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International Trade Administration
Washington, D.C. 20230

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Administrative Review
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February 17, 2012

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for Fresh Garlic from the People's Republic of China: Partial Final Results and Partial Final Rescission of the 2009-2010 Administrative Review

SUMMARY:

The Department of Commerce (Department) published its partial preliminary results of the administrative review of fresh garlic from the People's Republic of China (PRC) on October 20, 2011.[1] We have analyzed the case briefs submitted by Weifang Hongqiao International Logistics Co., Ltd. (Hongqiao), Sunny Import & Export Co. Ltd., and Shenzhen Greening Trading Co., Ltd. (collectively, Respondents), as well as the case and rebuttal briefs submitted by Petitioners.[2] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND:

On October 20, 2011, the Department published its partial preliminary results for the PRC-wide entity, which included non-responding mandatory respondents, Shandong Longtai Fruits &

[1] See Fresh Garlic From the People's Republic of China: Partial Preliminary Results, Rescission of, and Intent To Rescind, in Part, the 2009-2010 Administrative Review, 76 FR 65172 (October 20, 2011) (First Partial Preliminary Results).

[2] See Fresh Garlic from the People's Republic of China – AR 16 – Case Brief – Respondents (November 21, 2011) (Respondents' Case Brief); Fresh Garlic from the People's Republic of China: Petitioners' Case Brief (December 1, 2011); and Fresh Garlic from the People's Republic of China: Petitioners' Rebuttal Brief (December 6, 2011). Petitioners are the Fresh Garlic Producers Association, its individual members being Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

Vegetables Co., Ltd. (Longtai) and Hongqiao.[3] The two participating mandatory respondents and five separate rate respondents were covered in a second partial preliminary results.[4]

DISCUSSION OF THE ISSUES:

Comment 1: Selection and Corroboration of the PRC-wide entity rate as to the PRC-wide entity

Respondents' Arguments

- The PRC-wide entity rate of $4.71 per kilogram (kg) rate used in the First Partial Preliminary Results is punitive, arbitrary, capricious, and contrary to law.
- The PRC-wide entity per-unit rate relies, in part, on a 376 percent ad valorem petition rate which was never verified. Moreover, the per-unit rate is not based on commercial reality, because the Department has never calculated a per-unit "separate rate" as high as $4.71/kg.
- The Federal Circuit has ruled that while the Department may act with "an eye towards deterrence," the Department must select a rate that has a relationship to actual sales information.[5]
- The Department should recalculate the PRC-wide entity rate using a rate from a recent review that reflects current margins and then add an appropriate amount as a deterrence factor.
- In selecting a new PRC-wide entity rate, the Department must exclude the use of subsidized prices[6] and be consistent with the Department's zeroing methodology in investigations.[7]

Petitioners' Arguments

- There is no legal basis to support Respondents' apparent position that the PRC-wide entity rate assigned to the respondents should be based, in part, on margins calculated by the Department for mandatory respondents which have participated actively in this proceeding.
- The selection of a rate from the petition as adverse facts available (AFA) is consistent with section 776(b)(1) of the Tariff Act of 1930, as amended (the Act).

Department Position: We continue to find it appropriate to apply the rate of $4.71/kg to the PRC-wide entity, because it (1) constitutes the highest rate from any segment of the proceeding, (2) was applied as the PRC-wide entity rate in the immediately preceding review, and (3) was corroborated in a prior review.

As discussed in the First Partial Preliminary Results, Longtai and Hongqiao failed to reply to the Department's initial questionnaire. Also, as noted in the First Partial Preliminary Results, five companies on which a review was initiated neither filed separate rate documentation nor

[3] We also rescinded the review for 84 companies for which all requests for review had been withdrawn and signaled our intention to rescind the review of 14 companies that timely certified no shipments. See First Partial Preliminary Results.

[4] See Fresh Garlic From the People's Republic of China: Preliminary Results of the 2009-2010 Antidumping Duty Administrative Review, 76 FR 76375 (December 7, 2011).

[5] See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed. Cir. 2002).

[6] See, e.g., China National Machinery Import & Export v. United States, Slip Op. 03-16 (CIT 2003).

[7] See Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (Fed. Cir. 2011).

certifications of no shipments. As such, these seven companies did not overcome the presumption that they are part of the PRC-wide entity. Further, because two of these companies, from which we solicited information, and later found to be part of the PRC-wide entity, failed to respond to the Department's requests for information, the Department found that the PRC-wide entity failed to cooperate to the best of its ability. Therefore, pursuant to section 776(b) of the Act, we have used an adverse inference in selecting from the facts available for the margin for the PRC-wide entity.

In selecting from the facts otherwise available and making an adverse inference, we have relied upon the rate of 376.67 percent derived from the petition in the original investigation, and which was used to calculate the current PRC-wide entity per unit rate of $4.71/kg. as AFA. 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 accompanying the URAA, H.R. Rep No. 103-316 (SAA) at 870.

The SAA provides further 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. Thus, to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. The SAA also states that independent sources used to corroborate secondary information may include, for example, published price lists, official import statistics, and customs data, as well as information obtained from interested parties. See id.

The ad valorem rate of 376.67 percent is the highest rate on the record of any segment of this fresh garlic antidumping duty order. This rate was applied to the PRC-wide entity in the original investigation and consistently applied to the PRC-wide entity until the thirteenth administrative review.[8] In Garlic 13, the Department converted the ad valorem rate to a per-unit rate of $4.71/kg.[9] The rate of $4.71/kg has been applied to the PRC-wide entity in each review since

[8] See Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 29174 (June 19, 2009) (Garlic 13) and accompanying Issues and Decision Memorandum. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Fresh Garlic From the People's Republic of China, 59 FR 35310 (July 11, 1994), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Fresh Garlic From the People's Republic of China, 59 FR 49058 (September 26, 1994); and Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews, 71 FR 26329 (May 4, 2006) (Garlic 10).

[9] We converted the 376.67 percent rate to the $4.71/kg. rate by multiplying it by the U.S. Customs and Border Protection derived average unit value for subject merchandise entries during the Garlic 13 POR (excluding entries from our mandatory and separate rate respondents).

Garlic 13.[10] Further, the rate selected for the PRC-wide entity was additionally corroborated with transaction-specific margins in a prior administrative review.[11]

Similar to the reasons CIT found the PRC-wide entity rate corroborated in Watanabe Group v. United States, Court No. 09-00520 Slip Op. 10-139 (CIT December 22, 2010) and Peer Bearing Company - Changshan v. United States, 587 F. Supp. 2d 1319 (CIT December 8, 2008), here the Department finds the rate to be corroborated as applied to the PRC-wide entity. Specifically, the Department finds this rate to be reliable and relevant, because (1) it constitutes the highest rate from any segment of the proceeding, (2) it was applied as the PRC-wide entity rate in the immediately preceding review and has been applied as the PRC-wide entity rate in over a dozen completed reviews, and (3) was corroborated in a prior review based on examination of transaction-specific margins in that review.

As such, the per-unit rate applicable to the PRC-wide entity during the instant POR was known to Hongqiao (and other PRC exporters) at the time they made their shipments and when they decided not to participate in this administrative review. The United States Court of Appeals for the Federal Circuit has held that the Department is permitted to use a "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."[12]

Further, the Department finds that Respondents have provided no support for their argument that a PRC-wide entity rate based on any of the recently calculated company-specific rates for mandatory respondents would represent the "commercial reality" of companies who have not cooperated in this administrative review. The $4.71/kg. rate was the rate applicable to the PRC-wide entity during the entire POR. As such, any company deciding not to participate in this review would know that this would likely be the rate to be applied. As Longtai and Hongqiao intentionally left the record void of any information relevant to the PRC-wide entity, we find the rate has been corroborated to the extent practicable under section 776(c) of the Act.

Respondents claim that the selected PRC-wide rate must exclude the use of subsidized prices. Respondents also allege that certain values used to calculate rates for mandatory separate rate companies in prior reviews contained subsidies. As the Department is not using these rates for the PRC-wide entity and Respondents have failed to provide any argument or evidence that the 376.67 percent rate is distorted by subsidies, the Department finds no merit in Respondents' claim.[13]

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[10] See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review, 75 FR 34976 (June 21, 2010) and Fresh Garlic From the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008–2009 Antidumping Duty Administrative Review, 76 FR 37321 (June 27, 2011).

[11] See Garlic 10, citing Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Preliminary Results of New Shipper Reviews, 70 FR 69942 (November 18, 2005).

[12] See KYD, Inc. v. United States, 607 F.3d 760, 766 (Fed. Cir. 2010) (quoting Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990)).

[13] See Tianjin Mach. Imp. & Exp. Corp v. United States, 2007 Ct Intl Trade Lexis 137 at n.10 (Aug 28, 2007); Shandong Mach. Imp. & Exp. Corp v. United States, 2009 Ct Intl Trade Lexis 76 at *26, *27 (June 24, 2009).

Respondents also claim that the selected PRC-wide rate must be consistent with the Department's zeroing methodology in investigations. Respondents state that they "preserve {their} right to challenge the Department's use of zeroing . . . if the Department selects a PRC-wide rate that is different from the methodology the Department uses in investigations or that fails to provide a legally supported explanation." Respondents' Case Brief at 13. As the Department is not using a calculated rate for the PRC-wide entity, but rather the rate established based on information in the petition in the original investigation, this argument is moot.[14]

Comment 2: Respondent Selection Process in Reviews

Respondents' Arguments

- In NME cases the Department applies the PRC-wide rate to all imports subject to the order, unless the exporter participates in the review and received a separate rate or is excluded from review by the petitioners withdrawing its request of that respondent.
- Allowing domestic interested parties to identify individual companies in their request for review allows them to control the administrative review process.
- This practice encourages domestic interested parties to include as many exporters as possible in each review in order to negotiate deal(s) with the exporter to be excluded from the review. In excluding certain exporters from the review, domestic interested parties distort the separate rate applicable to non-mandatory respondents.
- The Department must change its procedures, by removing the ability of domestic interested parties to identify specific exporters in their review requests, so that domestic interested parties do not control the administrative review process.
- The Department must enforce its existing regulations, specifically 19 CFR 351.213(b), by requiring domestic interested parties to submit meaningful reasons why they desire a review of specific exporters.

Petitioners' Arguments

- Respondents point to no instance where the Department has acted in a manner that is inconsistent with the statute or regulations.
- Respondents' arguments that exporters that have a separate rate may prefer to opt out of a review and maintain their existing separate rate are irrelevant given their status in this review (i.e., as part of the PRC-wide entity).
- In requesting individual reviews for exporters, their request is based upon their belief that the companies identified in their request for review ". . . may have produced and/or exported fresh garlic shipped to the United States during the period of review and that the cash deposits or estimated antidumping duties required on any such entries understate the actual assessable antidumping duties owed." This statement is entirely reasonable and meets the requirements under 19 CFR 351.213(b).

[14] The petition rates ranged from 266.73 percent to 376.67 percent. See Initiation of Antidumping Duty Investigation: Fresh Garlic From the People's Republic of China, 59 FR 9470 (February 28, 1994). Each of the margins in this range, including the 376.67 percent rate, was calculated by comparing a single United States Price (less appropriate expenses) to a normal value based on factors of production and surrogate values. Accordingly, the issue of "zeroing" negative margins is not relevant.

Department Position: The Department's initiation of this review based on the requests received was in accordance with the statute and our regulations. Under section 751(a) of the Act, the Department is required to conduct reviews upon request. The Department's regulations require that domestic interested parties (i.e., Petitioners) must name specific exporters or producers in their request for an administrative review. The Department's regulations state:

> Request for administrative review. (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.[15]

The Department's regulations make clear that Petitioners' request for a review of specified individual companies in this case is precisely how the review request process is designed.[16] Therefore, the Department considers Petitioners' review requests to be in accordance with the Department's regulations. Furthermore, the regulations are also clear that any party (including Petitioners) requesting a review may withdraw any of its requests for review normally within 90 days from the date of publication of the initiation of review, and if no other party has requested a review of that producer/exporter, then the Department is obliged to rescind the review for that producer/exporter.[17]

Finally, our review of the record of this review shows that Petitioners' request for review fully complied with 19 CFR 351.213(b). We note that Petitioners' request named specific exporters or producers and clearly provided a complete reason for their requests for review. Specifically, in their request, Petitioners indicated that their request was based upon their belief that the companies identified in their request for review ". . . may have produced and/or exported fresh garlic shipped to the United States during the period of review and that the cash deposits or estimated antidumping duties required on any such entries understate the actual assessable antidumping duties owed." The Department finds this type of statement to be reasonable and meet the requirements under 19 CFR 351.213(b).

[15] See 19 CFR 351.213(b) (emphasis added).
[16] See also Floral Trade Council v. United States, 1993 Ct Intl Trade LEXIS 243 (Dec. 22, 1993) (affirming the Department's requirement that petitioners name specific producers and exporters).
[17] See 19 CFR 351.213(d)(1).

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish these partial final results of review in the Federal Register.

AGREE ✓ DISAGREE_____

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

February 17, 2012

Date