UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-570-851
Public Document
NSR: 02/01/15-07/31/15
E&C JV/MJH

DATE: August 2, 2016

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Decision Memorandum for the Preliminary Rescission of the 2015 Antidumping Duty New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China

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SUMMARY

In response to a request from Linyi Yuqiao International Trade Co., Ltd (Yuqiao), the Department of Commerce (Department) is conducting a new shipper review (NSR) of the antidumping duty (AD) order on certain preserved mushrooms from the People's Republic of China (PRC). The period of review (POR) is February 1, 2015, through July 31, 2015. As discussed below, the Department of Commerce (the Department) preliminarily determines that Yuqiao did not make a *bona fide* sale during the POR. Because any weighted-average dumping margin must be based solely on *bona fide* sales,[1] the Department is preliminarily rescinding the NSR of Yuqiao.

If this preliminary decision to rescind the NSR is adopted in our final results of review, the assessment rate to which Yuqiao's shipments will be subject will not be affected by this review. However, Yuqiao's entry is currently covered by the on-going administrative review of the antidumping duty order on certain preserved mushrooms from the PRC covering the period February 1, 2015 through January 31, 2016. If this preliminary decision to rescind the NSR is adopted in our final results of review, the assessment rate applicable to Yuqiao's shipments will be determined in that administrative review.[2]

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[1] On February 24, 2016, the President of the United States signed into law the Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125 (February 24, 2016), which made amendments to section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act). These amendments apply to this determination.
[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 FR 20324, 20338-20340 (April 7, 2016).

Interested parties are invited to comment on the preliminary rescission of this review. We intend to issue the final results or final rescission of the review no later than 90 days from the date the preliminary results are issued, pursuant to section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act).

BACKGROUND

In response to a request from Yuqiao, the Department initiated an NSR of the antidumping duty order on certain preserved mushrooms from the PRC covering the period February 1, 2015, through July 31, 2015.[3] The Department issued an antidumping duty questionnaire to Yuqiao, to which the company responded in a timely manner. Between October 2015 and February 2016, the Department issued supplemental questionnaires to Yuqiao to which it also responded in a timely manner.

The Department has exercised its discretion to toll all administrative deadlines due to the closure of the Federal Government because of Snowstorm "Jonas." Thus, all of the deadlines in this segment of the proceeding have been extended by four business days. The revised deadline for the preliminary results of this review, after the four business-day extension, was April 4, 2016.[4] However, on March 28, 2016, the Department extended the time period for issuing the preliminary results of this NSR by a further 120 days, until August 2, 2016.[5]

SCOPE OF THE ORDER

The products covered by this order are certain preserved mushrooms, whether imported whole, sliced, diced, or as stems and pieces. The certain preserved mushrooms covered under this order are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Certain Preserved Mushrooms" refers to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including, but not limited to, cans or glass jars in a suitable liquid medium, including, but not limited to, water, brine, butter or butter sauce. Certain preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.[6]

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[3] *See Certain Preserved Mushrooms From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 80 FR 60883 (October 8, 2015) (*Initiation Notice*).

[4] *See* Memorandum to the Record from Ron Lorentzen, Acting Assistant Secretary for Enforcement & Compliance, regarding "Tolling of Administrative Deadlines as a Result of the Government Closure during Snowstorm Jonas," dated January 27, 2016.

[5] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Certain Preserved Mushrooms from the People's Republic of China: Extension of Deadline for the Preliminary Results of Antidumping Duty New Shipper Review," dated March 28, 2016.

[6] On June 19, 2000, the Department affirmed that "marinated," "acidified," or "pickled" mushrooms containing less than 0.5 percent acetic acid are within the scope of the antidumping duty order. *See* Recommendation Memorandum-Final Ruling of Request by Tak Fat, *et al.* for Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China," dated June 19, 2000. On February 9, 2005, the United States Court of Appeals for the Federal Circuit upheld this decision. *See Tak Fat v. United States*, 396 F.3d 1378 (Fed. Cir. 2005).

Excluded from the scope of this order are the following: (1) all other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms;" (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified," or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this order is classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153, and 0711.51.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this order is dispositive.

DISCUSSION OF THE METHODOLOGY

Bona Fide Sale Analysis

Pursuant to section 751(a)(2)(B)(iv) of the Act, any weighted average dumping margin determined in a NSR must be based solely on *bona fide* sales during the period of review. Where a review is based on a single sale, exclusion of that sale as non-*bona fide* necessarily must end the review.[7]

To determine whether a sale in a new shipper review is *bona fide*, the Department considers, depending on the circumstances surrounding such sales:

> (I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor {it} determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.[8]

In examining the totality of the circumstances, the Department looks to whether the transaction is "commercially unreasonable" or "atypical of normal business practices."[9]

Although some *bona fide* issues may share commonalities across various Department cases, the Department examines the *bona fide* nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale.[10] In *TTPC*, the U.S. Court of International Trade

[7] *See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1249 (CIT 2005) (*TTPC*).
[8] Section 751(a)(2)(B)(iv) of the Act.
[9] *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1339 (CIT 2005) (*New Donghua*), citing *Windmill Int'l Pte., Ltd. v. United States*, 193 F. Supp. 2d 1303, 1313 (CIT 2002); *see also TTPC*, 366 F. Supp. 2d at 1249-50.
[10] *See New Donghua*, 374 F. Supp. 2d at 1340, n.5, citing *TTPC*, 366 F. Supp. 2d at 1260, and *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 FR 41304 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 2.

affirmed the Department's practice of considering that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant,"[11] and found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale."[12] Moreover, the Department's practice makes clear that the Department will examine objective, verifiable factors to ensure that a sale is not being made to circumvent an AD order.[13] Thus, a respondent is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practice.[14]

Based on the totality of the circumstances surrounding the sole sale reported by Yuqiao in its NSR request, we preliminarily determine that the sale at issue is not a *bona fide* sale and cannot be used to calculate an assessment rate or a cash deposit rate. We preliminarily find that the totality of the circumstances surrounding the reported sale, including the timing of Yuqiao's one U.S. sale, the importer's lateness in paying Yuqiao, and other elements relating to the atypical behavior of all parties in the transaction chain, indicate that Yuqiao's single U.S. sale is not representative of normal business practices and thus is not a *bona fide* sale.[15] A full discussion of our preliminary analysis is described in the *Bona Fide* Sales Analysis Memorandum.[16] Because we preliminarily find that the single POR sale is not a *bona fide* sale, we cannot rely on this sale to calculate a dumping margin in this NSR. Given the determination that there was no *bona fide* sale during the POR, there is no sale upon which we can base this review. Therefore, the Department is preliminarily rescinding this review.

CONCLUSION

We recommend applying the above methodology for these preliminary results of review.

✓

Agree | Disagree

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

August 2, 2016

(Date)

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[11] *See TTPC*, 366 F. Supp. 2d at 1250.
[12] *Id.* at 1263.
[13] *See New Donghua*, 374 F. Supp. 2d at 1339.
[14] *Id.*
[15] *See* Memorandum to Scot Fullerton, Director, Office VI, AD/CVD Operations, from Michael J. Heaney, Senior International Trade Analyst, Office VI, AD/CVD Operations, entitled "2015 Antidumping Duty New Shipper Review of Certain Preserved Mushrooms from the People's Republic of China: Preliminary *Bona Fide* Sales Analysis for Linyi Yuqiao International Trade Co., Ltd." dated concurrently with and hereby adopted by this memorandum.
[16] *Id.*