

MEMORANDUM TO: _____ James J. Jochum
Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the New
Shipper Review of Petroleum Wax Candles from the People's
Republic of China: Shandong Huihe Trade Co., Ltd.

Summary

We have analyzed the arguments of interested parties in the new shipper review of Shandong Huihe Trade Co. Ltd. (Shandong Huihe) under the antidumping duty order on petroleum wax candles from the People's Republic of China (PRC). As a result of our analysis, we have made changes to our preliminary results of this new shipper review. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this new shipper review for which we received case and rebuttal briefs from interested parties:

1. Whether the Department should apply adverse facts available (AFA) to Shandong Huihe;
2. The *bona fides* of Shandong Huihe's sale;
3. Shandong Huihe's eligibility as a new shipper.

Discussion of Issues

Comment 1: Whether the Department should apply AFA to Shandong Huihe

The National Candles Association (petitioner) argues that the Department was unable to verify key sales documents related to the sale in question because Shandong Huihe failed to provide original versions of these documents. Specifically, petitioner argues that because Shandong Huihe only provided a copy of the original invoice, and not the invoice itself, the Department cannot consider this document as verified.

Further, petitioner argues that because Shandong Huihe failed to report that its legal representative and sales manager actually conducts sales and export operations from his office in

Qingdao, and not at the factory in Jinan where verification was conducted, the Department was unable to conduct even a minimal verification of essential elements of the sale at issue. Specifically, petitioner states that without actually going to the Qingdao office where Shandong Huihe conducted its sales negotiations with the importer of the sale in this review, generated all of the original sales documentation, and currently serves as the company's legal representative and sales manager for the majority of each month, the Department cannot rely on the accuracy or the validity of any of the information provided in Shandong Huihe's submissions. Also, this failure to report the Qingdao office deprived both petitioners and the Department the opportunity to review and comment on this element of the sales process. Petitioner further argues that on two separate occasions, Shandong Huihe failed to cooperate to the best of its ability when it refused the Department's requests to travel to Qingdao to conduct the verification. Therefore, the petitioner argues that the Department has no choice but to rescind this new shipper review, or failing that, make an AFA determination.

Shandong Huihe argues that it has provided the Department with all of the information requested in the verification outline, which is all the information necessary for the Department to verify the sales and factor information provided in Shandong Huihe's questionnaire responses. Shandong Huihe further argues that while it is true that Shandong Huihe did not report that its sales manager and legal representative works in an office in Qingdao, it only did so because it felt that this information was not relevant. Shandong Huihe argues that it is not the Department's practice to verify every location from which a company might send a facsimile or place a telephone call. Shandong Huihe explained that it performs the vast majority of its sales operations from its factory in Jinan. Shandong Huihe states that all of its information that was maintained in the Qingdao office was transferred to the factory in preparation for verification. As a result, there is no additional information that the Department needed from this office to satisfactorily complete its verification.

Further, Shandong Huihe argues that it went to great lengths to comply with all of the Department's requests at verification. Shandong Huihe states that all of its information that is maintained in the Qingdao office was transferred to the factory in preparation for verification. As a result, there is no additional information that the Department needed from the Qingdao office to satisfactorily complete its verification. In addition, Shandong Huihe cites the Department's verification report which documents several examples of Shandong Huihe providing the Department with complete access to whatever information that the Department's verifiers requested during verification at the factory in Jinan. These examples included, in addition Shandong Huihe providing all of the information requested in the verification outline, Shandong Huihe allowed the verifiers to conduct a thorough verification of the factory offices, drove one of the company owners not present during verification more than 5 hours once the verifiers requested to interview the owner, and allowed the verifiers to interview company employees without company officials present.

Shandong Huihe also argues that it is only reasonable that its sales manager and legal representative would be unwilling to allow the Department to verify at the Qingdao sales office

after seeing the thoroughness with which the verifiers scrutinized Shandong Huihe's records at the factory facilities in Jinan. Shandong Huihe argues that the examples it provided, many of which it finds to be outside of appropriate verification procedure, clearly demonstrate Shandong Huihe's willingness to cooperate with the Department to the fullest of its abilities. Therefore, Shandong Huihe argues that the Department should calculate an individual dumping margin for Shandong Huihe based on the its submitted sales and factors of production data.

Department's Position:

We find that, pursuant to sections 776(a)(2)(B) and (C) of the Tariff Act of 1930, as amended (the Act), we should apply facts available to exports by Shandong Huihe because Shandong Huihe failed to report in a timely manner information that was requested by the Department, and because Shandong Huihe took further action that impeded the Department's ability to conduct this proceeding.

In its responses, Shandong Huihe reported in response to the Department's inquiries about the location of its sales activities that, "Huihe's administrative and sales office is located in Niuwang Village, Gaoxin District, Jinan City, Shandong Province, China." See Shandong Huihe's December 16, 2003, Section A questionnaire response at page 10. However, during verification, the Department learned that Shandong Huihe's sales manager, largest shareholder, and legal representative, the person able to enter Shandong Huihe into binding contracts, works at an office in Qingdao, 400 kilometers from Jinan. See Verification Report at page 6. Further, the Department also learned that the sales negotiations for Shandong Huihe's sale under review were conducted from the sales manager's office via telephone and telephonic facsimile; all of the relevant sales documents were created on the computer system located at this office; and, the sales manager's files concerning this sale are stored at this office. Id. at page 6. At no point in this new shipper review, prior to verification, did Shandong Huihe notify the Department of the existence of any additional sales offices, or seek guidance on the applicable reporting requirements as contemplated by section 782(c)(1) of the Act. Nor did Shandong Huihe report at the start of verification that it had an additional sales office in Qingdao, China. See Verification Report at page 1. Shandong Huihe thus failed to provide in a timely manner information requested by the Department within the meaning of section 776(a)(2)(B) of the Act.

The Department finds that the application of facts available is warranted for another reason. Specifically, the Department finds that Shandong Huihe significantly impeded the proceeding by refusing to consent to an extension of the schedule so as to permit verification at the Qingdao office, where key sales and export functions take place. Access to the facility where these functions take place was critical to the Department's ability to conduct a thorough verification of Shandong Huihe's responses, specifically, the *bona fides* of Shandong Huihe's sales, affiliations, and reported sales process. Shandong Huihe thus took specific action to prevent the Department from determining the reliability of central elements of its responses, thereby impeding this proceeding. That action itself warrants the application of facts available pursuant to section 776(a)(2)(C) of the Act.

Furthermore, Shandong Huihe has not met the requirements of sections 782(d) and (e) of the Act. Section 782(d) is not applicable because information concerning the additional sales office was not submitted by the established deadline. The Department only discovered this information at verification. Similarly, section 782(e) of the Act has also not been satisfied since, on two separate occasions, Shandong Huihe failed to provide consent that would have enabled the verification team to conduct an on-site verification of the company-specific information in Qingdao. Thus, Shandong Huihe has failed to satisfy the requirements of section 782(e), subsections (1), (2), and (4).

Having determined that the use of facts available is warranted, the Department makes the additional determination that the application of AFA pursuant to section 776(b) of the Act is appropriate, because the Department determined that Shandong Huihe failed to cooperate to the best of its ability in complying with the Department's requests for information.

In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of the respondent's conduct. See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Instead, the courts have made clear that the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid insufficient attention to its statutory duties. See Pacific Giant, 223 F. Supp. 2d. 1336, 1342 (2002), see also Tung Mung Dev. Co. v. US, 2001 Ct. Intl. Trade LEXIS 94 at 89 (July 3, 2001).

On more than one occasion, Shandong Huihe failed to provide information when requested to do so by the Department. Specifically, Shandong Huihe never indicated prior to verification that it had an additional sales office in Qingdao and that its sales operations took place from that office. Moreover, at the start of verification, in response to the Department's request for corrections, Shandong Huihe did not report its additional sales office. See Verification Report at page 1.

Nevertheless, the record indicates that Shandong Huihe could have possibly remedied these deficiencies even after they were discovered by the Department, but it chose not to avail itself of that opportunity. During verification, the Department learned that Shandong Huihe conducted its sales operations out of its Qingdao, China office. See Verification Report at page 6. The Department made it clear to Shandong Huihe at that time that Shandong Huihe's failure to provide information about its Qingdao office in its responses greatly impaired the Department's ability to conduct a complete and accurate verification under section 782(I) of the Act. See id. Immediately, and again the following day, the Department requested that Shandong Huihe extend the verification schedule to allow verification of its sales and export information at its Qingdao office. The Department thus offered Shandong Huihe an opportunity to remedy its failure to provide requested information in a timely manner, but Shandong Huihe refused the Department's

offer. During this time, Shandong Huihe did not attempt to explain its reasons for refusing to work with the Department on this matter.

With respect to Shandong Huihe's arguments that it cooperated to the best of its ability with the Department, we find that Shandong Huihe's arguments are unpersuasive. In all new shipper reviews, the Department has a heightened obligation to make an exhaustive investigation into a respondent company's past and current affiliations, the *bona fides* of the sales by the respondent, and every aspect of the new shipper company and sales relevant to the review. The Department conducts verification to examine not only the documents and information on the record, but also to examine the environment in which those documents and information were generated and maintained. Companies that seek to benefit from new shipper reviews have a responsibility to work with the Department to facilitate such in-depth inquiry. Plainly stated, Shandong Huihe neither did so nor did it attempt to explain why it would not do so.

Shandong Huihe's argument that the Department has allowed off-site verifications in the past is misplaced. While it is true that the Department does occasionally allow for off-site verifications, it does so only with full knowledge beforehand, and usually with a great deal of additional scrutiny. Shandong Huihe did not report the existence of its Qingdao sales office in its responses, and thus the Department was unaware of it until well into verification. Without being able to actually travel to this office and examine the company records and computer systems located there, the Department is left to rely solely on Shandong Huihe's assurances that it provided accurate and complete information. However, because the Department conducts verification on site where the books and records are maintained, Shandong Huihe's assurances do not satisfy the Department's need to verify the information provided by Shandong Huihe.

As AFA, the Department is assigning the rate of 108.30 percent – the highest rate determined in the current or any previous segment of this proceeding. See Amended Notice of Final Results of the Antidumping Duty Administrative Review: Petroleum Wax Candles from the Peoples Republic of China, 69 FR 20858 (April 19, 2004). For a more thorough discussion of this issue, see Petroleum Wax Candles from the People's Republic of China (PRC): Treatment of Shandong Huihe Trade Co., Ltd. in the Final Results of its New Shipper Review for 8/1/02 - 7/31/03, memorandum to Barbara E Tillman, Acting Deputy Assistant Secretary for Import Administration, through Dana Mermelstein, Acting Director of AD/CVD Operations, Office 6 and Thomas Gilgunn, Acting Program Manager for AD/CVD Operations, Office 6, from Scott Lindsay, case analyst, AD/CVD Operations, Office 6 (December 20, 2004).

Comment 2: The *bona fides* of Shandong Huihe's sale

Petitioner argues that Shandong Huihe's sale in this review is not *bona fide*. Petitioner contends that several issues surrounding the reported sales process, sales documents, sales price, terms of sale, timing of the payments, the order in which the sales occurred, and current disposition of the merchandise in question for Shandong Huihe's sale to the United States and Shandong Huihe's importers subsequent sale to its customer demonstrate that this sale is not *bona fide*. See Petitioner's September 29, 2004 case brief, at pages 14 through 21. Petitioner argues that based on these issues, the Department has no choice but to rescind the new shipper review of Shandong

Huihe due to the lack of a *bona fide* sale.

Shandong Huihe argues that the Department verified Shandong Huihe's questionnaire responses, and found no evidence that Shandong Huihe and its customer were in any way affiliated or that the prices of the sale was unusually high. In fact, Shandong Huihe argues, the fact that Shandong Huihe made a second sale to its customer after the period of review in similar quantities and values demonstrates the commercial reasonableness of the initial sale. With regard to the timing of the payment and the terms of sale for this sale versus the timing of payments and terms of sale in the domestic market, Shandong Huihe states that Shandong Huihe made it clear that they were willing to grant certain allowances to its U.S. importer in an effort to develop a long-term commercial relationship, allowances they would not provide to a domestic customer. Further, given the respective value of total sales to the U.S. importer and the domestic customer, Shandong Huihe stated that the risk in allowing extra time for payment for the U.S. importer were minor, and that this in no way invalidates the *bona fides* of this sale. Therefore, Shandong Huihe argues that Shandong Huihe's sale to the United States was a *bona fide* sale.

Department's Position: Because the Department has determined, for purposes of these final results of new shipper review, to apply AFA, pursuant to sections 776(a)(2)(B) and (C) and 776(b) of the Act, to Shandong Huihe, we have not addressed the issue of the *bona fides* of Shandong Huihe's sale.

Comment 3: Shandong Huihe's eligibility for a new shipper review

Petitioner argues that Shandong Huihe is not eligible for a new shipper review because it is, in reality, affiliated with both the company from which it purchased its candle making machines and the domestic customer to which it sells its candles. Petitioner argues that the companies with which it claims Shandong Huihe is affiliated have exported candles to the United States which were produced by Shandong Huihe. Therefore, petitioner argues, Shandong Huihe is not eligible for a new shipper review because it is actually only a spin-off of a company that has been exporting candles to the United States for years.

Petitioner argues Shandong Huihe's affiliation with the candle-making company is demonstrated by the week-long training in the use of the candle making machines received by Shandong Huihe's factory manager at the candle making company's factory several weeks prior to the actual purchase of the machines. Petitioner argues the affiliation is further demonstrated by the same company sending one of its employees to train Shandong Huihe employees several times following the sale, at no cost to Shandong Huihe. Also, petitioners state that it is not a coincidence that Shandong Huihe's sales manager's and legal representative's office, which Shandong Huihe refused to allow the Department to verify, are located in Qingdao, the same city as both the candle producing company and the domestic buyer. Petitioner states that Shandong Huihe would not allow the Department to verify its sales office in Qingdao because the Department would have found proof that these three companies are affiliated. Therefore, petitioner argues that Shandong Huihe is not eligible for a new shipper review and its new shipper review should be rescinded.

Petitioner also argues that Shandong Huihe failed to report all of its sales to the United States.

This argument is based on petitioner's assumption that Shandong Huihe should have reported all sales to the United States made by both the company from which it purchased its machinery and its domestic customer. Petitioner argues that the domestic customer surely exports candles to the United States because all Shandong Huihe's candle boxes are printed in English. Therefore, petitioner argues, Shandong Huihe has failed to report the full universe of its sales and exports and its review should be rescinded.

Shandong Huihe argues that the Department found no evidence of affiliation between these three companies during the extensive verification of Shandong Huihe's records, which it brought to verification to the factory in Jinan. Shandong Huihe further argues that there is no evidence on the record that either Shandong Huihe's domestic customer or the company from which they purchased the candle making machines has ever shipped to the United States. Shandong Huihe also argues that even if this were the case, which it is not, it would not prevent Shandong Huihe from being eligible for a new shipper review. Shandong Huihe explains that in its reading of the new shipper provisions in section 351.214(b)(2) of the Department's regulations, Shandong Huihe must certify that since the investigation (1) it has not been affiliated with any exporter or producer that exported to the United States during the period of investigation (POI), and (2) it was not affiliated with any of the companies that were individually examined during the POI. Shandong Huihe argues that is highly unlikely that either of the companies which petitioners argues is affiliated with Shandong Huihe were in operation during the investigation, as the original investigation was in 1986. Therefore, Shandong Huihe argues, as there is no record evidence of affiliation between Shandong and any other company, and the companies with which petitioner is arguing Shandong Huihe is affiliated would not negate Shandong Huihe's new shipper status even if there was affiliation, the Department should disregard petitioner's arguments on this issue.

Department's Position: Because the Department has determined, for purposes of these final results of new shipper review, to apply AFA, pursuant to sections 776(a)(2)(B) and (C) and 776(b) of the Act, to Shandong Huihe, we have not addressed the issue of Shandong Huihe's possible affiliations and whether it misrepresented the amount of its sales to the United States.

RECOMMENDATION

Based on our analysis of the comments received and the reasons set forth in detail above, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of this new shipper review in the Federal Register.

James J. Jochum
Assistant Secretary
for Import Administration

Date