

NORSK HYDRO CANADA, INC. v. UNITED STATES and U.S. MAGNESIUM, LLC

Court No. 03-00828

Slip Op. 05-58 (CIT May 17, 2005)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO REMAND**

SUMMARY

The Department of Commerce (“the Department” or “Commerce”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or “Court”) in Norsk Hydro Canada, Inc. v. United States and U.S. Magnesium, LLC, Court No. 03-00828, Slip Op. 05-58 (CIT May 17, 2005) (“Remand Order”). In accordance with the Court’s instructions in Remand Order and Norsk Hydro Canada, Inc. v. United States and U.S. Magnesium, LLC, Court No. 03-00828 (Oct. 12, 2004) (“Norsk 10/12/2004 Opinion”), the Department has reviewed and determined the amount of any net countervailable subsidy, ensured that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy, and determined the amount of any duty remaining to be assessed.

BACKGROUND

On July 13, 1992, the Department made its final determinations that producers or exporters in Canada of pure magnesium and alloy magnesium (“subject merchandise”) received benefits which constituted subsidies within the meaning of the countervailing duty law. See Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium From Canada, 57 FR 30946 (July 13, 1992). The Department found that Norsk Hydro Canada, Inc. (“NHCF”) received two non-recurring countervailable grants from the Canadian government. Id. The Department amortized the non-recurring grants over fourteen years and calculated the

amount to be countervailed for each year. Id. On August 31, 1992, the Department published in the Federal Register the countervailing duty orders concerning the subject merchandise. See Countervailing Duty Orders: Pure Magnesium and Alloy Magnesium From Canada, 57 FR 39392 (Aug. 31, 1992). Since the issuance of the countervailing duty orders, the Department has conducted annual administrative reviews.

On September 8, 1999, the Department published in the Federal Register the final results of the 1997 administrative review (January 1, 1997, through December 31, 1997) concerning the subject merchandise. See Pure Magnesium and Alloy Magnesium From Canada: Final Results of Countervailing Duty Administrative Reviews, 64 FR 48805 (Sept. 8, 1999). The Department determined the net subsidy rate for NHCI to be 2.02 percent ad valorem. Id.

On September 15, 2003, the Department published in the Federal Register the final results of the 2001 administrative review (January 1, 2001, through December 31, 2001) concerning the subject merchandise. See Pure Magnesium and Alloy Magnesium from Canada: Final Results of Countervailing Duty Administrative Reviews, 68 FR 53962 (Sept. 15, 2003) (“2001 Final Results”). The Department determined the net subsidy rate for NHCI to be 1.68 percent ad valorem. Id.

During the 2001 administrative review, Commerce declined to recognize and offset the countervailable subsidy amount for 2001 by NHCI’s alleged overpayment of countervailing duties in 1997. This overpayment occurred for entries at Port Huron, where officials of the U.S. Customs Service (“Customs”) incorrectly liquidated NHCI’s entries at the higher cash deposit rates, as opposed to liquidating at the net subsidy rate, 2.02 percent, as instructed by the Department. See Norsk 10/12/2004 Opinion at 4-5.

As a result, in November 2003, NHCI invoked the Court's jurisdiction and appealed Commerce's decision not to offset the alleged overpayment. On February 13, 2004, Commerce filed a motion to dismiss, arguing that the Court lacked jurisdiction and that the challenged liquidations were final and conclusive.

On October 12, 2004, the Court found jurisdiction under 28 USC § 1581(c) and ruled in favor of NHCI's claim for an offset of overpayment of countervailing duties by holding that NHCI "was not statutorily required to exhaust its extant Customs remedy" because "Commerce has the authority under § 1671(a) to ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy. . ." Norsk 10/12/2004 Opinion at 29.

On February 7, 2005, NHCI filed its Rule 56.2 motion arguing, inter alia, that the Court found that Commerce possessed the statutory authority to make the requested offset adjustment. Commerce, in its opposition brief, argued that it properly denied NHCI the adjustment to its countervailable subsidy for amounts allegedly overpaid to Customs by NHCI.

On May 17, 2005, the CIT remanded the Department's 2001 Final Results. See Remand Order at 2. The CIT ordered the Department "upon remand, and consistent with this Court's opinion and order," to (1) "review and determine the amount of any net countervailable subsidy," (2) "ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy," and (3) "determine the amount of any duty remaining to be assessed." Id.

In order to "make an evidentiary finding regarding the merits of {NHCI's} case" and "determine the amount of any net countervailable subsidy," the Department issued a supplemental questionnaire to NHCI on June 3, 2005. Id. at 1. In this supplemental

questionnaire, the Department sought an electronic version of NHCI's calculations as well as explanations and corrections concerning those calculations. On June 13, 2005, the Department received NHCI's timely filed supplemental questionnaire response.

The Department released the Draft Redetermination Pursuant to Court Remand ("Draft Remand") to NCHI and U.S. Magnesium, L.L.C. for comment on July 6, 2005. On July 8, 2005, NHCI requested a one-day extension until the close of business on July 11, 2005. On July 8, 2005, the Department granted NCHI an extension until 12:00 pm on July 11, 2005. The Department received timely filed comments from NCHI on July 11, 2005, while U.S. Magnesium, LLC did not comment. See infra "Comments."

DISCUSSION

Although Commerce respectfully disagrees with the Court's holding in Norsk 10/12/2004 Opinion, and the Court's Remand Order, Commerce has complied with all of the Court's instructions. Pursuant to the Court's Remand Order, the Department has reviewed its 2001 Final Results, determined the amount of any net countervailable subsidy, and will ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy by issuing instructions to Customs, as explained below.

After reviewing the evidence on the record, the Department has identified the total amount of countervailing duties imposed in the 2001 administrative review of the subject merchandise. See Memorandum to Susan Kuhbach, Business Proprietary Information for Draft Results of Redetermination Pursuant to Remand, dated July 5, 2005 ("BPI Memo"), Reference 1. This figure was obtained by multiplying the value of NHCI's exports of subject merchandise to

the United States in 2001, by the countervailing duty assessment rate for 2001, 1.68 percent. See BPI Memo, Reference 2; see also NHCI's January 27, 2003, Response to the CVD Questionnaire for the 2001 Administrative Review at page 8.

In accordance with the Court's Remand Order, we have offset the amount overcollected by Customs on the 1997 Port Huron entries (see BPI Memo, Reference 3) against the countervailing duties owed in 2001 (see BPI Memo, Reference 4). The resulting net countervailable subsidy in 2001 is zero. Similarly, the amount of duty remaining to be assessed for 2001 equals zero dollars.

Accordingly, the Department will issue liquidation instructions to U.S. Customs and Border Protection ("CBP") to liquidate all entries made from January 1, 2001, through December 31, 2001, without regard to countervailing duties.

COMMENTS

Comment 1: Net Countervailable Subsidy Calculation

Respondent's Argument

NHCI agrees with the Department's conclusion that NHCI's countervailing duty liability for 2001 should be zero. However, NHCI argues that in accordance with the CIT's Remand Order and Norsk 10/12/2004 Opinion, the Department must revise the fourteen year amortization schedule in order to determine the net amount of any countervailing duties remaining to be assessed against NHCI in future administrative review periods. NHCI contends that at a minimum, the Department should identify the amount of NHCI's total overpayment (minus the amount applied in the 2001 administrative review), so that in future administrative reviews the Department can calculate the correct net countervailable subsidy. Moreover, NHCI argues that

the Department has not explained how the amount of the excess countervailing duties imposed was at least as large as the amount of the countervailing duties otherwise owed for 2001.

Department Position

The Department disagrees with NHCI's argument that the Remand Order directed the Department to calculate the net countervailable duty beyond the 2001 administrative review period. The CIT ordered the Department "upon remand, and consistent with this Court's opinion and order," to (1) "review and determine the amount of any net countervailable subsidy," (2) "ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy," and (3) "determine the amount of any duty remaining to be assessed." Remand Order at 2. Here, the Department reviewed and determined the amount of net countervailable subsidy to be zero. By issuing liquidation instructions to CBP, the Department will ensure that the amount of CVD imposed is equal to the amount of net countervailable subsidy. Finally, the Department determined that the amount of duty remaining to be assessed was zero. The Remand Order relates to the Department's 2001 Final Results, as NCHI appealed the final results of the Administrative Review of its January 1, 2001 through December 31, 2001 entries. Thus, the Department has complied with the Court's instructions in the Remand Order by limiting its net countervailable subsidy calculation to the 2001 administrative review. Lastly, in response to NHCI's assertion that the calculation of the amount of the excess countervailing duties imposed was unexplained, we have revised paragraph 4 of the "Discussion" section to quantify the amount of the overcollection. See BPI Memo, Reference 4.

RESULTS OF REDETERMINATION

The Department has recalculated NHCI's net countervailable subsidy for the 2001 administrative review to include the offset for Customs' overcollection of countervailing duty deposits in 1997. Upon a final and conclusive decision affirming this remand redetermination, the Department will publish notice of its final results in the Federal Register and instruct U.S. CBP to assess duties in accordance with this redetermination.

Susan H. Kuhbach
Acting Assistant Secretary
for Import Administration

Date