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ALLOY PIPING PRODUCTS, INC., et al., V. UNITED STATES
Consol. Court No. 08-00027
Slip Op. 09-29 (CIT, April 14, 2009)

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

SUMMARY

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or Court) in Alloy Piping Products, Inc., et al., v. United States, Slip Op. 09-29 (CIT April 14, 2009) (Opinion).

In accordance with the Court's instructions, Commerce has provided a more rigorous analysis in its examination of whether imputed costs are adequately reflected in the total actual costs used in the "total actual profit" and "total expenses" components of the constructed export price (CEP) profit methodology employed by Commerce. After the analysis, and for the reasons explained below, Commerce finds that imputed costs are adequately reflected in the total actual costs used to calculate CEP profit, and that an adjustment is not warranted.

BACKGROUND

On June 16, 1993, Commerce published in the Federal Register the antidumping duty order on certain stainless steel butt-weld pipe fittings (pipe fittings) from Taiwan. See Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 58 FR 33250 (June 16, 1993). On June 2, 2006, Commerce published a notice of opportunity to request an administrative review for the period June 1, 2005, through May 31, 2006 of this order. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 71 FR 32032 (June 2, 2006).

In accordance with 19 CFR 351.213(b)(1) and (2), on June 22, 2006, Flowline Division of Markovitz Enterprises, Inc. (Flowline Division), Gerlin, Inc., Shaw Alloy Piping Products, Inc., and Taylor Forge Stainless, Inc. (collectively, Petitioners) requested an antidumping duty administrative review for Ta Chen Stainless Pipe Co., Ltd. (Ta Chen), and four other Taiwanese producers of pipe fittings. On June 29, 2006, Ta Chen also requested an administrative review. On July 27, 2006, and August 30, 2006, Commerce published notices initiating this

administrative review. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation In Part, 71 FR 42626 (July 27, 2006) and Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 71 FR 51573 (August 30, 2006).

Commerce's preliminary results of review were published on July 2, 2007. See Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part, 72 FR 35970 (July 2, 2007). The final results of review and final rescission in part were published on January 7, 2008. See Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 73 FR 1202 (January 7, 2008), and accompanying Issues and Decision Memorandum (Final Results).

In the Final Results, Commerce concluded that Ta Chen's home market (HM) sales were made at a more advanced level of trade than those made to Ta Chen's U.S. affiliate, Ta Chen International (TCI). Therefore, Commerce determined that a CEP offset was warranted. See Final Results and accompanying Issues and Decision Memorandum at Comment 2. Commerce also determined that an adjustment to CEP profit was not warranted. Id. at Comment 4.

Both Petitioners and Ta Chen challenged Commerce's Final Results to the CIT. The Court remanded the case to Commerce, instructing it to further explain its factual findings with respect to the issue of CEP profit.

DISCUSSION

The Court remanded the CEP profit issue, stating that "Commerce must provide a more rigorous analysis in its examination of whether imputed costs are adequately reflected in total actual costs used in the 'total actual profit' and 'total expenses' components of the CEP profit methodology." Opinion at 23. The Court stated that it is Commerce's normal practice to derive CEP profit by multiplying the total actual profit for all production and selling activities of the subject merchandise by the applicable percentage, with the percentage determined by dividing total U.S. expenses by total expenses. See Opinion at 15-16 (citing 19 U.S.C. §§ 1677a(d)(3) and (f)). For both total U.S. expenses and total expenses, the Court further noted that recognized (i.e., actual) financial expenses are included in the cost of both the U.S. and HM merchandise. See Opinion at 16 (citing Ta Chen Stainless Steel Pipe, Ltd. v. United States, 30 CIT 376, 380 427 F. Supp. 2d 1265, 1269 (Ta Chen 2006)). Additionally, the Court stated that Commerce's normal practice does not include imputed expenses in the calculation, as Commerce holds that these are themselves an estimate of actual expenses, and the actual financial expenses already reflect the costs of carrying merchandise in inventory and extending credit. See Opinion at 16-17 (citing Ta Chen 2006, 30 CIT at 380, 427 F. Supp. 2d at 1269-70). The Court noted previous instances where the CIT and the U.S. Court of Appeals for the Federal Circuit upheld Commerce's methodology. See Opinion at 17.

However, the Court stated that Commerce did not properly analyze the information before it with respect to this issue. Rather, the Court found that Commerce in the Final Results simply cited to two previous Court decisions concerning prior administrative reviews in this proceeding as the basis for its determination, instead of addressing directly Ta Chen's claim that

the exclusion of imputed costs in the CEP profit calculation in this review renders Ta Chen's actual costs inaccurate. The Court explained that the data available to Commerce in previous reviews, which Commerce used as the basis for denying an adjustment to CEP profit in those circumstances, are different than the data before Commerce in this review. See Opinion at 22. Therefore, the Court stated that Commerce must provide substantial evidence, based on the record of this review, to support its finding that actual costs adequately reflect imputed costs. See Opinion at 22-23.

ANALYSIS

After analyzing the information on the record in preparing these final results of redetermination pursuant to remand and considering comments received by interested parties, Commerce determines that the continuance of calculating CEP profit based on actual expenses per the statute, 19 U.S.C. §§ 1677a(d)(1) and (2), and our regulations, 19 C.F.R. § 351.402(d) is appropriate.

Commerce is required in its determination of CEP to identify and deduct from the starting price in the United States market an amount for profit allocable to selling, distribution, and further manufacturing activities in the United States. Specifically, the statute identifies "the profit allocated to the expenses described in paragraphs (1) and (2)." 19 U.S.C. § 1677a(d)(3). "Paragraphs (1) and (2)" refer to (1) direct and indirect selling expenses; and (2) the cost of any further manufacture or assembly. See 19 U.S.C. §§ 1677a(d)(1) and (2). The statute also contains a special rule for determining profit, which provides as follows:

> (f) Special rule for determining profit
>
> (1) In general
>
> For purposes of subsection (d)(3) of this section, profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.
>
> (2) Definitions
>
> For purposes of this subsection:

(A) Applicable percentage

The term "applicable percentage" means the percentage determined by dividing the total United States expenses by the total expenses.

(B) Total United States expenses

The term "total United States expenses" means the total expenses described in subsection (d)(1) and (2) of this section.

(C) Total expenses

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

(i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

(ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

(D) Total actual profit

The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

19 U.S.C. § 1677a(f).

The Statement of Administrative Action (SAA) states that "the total profit is calculated on the same basis as the total expenses." H.R. Doc. No. 103-316, vol. 1, at 825, reprinted in 1994 U.S.C.C.A.N. 3773, 4164. Moreover, "no distortion in the profit allocable to U.S. sales is

created if total profit is determined on the basis of a broader product-line than the subject merchandise, because the total expenses are also determined on the basis of the same expanded product line. Thus, the larger profit pool is multiplied by a commensurately smaller percentage." Id. By regulation, Commerce has determined that "in calculating total expenses and total actual profit, the Secretary normally will use the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country, including sales that have been disregarded as being below the cost of production." See 19 C.F.R. § 351.402(d)(1).

Commerce considers imputed selling expenses (such as imputed credit and inventory carrying costs) to be types of selling expenses encompassed by 19 U.S.C. § 1677a(d)(1) and 19 U.S.C. § 1677a(d)(2). See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 2081, 2127 (January 15, 1997) (Antifriction Bearings); see also Silver Reed America, Inc. v. United States, 679 F. Supp. 12 (CIT), reh'g granted, 683 F. Supp. 1393 (CIT 1988) (sustaining Commerce's authority under pre- Uruguay Round Agreements Act (URAA) law to deduct imputed selling expenses from exporters sales price).[1] For this reason, in determining "total United States expenses," Commerce includes imputed selling expenses because the statute defines "total United States expenses" as equaling the selling expenses described in 19 U.S.C. § 1677a(d)(1) and 19 U.S.C. § 1677a(d)(2).

In its determination of "total actual profit," however, Commerce does not include imputed selling expenses because "'normal accounting principles permit the deduction of only actual booked expenses, not imputed expenses, in calculating profit.'" See, e.g., Antidumping Duties; Countervailing Duties, 62 FR 27296, 27354 (May 19, 1997). Commerce has also explained that its calculation of profit already includes net interest expenses and that, as a result, there is no need to include imputed interest expenses in determining total profit. See Antifriction Bearings, 62 FR at 2126-27. Commerce's decision to use only actual expenses, not imputed expenses, in determining profit is buttressed by the statute itself, which specifically refers to "total actual profit." See 19 U.S.C. § 1677a(f)(2)(D).

In its determination of "total expenses," Commerce also does not include imputed selling expenses. As is evident from the statute itself, Commerce's determination of "total actual profit" is based upon its determination of total actual expenses. That is, Commerce determines profit "with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph" (i.e., the subparagraph which defines "total expenses"). 19 U.S.C. § 1677a(f)(2)(D). The SAA echoes the statute, noting that "total actual profit" is to be calculated "on the same basis" as total expenses. See SAA at 825, reprinted in 1994 U.S.C.C.A.N. at 4164. The link between "total actual profit" and "total actual expenses" ensures that, regardless of the product line used to determine profit, a *pro-rata* amount of profit will be allocated to selling, distribution, and further manufacturing activities in the United States because, as indicated by the

[1] The URAA amendments did not require a change in Commerce's practice with regard to its treatment of imputed selling expenses as types of selling expenses that are properly deducted from the starting price used to establish CEP.

SAA, higher profit amounts that result from the use of broader product lines result in a proportionately smaller amount of allocated profit. Id. As with "total actual profit," Commerce does not include imputed selling expenses in its calculation of total expenses so as to avoid double-counting. See Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review, 62 FR 18476, 18479 (April 15, 1997) ("Although the actual and imputed amounts may differ, if we were to account for imputed expenses in the denominator of the constructed export price allocation ratio, we would double count the interest expense incurred for credit and inventory carrying costs because these expenses are already included in the denominator.").

The Court has also held that imputed expenses do not need to be limited to, or less than, the total amount of recognized net financial expenses included in the "total expenses" denominator because the imputed expenses in the numerator are gross expenses, while the recognized financial expenses in the denominator are net of interest income, which itself may not be allocable to U.S. selling activities. See Ta Chen 2006, 427 F. Supp. 2d at 1277. Furthermore, in Alloy Piping Products, Inc. v. United States, 28 CIT 1805 (2004) ("Alloy Piping 2004"), the Court rejected Ta Chen's argument that there was an "enormous" discrepancy between imputed expenses, which "total 17.3 percent whereas actual interest costs are 1.37 percent." Alloy Piping 2004, 28 CIT at 1811. The Court held that it "cannot find…that the 'imputed expenses represent some real, previously unaccounted for expenses' because the actual interest cost, 1.37 percent, is allocated to selling expenses, which are included in the figure for 'total expenses.'" Id. The Court also held "{T}hat imputed expenses are greater than actual expenses does not necessarily engender an actionable distortion." Id. Thus, even with a twelve-fold difference between the imputed and actual expenses, the Court in Alloy Piping 2004 found there to be no distortion. Similarly here, Commerce lacks record evidence to conclude that the differences in imputed costs and actual expenses reported by Ta Chen distort the calculation of CEP profit.

We disagree with Ta Chen's claim that reducing the actual interest costs by the alleged percentage of Ta Chen's total assets related to accounts receivable or finished goods inventory (that is, to adjust Ta Chen's CEP profit to include such costs) is appropriate. First, were Commerce to include imputed expenses in the denominator (i.e., total expenses), as suggested by Ta Chen, then Commerce would be double-counting such expenses because the total expenses figure (discussed above) already accounts for these amounts. Second, notwithstanding Ta Chen's suggestion that we add imputed expenses to our calculation of total U.S. selling expenses (i.e., the numerator of the CEP profit ratio calculation), that approach is contrary to our practice and statutory guidance as discussed above. Additionally, reducing the actual interest costs as suggested by Ta Chen is not more accurate. Generally, companies may finance their operations by collecting cash through various sources, including debt financing, equity financing, and through working capital. Because money is fungible, it is difficult to ascertain exactly which portion of a respondent's financial expenses arises as a result of certain specific operations of the company, such as U.S. selling activities. However, to the extent that a respondent company borrows funds through debt-financing, some portion of the financial expenses incurred on those funds may reasonably be attributable to the company's U.S. selling activities. The U.S. imputed expenses are an estimate of that amount. Credit costs are a function of a company's actual short-term borrowing rate (or interest rate) and the amount of time the customer takes to remit payment for sales. Therefore, a company that extends long payment terms to its customer would thereby

incur more imputed credit expenses.

Imputed inventory carrying costs are based upon a company's actual short-term borrowing rate, the average time merchandise remains in inventory and, in most cases, the total cost of manufacture for each product. Hence, the longer merchandise with a high cost of production remains in inventory, then the greater its opportunity cost, i.e., imputed inventory carrying costs. To the extent that a company incurs a longer waiting period between production and payment, it will not have recourse to such funds and will generally incur greater financial expenses relative to receiving payment immediately upon production. Thus, the imputed expenses may reasonably exceed the amount of recognized financial expenses in the denominator (total expense calculation used to derive the CEP profit ratio) without the existence of a distortion.

As stated above, if we were to include both the imputed expenses and the recognized financial expenses in the "Total Expenses" denominator, the denominator would then include both the recognized financial expense and an estimate of the amount of financial expenses due to U.S. selling activities, and thus would result in double-counting that amount. Ta Chen did not present any specific evidence on the record, other than a vague assertion in its case brief and a general citation to its database, to rebut Commerce's concerns regarding double-counting. See Ta Chen's case brief, dated September 10, 2007, at page 2, attached hereto as Exhibit 1. Because Ta Chen does not and cannot point to any record evidence demonstrating that Commerce's concerns regarding double-counting are not applicable to this review, we have followed statutory guidance and departmental practice to avoid such double-counting by excluding recognized financial expenses from the "Total U.S. Expense" numerator (i.e., thereby accounting for imputed expenses) in Ta Chen's calculations.

Thus, it is Commerce's position in this review that a relation exists between recognized financial expenses and imputed expenses, such that the recognized net expenses account for the extent to which Ta Chen incurs inventory carrying cost and credit costs related to the collection of accounts receivable, among other financial or economic costs. Therefore, we find that the imputed financial expenses included in the "Total U.S. Expenses" numerator are a reasonable surrogate for the relevant recognized financial expenses included in both the "Total Expenses" denominator and the "Total Actual Profit" multiplier. Although the CIT in Ta Chen 2006 did recognize that the imputed expenses in the numerator are gross expenses, while the recognized financial expenses are net of interest income, the Court also recognized in principle that the imputed expenses are an approximate amount, and that "there is no apparent reason why all such costs – whatever their magnitude – would not be fully and accurately reflected in Ta Chen's consolidated financial statements." Ta Chen 2006, 427 F. Supp. 2d at 1272, n.13. Thus, in this case, in light of Ta Chen 2006, Commerce finds that, in the absence of record evidence demonstrating otherwise, the application of our standard methodology properly accounts for a producer-exporter's financial expense in all parts of the CEP profit equation. Based on the reasons set forth above, we find that the exclusion of imputed costs in our standard CEP profit calculation does not render Ta Chen's actual costs inaccurate. Hence, we continue to find that an adjustment to our calculation of Ta Chen's CEP profit is not warranted.

COMMENTS

On May 26, 2009, we invited interested parties to comment on the Draft Results of Redetermination Pursuant to Remand (Draft Remand Results). The initial deadlines for comments and rebuttal comments were June 1, 2009 and June 4, 2009, respectively. On June 1, 2009, pursuant to Ta Chen's request of the same day, we extended the deadline for parties to provide comments and rebuttal comments by one additional day to June 2, 2009 and June 5, 2009, respectively.[2] On June 1, 2009, petitioners filed a letter in which they expressed their support for Commerce's analysis of the CEP profit issue and informed Commerce that they would no longer be actively participating in this matter. See Petitioners' Letter to Commerce, dated June 1, 2009, attached hereto as Exhibit 2. On June 2, 2009, Ta Chen submitted comments on the Draft Remand Results. See Ta Chen Letter to Commerce, dated June 2, 2009, attached hereto as Exhibit 3. We did not receive rebuttal comments from either party. Ta Chen's comments and Commerce's position are summarized below.

General Comment: Whether Commerce Complied with the Court's Remand Instructions

Ta Chen believes that Commerce's Draft Remand Results reflect the same problems discussed by the Court in its Opinion. In particular, Ta Chen states that "this remand decision just repeats Commerce's prior decisions with different words." Ta Chen contends that Commerce's treatment of the double-counting issue, to the extent it is responsive, supports Ta Chen's position that reducing the actual interest costs by the alleged percentage of its total assets related to accounts receivable or finished goods inventory avoids the problem of double counting. Ta Chen further asserts that the Draft Remand Results do not "explain why the Department's prior precedent of the appropriateness of such an adjustment should no longer be followed." Nor does Commerce, according to Ta Chen, "address the point that just considering imputed costs that Ta Chen linked to the subject merchandise, and not actual costs, would definitely avoid double counting and be more accurate." Lastly, Ta Chen argues that Commerce "failed to address the specific record evidence cited before by Ta Chen as to its imputed costs exceeding its actual costs." See Exhibit 3.

Commerce's Position:

Commerce does not agree with Ta Chen's comments on the Draft Remand Results. First, Ta Chen's comments are general statements of disagreement with Commerce's Draft Remand Results that do not rely on any citations to record evidence. Commerce has specifically found that were it to include imputed expenses in the denominator (i.e., total expenses), as suggested by Ta Chen, it would result in double-counting such expenses because the total expenses figure as discussed above already accounts for those categories of expenses. Despite Ta Chen's assertions, this finding does not support Ta Chen's claims. Moreover, contrary to Ta Chen's assertion otherwise, Commerce thoroughly addressed how accounting for actual costs in the "total expenses" component of the CEP profit calculation adequately and reasonably reflects imputed costs in a manner consistent with the statute, Commerce's

2 In its June 1, 2009 extension request, Ta Chen asked for an additional 10 days to submit comments on the Draft Remand Results, which the Department found to be impractical if it were to meet the June 16, 2009 deadline established in the Opinion to submit remand results to the Court.

regulations, prior agency practice and accounting principles. See "Analysis" section, pages 3-8 supra. As imputed credit and inventory carrying costs are already embedded in the calculation of profit in this administrative review, there is no need to separately account for such imputed expenses in determining total profit.

Commerce has thoroughly reviewed the record in this segment of the proceeding and has found no basis to conclude that imputed expenses are not accurately reflected in its profit calculation. To the extent that Ta Chen claims a significant discrepancy between actual costs and imputed costs during the period of review are indicative of distortion, such claims are based on calculations examining only a portion of the company's total actual expenses. As explained above, the fungibility of money makes it difficult to ascertain exactly what share of a respondent's financial expenses derives from certain specific operations of the company. See "Analysis" section, pages 6-7 supra. Thus, Ta Chen's selective reliance on record evidence to claim an alleged discrepancy between actual and imputed costs in no way demonstrates that Commerce's profit calculations were distorted or otherwise in error as the imputed costs may be reflected elsewhere in total actual expenses. Additionally, Ta Chen's argument fails to recognize that imputed expenses may reasonably exceed the amount of recognized financial expenses used in the profit calculation due to such factors as financing practices and prolonged inventory periods. Id.

Lastly, Commerce disagrees with Ta Chen's contention that Commerce "failed to address the specific record evidence cited before by Ta Chen as to its imputed costs exceeding its actual costs." See Exhibit 3. In the administrative proceeding, Ta Chen never specifies with any particularity what record evidence Commerce should consider in its remand analysis. Ta Chen's original case brief to Commerce and subsequent remand comments only generally allude to Ta Chen's database without ever identifying specific record evidence to be used by Commerce or explaining how and why that record evidence should be applied as part of Commerce's CEP profit calculation. See Exhibits 1 and 3. Should the reference to "specific record evidence cited before by Ta Chen" refer to Ta Chen's brief to the Court, Commerce filed its own brief with the CIT specifically addressing Ta Chen's arguments in this regard. In any event, Commerce has also addressed these arguments as part of this remand determination. See "Analysis" section, pages 3-8 supra (finding, inter alia, that a difference between the imputed expenses at issue and certain categories of actual expenses does not establish a distortion in the CEP profit calculation).

FINAL RESULTS OF REDETERMINATION

Based on our review of the record and consideration of comments from Ta Chen, we find that a more rigorous analysis of the CEP profit issue supports our previous finding in the Final Results that imputed costs are adequately reflected in the total actual costs used to calculate CEP profit. Accordingly, an adjustment is not warranted.

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Carole Showers
Acting Deputy Assistant Secretary
for Policy and Negotiations

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Date