RESULTS OF REDETERMINATION
PURSUANT TO REMAND

Gerber Food (Yunnan) Co., Ltd. and Green Fresh (Zhangzhou) Co., Ltd.
v. United States
Slip Op. 07-85 (May 24, 2007)

SUMMARY

The Department of Commerce (the Department) has prepared this second redetermination of the Final Results[1] as directed by the U.S. Court of International Trade (the Court) in Gerber Food (Yunnan) Co., Ltd. and Green Fresh (Zhangzhou) Co., Ltd. v. United States, Slip Op. 07-85 (May 24, 2007) (Gerber v. United States II).

In accordance with the Court's instructions, the Department has recalculated the assessment rate for Gerber Food (Yunnan) Co., Ltd. (Gerber) using a rate other than the PRC-wide rate as partial adverse facts available (AFA) with respect to the 24 sales made by Gerber during the period of review (POR) which were exported to the United States using the invoices of another respondent, Green Fresh (Zhangzhou) Co., Ltd. (Green Fresh). The Department has also recalculated the assessment rate for Green Fresh exclusive of the same 24 transactions in accordance with the Court's instructions. As a result of the Department's recalculations, the revised margins for Gerber and Green Fresh are 92.11 and 31.55 percent, respectively, for both assessment and cash deposit purposes.

We issued a draft of this redetermination to the parties for comment on August 14, 2007. No parties submitted comments on the draft. Accordingly, our findings in these final results of redetermination are the same as in the draft.

BACKGROUND

As detailed in the Final Results, Gerber and Green Fresh entered into an agreement during the POR by which Green Fresh, which had a previously calculated cash deposit rate of 29.87 percent, sold invoices to Gerber, which had a previously calculated cash deposit rate of 121.33 percent. Pursuant to this agreement, Gerber, using Green Fresh invoices, reported to U.S. Customs and Border Protection (CBP) that Green Fresh was the "exporter" of the merchandise. Although the agreement provided that Green Fresh would be more active in these sales, in fact,

---

[1] See Notice of Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of Third Antidumping Duty Administrative Review for Certain Preserved Mushrooms from the People's Republic of China (PRC), 68 FR 41304 (July 11, 2003).

Green Fresh was not the exporter of this merchandise, and at most performed minimal paperwork for only two of Gerber's transactions. As a result of this relationship, Gerber paid significantly less in cash deposits to the Government of the United States during the POR than was required by the Department's instructions.

In the Preliminary Results,[2] the Department calculated dumping margins for both companies based on their reported data. However, recognizing the inappropriate nature and effect of this arrangement on the antidumping duty (AD) process and the potential for recurrence, the Department applied the higher of the two calculated rates to both companies' cash deposit rates as AFA, pursuant to Section 776(b) of the Tariff Act of 1930, as amended (the Act).

In the Final Results, the Department determined, pursuant to Section 776(b) of the Act and its inherent authority to protect the integrity of its proceedings and prevent the circumvention of the AD law, that the application of total AFA to both Gerber and Green Fresh was appropriate for two reasons: (1) Gerber and Green Fresh had continuously misrepresented or inadequately explained the nature of their relationship throughout the seven-month questionnaire issuance and response analysis process of this review; and (2) the agreement between the two companies resulted in the circumvention of the payment of cash deposits. The Department applied an AFA rate of 198.63 percent, which is the highest rate from the petition in the less-than-fair-value (LTFV) investigation and also the PRC-wide rate.

On July 18, 2005, the Court issued its first opinion in this case and ordered a remand of the Department's Final Results. See Gerber Food (Yunnan) Co., Ltd. and Green Fresh (Zhangzhou) Co., Ltd. v. United States, 387 F. Supp. 2d 1270 (CIT 2005) (Gerber v. United States I). The Court ruled that the Department exceeded its statutory authority in applying total AFA in calculating the assessment rates for both Gerber and Green Fresh. The Court held that should the Department continue to rely on the facts available provision of the statute in its redetermination, the agency must identify and substantiate what information was unavailable, deficient or otherwise unverifiable to support rejection of any of the plaintiffs' data in calculating AD assessment rates.

On remand the Department applied partial AFA, not total AFA, in its margin calculations for both Gerber and Green Fresh. The Department applied the selected AFA rate of 198.63 percent to only those 24 transactions in which Gerber exported merchandise to the United States and improperly claimed Green Fresh as its exporter to CBP. In its AFA analysis, the Department attributed those 24 transactions to both Gerber and Green Fresh. For all other transactions reported by the companies in their respective sales databases, the Department used the reported transaction-specific data in its margin calculations. As a result, Gerber's and Green Fresh's

---

[2]See Notice of Preliminary Results and Partial Rescission of Fourth New Shipper Review and Preliminary Results of Third Antidumping Duty Administrative Review for Certain Preserved Mushrooms from the People's Republic of China, 68 FR 10694 (March 6, 2003).

margins changed from 198.63 percent, to 150.79 percent and 84.26 percent, respectively. See Redetermination Pursuant to Court Remand: Gerber Food (Yunnan) Co., Ltd. and Green Fresh (Zhangzhou) Co., Ltd. v. United States (December 1, 2005) (Redetermination I).

On May 24, 2007, the Court issued its opinion on the Department's remand redetermination and ordered a second remand. We are issuing this second redetermination consistent with that order.

REDETERMINATION

Gerber

In Gerber v. United States II, the Court agreed with the Department that Gerber failed to cooperate to the best of its ability in the review and that the Department was justified in resorting to AFA pursuant to Section 776(b) of the Act for the 24 sales in which Gerber improperly used Green Fresh invoices. However, the Court also concluded that the highest rate from the petition in the LTFV investigation, which is also the PRC-wide rate, could not be used as the AFA rate for those 24 sales because it failed the corroboration requirement, pursuant to Section 776(c) of the Act. In particular, the Court found that the petition rate bears no "rational relationship" to the actual sales information available for either respondent nor otherwise relates to the respondent to which it is assigned. See Gerber v. United States II at 40.[3] Therefore, the Court instructed the Department on remand to use another AFA rate for those 24 sales that had "an actual relationship" to Gerber for purposes of calculating the assessment rate for Gerber. See Gerber v. United States II at 40.

[3] In addition, the Court again found that "an assessment rate, standing alone, is not a 'fact' or a set of 'facts otherwise available,' and under no reasonable construction of the provision could it be so interpreted." See Gerber v. United States II at 36 (citing Gerber v. United States I at 1285).

The Department respectfully disagrees that the Department is precluded from using the petition rate as the AFA rate for the 24 sales in this case.[4] However, consistent with the Court's instructions, the Department has applied an AFA rate of 121.33 percent to the 24 transactions described above. This rate is derived from the 1998-2000 administrative review of Gerber, based upon Gerber's single export sale of subject merchandise during that POR. See Amended Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China, 66 FR 35595, 35596 (July 6, 2001). The Department believes that the application of this rate is consistent with the Court's order to find an AFA rate which bears a "rational relationship" to Gerber's transactions, as this rate is derived directly from Gerber's own commercial experience from the most recent prior review in which it received a calculated AD margin.

Furthermore, our use of the 121.33 rate as the AFA rate for Gerber satisfies the corroboration requirements of Section 776(c) of the Act. Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 103-316 at 870 (1994) and 19 C.F.R. 351.308(d). The SAA further provides that the term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. Neither Section 776(c) of the Act nor the SAA defines how the Department should determine the relevance of the margin selected as AFA. The Federal Circuit has stated that "{b}y requiring corroboration of AFA rates, Congress clearly intended that such rates should be reasonable and have some basis in reality." See F.Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1034 (Fed. Cir. 2000) (F.Lli De Cecco). Thus, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. The Federal Circuit has also stated that Congress "intended for an AFA rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." See F.Lli De Cecco, 216 F.3d at 1034. The Department considers information reasonably at its disposal to determine whether a margin continues to have relevance to the respondent receiving the rate. After examining both the reliability and relevance aspects of the corroboration requirement, as discussed below, we find that the 121.33 percent rate has probative value and, therefore, is appropriate for use as the AFA rate for Gerber.

---

[4] We note that Section 776(b)(1) of the Act expressly provides that the Department may use "information derived from the petition" as AFA in an investigation or administrative review. We also continue to note our disagreement with the Court, as indicated in the first remand redetermination, that the application of total AFA, as opposed to partial AFA, is not warranted. See Redetermination I at 49. See Viraj Group, Ltd. v. United States, 343 F.3d, 1371, 1376 (Fed. Cir. 2003).

With regard to the reliability aspect of corroboration, because the 121.33 percent rate is derived from Gerber's own verified data, submitted by that respondent in the most recent prior review in which it actively participated, we believe that this rate is reliable on its face. Indeed, this is the rate applicable to entries of Gerber's merchandise at the time Gerber entered into its agreement with Green Fresh to circumvent the payment of cash deposits by falsely identifying Green Fresh as the exporter of the subject merchandise to CBP. Moreover, there is no information on the record that would call into question the reliability of this rate with regard to its application to Gerber's invoice-scheme transactions.

With regard to the relevance aspect of corroboration, because the rate was calculated for Gerber, and was derived from a sale of subject merchandise made and exported by Gerber to the United States, the rate has a direct relationship to Gerber's own commercial behavior. Furthermore, this margin was calculated from a POR only two years prior to the period of this administrative review, making it relatively recent, and therefore temporally relevant. In addition, there is nothing on the record of this review that would undermine the relevance of this transaction with respect to Gerber, especially in light of the fact that Gerber itself apparently considered this rate in deciding to enter into a scheme to circumvent the effective enforcement of the AD law and avoid the proper payment of cash deposits.

The Department also finds it appropriate to use as AFA a calculated rate from a prior review because Gerber should have anticipated that this rate (a rate that had been applied to its merchandise in a previous review), or an even higher rate, would have been applied to its calculations if it failed to cooperate to the best of its ability during the administrative review, as it did in this case. In reviews where a respondent does not cooperate, the Department relies upon the "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990). Because of this well-known practice, respondents typically will cooperate if they expect to receive a rate lower than the highest previously calculated rate for any respondent, or not cooperate if they anticipate receiving a margin higher than the highest previously calculated rate for any respondent. Even if the respondent does not expect to receive the highest calculated rate for any respondent, it will, at a minimum, expect to receive its own highest calculated rate, plus a "built-in increase" for deterrence, and make its decision whether or not to cooperate on this basis.

In remanding the AFA rate to the Department, the Court explained that "the statute does not permit Commerce to choose an antidumping duty assessment rate as an 'adverse inference' without making factual findings, supported by substantial evidence..." Gerber v. United States II at 36 (quoting Gerber v. United States I at 1285). The AD margin applied in this remand is based on factual findings and is supported by substantial evidence, as it is in fact derived from Gerber's own data in a prior review. Accordingly, as AFA we have applied Gerber's previously calculated AD margin, based on a single transaction in the 1998-2000 administrative review. This rate is corroborated, and otherwise meets all of the requirements of Sections 776(a), (b) and (c) of the Act. As a result of our recalculation, Gerber's weighted-average margin changes from 150.79 percent to 92.11 percent.

Green Fresh

With respect to Green Fresh, the Court concluded that Green Fresh failed to cooperate to the best of its ability in the review. See Gerber v. United States II at 28-29. In fact, the Court held that Green Fresh had both withheld information material to the Department's determination and had provided, at times, confusing, misleading, evasive, or false responses to the Department's questionnaires. See Gerber v. United States II at 25. However, the Court also ruled that the

Department had not provided a sufficient basis to assign the same 24 sales described above to Green Fresh because the record evidence demonstrated that those sales were made by Gerber (and not by Green Fresh). Therefore, the Court instructed the Department on remand to recalculate the assessment rate for Green Fresh without relying on the analysis which attributed the 24 sales to it. See Gerber v. United States II at 33-35, 47.

The Department respectfully disagrees that it did not have a sufficient basis to assign the 24 transactions to Green Fresh as partial AFA, in order to protect the integrity of its proceedings.[5] Although the Court affirmed the Department's determination that Green Fresh had failed to cooperate to the best of its ability, the Court held that the Department's analysis failed to justify the inclusion of the 24 transactions at issue in the assessment rate calculations for Green Fresh. The Department believes that the Court's decision leaves the Department with no other practical means by which to apply AFA to Green Fresh.[6] Therefore, the Department has recalculated both Green Fresh's assessment and cash deposit rates without the application of AFA on remand.

As a result, Green Fresh's weighted-average margin changes from 84.26 percent to 31.55 percent.

---

[5] Because Green Fresh impeded the conduct of the administrative review, provided incorrect, misleading and false responses in its questionnaire responses, and otherwise failed to act to the best of its ability by participating in the circumvention of both the payment of cash deposits and the enforcement of the AD law, the Department continues to believe that the application of AFA is warranted. We continue to note our disagreement with the Court, as indicated in the first remand redetermination, that the application of total AFA, as opposed to partial AFA, is not warranted. See Redetermination I at 49.

[6] Were these procedures part of an ongoing administrative review, the Department could assign Gerber's recalculated rate of 92.11 percent to Green Fresh's future cash deposits, consistent with its determination in the Preliminary Results. As we stated in the Preliminary Results, 68 FR at 10697, "because the Department is concerned that antidumping duty cash deposits may be evaded again in subsequent PORs, as they were in this POR, the Department has determined it appropriate to assign to each of these respondents for future cash deposit purposes the higher of the rates calculated for each of them in this review." However, an application of AFA to Green Fresh's cash deposit rate would, as a practical matter, be futile. Since the publication of the Final Results, significant time has passed and Green Fresh's cash deposit rate resulting from this review has been superceded by the completion of subsequent administrative reviews. Thus, any change to Green Fresh's cash deposit rate would not be meaningful.

CONCLUSION

Based on the foregoing, the Department requests that the Court affirm its remand redetermination because it is in accordance with the Court's remand order in Gerber v. United States II .

____
David M. Spooner
Assistant Secretary
for Import Administration

____
(date)