

**Final Results of Redetermination Pursuant to  
*Hiep Thanh Seafood Joint Stock Co. v. United States*,  
Consol. Court No. 09-00270, Slip Op. 10-125, (November 5, 2009)**

**1. SUMMARY**

The U.S. Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in *Hiep Thanh Seafood Joint Stock Co. v. United States*, Consol. Court No. 10-00125, Slip Op. 10-125, (November 5, 2010) (“*Hiep Thanh*”). This remand addresses the issue of whether certain sales should be included in Hiep Thanh’s U.S. sales database in the third new shipper review of the antidumping duty order of certain frozen fish fillets from the Socialist Republic of Vietnam (“Vietnam”). See *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Third New Shipper Reviews*, 74 FR 29473 (June 22, 2009) and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of New Shipper Review* 74 FR 37188 (July 28, 2009) (“*Final Results*”). The Court remanded the issue providing the Department with the opportunity to further explain its decision to include these sales in Hiep Thanh’s U.S. sales database.<sup>1</sup> As explained below, the Department has determined that at the time of the sale, Hiep Thanh knew or should have known that the sales at issue were being shipped to the United States and that, as such, the sales were properly included in Hiep Thanh’s U.S. sales database. As a result of this redetermination, the Department has not revised the dumping margin calculation for Hiep Thanh and its margin remains \$0.35 per kg, for sales of certain frozen fish fillets during the August 1, 2007 through January 31, 2008, period of review (“POR”).

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<sup>1</sup> See *Hiep Thanh* at 11.

## II. ANALYSIS

### Background

In the *Final Results*, the Department included in its calculation of Hiep Thanh's antidumping duty margin nine sales that U.S. Customs and Border Protection ("CBP") documents identified as having been entered as Type 3 entries<sup>2</sup> for U.S. consumption, but which Hiep Thanh had not initially reported to the Department. These sales were made to an unaffiliated customer, Company 2,<sup>3</sup> who, as part of the sale, requested delivery to the United States with an apparent intent to further transport the goods to Mexico. However, instead of going on to Mexico, these sales were entered into the United States customs territory for consumption, and therefore, subject to AD/CVD duties. Hiep Thanh challenged, before the CIT, the Department's determination to include these sales in the company's U.S. sales database for margin calculation purposes. Upon review of Hiep Thanh's challenge, the Court remanded for further explanation the Department's decision to include these sales in Hiep Thanh's margin calculation.<sup>4</sup>

For the reasons explained in the analysis below, we are continuing to include these sales in Hiep Thanh's margin calculation.

#### A. The sales at issue meet the statutory definition for a U.S. sale.

The Department determines whether a party is dumping merchandise in the United States by comparing a respondent's U.S. price with the respondent's home market sales, third-country

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<sup>2</sup> CBP identifies merchandise that enters the United States for consumption and that is subject to antidumping/countervailing ("AD/CVD") duty orders as Type 3 entries.

<sup>3</sup> The name of Company 2 is business proprietary.

<sup>4</sup> At page 9 of *Hiep Thanh*, the Court stated that Commerce needs to clarify "which standard it applied when it affixed liability for the sales to Hiep Thanh." The Department notes that generally all sales of subject merchandise are subject to duties and the liability always lies with the importer of record. The issue, therefore, is not one of liability for duties. The issue is which rate to apply to these U.S. sales and in whose margin calculation should they be included.

sales, or constructed value.<sup>5</sup> 19 U.S.C. § 1675(a)(2)(A). U.S. price is defined as “the price at which the subject merchandise is first sold . . . to an unaffiliated purchaser for exportation to the United States . . .” *See* 19 U.S.C. § 1677(a). The reason 19 U.S.C. § 1677a(a) identifies the sale to an unaffiliated purchaser for exportation to the United States as the relevant sale is because the sale to the first unaffiliated purchaser represents the first market price, untainted by affiliation, to the United States. This is the sale that would be distortive of market prices in the United States market if it were dumped, *i.e.*, sold at less than the normal value. The party that makes that sale is the potential price discriminator because it is in a position to discriminate on prices between markets. It is the activity of the price discriminator for which the antidumping duty law provides a remedy.

The sales at issue meet this definition. Hiep Thanh sold the merchandise to an unaffiliated customer for delivery to the United States; Hiep Thanh shipped the goods to the United States and the goods entered the United States; the sales and shipment documents associated with these sales list the United States as a destination, though Mexico was listed as the ultimate destination; and the goods entered the U.S. market as Type 3 entries for consumption. As such, Hiep Thanh was in a position to price discriminate between the U.S. market and other markets, and thus these sales belong in Hiep Thanh’s U.S. sales database for calculating their antidumping duty margin. This conclusion is supported by *Allegheny Ludlum Corp., et al. v. United States*, 215 F. Supp. 2d 1322, 1331 (CIT 2000) (“*Allegheny Ludlum*”), insofar as there is evidence on the record to demonstrate that Hiep Thanh knew that the merchandise was being shipped to the United States. In this case, we find that Hiep Thanh had the requisite knowledge because the company itself, at the time of the sale, knew it was shipping the merchandise to the United States as evidenced by the documentation cited above.

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<sup>5</sup> In non-market economy cases, U.S. prices are compared to normal value based on factors of production.

## **B. The Knowledge Test**

Hiep Thanh's position is that no sales to Company 2 should be included in Hiep Thanh's U.S. sales database because although some of the merchandise entered the United States for consumption, Hiep Thanh neither knew nor should have known that the merchandise would be entered for consumption into the United States. Hiep Thanh argued that it was not the importer and had listed Mexico as the ultimate destination in both sales and shipment documents. Hiep Thanh argued that section 772(a) of the Tariff Act of 1930, as amended ("Act"), states that the basis for export price is the price at which the first party in the chain of distribution, that has knowledge of the U.S. destination of the merchandise, sells the subject merchandise either directly to a U.S. purchaser or to an intermediary such as a trading company. The party making such a sale, with knowledge of the destination, is the appropriate party to be reviewed. Hiep Thanh argued that the facts in this case do not support the conclusion they knew nor should have known the ultimate destination of the goods was the United States. Essentially, Hiep Thanh has argued that it is not the proper price discriminator for the sales at issue because it did not know the merchandise was going to enter the U.S. market.

The focus on the seller's knowledge, although not in the statute, is derived from the Statement of Administrative Action which accompanied the Trade Agreement Act of 1979: "{i}f the producer knew or had reason to know that the goods were for sale to an unrelated U.S. buyer . . . the producer's sales price will be used as 'purchase price' to be compared with that producer's foreign market value." S.R. Doc. No. 96-249, at 411 (1979) ("1979 SAA") (cited in *Allegheny Ludlum*, 215 F. Supp. 2d at 1331). As a result, the Department developed the

“knowledge test” to identify the price discriminator, and thus the appropriate price to be used in the antidumping duty calculation. See 1979 SAA.

Hiep Thanh is correct that in identifying the appropriate price discriminator in the chain of distribution, the standard is whether the party making the first sale to an unaffiliated party knew or should have known at the time of the sale that merchandise was going to the United States. *See* 1979 SAA, and *see Allegheny Ludlum*, 215 F. Supp. 2d at 1331. However, Hiep Thanh’s application of the test to the sales in this case is incorrect. At the time of the sale, Hiep Thanh knew it was shipping the goods to the United States. Hiep Thanh does not dispute this fact. This knowledge at the time of the sale is enough to satisfy the knowledge test. This knowledge put Hiep Thanh in the position of being able to discriminate on its pricing between the U.S. market and other markets. With the requirement at the time of sale that the merchandise was to be shipped to the United States, Hiep Thanh knew or should have known that the goods were being shipped to the United States, regardless of whether the stated intent of the importer was to subsequently ship the goods to Mexico. Further, this merchandise subsequently entered the United States for consumption subject to AD/CVD duties. As such, the sales underlying these entries are properly included in the margin calculation.

As a policy matter, Hiep Thanh wants the Department to determine that because the shipping documents generated at the time of sale indicated further transport of the goods to Mexico, Hiep Thanh did not have knowledge that the goods were destined for the United States. However, the Department believes that such an application of the knowledge test would be inappropriate because it would place certain respondents in a position to exclude U.S. sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the sales remain in the United States and are entered for consumption subject to

AD/CVD duties. Significantly, the Department did not find that all sales with documentation that indicated transshipment through the United States to be included in Hiep Thanh's margin calculation, but only those sales that entered the United States for consumption subject to AD/CVD duties.

To be clear, the fact that the shipments subsequently entered the United States has no bearing on the knowledge of the respondent, Hiep Thanh, at the time of the sale. Thus, apart from the knowledge test, the actual entry into the United States identifies the sale as a U.S. sale of subject merchandise, as opposed to another market, and thus is subject to U.S. reporting requirements in the context of a review. If the sale does not enter the United States for consumption, while Hiep Thanh's knowledge of U.S. destination at the time of sale would still exist, the goods, having not entered U.S. customs territory for consumption, would not be subject to antidumping duty/countervailing duties. *See Allegheny Ludlum*, 215 F. Supp. 2d at 1331.

Because Hiep Thanh had knowledge at the time of sale that its merchandise was being shipped to the United States, Hiep Thanh was in a position to set its price accordingly. Further, because the merchandise entered the United States for consumption, it constitutes subject merchandise and the sales at issue are properly included in Hiep Thanh's U.S. sales database.

### **III. COMMENTS FROM INTERESTED PARTIES**

On December 28, 2010, we released the draft remand determination to interested parties and Hiep Thanh submitted comments on January 7, 2011.

Hiep Thanh argues that the contested sales were not in fact U.S. sales, but were in fact sales to Mexico. Hiep Thanh argues that the fact that the merchandise was shipped to the United States does not in and of itself make the sales at issue, U.S. sales. Furthermore, Hiep Thanh states that the Department is incorrect in determining that Hiep Thanh was acting as a price

discriminator for sales between the United States and other markets for these sales, as the sales at issue were sales made by Hiep Thanh to Mexico, not the United States. Therefore, Hiep Thanh contends that these sales were not U.S. sales and should not be included in the U.S. sales database for the purposes of calculating their antidumping duty margin calculation.

**DEPARTMENT'S POSITION:**

We continue to disagree with Hiep Thanh and will include the disputed sales in Hiep Thanh's calculation of the antidumping duty margin. We find that the sales at issue meet the definition of a U.S. sale under 19 U.S.C. § 1677(a) as these sales were made to an unaffiliated purchaser for exportation to the United States. Hiep Thanh argues that simply because its unaffiliated purchaser indicated it may re-export the merchandise to a third country, this is sufficient to disregard the facts of what actually occurred. In sum, Hiep Thanh asks the Department to ignore what Hiep Thanh actually knew at time of shipment - the destination was the United States. A review of the evidence on the record shows that in the commercial invoices Hiep Thanh indicated shipment was to be made to a United States port. See Memorandum to the File from James C. Doyle, Regarding U.S. Entry Documentation, dated October 22, 2008. The accompanying bills of lading for these shipments indicated that the port of discharge for these sales at issue was in the United States. See Id. In other words, the product was exported to the United States and delivered to the United States. Upon arrival, the entries were classified as type 3 entries (consumption). Hiep Thanh essentially asks the Department to ignore these record facts which ultimately satisfy 19 U.S.C. § 1677(a). Hiep Thanh's knowledge of whether the subject merchandise would be re-exported to a third country is a mere assumption, when compared to the action taken – shipped to the United States and purchased from an unaffiliated customer. As such, Hiep Thanh was in a position to price discriminate between the U.S. market

and other markets as they sold the merchandise to an unaffiliated customer for delivery in the United States. As the merchandise was entered into the United States for consumption subject to AD/CVD duties, those sales provide the appropriate prices to be included in the antidumping duty calculation. *See Allegheny Ludlum*, 215 F. Supp. 2d at 1331.

#### **IV. FINAL REMAND CONCLUSION**

Pursuant to the Court's order, based on the analysis of the issue the Department was instructed to reconsider, the Department has determined that the sales at issue are properly included in Hiep Thanh's U.S. sales database. As a result, the Department has not revised the antidumping duty margin calculations for Hiep Thanh and its margin remains \$0.35 per kilogram.

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

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Date