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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Less-Than-Fair-Value
Investigation of Electrolytic Manganese Dioxide from Australia

Summary

We have analyzed the case and rebuttal briefs of interested parties in the antidumping duty investigation of electrolytic manganese dioxide from Australia. As a result of our analysis, we have made changes in the margin calculation. We recommend that you approve the position described in this memorandum with respect to the issue of profit for constructed value.

Background

On March 26, 2008, the Department of Commerce (the Department) published the preliminary determination of the less-than-fair-value investigation of electrolytic manganese dioxide (EMD) from Australia. See Notice of Preliminary Determination of Sales at Less Than Fair Value and of Affirmative Preliminary Determination of Critical Circumstances: Electrolytic Manganese Dioxide from Australia, 73 FR 15982 (March 26, 2008) (Preliminary Determination). The investigation covers the imports of one producer/exporter, Delta EMD Australia Pty Limited (Delta). We invited interested parties to comment on the preliminary determination. At the request of Delta, we held a hearing on June 17, 2008.

Other Abbreviations

AFA – adverse facts available
CAFC – U.S. Court of Appeals for the Federal Circuit
CBP – U.S. Customs and Border Protection
CIT – Court of International Trade
CV – constructed value
Final Rule – Antidumping Duties, Countervailing Duties, Final Rule, 62 FR 27296 (May 19, 1997)
LTFV – less than fair value

SG&A – selling, general, and administrative
The Act – The Tariff Act of 1930, as amended
POI – period of investigation

Discussion of the Issue

Comment: Profit for Constructed Value¹

Delta argues that, under the statute, the Department can calculate CV profit under three different alternatives. Under the first alternative, Delta asserts, the Department can calculate profit based on actual amounts incurred by the specific exporter or producer of merchandise in the same general category as the subject merchandise. Under the second alternative, Delta argues, the Department can calculate profit based on the weighted-average of the actual amounts incurred and realized by other exporters or producers that are subject to the investigation. Under the third alternative, Delta argues, if neither the first or second alternative is possible, the Department can calculate CV profit using any other reasonable method as long as the result does not exceed the amount normally realized by exporters or producers in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Delta argues that the only alternative available to the Department in this case is the third alternative and, therefore, the Department should base its CV calculation on the experience of Delta PLC's (Delta's parent company) manganese-specific business unit which pertains to the same general category of products sold for consumption in Australia. Delta argues that adopting the third alternative with regard to the calculation of the profit ratio is more consistent with the commercial reality in the global EMD industry than the 44.27 percent ratio the Department calculated for the Preliminary Determination based on the experience of Zinifex Limited (Zinifex), a company engaged in zinc production and mining activities.

Delta argues that, both the Australian and global EMD industries have experienced financial difficulties. Citing Manifattura Emmepi S.p.A. v. United States, 799 F. 3d 110,115 (CAFC 1992), Delta argues that the courts have made clear that, when the Department assigns AFA, there must still be a rational relationship between the data chosen and the matter to which they are applied. According to Delta, in this regard, the Department must balance the statutory objectives of finding an accurate dumping margin and inducing compliance rather than creating an overly punitive result. Delta argues that, as a result, the Department must ensure that the rate it assigns as AFA is representative of the respondent's own data. Delta claims that nothing on the record of this case suggests that Delta is earning any profits. Thus, according to Delta, it is unreasonable and inconsistent with commercial reality to impute a high 44.27 percent profit ratio to use in the calculation of an AFA rate to apply to Delta in this case.

Delta argues that, based on its actual financial performance, it is appropriate to use a CV profit of zero percent in the final determination. Citing Automotive Replacement Glass Windshields from the People's Republic of China: Final Results of Administrative Review, 69

¹ This is for purposes of CV profit as it applies to the AFA margin being assigned to Delta, the respondent in this investigation.

FR 61790 (October 21, 2004), and accompanying Issues and Decision Memorandum at Comment 6, Delta asserts that the Department has stated that the only instance in which it considers negative or zero amounts in the calculation of CV profit is where there are no positive profits realized by any of the producers in the industry. Delta contends further that the CIT has stated that the CV provision does not mandate the creation of a positive amount where all available evidence indicates non-profitable sales. Delta asserts that, in this case, there are no profits realized by the Australian EMD industry and, thus, the Department should assign Delta a CV profit rate of zero based on its audited financial statements.

Delta argues that the Department's preliminary calculation methodology is distortive because it relied on an SG&A ratio from its parent company but derived a profit ratio from Zinifex's financial statement. Citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 FR 49219 (August 11, 2000), Issues and Decision Memorandum at Comment 85, Delta argues that the Department has stated frequently that its preference is to compute SG&A and profit ratios from the same source. According to Delta, this preference reflects the fact that a company's profit is a function of its total expenses which suggests that the SG&A and profit ratios are interconnected. Delta argues that, in the Preliminary Determination, the Department mixed the ratios by using SG&A expenses from one producer (Delta) and the profits of another producer (Zinifex), undermining the accuracy of the margin it established for Delta. Delta asserts that this approach cannot withstand scrutiny under any reasonable standard.

Delta states that, to ensure that its margin is calculated as accurately as possible, the Department should use its financial statements to calculate both SG&A and profit. Delta asserts that, because its manganese-materials segment did not earn a profit in 2006, the Department should use a CV profit of zero along with the company's calculated SG&A ratio of 27.27 percent. Delta argues that, if the Department is concerned about calculating a zero profit, it can use instead Delta's manganese segment's financial performance for 2005 for purposes of calculating profit.

Delta argues that the profit ratio the Department derived from Zinifex's financial statement does not relate to the same general category of products as EMD or to sales in Australia and the Department should not use Zinifex's financial statement to calculate a CV profit ratio for the final determination. Delta contends that the record demonstrates that zinc is different from EMD and cannot reasonably be considered in the same general category of products as EMD and, thus, Zinifex's financial statements do not serve as a reasonable surrogate for Delta's financial performance.

Delta argues that, if the Department decides that zinc is within the same general category of products as EMD and continues to rely on Zinifex's financial statements in the final determination, it should revise its calculation to use the financial performance of the business segment that is involved with the production of zinc in Australia at the Hobart Refinery. Delta contends that using the Hobart Refinery's financial information to calculate the CV profit ratio would reflect more closely Delta's profit experience. Delta argues that, if the Department were to decide to use Zinifex's financial statement to calculate a CV profit ratio, it should also calculate an SG&A ratio based on the same source to ensure that it does not mix "apples and

oranges” in the calculations.

The petitioner agrees with the Department’s preliminary use of a CV profit ratio using the 2006 financial statement of an Australian zinc producer. The petitioner argues that Delta’s argument for applying a zero profit rate is without merit. Citing Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From the Republic of Korea, 68 FR 47540 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1, the petitioner argues that it is the Department’s well-established practice to exclude from the profit calculation information from companies that recorded losses. In addition, the petitioner argues, Delta’s contention that the Department should apply a zero profit to its CV calculation because operating losses are characteristic of the EMD industry is contradicted by the record evidence. Specifically, the petitioner argues, the EMD divisional results for Manganese Ore Limited from India for the fiscal year April 1, 2006, through March 31, 2007, shows a profit rate of 53.51 percent. The petitioner argues that this amount corroborates the 44.27 percent profit amount the Department used in the Preliminary Determination.

The petitioner argues that, while it agrees with Delta that it would be more appropriate for the Department to base Delta’s SG&A ratio on the experience of Zinifex rather than Delta’s parent company, the Department should not introduce a major distortion into the antidumping calculation by basing Delta’s profit on the combined zero-profit experience of Delta’s South African and Australian manganese operations, including its non-EMD operations in South Africa.

The petitioner believes that Delta’s recommendation to use the profit rate based on the experience of the manganese-materials segment of Delta’s parent during 2005 is inappropriate. According to the petitioner, reliance on 2005 data disregards the Department’s concern for the contemporaneity of the surrogate data to the POI. In addition, the petitioner asserts, the data for the manganese-materials segment are distorted because they capture substantial production activities in South Africa, including non-EMD operations.

The petitioner disagrees with Delta’s contention that zinc is not within the same category of merchandise as EMD. The petitioner argues that the metal-content levels of the zinc and manganese ores are closely comparable and, as a result, the amount of ore that must be mined, transported, roasted, and leached is similar. The petitioner argues that both ores go through similar processes through the electrolysis stage and, with regard to byproducts, Delta’s assertion that Zinifex can re-use sulfuric acid in its zinc-manufacturing process but EMD producers cannot is simply incorrect. The petitioner asserts that, although either producer must consume some makeup sulfuric acid in the leach step, most of the sulfuric acid is recovered during the electrolysis process and recycled for use in the leach step.

With regard to cost, the petitioner argues that nothing in the record supports Delta’s conclusion that zinc and EMD production have fundamentally different cost structures. In terms of uses, the petitioner argues that Delta’s assertion that EMD and zinc are used for entirely different purposes and are not sold to the same customers is incorrect because battery producers purchase both EMD and zinc for use in the production of electrodes contained in alkaline batteries.

The petitioner argues that, if the Department decides that it should restrict itself to profits on Zinifex's Australian operations, it should combine the results from the Century Mine and the Hobart Refinery. The petitioner argues that combining the results from these two operations is necessary because transfer prices may have been used to assign profits to the mine at the expense of the Hobart Refinery. The petitioner argues that the Department can neutralize the effects of such shifts by combining the experience of the two operations.

Department's Position: In our Preliminary Determination we calculated the AFA rate using information from the petition and we used the financial statements of Zinifex to establish a reasonable profit rate for use in the calculation of CV. We based our decision to use Zinifex on the fact that it is an Australian zinc producer with similar production processes to that of EMD production, which involves electrolysis, and on the fact that Delta's contemporaneous financial statements showed no profit.

Section 773(e)(2)(B) of the Act provides the Department with three options under which it can calculate CV profit. Under the first option, section 773(e)(2)(B)(i) of the Act directs the Department to calculate CV profit based on actual amounts incurred by the specific exporter or producer of merchandise in the same general category as the subject merchandise. Because we do not have the necessary information on the record from the specific exporter or producer of merchandise being examined in this investigation, we are unable to use this option for purposes of calculating CV profit.

Under the second option, section 773(e)(2)(B)(ii) of the Act directs the Department to calculate profit based on the weighted average of the actual amounts incurred and realized by other exporters or producers that are subject to the investigation. Because Delta is the only known exporter and producer in this investigation, we cannot use this option to calculate CV profit.

Thus, the only option available to the Department is option three under section 773(e)(2)(B)(iii) of the Act. Section 773(e)(2)(B)(iii) of the Act directs the Department to base profit amounts on any other reasonable method except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

We have reexamined the record and find that Zinifex's financial information includes financial information from other business operations unrelated to zinc production as well as production operations that occurred outside Australia. See Petitioner's February 19, 2008, submission, at Exhibit B. As a result, we have determined that it is more appropriate to base the calculation of the CV profit ratio on the financial information of the Hobart Refinery, a subsidiary of Zinifex, because this segment of Zinifex's operations relates more closely to the production of merchandise that is in the same general category of products as the subject merchandise. Specifically, information on the record indicates that the Hobart Refinery is in the business of producing electrolytic zinc in Australia. Thus, use of the Hobart Refinery's financial information satisfies the requirements under section 773(e)(2)(B)(iii) of the Act with regard to

our CV profit ratio calculation. See Final Determination Analysis Memorandum (August 8, 2008) for further details on our revised calculation of CV profit.

We disagree with Delta's contention that we should use a profit rate of zero because the record indicates that it had no profits during the POI. As we stated in our Australia Initiation Checklist at the commencement of this investigation (September 11, 2007), the margin on which we initiated this investigation, based on a comparison of CV to U.S. price, did not include an amount for profit because the only financial statement submitted by the petitioner in the original petition reflecting the experience of Delta PLC (Delta's parent company) showed a net loss for the manganese segment for the year ending 2006. We stated that we would examine different options for calculating a profit rate later in this proceeding if it became necessary to calculate a CV from the petition. See Australia Initiation Checklist at 9. Thus, consistent with our practice, our intent was to include a positive profit rate should we use the petition rate as facts available or AFA in the course of this proceeding.

Because Delta is an uncooperative respondent in this investigation, the Department is not relying on the unverified information submitted by Delta in the course of this proceeding. Use of a zero-profit rate would not be adverse but rather would benefit Delta for its non-cooperation. Moreover, it is the Department's practice not to rely on companies with zero-profit rates when calculating CV profit. See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From the Republic of Korea, 68 FR 47540 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1. We also disagree with Delta's argument that, as an alternative, we should use the profit figure derived from Delta's parent's financial statements for 2005. As we stated in the Preliminary Determination, our practice is to use surrogate profit information that is contemporaneous with the POI. *Id.* Therefore, for purposes of this final determination, we have relied on profit information with respect to Zinifex's Horbart Refinery because it is contemporaneous with the POI.

We also disagree with Delta's argument that we should calculate SG&A and profit amounts using the same source when applying AFA. The SG&A ratio we calculated for the Preliminary Determination is based on the contemporaneous financial statements of Delta's parent company² in the original petition and, therefore, we find it to be a reasonable surrogate for SG&A in our CV calculation. Our practice is to use the contemporaneous data from the market-economy company under investigation when constructing CV, if possible. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 76919 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 14. In addition, because we are basing normal value on CV and have applied AFA to Delta in this case, section 773(e)(2)(B)(iii) of the Act provides the Department the discretion to use any reasonable method that is appropriate. Thus, we find that using Delta's parent company's financial statement to calculate SG&A is reasonable, as required by section 773(e)(2)(B)(iii) of the Act.

Finally, we disagree with the petitioner's argument that we should combine the profit amounts of Century Mine and the Hobart Refinery in this case. The petitioner has not provided

² This parent company's financial statement includes the operating results for Delta, the Australian EMD respondent.

any evidence to support its concern that transfer prices occurring between the two operations were used to shift profit amounts from the Hobart Refinery to the Century Mine. Thus, we are not persuaded by the petitioner's assertion and have used profit amounts from the financial information for the Hobart Refinery in our calculation of CV for the final determination.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above position. If this recommendation is accepted, we will publish the final determination in the *Federal Register*.

Agree _____

Disagree _____

David M. Spooner
Assistant Secretary
for International Trade

Date