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PUBLIC DOCUMENT

BY HAND DELIVERY

James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Pennsylvania Ave., NW
Washington, DC 20230

Re: Comments on Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries

Dear Assistant Secretary Jochum:

On behalf of Ames True Temper ("Ames"), we submit the following comments in response to the Department of Commerce's ("Department" or "Commerce") proposed Separate-Rates Practice in Antidumping Proceedings involving Non-Market Economy Countries.[1]

Please find attached an original and six copies of our comments per the request of the Department. Additionally and as per the Department's request, we hereby submit an electronic copy of the text of our comments on CD-ROM.

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[1] Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 56,188 (Sept. 20, 2004).

I. RESPONSE PROCESS VERSUS APPLICATION PROCESS

Commerce proposes changing the separate rate request from a Section A response to an application process. While Ames recognizes the resource-saving benefit from switching to an application-based system, Ames is concerned that reduced scrutiny will open this process to manipulation. There are differences, usually substantial, between the PRC-wide margin rate and the separate rate company margin. This provides a strong incentive for companies to misreport, omit, or falsify information.

Commerce's proposal would reduce the separate rate application process to a "checklist," while at the same time reducing the resources devoted to analyzing separate rate responses. The likely result of these actions, especially taken together, will be to reduce the accuracy of the process, without particular benefits in terms of efficiency. The "checklist" format will encourage companies to check a box, standardizing responses and making inaccuracies harder to detect. The threat of verification and supplemental questionnaires is little reassurance given Commerce's stated objective of reducing the manpower devoted to this analysis. Finally, it is unclear whether Commerce would be required to notify parties under Section 782(d) that a voluntarily submitted application (as opposed to a required questionnaire response) was deficient prior to denying separate rate status. In all likelihood, Commerce is setting itself up for a WTO challenge by the first company denied a separate rate without notification of deficiency. In short, we fail to see how Commerce can save resources while guaranteeing accuracy in its determinations.

Ames is also concerned that the current information requirements for separate rate status do not allow Commerce to make a sufficient assessment of either *de facto* or *de jure* control. Ames supports Commerce's suggestions that its examination of control should not stop at the national level but should include provincial, local, and municipal ownership and influence. Any application or questionnaire should allow for specific questions regarding ownership and influence by local authorities. Ames requests that Commerce allow parties an opportunity to submit suggestions for specific information requests regardless of whether Commerce adopts the application process or retains the Section A questionnaire.

Commerce should also consider non-governmental aspects before granting separate rate status. For example, Commerce should require proof from any company requesting separate rate status that the company has export rights. Moreover, the company should certify that it exported the subject merchandise using its own export rights and did not use an export agent or "borrow" another company's export license. Recent Commerce proceedings have found fraudulent use of agents as a means of blatant evasion of antidumping duties. Commerce should verify, through a Customs query placed on the record, that the requesting company has been listed as an exporter/manufacturer on the U.S. Customs 7501 form for entries during the POI.

Finally, Commerce suggests that an application process might eventually lead to electronic filing. Ames is concerned that such a process will discourage companies from submitting information potentially subject to an administrative protective order or inducing answers that are less specific than required in order to avoid any bracketing

issues. This incentive is self-defeating because such an answer would increase the burden on Commerce by requiring follow-up questions. Moreover, electronic filing will require a change to the service regulations and the APO regulations, and it is unclear how interested parties might access these electronic applications.

II. COMBINATION RATES

Commerce proposes expanding the use of producer-exporter combination rates, currently used in three limited circumstances, to all separate rate status companies. We recognize that this practice will reduce the likelihood that a separate rate company will be used as a "conduit" by PRC-entity companies and by individually-reviewed respondents that receive a rate higher than the separate rate margin. In general, we support this concept. However, without further measures, this goal will likely be undermined by fraud and circumvention schemes.

In the most recently completed review of Heavy Forge Hand Tools from the PRC, Commerce found that several respondents engaged in a scheme to circumvent the order.[2] The scheme works like this: two respondents have individual margins, one substantially lower than the other. Company A, which has the high margin, uses an export agent to sell the merchandise to the United States. Company B is the export agent. The export agent issues all shipping documents and invoices under its company name and export license. However, title does not transfer. The importer, acting in concert with the

[2] Memorandum from Jeffrey May to James J. Jochum, Issues and Decision Memorandum for the Twelfth Administrative Review of the Antidumping Duty Orders on Heavy Forged Hand Tools from the People's Republic of China at cmt.19-20 (Sept. 7, 2004)

manufacturer and export agent, lists the exporter as Company B upon entry to the United States, taking advantage of Company B's lower deposit rate. As far as CBP is concerned, the exporter listed on the entry documents matches the commercial invoice and shipping documents. If no party requests a review, the merchandise is liquidated at the entered rate. If a review is requested, respondent's scheme remains intact. This holds true even if Commerce ultimately realizes that the manufacturer used an agent, uses the "agent" sales to calculate Company A's margin (or apply AFA to Company A), and then attempts to issue assessment instructions for Company A. The critical aspect of this scheme occurs at the assessment stage because CBP will have no suspended entries from Company A since the importer has reported Company B as the exporter.

Essentially, this scheme takes advantage of the lack of communication between Customs and Commerce and the ambiguity of information submitted to both agencies. Commerce recognized this inherent problem when it stated, "Given that the respondents reported to the Department that the seller of the merchandise is the principal, but participated in a scheme that allows the importer to incorrectly identify the agent as the seller to CBP, the universe of sales for which the Department would calculate the antidumping duty rate, and the universe of sales against which CBP would assess that rate, are different."[3]

This scheme would apply equally to separate rate companies. In fact, these non-reviewed companies would be more likely to engage in this scheme given that these companies are generally small exporters and, therefore, not likely to be included in

[3] *Id.* at 20.

subsequent review requests by Petitioners. Moreover, because Petitioners do not have access to detailed import data, Petitioners would not know to request a review if a separate rate company had increased exports due to being used as a conduit.

Using combination rates would not close this loophole. Moreover, Commerce dismissed the notion of combination rates in Hand Tools, stating, "Issuing exporter/producer specific cash deposit rates, as the respondents urge, would amount to an application of only partial AFA."[4] A first step would be a change in the information required by CBP on the US 7501 form to include separate data fields for manufacturer, exporter, and agent. However, this change may be outside the ambit of the current rulemaking process. A better alternative to combination rates with respect to circumvention and fraud are "master lists." Ames recognizes that the use of master lists might prove to be an administrative burden. However, Commerce does have the ability to run import queries and place these on the record. In short, while Ames believes that Commerce's proposal is a step in the right direction, a more comprehensive approach is required to avoid fraud and circumvention.

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[4] *Id.* at 20.

Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

Alan H. Price
Timothy C. Brightbill

Counsel to Ames True Temper