REDETERMINATION
PURSUANT TO COURT REMAND

GERBER FOOD (YUNNAN) CO., LTD. AND
GREEN FRESH (ZHANGZHOU) CO., LTD.
v.
UNITED STATES
Court No. 04-00454 (May 5, 2009)

SUMMARY

The Department of Commerce ("the Department") has prepared this redetermination of the Fourth Mushrooms Review[1] ("Remand Redetermination") pursuant to the U.S. Court of International Trade ("the Court") granting the Department a voluntary remand in Gerber Food (Yunnan) Co., Ltd. and Green Fresh (Zhangzhou) Co., Ltd. v. United States, Court No. 04-00454 (May 5, 2009) ("Gerber v. United States Remand Order").

The Department issued its draft Remand Redetermination to all interested parties on June 30, 2009. None of the interested parties submitted comments on the draft Remand Redetermination.

The Department has recalculated the margin for Gerber Food (Yunnan) Co., Ltd. ("Gerber") using a rate other than the People's Republic of China ("PRC")-wide rate as partial adverse facts available ("AFA") with respect to the 23 sales made by Gerber during the period of the Fourth Mushrooms Review which were exported to the United States using the invoices of another respondent, Green Fresh (Zhangzhou) Co., Ltd. ("Green Fresh"). The Department has also recalculated the margin for Green Fresh exclusive of the application of AFA.

As a result of the remand, the revised margins are as follows:

Manufacturer/Producer/Exporter	Final Results Weighted-Average Margin Percentage	Remand Redetermination Weighted-Average Margin Percentage
Gerber Food (Yunnan) Co., Ltd.[2]	198.63	22.84
Green Fresh (Zhangzhou) Co., Ltd.[3]	42.90	15.83

[1] 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 (September 9, 2004), and accompanying Issues and Decision Memorandum ("Fourth Mushrooms Review").

[2] See Memorandum entitled "4th Administrative Review of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China: Calculation Memorandum for the Remand Redetermination for Gerber Food (Yunnan) Co., Ltd. ("Gerber")," dated June 30, 2009.

[3] See Memorandum entitled "4th Administrative Review of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China: Calculation Memorandum for the Remand

As discussed below and in accordance with the Gerber v. United States Remand Order, this Remand Redetermination is consistent with the relevant portions of the Court's rulings in the litigation covering the previous administrative review of this antidumping duty order, culminating in Gerber Food (Yunnan) Co., Ltd. and Green Fresh (Zhangzhou) Co., Ltd. v. United States, Slip Op. 08-97 (September 16, 2008) ("Gerber v. United States I").

BACKGROUND

As detailed in the Fourth Mushrooms Review, Gerber participated in a scheme with another respondent, Green Fresh, commencing during the period of the prior review ("Third Mushrooms Review"),[4] by which Green Fresh, which had a previously calculated cash deposit rate of 29.87 percent, sold its own invoices to Gerber, which had a previously calculated cash deposit rate of 121.33 percent. Pursuant to this arrangement, Gerber, using Green Fresh invoices, reported to U.S. Customs and Border Protection ("CBP") that Green Fresh was the "exporter" of the merchandise. Although the written agreement between the companies provided that Green Fresh would be more active in these sales, in fact, Green Fresh was not the exporter of this merchandise and, at most, during the Third Mushrooms Review period, performed minimal paperwork for a couple of Gerber's transactions.[5]

During the Fourth Mushrooms Review period, all of the evidence on the record indicates that Green Fresh and Gerber severed any pre-existing relationship and that Gerber unilaterally reported to CBP Green Fresh as the exporter of its merchandise, based on its use of Green Fresh's invoices to ship its merchandise, without Green Fresh's continued assistance. As a result of this scheme, in both the Third Mushrooms Review and Fourth Mushrooms Review (collectively, "Mushroom Reviews"), Gerber paid significantly less in cash deposits to the Government of the United States during the period of review ("POR") than was statutorily required. See 19 U.S.C. 1675(a).

Meanwhile, in the twelfth and thirteenth administrative reviews of the antidumping duty orders covering heavy forged hand tools from the PRC ("Handtools"), the Department discovered that exporters Shandong Huarong Machinery Co., Ltd., Tianjin Machinery Import & Export Corporation ("TMC"), and Liaoning Machinery Import & Export Corporation entered into invoice schemes that were strikingly similar to the one at issue in the Mushroom Reviews.[6]

Redetermination for Green Fresh (Zhangzhou) Co., Ltd. ("Green Fresh")," dated June 30, 2009.

[4] See 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, 41306 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1 ("Third Mushrooms Review").

[5] See Third Mushrooms Review, at Comment 1.

[6] See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews, Final Partial Rescission of

In the Mushroom Reviews and Handtools administrative reviews, the Department applied AFA to the POR entries of all of the exporters who had participated in the various invoice schemes, pursuant to 19 USC 1677e(a) and (b). For the Third Mushrooms Review (and both Handtools reviews), the Department applied AFA to all of the sales of both companies involved in the scheme. Specifically, AFA was applied to Green Fresh, the company selling the invoices, as well as Gerber, the company that purchased those invoices to avoid the payment of cash deposits.[7] In the Fourth Mushroom Review, the Department applied AFA to all of Gerber's entries, but not to all of Green Fresh's entries. Instead, the Department used only partial AFA -- applying AFA to the 23 sales in which Gerber utilized Green Fresh's invoices to Green Fresh's antidumping margin calculations, but otherwise calculating Green Fresh's margins using the information supplied by Green Fresh on the administrative record.[8]

In the Mushroom Reviews, the Department applied as AFA the highest antidumping duty margin on the administrative record – that of 198.36 percent, which was derived from the petition in the less-than-fair-value investigation and which continues to be applied to the PRC-wide entity under the terms of the antidumping duty order on certain preserved mushrooms from the PRC. This Court concluded that, because this rate did not pertain to "shipments of mushrooms associated with Gerber or Green Fresh during the period of review," this rate was unsupported by substantial evidence on the record and was otherwise not in accordance with law. Gerber v. United States I at *5 (citing the earlier ruling in Gerber Food (Yunnan) Co., Ltd. v. United States, 387 F. Supp. 2d, 1270, 1278 (CIT 2005)). Upon remand, the Department assigned to the Gerber transactions at issue the rate of 121.33 percent, which was Gerber's own calculated rate from an earlier segment of the proceeding, and the Court affirmed the use of this rate as AFA. Id. at *13.

In litigation that arose from the above-referenced Handtools cases, the Court also ruled on the rates used as AFA. For the Handtools 12th Review, the Court affirmed the Department's use of 139.31 percent for exporter TMC because that rate was "calculated for TMC in a recent review" and because the Court found that the rate accorded "with the volatility observed in TMC's rate and that industry generally in the five years between the eighth and twelfth reviews." Shandong Huarong Mach. Co. v. United States, Slip Op. 07-169 (CIT Nov. 20, 2007) at *12. For the Handtools 13th Review, however, which is still upon appeal, the Court concluded that the 139.31 percent rate did not meet this standard. Tianjin Machinery Import & Export Corp. v.

Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part, 69 FR 55581 (September 15, 2004), and accompanying Issues and Decision Memorandum at Comment 19 ("Handtools 12th Review"); Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews, 70 FR 54897 (September 19, 2005), and accompanying Issues and Decision Memorandum at Comment 2 ("Handtools 13th Review").

[7] See Third Mushrooms Review, 68 FR at 41306; Handtools 12th Review, 69 FR at 55583; and Handtools 13th Review, 70 FR at 54898.

[8] See Fourth Mushrooms Review, 69 FR at 54637.

United States, Slip Op. 07-131 (CIT Aug. 28, 2007) at *45–46.

Further, in the Gerber v. United States I litigation, this Court concluded that it was impermissible to apply AFA to all of Gerber and Green Fresh's entries, when Gerber had only used the Green Fresh invoices for 24 transactions. Accordingly, upon remand, the Department applied AFA to only 24 of Gerber's sales, which the Court affirmed. Gerber v. United States I at *6. With regard to Green Fresh, however, the Court indicated that it did not believe the Department had the authority to attribute the same 24 transactions to both exporters as AFA, which the Department had applied on remand, finding that the application of those sales to Green Fresh "was contrary to law." Id. at *8. Thus, the Department was required on remand to calculate a margin for Green Fresh exclusive of AFA, which the Court affirmed. Id. at *13.[9]

In light of the CIT's analysis in its decisions in the Gerber v. United States I litigation, as well as the additional contemporaneous CIT decisions in Shandong Huarong Mach. Co. v. United States, and Tianjin Machinery Import & Export Corp. v. United States, the U.S. Government requested a voluntary remand, which this Court granted on May 5, 2009.

REDETERMINATION

A. CHANGES FROM THE FINAL RESULTS

For purposes of this Remand Redetermination, the Department is making the following changes to its calculations in the final results of the Fourth Mushrooms Review:

1) The Application of Adverse Facts Available Only to Gerber/Green Fresh Transactions

With respect to Gerber, there is no discernable difference between Gerber's use of Green Fresh's invoices in the Third Mushrooms Review POR and the Fourth Mushrooms Review POR. Thus, the Court's analysis from Gerber v. United States I is equally applicable in this case with regard to limiting the application of AFA to only those transactions for which Gerber used the Green Fresh invoices. Accordingly, the Department has limited its application of AFA to only those sales transactions for which Gerber continued to use Green Fresh invoices in order to avoid paying the proper antidumping duties during the Fourth Mushrooms Review POR.

[9] This analysis differs greatly from the CIT's analysis in Shandong Huarong Mach. Co. v. United States at *38 and Tianjin Machinery Import & Export Corp. v. United States at *11-12, in which the Court affirmed the Department's application of total AFA to both parties to the invoicing schemes: "Because of TMC's participation in the invoicing scheme, all of its sales data was necessarily tainted. Thus, no rate could be calculated using TMC's actual data . . . Here, all of TMC's sales data is tainted and unsuitable for calculation of an actual rate". See Shandong Huarong v. United States, at *11-12.

2) **The Use of an Adverse Facts Available Rate Calculated from Gerber's Own Sales Experience**

Consistent with the Court's analysis in Gerber v. United States I and the Handtools cases, the Department is no longer applying the 198.36 percent rate from the less-than-fair-value investigation to Gerber's margin calculations, but is applying instead a 121.33 percent rate as AFA. This rate, affirmed by this Court in Gerber v. United States I, is derived from the 1998-2000 administrative review of Gerber,[10] based upon Gerber's single export sale of subject merchandise during that POR. The application of this rate is consistent with the Court's order in Gerber v. United States I to find an AFA rate which bears a "rational relationship" to Gerber's transactions and is derived directly from Gerber's own commercial experience from the most recent prior review in which it received a calculated antidumping margin. See Gerber v. United States I at *10.

We believe that this 121.33 percent rate for Gerber satisfies the corroboration requirements of 19 U.S.C. 1677e(c). Section 1677e(c) requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." See Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H. Doc. No. 103-316 at 870 (1994) and 19 C.F.R. 351.308(d). The SAA further provides that the term "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870. Neither the statute, nor the SAA, defines how the Department should determine the relevance of the margin selected as AFA. The Federal Circuit has stated that "{b}y requiring corroboration of AFA rates, Congress clearly intended that such rates should be reasonable and have some basis in reality." See F.Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1034 (Fed. Cir. 2000) ("F.Lli De Cecco"). Thus, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. The Federal Circuit has also stated that Congress "intended for an AFA rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." See F.Lli De Cecco, 216 F.3d at 1034. The Department considers information reasonably at its disposal to determine whether a margin continues to have relevance to the respondent receiving the rate. After examining both the reliability and relevance aspects of the corroboration requirement, as discussed below, we find that the 121.33 percent rate has probative value and, therefore, is appropriate for use as AFA for Gerber.

With regard to the reliability aspect of corroboration, because the 121.33 percent rate is derived from Gerber's own verified data, submitted by that respondent in the most recent review prior to the Third Mushrooms Review in which it actively participated, we believe that this rate

[10] See Amended Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China, 66 FR 35595, 35596 (July 6, 2001).

is reliable on its face. Indeed, this is the rate applicable to entries of Gerber's merchandise at the time Gerber entered into its agreement with Green Fresh to circumvent the payment of cash deposits by falsely identifying Green Fresh as the exporter of the subject merchandise to CBP. Moreover, there is no information on the record that would call into question the reliability of this rate with regard to its application to Gerber's invoice-scheme transactions.

With regard to the relevance aspect of corroboration, because the rate was calculated for Gerber, and was derived from a sale of subject merchandise made and exported by Gerber to the United States, the rate has a direct relationship to Gerber's own commercial behavior. Furthermore, this margin was calculated from a POR ending only two years prior to the beginning of the period of this administrative review, making it relatively recent, and therefore temporally relevant. In addition, there is nothing on the record of this review that would undermine the relevance of this transaction with respect to Gerber, especially in light of the fact that Gerber itself apparently considered this rate in deciding to enter into a scheme to circumvent the effective enforcement of the antidumping duty law and avoid the proper payment of cash deposits.

The Department also finds it appropriate to use as AFA a calculated rate from a prior review because Gerber should have anticipated that this rate (a rate that had been applied to its merchandise in a previous review), or an even higher rate, would have been applied to its calculations if it failed to cooperate to the best of its ability during the administrative review, as it did in this case. In reviews where a respondent does not cooperate, the Department relies upon the "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990). Because of this well-known practice, respondents typically will cooperate if they expect to receive a rate lower than the highest previously calculated rate for any respondent, or not cooperate if they anticipate receiving a margin higher than the highest previously calculated rate for any respondent.

3) **No Application of Adverse Facts Available To Green Fresh**

To the extent that there is a significant difference between the facts of the Mushroom Reviews, it is that Green Fresh did not benefit further from its sales of invoices during the Third Mushrooms Review POR in the subsequent period. As noted above, in the Fourth Mushrooms Review, the Department concluded that as AFA it would only attribute the Gerber transactions which involved Green Fresh invoices to Green Fresh's margin calculations, but otherwise calculate a margin for Green Fresh on its own data.[11] The Department's analysis with respect to Green Fresh for purposes of this remand is the same as the one the Department applied on remand in the litigation covering the Third Mushrooms Review, pursuant to the Court's holding that the Department did not have the authority to apply AFA to Green Fresh.[12] Accordingly, the

[11] See Fourth Mushrooms Review, 69 FR at 54638.

[12] See Gerber v. United States I, at *7.

Department now believes that it has no option available with regard to Green Fresh, but to calculate a margin for it free of facts otherwise available. Thus, the Department has modified its calculations accordingly.

B. THE APPLICATION OF ADVERSE FACTS AVAILABLE TO GERBER'S ENTRIES

Despite the several modifications the Department has made in this Remand Redetermination to the final results of the Fourth Mushrooms Review, we continue to maintain that the application of AFA with regard to Gerber is warranted in this case.

19 USC 1675(a)(2) states that in an administrative review, the Department is required to calculate a dumping margin for reviewed exporters and that the margin calculated in administrative review proceedings is used for both assessment purposes and "for deposits of estimated duties." Further, 19 USC 1673d(c)(1)(B)(i) and (ii) describe in detail that margins are calculated in antidumping investigations "for each exporter and producer individually investigated" and that "the administering authority shall order the posting of a cash deposit . . . as the administering authority deems appropriate" based upon such a margin.

It is a well-established principle of administrative law that in interpreting and enforcing its statutory obligations, an agency has the "inherent power" to "protect the integrity of its proceedings." Alberta Gas Chems., Ltd. v. Celanese Corp., 650 F.2d 9, 12 (2nd Cir. 1981). This authority is not without limitation, as the Federal Circuit recently articulated in Tokyo Kikai Seisakusho, Ltd. v. United States, 529 F.3d 1352, 1361 (Fed. Cir. 2008), and an agency "cannot exercise its inherent authority in a manner that is contrary to a statute." (citing Macktal v. Chao, 286 F.3d 822, 825 (5th Cir. 2002)). Nonetheless, in the context of the enforcement of the antidumping duty law, the CIT has recognized that consistent with the statute, "the ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has {a} certain amount of discretion {to act} . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping law." Tung Mung Development v. United States, 219 F. Supp. 2d 1333, 1343 (CIT 2002))(upholding the Department's application of middleman dumping, although such an application does not appear in the statute or in the Department's regulations) (quoting Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 555 (1988)), aff'd 898 F. 2d 1577 (Fed. Cir. 1990)).

In this case, the Department became aware that despite the Department's previous administrative review of Gerber, despite the Department's calculation of Gerber's antidumping duty margin in that review, and despite the Department's issuance of liquidation instructions to CBP as a result of that review, Gerber was circumventing the payment of cash deposits during the relevant POR and evading application of the Department's instructions issued pursuant to the antidumping duty statute. As the U.S. Supreme Court stated in Interstate Commerce Commission v. Amer. Trucking Assoc., Inc., 467 U.S. 354 (1984), an agency cannot be expected to "sit idly by and wink at practices that lead to violations" of the statute. Id. Thus, when an agency becomes aware that circumvention of the law over which it has authority is occurring, the

U.S. Supreme Court has found that it is within the authority of an agency to address that problem, even if that authority is not "explicit in the statute." Id. Consistent with this principle, this Court held in Queen's Flowers De Colombia v. United States, 981 F. Supp. 617, 621 (CIT 1997), that the Department had the authority to conduct a collapsing analysis with respect to affiliated entities despite the lack of specific collapsing provisions in the statute, in order to further the Department's "responsibility to prevent circumvention of the antidumping law."

For this reason, as described in greater detail in the final results of the Fourth Mushrooms Review, the Department concluded that the application of AFA to Gerber's transactions was warranted, pursuant to 19 USC 1677e(a) and (b) and the agency's inherent authority to enforce the statutory requirements of 19 USC 1675(a)(2) and 1673d(c)(1)(B)(i) and (ii).

We recognize that in Gerber v. United States, 37 F. Supp. 2d 1270, 1289 (CIT 2005), the Court found that the Department's invocation of "inherent authority" did "not justify the exercise of a statutory power in a manner contrary to Congress's clearly expressed intent," disagreeing with the Department that the cases cited supported application of AFA in that case. Id. We do not believe the Court's conclusion in that case applies in this Remand Redetermination.

First, the Department's application of AFA in this Remand Redetermination differs from that on which the Court based its analysis in Gerber v. United States. In the Third Mushrooms Review, the Department applied AFA to all of Gerber and Green Fresh's entries using the highest dumping margin on the administrative record of any segment of the proceeding – i.e., the PRC-wide entity rate of 198.63 percent. On the other hand, as discussed above, in this Remand Redetermination, the Department is applying only partial AFA to those Gerber transactions in which Gerber used Green Fresh invoices. The Department is using as AFA a rate calculated from Gerber's own sales experience in a prior review, and is making no adverse inference with respect to the margin for Green Fresh. Thus, the Court's expressed concern that the Department's use of "PRC-wide assessment rates" was not "justified" simply does not apply to these facts.

Additionally, the Department respectfully disagrees that the statute should be interpreted in a manner that would thwart the Department's authority to protect the integrity of its proceedings in this case. Congress granted the Department the authority to administer the antidumping law and calculate antidumping duty margins that would subsequently be applied to a reviewed exporter's cash deposits. Any interpretation of the statute, and Congress's intentions in implementing the statute, that results in the conclusion that the Department must, in the words of the U.S. Supreme Court, "sit idly by and wink at practices that lead to violations" of the statute is simply unreasonable. See Interstate Commerce Commission v. Amer. Trucking Assoc., Inc. By applying AFA to those transactions which Gerber incorrectly claimed to be subject to another's cash deposit rate, the Department was exercising its inherent authority to prevent the circumvention of the payment of cash deposits. Put another way, Gerber was required to pay the cash deposits determined by the Department in an administrative proceeding to be applicable to Gerber and the substantial evidence on the record indicated that Gerber did not do so. Because Gerber evaded the correct payment of cash deposits, the Department

considered the information reported with respect to the transactions at issue to be inherently unreliable. The Department was therefore not required to calculate a margin using information relevant to those tainted transactions. This determination is fully consistent with the Court's decision in Shandong Huarong v. United States, that "because of (the exporter's) participation in the invoicing scheme, all of its sales data was necessarily tainted," and therefore, unusable. See Shandong Huarong v. United States, at *11.

On remand, the Department has concluded that it will limit the application of AFA, however, only to those transactions in which Gerber benefited from the use of Green Fresh's invoices. In this regard, the Department's application of AFA pursuant to 19 USC 1677e(a) and (b) is tailored only to prevent further circumvention of estimated duties, as required by 19 USC 1675(a)(2)(C), and will effectuate the remedial purpose of the statute to "equalize competitive conditions between the exporter and American industries affected," through a guarantee of the statutorily-required correct payment of cash deposits by Gerber in the future. See C.J. Towers & Sons v. United States, 71 F.2d 438, 448 (1934).

CONCLUSION

For the reasons stated above, the Department requests that the Court affirm its Remand Redetermination in full as supported by substantial evidence and otherwise in accordance with law.

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Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration