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MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Senior Director
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum: Certain Cased Pencils from the People's Republic of China; 2015-2016

SUMMARY

The Department of Commerce (Commerce) published the preliminary results of the administrative review of the antidumping duty (AD) order on certain cased pencils (pencils) from the People's Republic of China (China) on September 15, 2017.[1] The period of review (POR) is December 1, 2015, through November 30, 2016. We analyzed the arguments presented in the sole case brief submitted on the record, but made no changes to the *Preliminary Results*. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a list of the issues in this administrative review for which we received comments from an interested party:

Comment 1: Whether Commerce Erred by Rejecting Prime Time's Information Submitted on Behalf of Ningbo Homey

Comment 2: Whether Commerce Should Calculate an Exporter/Importer-Specific Margin for Prime Time

[1] *See Certain Cased Pencils from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Rescission of Review, in Part; 2015–2016*, 82 FR 43329 (September 15, 2017) (*Preliminary Results*) and accompanying Memorandum, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Partial Rescission: Certain Cased Pencils from the People's Republic of China; 2015-2016" (Preliminary Decision Memorandum).

BACKGROUND

In accordance with 19 CFR 351.309(c)(ii), Commerce invited parties to comment on our *Preliminary Results*. On October 16, 2017, Prime Time Commerce, LLC (Prime Time), an importer of pencils, submitted a case brief.[2] No parties filed rebuttal briefs.

SCOPE OF THE ORDER

Imports covered by this order are shipments of certain cased pencils of any shape or dimension (except as described below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of the order are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the order are pencils with all of the following physical characteristics: (1) length: 13.5 or more inches; (2) sheath diameter: not less than one-and-one quarter inches at any point (before sharpening); and (3) core length: not more than 15 percent of the length of the pencil.

In addition, pencils with all of the following physical characteristics are excluded from the scope of the order: novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches in circumference, composed of turned wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end.

Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

DISCUSSION OF THE ISSUES

The mandatory respondent, Ningbo Homey Union Co., Ltd. (Ningbo Homey), filed a timely separate rate application but did not otherwise participate in this administrative review. Prime Time, an importer of pencils exported by Ningbo Homey, its unaffiliated supplier, submitted information purportedly in response to sections C and D of the AD questionnaire. This information, according to Prime Time, consisted of information pertaining to sales between Ningbo Homey and Prime Time and information regarding Ningbo Homey's factors of production (FOP).

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[2] *See* Letter from Prime Time, "Certain Cased Pencils from the People's Republic of China: Case Brief Prime Time Commerce LLC," dated October 16, 2017 (Case Brief).

Commerce rejected this information as unsolicited new factual information.[3] As summarized below, Prime Time now argues that Commerce should (a) accept Prime Time's information, (b) supplement the record with the business proprietary FOP information submitted in prior reviews by other mandatory respondents, and (c) use this combined information, along with the surrogate value information submitted by Prime Time,[4] to calculate an importer-specific AD rate for Prime Time.

Comment 1: Whether Commerce Erred by Rejecting Prime Time's Information Submitted on Behalf of Ningbo Homey

Prime Time's Arguments

- Commerce erroneously characterized Prime Time's information as "unsolicited" because Commerce solicited the information from Ningbo Homey. Moreover, information that Prime Time submitted on behalf of Ningbo Homey was first-hand information about Ningbo Homey's production which Ningbo Homey shared with Prime Time; therefore, this information is independently verifiable.[5]

- Commerce has no regulation or written practice for accepting responses only from mandatory (or voluntary) respondents, or from only the party originally presented with the questionnaire. Commerce regularly asks respondents to provide information from suppliers and customers, accepts information regardless of whether it is submitted by the respondents or the non-respondent suppliers and customers, and applies adverse facts available (AFA) to non-mandatory-respondent interested parties for their failure to provide requested information. In support, Prime Time cites *Yantai Xinke Steel Structure Co. v. United States*, Case No. 10-00240, Slip Op. 2012-95 (CIT July 18, 2012) (*Yantai Xinke*) and *Notice of Final Determination of Sales at Less than Fair Value and Final Determination of Critical Circumstances: Certain Crepe Paper from the People's Republic of China*, 69 FR 70233 (December 3, 2004) (*Crepe Paper—China)*.[6]

- In the Rejection Letter, Commerce improperly applied the rationale in *KYD, Inc. v. United States*, 779 F. Supp. 2d 1361 (CIT 2011) (*KYD*), to claim that it could not use Prime Time's information without "considerable difficulties." First, in *KYD*, there were two mandatory respondents, while in this case there were no participating mandatory respondents. Second, *KYD* involved a market-economy administrative review where the respondent's home market sales were relevant, whereas here only Ningbo Homey's production process is relevant to the margin calculation, and Commerce has access to information it could place on the record to complete the dataset necessary to calculate a margin for Prime Time's entries.[7]

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[3] *See* Memorandum, "Rejection of Unsolicited New Factual Information," and Letter to Prime Time, "Antidumping Duty Administrative Review of Certain Case Pencils from the People's Republic of China: Rejection of Unsolicited New Factual Information," both dated June 9, 2017 (Rejection Letter).
[4] *See* Letter from Prime Time, "Certain Cased Pencils from the People's Republic of China: Surrogate Value Comments," dated August 3, 2017.
[5] *See* Case Brief at 4.
[6] *Id.* at 4 – 5.
[7] *Id.* at 6 – 8.

- Also in accordance with *KYD,* pursuant to section 782(e) of the Act, as amended (the Act), with all necessary information available on the record (including the FOP information Commerce may itself place on the record), Commerce may "not decline to consider information that is submitted by {Prime Time} and is necessary to the determination."[8]

Commerce Position

We disagree that we erred by rejecting Prime Time's information submitted on behalf of the respondent, Ningbo Homey. As we explained in the Rejection Letter, we determined that Prime Time's questionnaire response was an unsolicited questionnaire response within the meaning of 19 CFR 351.302(d), because we sought the information from Ningbo Homey, not Prime Time. Therefore, although Prime Time may be in possession of some information pertaining to Ningbo Homey's production process, the fact that Ningbo Homey is not participating in this review belies Prime Time's assertion that the information can be verified, *i.e.,* that Commerce can establish its veracity through examination of Ningbo Homey's own records, maintained in the normal course of business.[9]

With respect to Prime Time's arguments regarding from whom Commerce accepts information, we find Prime Time's reasoning unconvincing. Prime Time has not cited an instance where Commerce has substituted unsolicited information from a secondary source as facts available for a non-cooperative mandatory respondent, nor does the precedent cited by Prime Time support its position. The relevant issue in *Yantai Xinke* was whether Commerce should assign the separate rate applicants a margin based on the average of the margins alleged in the petition or on surrogate value data that was already on the record of that proceeding.[10] Thus, all the information at issue in that case was solicited by Commerce and timely submitted. In *Crepe Paper—China*, Commerce applied the China-wide rate as adverse facts available (AFA) to the two non-cooperative mandatory respondents.[11] Rather than supporting Prime Time's position that Commerce should use unsolicited information from a secondary source to calculate a margin for the mandatory respondent, *Crepe Paper—China* supports Commerce's determination to treat Ningbo Homey as part of the China-wide entity as AFA because it failed to cooperate in the administrative review.

We also find that Prime Time's characterization of Commerce's reliance on *KYD* in the Rejection Letter is misplaced. First, we did not decline to use Prime Time's information due to a lack of resources as Prime Time suggests. In the Rejection Letter, we stated that, in accordance with section 782(e) of the Act, we could not use Prime Time's information without undue difficulties because it was incomplete.[12] We noted that Ningbo Homey's Section A response was missing from

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[8] *Id.* at 7.
[9] *See, e.g., Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62474 (September 9, 2016), and accompanying Issues and Decision Memorandum (IDM) at Comment 10 (Commerce found certain toller information provided by the respondent to be unusable because the tollers would not permit verification).
[10] *See Yantai Xinke*, Case No. 10-00240, Slip Op. 2012-95. In *Yantai Xinke*, the CIT remanded Commerce's determination so Commerce could reconsider the data.
[11] *See Crepe Paper—China*.
[12] *See* Rejection Letter.

the record and that we would have considerable difficulties calculating a dumping margin for Ningbo Homey using only the incomplete section C and D responses provided by Prime Time, which relied on a patchwork of information obtained from various other sources and which were not contemporaneous with the POR.[13] We cited to *KYD* for the proposition that Commerce may use adverse inferences in selecting a rate for non-cooperating respondents, notwithstanding the "cooperation" of the unaffiliated importer, and that, as in *KYD*, we reasonably interpreted section 782(e) of the Act to require that information must not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination."[14]

Comment 2: Whether Commerce Should Calculate an Exporter/Importer-Specific Margin for Prime Time

Prime Time's Arguments

- In *KYD*, the CIT held that Commerce "is statutorily required" to find "a reasonably accurate assessment rate for {an importer's} entries."[15]

- In the Rejection Letter, Commerce concedes that it can and does calculate importer-specific margins.[16]

- Commerce has "significant discretion," and may rely on Ningbo Homey's separate rate application as a basis to apply neutral facts available in determining its separate rate status. Accordingly, upon Commerce's reconsideration, acceptance of Prime Time's information, and supplementation of the record with FOP information, Commerce will have all the information it needs to calculate a margin for Ningbo Homey's sales to Prime Time.[17] In support of its request for Commerce to place business proprietary FOP information from a previous proceeding on this administrative review's record, Prime Time cites *Hubscher Ribbon Corp v. United States*, 942 F. Supp. 2d 1375 (CIT 2013) (*Hubscher Ribbon*).

- To the extent that Ningbo Homey had export sales to other unrelated customers in the United States, Commerce can apply partial AFA to those sales, establishing a different cash deposit rate for Ningbo Homey's future imports, while applying neutral facts available to Prime Times's entries.[18] For support, Prime Time relies on *Gerber Food Co., Ltd. v. United States*, 34 CIT 1 (2010) (*Gerber Food*).

- Should Commerce decide to apply an adverse inference when selecting among facts otherwise available, it should temper its selection of an AFA rate because of Prime Time's "exceptional efforts" to cooperate by providing all the information Commerce needs to

[13] *Id*. We address Prime Time's argument that Commerce should append the record with extraneous FOP information in Comment 2.
[14] *See* Rejection Letter.
[15] *See Case Brief* at 8.
[16] *Id.* at 5 – 6.
[17] *Id*. at 9.
[18] *Id*. at 9 – 10.

calculate a margin for its imports from Ningbo Homey.[19]

Commerce Position

We disagree that Commerce should calculate a margin specific to POR sales between Prime Time and Ningbo Homey. Although Prime Time is correct that we noted in the Rejection Letter that Commerce derives importer-specific assessment rates based on the exporter's margin, we emphasized that this is done only after we calculate a margin for each exporter individually examined.[20]

We also find that Prime Time has misconstrued the CIT's opinion in *KYD* to erroneously support its position that "{Commerce} 'is statutorily required' to find 'a reasonably accurate assessment rate for {an importer's} entries.'"[21] In context, it is clear that the CIT was concerned with corroboration of a margin used as AFA rather than calculating an importer-specific rate. The CIT stated the following:

> However, Commerce's obligation to correctly determine antidumping duties under 19 U.S.C. § 1675(a) is not diminished by an importer's obligation to pay those duties under 19 U.S.C. § 1673g(b)(4). KYD {the unaffiliated importer} seeks *a reasonably accurate assessment rate for its entries*. *See* KYD's Memo at 3 ("If a rate is to be calculated for KYD based on adverse inferences, the selected rate cannot be used as it was not properly corroborated and not supported by substantial evidence and does not reflect the actual experience of KYD plus a reasonable amount for deterrence."), 19-35. *Commerce is statutorily required to* oblige. *See* 19 U.S.C. § 1675(a); *supra* Part IV.A; *infra* Part IV.D.[22]

Next, while Prime Time argues that Commerce may rely on Ningbo Homey's separate rate application as a basis to apply neutral facts to Ningbo Homey's separate rate status, Prime Time does not address why Commerce should overlook the fact that Ningbo Homey failed to participate in this administrative review. As we noted in the Preliminary Decision Memorandum, while Ningbo Homey filed a separate rate application, Commerce's Section A questionnaire requests additional separate rate information necessary to determine whether Ningbo Homey operated free of *de jure* and *de facto* government control.[23] We also noted that, per the separate rate criteria, exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents must respond to all parts of the questionnaire in order to be eligible for separate rate status.[24] Thus, all exporters and producers involved in this administrative review were on notice of the requirements necessary to obtain a separate rate.[25] Ningbo Homey did not cooperate with this administrative review and, therefore, we find no reason to revisit Ningbo Homey's separate rate status. Because Ningbo Homey is not eligible for a

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[19] *Id*. at 10 – 12.
[20] *See* Rejection Letter at 2.
[21] *See Case Brief* at 8.
[22] *See KYD*, 779 F. Supp. 2d 1361, 1367 (emphasis added).
[23] *See* Preliminary Decision Memorandum at 5.
[24] *Id*.
[25] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 82 FR 10457 (February 13, 2017).

separate rate, we need not address whether we have all the information necessary to calculate a margin for Ningbo Homey's sales to Prime Time or whether Commerce can or should apply partial AFA to Ningbo Homey's sales to importers other than Prime Time.[26]

Finally, Prime Time's argument that Commerce should temper its selection of an AFA rate due to Prime Time's "exceptional efforts" to cooperate is misplaced. First, as we noted above, Ningbo Homey is not eligible for a separate rate and, therefore, is considered to be part of the China-wide entity with an applicable dumping margin of 114.90 percent.[27] Second, as also noted, we rejected Prime Time's information as we requested that information (*i.e.*, sections C and D of the AD questionnaire), from Ningbo Homey. That is, while Prime Time is an interested party in this administrative review, it is uncontested that the mandatory respondent is Ningbo Homey. Therefore, any decision with respect to which margin is assigned to Ningbo Homey is solely dependent on Ningbo Homey's participation in this administrative review.

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[26] With respect to Prime Time's argument that Commerce should place business proprietary FOP data from another segment on the record of this administrative review, Prime Time has not demonstrated how, short of a past respondent agreeing to this unusual request, placing business proprietary information from one administrative review on the record of this administrative review would not constitute a violation of the administrative protective order of the previous review. In *Hubscher Ribbon*, which Prime Time cites for the proposition that Commerce can supplement the record, Commerce used the petition rate of the investigation in a subsequent administrative review, *i.e.*, we supplemented that record with public information. Therefore, *Hubscher Ribbon* does not support Prime Time's position. Finally, with respect to *Gerber Food*, in the underlying administrative review, Commerce found that one exporter used another exporter's invoices in order to evade higher import duties. *See Certain Preserved Mushrooms from the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review*, 69 FR 54635, 54637 (September 9, 2004). The litigation concerned Commerce's determination to apply AFA to those particular sales. Thus, *Gerber Food* is distinguishable from this case because it involved exporters only and evasion of AD duties by exporters.
[27] *See* Preliminary Decision Memorandum at 6.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions, and making no changes to our preliminary results. If accepted, we will publish the final results of review in the *Federal Register*.

☒	☐
Agree	Disagree

1/16/2018

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Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance