Public Document

Atar, S.r.l. v. United States
Court No. 07-86 Slip Op. 09-53 (CIT June 5, 2009)
Court No. 07-86 Slip Op. 10-43 (CIT April 20, 2010)

FINAL RESULTS OF REDETERMINATION

PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (the "Department") has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade ("Court") in Atar, S.r.l. v. United States, Court No. 07-86, Slip Op. 10-43 (CIT April 20, 2010) ("Atar II"). The Court directed the Department to reconsider and redetermine constructed value ("CV") profit for Atar, S.r.l. ("Atar") in a way that satisfies both the profit cap and reasonable method requirements of section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended ("the Act").

The Department issued its draft remand results to interested parties on June 9, 2010. On June 17, 2010, we received comments on the draft remand results. These comments are addressed in section "D. Comments on Draft Remand Results" below.

In accordance with Atar II, the Department has reconsidered the CV profit rate that we calculated in the Results of Redetermination Pursuant to Court Remand that we filed with this Court on September 3, 2009 ("September 3 Remand Redetermination") to determine whether that profit rate satisfies the profit cap and reasonable method requirements of section 773(e)(2)(B)(iii) of the Act. In doing so, we have reconsidered the data source used to

determine the profit cap in the Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 71 FR 45,017, 45,022 (Aug. 8, 2006) ("Preliminary Results"), unchanged in final, Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (Feb. 14, 2007) ("Final Results"), and accompanying Issues and Decision Memorandum ("Decision Memorandum").[1] As noted in the September 3 Remand Redetermination, the Department continues to believe that the methodology it used in the Final Results to calculate CV profit constitutes a "reasonable method" under section 773(e)(2)(B)(iii) of the Act. The Department also believes that such methodology met the profit cap requirements under section 773(e)(2)(B)(iii) of the Act. Nevertheless, in light of the Court's opinion in Atar, S.r.l. v. United States, 637 F. Supp. 2d 1068 (CIT 2009) ("Atar I"), the Department continues to redetermine Atar's CV profit and indirect selling expense ("ISE") rates consistent with the Court's holding that the Department erred by excluding sales outside of the ordinary course of trade in its CV ISE and profit calculations under section 773(e)(2)(B)(iii) of the Act. For purposes of this second remand redetermination, we continue to use the CV ISE and profit rate that we used in the September 3 Remand Redetermination, which was based on data relating to the home market sales of foreign like product from the respondents that earned a profit in the prior administrative review ("Eighth Administrative Review"), including their sales that were both inside and outside the ordinary course of trade.

Given the Court's order in Atar I with respect to including both sales made inside and

[1] We note the Department only addressed the profit cap calculation in the Preliminary Results of this proceeding.

outside the ordinary course of trade in its CV profit calculations, the population of companies on which the Department could base profit changed where several companies were determined not to be profitable and, therefore, could not serve as the basis for a profit calculation under the Department's practice for purposes of the September 3 Remand Redetermination. Consistent with the revised calculation methodology and consistent with the methodology used in the Preliminary Results, for purposes of these second results of redetermination we recalculated the profit cap using the weighted–average profit rate derived from the home market sales data from sales of foreign like product by those respondents in the Eighth Administrative Review that earned a profit, based on data from their sales that were both inside and outside the ordinary course of trade. For the reasons demonstrated below, this reasonably reflects the profit normally realized by other companies on sales of the same general category of merchandise in the market under consideration, i.e., the profit cap.

B. BACKGROUND

On February 14, 2007, the Department published its Final Results and Decision Memorandum in the administrative review of the antidumping duty order on certain pasta from Italy. Final Results, 72 FR 7011 and Decision Memorandum. The period of review covered the period July 1, 2004, through June 30, 2005.

Atar challenged the Department's Final Results. After a full briefing of all the issues, on June 5, 2009, the Court upheld the Department's final results in part, particularly (a) the Department's decision to base Atar's normal value on something other than Atar's sale to Angola, and (b) the figure the Department used to value certain services an Atar employee provided to the company. Atar I, 637 F. Supp. 2d 1068. However, the Court remanded the

Department's calculation of Atar's CV ISE and profit rate, which had been based on the weighted-average data relating to sales by the six respondents in the Eighth Administrative Review of foreign like product sold in the home market in the ordinary course of trade. In its remand order, the Court directed the Department to reconsider and redetermine, as necessary, its calculations for Atar's CV ISE and profit rate and its exclusion from those calculations of the data derived from home market sales that occurred outside the ordinary course of trade, and explain why the remand redetermination satisfied the reasonable method requirement of section 773(e)(2)(B)(iii) of the Act. Atar I, 637 F. Supp. 2d at 1092-1093.

On September 3, 2009, the Department issued the September 3 Remand Redetermination, in which we calculated CV profit and ISE using a weighted average of the sales of two of the six respondents in the Eighth Administrative Review because they were the only respondents that earned a profit after including sales outside the ordinary course of trade in the profit calculation. We also provided an additional explanation as to why the existing CV profit calculation was reasonable, supported by substantial evidence and in accordance with law. However, on April 20, 2010, the Court remanded the issue to the Department, stating, "the remand redetermination is not in accordance with law because of Commerce's failure to comply with the profit cap requirement as set forth in {section 773(e)(2)(B)(iii) of the Act}." Atar II, at 19. Specifically, the Court directed the Department to "reconsider the matter and redetermine constructed value profit for Atar in a way that satisfies both the profit cap and reasonable method requirements of that provision of the statute," id., and ordered the Department to submit a second remand redetermination that is in accordance with the directives and conclusions that appeared in the Court's opinion.

Pursuant to the Court's remand instructions, we have revisited the Department's CV profit analysis and revised the calculation of the CV profit cap for Atar for the reasons explained below. Because the CV profit rate that the Department calculated in the September 3 Remand Redetermination satisfies the profit cap requirement contained in section 773(e)(2)(B)(iii) of the Act, as demonstrated below, and constitutes a reasonable methodology for the reasons demonstrated in the September 3 Remand Redetermination, the Department continues to apply that rate for purposes of these results of remand redetermination.

C. ANALYSIS

CV Profit Cap Calculation

In Atar II, the Court remanded the Department's calculation of CV profit in light of the statutory requirements that the method the Department apply be "reasonable" and not exceed the profit cap. The Court focused particularly on the Department's lack of demonstration concerning whether the selected methodology satisfied the profit cap requirement contained in section 773(e)(2)(B)(iii) of the Act (i.e., "the third alternative"). Atar II, at 7-13. Section 773(e)(2)(B)(iii) of the Act allows the Department to use any reasonable method to determine CV profit as long as the amount applied for profit is not greater than 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." In the Preliminary Results, pursuant to section 773(e)(2)(B)(iii) of the Act, the Department calculated Atar's CV profit and the profit cap using the weighted-average profit rates that it calculated for the six respondents in the Eighth Administrative Review. Pursuant to the Court's opinion in Atar I, under a respectful protest, we recalculated the CV ISE and profit

rates for the September 3 Remand Redetermination, although we did not recalculate the profit cap.

Pursuant to the Court's order in Atar II, we have reexamined our CV profit calculation. We have done so taking into consideration the Court's focus on compliance with the profit cap requirement. See Atar II, at 7-13. Accordingly, we have re-examined the profit cap we calculated in the Final Results.

This Court stated that "Congress did not intend for Commerce to exclude data on below-cost sales from its calculation when determining a profit cap." Atar II, at 9. The profit cap we calculated in the Final Results was based on sales of the foreign like product that were made in the ordinary course of trade by the six respondents in the prior administrative review. See Decision Memorandum at comment 2. That is, the profit cap calculation excluded below cost sales that met the requisite criteria of section 773(b)(1) of the Act, (i.e., below-cost sales that are made within an extended period of time and were not at prices that permit recovery of costs within a reasonable period of time). Therefore, to address the Court's concern in Atar II, and as we did with respect to CV profit in the September 3 Remand Redetermination under respectful protest, for purposes of this remand redetermination, again, under respectful protest, we have reconsidered the CV profit cap calculation to take into account sales that were made both within and outside the ordinary course of trade. In analyzing the underlying data, we have found that several of the six respondents whose data the Department is using to calculate CV profit did not earn a profit, while others did. See Memorandum from Dennis McClure to the File, re: Final Calculation, dated September 3, 2009.

Consistent with our practice, and as determined to be reasonable by the Court,[2] CV profit must be a positive amount. Because we require that CV profit be a positive amount, where the Court is requiring the Department to include sales that are made both within and outside the ordinary course of trade in its CV profit calculations, it is reasonable to determine that rates from only profitable companies here should constitute the "amount [of profit] 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 subject merchandise." See section 773(e)(2)(B)(iii) of the Act. Therefore, we recalculated the profit cap for Atar based on the weighted–average data from those respondents in the Eighth Administrative Review that earned a profit.

As such, in accordance with section 773(e)(2)(B)(iii) of the Act, the weighted–average profit rate of the two respondents that earned a profit in the Eighth Administrative Review, after including sales made both within and outside the ordinary course of trade, establishes a reasonable profit cap. Therefore, consistent with section 773(e)(2)(B)(iii) of the Act, the CV profit rate that the Department calculated for Atar, based on the weighted-average profit data from those respondents in the Eighth Administrative Review that earned a profit, does not exceed the CV profit cap, which is based on that same information. Additionally, for the reasons explained in the September 3 Remand Redetermination, the CV profit rate that the Department calculated for Atar satisfies the reasonableness requirement contained in the statute.

[2] Rhodia, Inc. v. United States, 240 F. Supp. 2d 1247, 1254-55 (CIT 2002). We recognize that in Atar II the Court stated that it is not bound by the Rhodia decision and that Rhodia is inapposite. Nevertheless, we read the Rhodia decision as upholding the Department's non-market economy profit calculation methodology, which the Court recognized was based on the Department's methodology for calculating CV profit in market economy cases. Upholding the non-market economy profit methodology thereby recognizes that the market-economy CV profit methodology to exclude data from non-profitable companies is reasonable.

See the September 3 Remand Redetermination; section 773(e)(2)(B)(iii) of the Act. Accordingly, the Court should find that the CV profit calculation, including this profit cap calculation, is reasonable and in accordance with the statute.

D. COMMENT S ON DRAFT REMAND RESULTS

On June 17, 2010, Atar submitted a comment on our draft remand results of redetermination. This comment is addressed below.

Comment: The Department's Calculation of the Margin for Atar Continues to be Improper Because of the CV Profit Selected

Atar asserts that the Department's selected profit does not comport with the profit cap and the reasonable method requirements of section 773(e)(2)(B)(iii) of the Act. According to Atar, the key question is the meaning of the phrase "normally realized by exporters and producers……in the connection with the sale, for consumption in the foreign country, of the merchandise that is in the same general category of products as the subject merchandise" in section 773(e)(2)(B)(iii) of the Act. Atar argues that when the Department excludes from the profit cap calculation those companies that did not make a profit, the result is "gross profits" and not "net profits" being considered, which is contrary to the plain language of the statute. Atar emphasizes that the use of data from all six companies, from the Eighth Administrative Review, in calculating the profit cap would not produce an overall "negative" profit. Accordingly, the use of all six companies would produce a CV profit reflecting the "net profits" of the same general category of products of the subject merchandise.

Atar also argues that excluding the companies with net losses would result in consideration of something less than the same general category of products. Atar asserts that

the key distinction is that the statute limits itself not to overall profits, but rather to products in the same general category of products as the subject merchandise. Commerce's methodology allegedly reads into the statute words that do not appear there. For these reasons, Atar concludes that limiting the profit cap calculation to include only profitable companies is inherently unreasonable as it does not reflect the "amount normally realized in connection with the sale of merchandise that is in the same general category of products as the subject merchandise."

Department's Position:

We disagree with Atar. The statute requires that any reasonable surrogate profit rate can be selected for CV under alternative three "…except the amount allowed for profit may not exceed the amount normally realized…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." See section 773(e)(2)(B)(iii) of the Act (emphasis added). Stated differently, the surrogate profit rate selected under alternative three cannot exceed the profit cap. For this provision of the statute, it is clear that Congress intended the profit cap to be (1) based on home-market sales information of the same general category of products as the subject merchandise (2) non-aberrational to the industry under consideration (i.e., "the amount normally realized.") and (3) not based on the data of the respondent for which the Department is calculating constructed value. See section 773(e)(2)(B)(iii) of the Act; the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1, at 840 (1994) ("SAA") (Congress's discussion of (e)(2)(B)(iii) of the Act).

Other than these three criteria, neither the statute nor the SAA provides guidance concerning the manner in which to select a profit cap. In fact, the SAA clearly states that the statute purposefully provides the Department with ample discretion in employing alternative three, including the determination of a profit cap:

> The Administration does not believe that it is appropriate at this time to establish particular methods and benchmarks for applying {alternative three}. Instead, the *Administration intends that Commerce will develop this alternative* through practice, and that Commerce will determine on a case-by-case basis the profits "normally realized" by other companies on merchandise of the same general category.

SAA at 841 (emphasis added).

In circumstances in which Congress has expressly delegated authority to the Department to interpret a provision in the statute, as is the case here, this court should accord such an interpretation a great deal of deference. Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1380 (Fed. Cir. 2001).

In the instant case, the Department recalculated the profit cap for Atar based on the weighted–average data from those respondents in the Eighth Administrative Review that earned a profit because the general usage of the term "profit" explicitly refers to a positive figure. For example, Barron's Financial Guides: Dictionary of Finance and Investment Terms (New York: Barron's Educational Series, 1987) defines profit as the "*positive difference* that results from selling products and services for more than the cost of producing these goods" and also the "difference between the selling price and the purchase price of commodities or securities *when the selling price is higher*" (emphasis added). Additionally, the SAA indicates that section 773(e)(2)(B) "establishes alternative methods for calculating amounts for {selling, general, and

administrative} expenses and profit in those instances where… section 773(e)(2)(A) cannot be used, either because there are no home market sales of the foreign like product or because all such sales are at below-cost prices." SAA at 840. Therefore, if a company has no home market profit or has incurred losses in the home market, the Department is not instructed to ignore the profit element, include a zero profit, or even consider the inclusion of a loss; rather, the Department is directed to find an alternative home market profit.

Consequently, a reasonable interpretation of the statute indicates that a positive amount for profit must be included in CV. Additionally, it reasonably follows that a "profit cap" should include only positive amounts because Commerce reasonably interprets "profit" to be a positive amount and in its profit cap calculation the Department is determining the "profit" normally realized by other producers. The reasonableness of Commerce's interpretation of "profit" and use of data from only profitable companies in its profit cap calculation is not negated by the fact that including data from companies that did not earn a profit could or does result in a positive profit figure.

The Department's profit cap calculation is consistent with the statute. The Department recalculated the profit cap for Atar based on the weighted–average data from those respondents in the Eighth Administrative Review that earned a profit. That is, the calculation was based on the profit normally realized by exporters or producers other than Atar. Also, the sales information used to calculate the profit cap was derived from sales in the home market of merchandise in the same general category of products as subject merchandise. Atar has failed to provide any information that the rate the Department used as a profit cap was aberrational.

Further, although Atar argues that excluding data from the companies that did not earn a

profit from its profit cap calculation results in the Department considering "something less than the same general category of products," the Department does not consider whether a company earns a profit or experiences a loss in its analysis of merchandise that is "in the same general category of products as the subject merchandise." There can be no question that the Department based its profit cap calculation on the profits realized in connection with the sale of merchandise in the same general category of subject merchandise. The Department's calculations in this case are based on profits realized in connection with the sale of subject merchandise, which necessarily falls within the definition of merchandise in the same general category as subject merchandise.

For these reasons, the CV profit rate and the CV profit cap that the Department calculated for Atar are in accordance with the statute.

D. CONCLUSION

In conclusion, because this Court directed the Department to calculate CV profit in a way that satisfies both the profit cap and reasonable method requirements of section 773(e)(2)(B)(iii) of the Act, for these final results of redetermination the Department re-examined the CV profit cap and recalculated that cap using home market sales data from the population of respondents that earned a profit in the Eighth Administrative Review after including sales both inside and outside the ordinary course of trade. Based on our recalculation of the profit cap, the profit rate assigned to Atar in the September 3 Remand Redetermination is consistent with the profit cap requirement contained in section 773(e)(2)(B)(iii) of the Act because it does not exceed that profit cap and, for the reasons discussed in the September 3 Remand Redetermination, constitutes a reasonable method. Therefore, we continue to apply to Atar the profit rate from the September 3 Remand Redetermination. Also, we have not changed our calculation of CV ISE from the September 3 Remand Redetermination. Accordingly, we continue to assign a dumping margin of 14.45 percent to Atar.

/Ronald K. Lorentzen/

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(Date)