A-570-898
New Shipper Review
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April 5, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the New Shipper Review of Chlorinated Isocyanurates from the People's Republic of China: Heze Huayi Chemical Co., Ltd.

SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the antidumping duty new shipper review of chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (PRC). The period of review (POR) is June 1, 2010, through December 31, 2010. As a result of our analysis, we have determined not to maintain our preliminary determination to rescind the new shipper review (NSR) with regard to Heze Huayi Chemical Co., Ltd. (Heze Huayi) for the final results. Instead, we are assigning Heze Huayi its own rate for these final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND:

On November 15, 2011, the Department of Commerce (the Department) published its preliminary results of the antidumping duty NSR of chlorinated isos from the PRC for Heze Huayi.[1] In our Preliminary Results, we determined that Heze Huayi had not reported all U.S. sales in its NSR application submitted to the Department in December 2010. In particular, the omitted sales included the first sale by Heze Huayi to the United States, which it was required to report in its application pursuant to 19 CFR 351.214(b)(2)(iv). We gave interested parties an opportunity to comment on the Preliminary Results. We received a case brief from Heze Huayi on December 16, 2011; we received a rebuttal brief from Petitioners on December 22, 2011.[2]

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[1] See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Rescission of Antidumping Duty New Shipper Review, 76 FR 70705 (November 15, 2011) (Preliminary Results).
[2] Petitioners filed an extension request for filing their rebuttal brief until December 22, 2011, and the Department granted the extension request.

On December 15, 2011, we received a hearing request from Heze Huayi, pursuant to 19 CFR 351.310(c). Also on December 15, 2011, Petitioners requested the opportunity to participate in a hearing should one be requested by another party. On January 18, 2012, we conducted a closed session hearing concerning Heze Huayi's unreported sales that led to the Department's preliminary rescission of the NSR. On February 1, 2012, the Department extended the time limit for the final results of the NSR.[3] On February 22, 2012, Heze Huayi submitted a "Notice of New Authority" following the decision of the U.S. Court of International Trade (CIT) in Hiep Thanh Seafood Joint Stock Co. v. United States, Consol. Court No. 09-00270, Slip Op. 12-19 (February, 15, 2010) (Hiep Thanh), approving the Department's September 30, 2011 final results of remand redetermination for the third NSR of certain frozen fish fillets from the Socialist Republic of Vietnam.[4] Petitioners filed a response to the "Notice of New Authority" submission on February 29, 2012.

DISCUSSION OF THE ISSUES:

Comment 1: Whether the Department's Preliminary Determination to Rescind the New Shipper Review Was Correct

Heze Huayi's Arguments

- The Department's theories and conclusions regarding whether or not Heze Huayi reported all of its U.S. sales do not justify the wholesale rescission of this NSR.
- The reporting of the very first sale by a new shipper is not a threshold requirement for the consideration of a NSR application.
- The remand decision affecting the Department's analysis was issued after Heze Huayi filed its new shipper application.
- If the Department maintains its determination that the unreported sales are U.S. sales, the Department should include the sales at issue in the calculation of Heze Huayi's antidumping margin. The failure to report these sales does not warrant rescission.

Petitioners' Arguments

- Heze Huayi has mischaracterized the well-established Department practice that was correctly applied in the preliminary results of the NSR.
- The Department has previously rescinded an NSR where required information was omitted from the NSR request.
- Heze Huayi was aware of the consequences of its failure to report all sales, accurately and completely, in its new shipper review request.
- Heze Huayi elected not to supply information that would be necessary to calculate an accurate margin.

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[3] See Chlorinated Isocyanurates From the People's Republic of China: Extension of Time Limit for Final Results of Antidumping Duty New Shipper Review, 77 FR 4990 (February 1, 2012).
[4] See Memorandum, "Final Results of Redetermination Pursuant to Hiep Thanh Seafood Joint Stock Co. v. United States, Consol. Court No. 09-00270, Slip Op. 11-74, (June 23, 2011)," dated September 30, 2011 (Hiep Thanh Remand Redetermination).

Department's Position: In the Preliminary Results, we concluded that "…based on the {U.S. Customs and Border Protection} data, the Customs Entry Documents, and Heze Huayi's supplemental questionnaire responses, the Department has now determined that Heze Huayi had additional sales and entries that were not reported to the Department in its request for a NSR under 19 CFR 351.214(b)(2)(iv)." The Department treated the additional unreported sales as U.S. sales based on the definition of a U.S. sale detailed in the Hiep Thanh Remand Redetermination. Therefore, the Department preliminarily rescinded the NSR because Heze Huayi had not reported all of its U.S. sales in its NSR application, and, therefore, had not satisfied the requirements of 19 CFR 351.214(b)(2)(iv).

Heze Huayi argues that it was unreasonable to expect Heze Huayi to understand and apply the Hiep Thanh Remand Redetermination standard when it submitted its NSR application on December 20, 2010, more than nine months before the Department's final results of remand in the Hiep Thanh remand proceeding. According to Heze Huayi, given that the Hiep Thanh Remand Redetermination was not issued until after its NSR request, it should have been given the opportunity to report all sales and factors of production information for these sales once the Department had determined them to be U.S. sales under the new definition.

The Department agrees with Heze Huayi's arguments regarding the timing of the events affecting this review. As noted, Heze Huayi's NSR application was submitted nine months before the Department's Hiep Thanh Remand Redetermination (i.e., the reasoning set forth in the Hiep Thanh Remand Redetermination regarding what constitutes exportation to the United States had not been clearly articulated by the Department at the time of the NSR application). Therefore, we agree with Heze Huayi that it could not have been expected to apply this reasoning in preparing its NSR application.

We disagree with Petitioners' argument that Heze Huayi has mischaracterized the well-established practice regarding what constitutes a sale to the United States. Before our Hiep Thanh Remand Redetermination, the Department normally examined whether the exporter had knowledge that the ultimate destination of its shipments to the United States was other than the United States.[5] The record indicates that the unreported shipments to the United States may have been destined for a location outside the United States,[6] in which case Heze Huayi could have reasonably concluded based on the Department's practice prior to the Hiep Thanh Remand Redetermination that it did not need to report such sales in its NSR application.

However, as explained in the Hiep Thanh Remand Redetermination, the Tariff Act of 1930, as amended (Act) requires the Department to ask a more straightforward question regarding whether the merchandise was sold for exportation to the United States. The Department no longer considers whether the exporter believes its exports are ultimately destined to a location outside the United States in determining what constitutes a U.S. sale. While Petitioners are correct that the Department has, in the past, rescinded NSRs because we discovered after

[5] See, e.g., Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 9041 (February 24, 2005) and accompanying Issues and Decision Memorandum at Comment 4 (determining certain sales were U.S. sales because respondent did not know at the time of shipment that they were ultimately destined for another location).
[6] The facts regarding ultimate destination are business proprietary.

initiation that the respondent failed to disclose information required by the application,[7] in this case, the possible ambiguity surrounding these sales does not permit the Department to conclude definitively that the application required that the additional sales be reported.

We emphasize, however, that the standard set forth in the Hiep Thanh Remand Redetermination is the standard the Department relies upon to determine what constitutes a U.S. sale. When there are only two parties involved in a sale, and no third parties, the Department does not examine such sales within the framework of the knowledge test, and the Hiep Thanh Remand Redetermination makes that clear. Instead, the Department examines whether the sales are made "to an unaffiliated purchaser for exportation to the United States,"[8] and, if so, determines that such sales constitute U.S. sales and should be included in the margin calculation.[9] Under this legal and analytical framework, exporters must report all shipments of subject merchandise to the United States regardless of what they believe to be the ultimate destination of such merchandise. Such sales include free on board shipments, of which the exporter relinquishes custody at its factory or at a foreign port to its customer or to a third party. All such shipments, regardless of the exporter's knowledge, that enter U.S. customs territory for consumption are considered to be U.S. sales and the failure to report them may result in the application of adverse facts available, or, in the case of an NSR, in the rescission of the review.

Section 776(a)(1) of the Act, provides that facts available are warranted when necessary information is not available on the record. Because we do not have information on the record regarding factors of production for all sales, we have applied "neutral" facts available to determine the rate for Heze Huayi. As "neutral" facts available, we have determined to use the most recently calculated weighted-average margin for a review under this order: 2.66 percent. This rate was calculated for Hebei Jiheng Chemical Company, Ltd. (Hebei Jiheng) in the 2008-2009 administrative review.[10] We note that this rate was based entirely on sales and factors of production information reported by Hebei Jiheng in the 2008-2009 administrative review, and was not based in any part on the use of adverse inferences.

Comment 2: Whether the Department Properly Analyzed Heze Huayi's Unreported Sales

Heze Huayi' Arguments

- The facts of Heze Huayi's case do not fit those of the Hiep Thanh case.
- The phrase "exportation to the United States" as used in section 772(a) of the Act cannot be understood correctly outside the context of determining the correct purchase price of a U.S. sale. The Department must consider what the seller knew about the destination of its shipment in determining whether it made an export sale to the United States.

[7] See, e.g., Silicon Metal from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review, 67 FR 38255 (June 3, 2002).
[8] See Hiep Thanh Remand Redetermination, at 1.
[9] Also relevant in the Department's analysis is the fact that the entry entered the United States for consumption. Hiep Thanh Remand Redetermination, at 7.
[10] See Chlorinated Isocyanurates from the People's Republic of China: Final Results of 2008-2009 Antidumping Duty Administrative Review, 75 FR 70212 (November 17, 2010).

- Entries for "transportation and exportation" are not "imports" into the United States. Such entries travel through the United States under bond, and are allowed to do so only because the importer demonstrates that the final destination of the shipment is outside the United States.
- The Department's new policy, expressed in the Hiep Thanh Remand Redetermination, of disregarding the knowledge test cannot be effective in attaining the Department's stated goal of curbing deceptive practices.
- The Department's Hiep Thanh Remand Redetermination policy contradicts the stated goals of the Department's reseller policy.

Petitioners' Arguments

- Heze Huayi's unreported sales were clearly intended for consumption in the United States.
- The unreported sales were in fact entered into the United States.
- Heze Huayi's unreported sales are clearly sales for exportation to the United States under the Department's Hiep Thanh Remand Redetermination.
- The reasoning of Hiep Thanh Remand Redetermination further supports treating Heze Huayi's unreported sales as a sale for exportation to the United States.
- The policy arguments in Heze Huayi's case brief are not persuasive.

Department's Position: As we explained extensively in our Preliminary Results, the unreported sales are U.S. sales under the standard developed in the Hiep Thanh Remand Redetermination. As we noted in the analysis memorandum that accompanied the Preliminary Results, multiple business-proprietary facts demonstrate that the unreported sales were "to an unaffiliated purchaser for exportation to the United States," and thus they are U.S. sales under Section 772(a) of the Act."[11] The reasoning underlying our analysis and our finding that it is a correct interpretation of the Act are both explained in detail in the Hiep Thanh Remand Redetermination, which was upheld recently by the CIT in Hiep Thanh, referenced above. The Hiep Thanh Remand Redetermination involved facts similar to those at issue in this review, and the straightforward determination that exports to the United States entered for consumption are U.S. sales. Therefore, we continue to conclude that Heze Huayi's unreported sales are U.S. sales. Our determination to provide Heze Huayi with its own rate for these final results is based solely on the fact that the Department had not clearly articulated this legal and analytical framework for determining what constitutes a U.S. sale until the Hiep Thanh Remand Redetermination, which had not been issued at the time of Heze Huayi's NSR application, and not on any reconsideration of the proper classification of Heze Huayi's unreported sales.

Further, Heze Huayi's argument that disregarding the knowledge test contradicts the Department's goal of curbing deceptive practices is unfounded. The Department's goal is to ensure that every sale of subject merchandise to the United States is reported to the Department and that antidumping duties are properly collected when those sales enter the United States. The

[11] See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, "Analysis of Heze Huayi Chemical Co., Ltd.'s Additional Sales in the Antidumping Duty New Shipper Review of Chlorinated Isocyanurates from the People's Republic of China," dated November 7, 2011.

standard articulated in the Hiep Thanh Remand Redetermination furthers this goal. While knowledge of whether a sale is going to the United States can play a role in evaluating whether a sale should be reported, that concept is normally applicable when there are multiple parties involved in the sale and when the Department must determine which U.S. price to use in the less than fair value analysis. These are some of the concerns that the reseller policy was developed to address. As such, we do not consider that the standard articulated in the Hiep Thanh Remand Redetermination contradicts the goals of the Department's reseller policy.

Comment 3: Whether Heze Huayi's Final Antidumping Duty Rate Should Be the PRC-entity Rate

Heze Huayi's Arguments

- Heze Huayi should not be assigned the PRC-entity rate from the ongoing 2010-2011 administrative review.
- At the very worst, Heze Huayi's rate should take into consideration only the rates assigned to the two mandatory respondents in the 2010-2011 administrative review.

Petitioners did not comment on this issue.

Department's Position: Heze Huayi is not covered by the ongoing administrative review as no review was requested for Heze Huayi. As such, Heze Huayi's arguments about which rates from the ongoing 2010-2011 administrative review are applicable to it are moot. Furthermore, as noted above, we have determined to assign Heze Huayi its own rate for these final results. This rate, which is from a prior administrative review, is a calculated rate which was not based on any adverse inferences.

RECOMMENDATION:

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

AGREE___________ DISAGREE___________

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Paul Piquado
Assistant Secretary
for Import Administration

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Date