co., Ltd. Id. In addition, we note that Jinfu USA's Master License Application, filed with King County, Washington on November 18, 2002, was signed by Jinfu USA's sole employee. We note that under the "Purpose of Application" section, which instructs the applicant to "Please check all boxes that apply," the only checked box is "Open/Reopen Business." The next box, "Change Ownership," is left blank. In addition, under "List all owners: Sole proprietor, partners, officers, and LLC members," Jinfu USA's sole employee only lists himself as the secretary. There is no mention of any owner of Jinfu USA, other than this employee asserting that he is the owner. See Final Results at Comment 8. Moreover, Jinfu's narrative appears to demonstrate that Jinfu PRC and Jinfu USA had an ongoing, arm's-length commercial relationship established for the mutual benefit of both parties. We do not find evidence of any type of control by one party over the other. Id. A mere business relationship does not demonstrate control. See TIJID, Inc. v. United States, 366 F. Supp. 2d 1286 (CIT 2005) ("*TIJID*").

The foregoing facts do not evidence CEO B exerting actual control over Mr. A; rather, they demonstrate that Mr. A made unilateral business decisions regarding the

establishment and day-to-day operations of Jinfu USA without the consent, direction or authorization of CEO B. In conclusion, we find no record evidence supporting Jinfu's argument that Jinfu PRC's CEO exercised control over Jinfu USA, prior to October 25, 2003. Therefore, following the same reasoning and directing the same results articulated in Jinfu II Final Results, which is currently pending before this Court,[10] we continue to find that Jinfu PRC is "affiliated" with Jinfu USA as of October 25, 2003, within the meaning of section 771(33)(F) of the Act. Thus, we treated any sales made between Jinfu PRC and Jinfu USA prior to October 25, 2003, on an EP basis, while all sales made after this date were treated on a CEP basis.

Conclusion

The Department hereby complies with the remand order as directed by the Court in Shanghai Eswell, Slip Op. 07-138 at 34, and assigns the following final dumping margins: Shanghai Eswell 27.64 percent ad valorem; Jinfu 58.44 percent ad valorem; Zhejiang 34.81 percent ad valorem. Upon a final and conclusive court decision, we will publish an amended final results to that effect.

_____

David M. Spooner
Assistant Secretary
for Import Administration

_____

Date

[10] See Jinfu II Final Remand Results.