A-475-818
Administrative Review
POR 7/1/05-6/30/06
Public Document
Office III: The Team

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

RE: Certain Pasta from Italy (Period of Review: July 1, 2005, through June 30, 2006)

SUBJECT: Issues and Decisions for the Final Results of the Tenth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part

Summary:

We have analyzed the case and rebuttal briefs submitted by interested parties. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments section of this memorandum. Below is the complete list of the issues in this review for which we received comments from the parties:

I. List of Comments

Rummo S.p.A. Molino e Pastificio ("Rummo")

Comment 1: Application of the Countervailing Duty ("CVD") Offset in Calculating Rummo's Dumping Margin

Atar, S.r.L. ("Atar")

Comment 2: Analysis of Atar's Status as a Manufacturer

Comment 3: Treatment of Atar as a Reseller/Exporter

Comment 4: Atar's Assessment Rate

II. Background

On August 24, 2007, the Department of Commerce ("the Department") published the preliminary results of the tenth administrative review of the antidumping duty order on certain pasta from Italy. See Certain Pasta from Italy: Notice of Preliminary Results and Partial Rescission of Tenth Antidumping Duty Administrative Review, 72 FR 44082 (August 7, 2007) ("Preliminary Results"). The merchandise covered by this review is described in the Federal Register notice issued the same date as this memorandum. The review covers one manufacturer/exporter – Rummo. On August 7, 2007, the Department rescinded this review with respect to two respondents, Industria Alimentare Colavita S.p.A. ("Indalco") and Corticella Molini e Pastifici S.p.A. and its affiliate Pasta Combattenti S.p.A. (collectively, "Corticella/Combattenti") because they timely withdrew their requests for review. See Certain Pasta from Italy; Notice of Preliminary Results and Partial Rescission of Tenth Antidumping Duty Administrative Review, 72 FR 44082 (August 7, 2007). On July 31, 2007, the Department preliminarily determined that Atar was not a manufacturer of subject merchandise, and preliminary rescinded the review with respect to Atar. See id. The period of review ("POR") is July 1, 2005, through June 30, 2006. On September 6, 2007, we received case briefs from Rummo and Atar. On September 14, 2007, we received a rebuttal brief from petitioners.[1] On October 11, 2007, at the request of Atar, the Department held a public hearing.

III. Discussion of Interested Party Comments

Rummo

Comment 1: Application of the CVD Offset in Calculating Rummo's Dumping Margin

Rummo argues that the Department intended to, and should, apply the CVD offset in calculating Rummo's dumping margin, as stated in the Preliminary Results. Rummo stated that the Department applied the CVD offset at the rate of entered value times 0.60 percent in the most recently completed administrative review.[2] Petitioners did not comment on this issue.

Department's Position

The Department agrees with Rummo that the CVD offset should be applied to the calculation of the dumping margin in this case. Section 772(c)(1)(C) the Tariff Act of 1930, as

[1] Petitioners are New World Pasta Company; Dakota Growers Pasta Company; and American Italian Pasta Company.

[2] See Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255 (February 10, 2004); see also Certain Pasta from Italy: Final Results of the Fourth Countervailing Duty Administrative Review, 66 FR 64214 (December 12, 2001).

amended ("the Act"), states that the Department will increase the price used to establish export price ("EP") and constructed export price ("CEP") by the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy. In the Preliminary Results, the Department granted the CVD offset, but inadvertently did not apply the adjustment in the calculation of Rummo's antidumping duty rate. Thus, for the purposes of these final results, the Department has increased EP and CEP by 0.60 percent of entered value.[3]

Atar

Comment 2: Analysis of Atar's Status as a Manufacturer

Atar claims that the Department's finding that Atar is not a producer is without merit. Atar bases its claim on its interpretation of the Department's analysis memorandum from the preliminary results. Atar asserts that the entire basis for the Department's decision is the comparison between Atar's operations and those of Corex, whom we had found to be a toll producer in a prior administrative review. See Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review, 63 FR 53641 (October 6, 1998), unchanged in Certain Pasta from Italy: Final Results of New Shipper Antidumping Duty Administrative Review, 64 FR 852 (January 6, 1999) ("Corex"). Specifically, Atar disputes the relevancy of the facts from the Corex proceedings where the toller purchased all inputs, paid the subcontractor a processing fee, and maintained ownership of the inputs and the final product. Atar argues that the Department did not place sufficient information on the record from the Corex proceedings to make a decision. Furthermore, Atar argues that none of the Department's other reviews related to Corex supports the Department's decision not to consider Atar a manufacturer.

Atar argues that as in Corex it clearly purchased all of the inputs used in the production of the merchandise. Atar maintains that it provided support in its May 11, 2007, response to demonstrate that it purchased all of the inputs used in the production of the pasta, even inputs purchased from subcontractors, and its contracts between Atar and the subcontractors are evidence that it paid the subcontractors a processing fee. Atar argues that its situation is clearer than in Corex because in Corex the facts did not indicate when the inputs were purchased, whereas here Atar claims that it clearly showed where and when all of the inputs were purchased. On page 11 of its April 4, 2007, supplemental response, Atar states, "The toll manufacturer never takes title to either the inputs or the finished pasta." In addition, Atar maintains that it identified the relevant portions of the tolling agreements with its subcontractors which confirms this. Atar reasons that the record does not indicate that there was a transfer of ownership from the subcontractor to Atar. Furthermore, Atar argues that grain maintained in silos is commingled and therefore fungible. Atar asserts that common storage does not change the ownership of the grain. Atar argues that commingling is the normal method for storing input like grain.

[3] See Certain Pasta From Italy: Final Results of the Fourth Countervailing Duty Administrative Review, 66 FR 64214 (December 12, 2001).

Further, Atar believes that it is the producer for the following three reasons. First, Atar argues, like in Corex, it is solely responsible for marketing and sales of the product. Atar explains that it negotiated with its customers, took the orders, and produced and sold the goods. Atar asserts that there is no evidence that a third party is involved in the marketing and sale of the product. Atar argues that with regard to marketing and sales, it is no different than Corex. Second, Atar contends that it was responsible for making more freight arrangements than Corex. Atar argues that the arrangements made for Corex were made ex factory for U.S. sales and FOB for third country sales. In contrast, Atar maintains that it was responsible for arranging Italian inland freight and international ocean freight. Third, Atar argues that there was no reason for the U.S. customer to have contact with the subcontractor and that Atar is not related to any of its customers. Furthermore, Atar argues that there was no reason for the U.S. customer to have had contact with the subcontractor because Atar made the freight arrangements. Atar contends that in Corex the U.S. customer had to contact the subcontractor because it needed to make freight arrangements.

Atar claims that the Department also included three additional factors to differentiate between Corex and Atar, for which the record is silent with regard to Corex. First, Atar claims that it purchased its inputs independently as set forth in the tolling contracts. Atar also explains that it provided various sample documents to demonstrate that it purchases inputs from a range of suppliers. Second, Atar provided an affidavit in its Section A response from the principal of Atar to demonstrate that it had conducted independent market research to determine how to best sell Atar's product. Atar also argues that independent testing is unnecessary in the pasta industry because pasta is a mature product. Third, Atar argues that there is no evidence indicating that Corex made independent arrangements for warehousing. Atar asserts that it did not need to warehouse the pasta sold to the United States. However, Atar notes that it would have satisfied the test because of the arrangements it makes for shipping the product to its U.S. customers.

In addition, Atar argues that the Department made several incorrect assumptions regarding the facts of the record. First, Atar contends that the Department cannot assume that producers are aware of the brands they produce and sell only brands that they own. Atar points to an e-mail from its U.S. customer, which questions the Department's request for information concerning the ownership of a particular brand. See Exhibit DR-5(b) of Atar's May 11, 2007, supplemental response. In addition, Atar cites the Department's memorandum explaining that even the subcontractors sold the same brand names to the same customers. See Memorandum from Melissa G. Skinner to Stephen J. Claeys, entitled "Status of Atar, S.r.l. as Manufacturer of Subject Merchandise," dated July 31, 2007 ("Atar Status Memo"), at 5. Second, Atar argues that the prices were set in this review by a purchase order and an acceptance of the order by Atar. Atar asserts that this clearly demonstrates that Atar set the price. Third, Atar claims that its experience working as a commissioned agent to sell pasta is not at issue. Atar explains that its familiarity with the pasta industry led to a logical conclusion to begin tolling. Fourth, Atar contends that its ability to toll produce provides an incentive to its U.S. customers. Atar asserts that it represented an additional source of supply. Atar explains that it is able to combine production for several customers at one time and command greater interest from the subcontractor. Finally, Atar argues that it does contribute meaningful value to the production process. Atar contends that it locates, purchases, and arranges for delivery of the raw material to the subcontractor. Further, Atar explains that it provides instructions to the subcontractor, telling

the subcontractor what to produce, how to pack, and the brand name to be put on the package. Atar also explains that it receives orders, communicates with customers, and arranges and is responsible for shipping of the goods to the customer, and thus does far more than merely issuing invoices and receiving payments.

Petitioners argue that Atar and JCM Ltd. ("JCM") do not cite to any administrative or judicial precedent in their brief. Petitioners argue that the Department cited to Polyvinyl Alcohol From Taiwan: Final Results of Antidumping Duty Administrative Review, 63 FR 32810 (June 16, 1998) ("PVA") as well as Corex. Petitioners contend that the Department reviews the "totality of the circumstances" to test for toll production. Petitioners cite to PVA where the Department stated "whether a party has engaged either directly or indirectly in some aspect of the production of subject merchandise is an important consideration" at 32814. Finally, petitioners contend that the Department considered all the relevant facts in the Atar Status Memo. Petitioners point to 19 facts the Department made in its analysis of whether to consider Atar a producer. See Petitioners' Brief at 3 and 4.

Petitioners argue that Atar and JCM do not address most of the evidence in the Atar Status Memo. Further, petitioners claim that Atar did not even satisfy the first three findings in Corex because it did not satisfactorily show that it purchased all of the inputs; paid the subcontractor a tolling fee; and maintained ownership, at all times, of the inputs and finished product. Petitioners assert that Atar did not demonstrate that the ordered and delivered quantities of semolina do not correspond to ordered and delivered quantities of shipped finished pasta. Petitioners assert that Atar must create a complete and adequate record. See NSK Ltd. v. United States, 919 F. Supp. 442, 449 (CIT 1996).

In regard to ownership of inputs, petitioners assert that Atar did not possess title or pay for certain inputs until after they were delivered to its toll processors. Petitioners contend that the purchase of raw materials from its toll producers is at odds with the tolling contracts. Petitioners claim that the decision of tolling should not only be tied to the existence of a contract. See Atar Status Memo at 2. In addition, petitioners argue that Atar does not maintain inventory ledgers with respect to the commingled grain it purchases from its subcontractors. See Atar's April 12, 2007, supplemental response at 4.

Petitioners argue that Atar must not simply make unsupported assertions but must provide factual support for such claims as noted above. See NSK Ltd. v. United States, 481 F.3d 1355, 1360-61 (Fed. Cir.) (Mar. 7, 2007). Furthermore, petitioners assert that while this standard "does not require perfection, it does not condone inattentiveness, carelessness or inadequate record keeping." See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). Petitioners assert that these cases justify the Department's decision finding that Atar was not a toll producer, as Atar failed to maintain inventory ledgers or documents that tie the purchase of inputs to finished pasta.

Petitioners argue that Corex does in fact support the Department's conclusion that Corex conducted independent product testing and market research, had sole responsibility for marketing pasta and making freight arrangements, and that there was never any contact between Corex's contract service providers and Corex's customers or any evidence that Corex had "historical

relationships" with its subcontractor/service providers. Petitioners argue that there is an indication that Atar did not conduct independent product testing and market research, demonstrate sole responsibility for marketing pasta and making freight arrangements, or show that there was not contact between Atar's subcontractors and its customers. Petitioners claim that there is a distinction between Corex and Atar. See Corex at 53642.

Petitioners contend that Atar did not purchase inputs from independent sources but purchased inputs from the "same suppliers that supplied inputs to its toll producers." See Atar Status Memo at 4. Petitioners also rebut Atar's claim that product testing is wholly unnecessary. Petitioners assert that manufacturers still must conduct market research and product testing to ensure that customer demands are met and the safety and fitness for consumption of its products. Finally, petitioners assert that Atar's subcontractors had contact with Atar's U.S. customers. As an example, petitioners refer to the Atar Status Memo at 5, where the Department states Atar's subcontractors "produced, packaged and sold {pasta} to the same customers using the same brand names." Petitioners argue that the contact demonstrates that Atar and JCM planned Atar's participation to avoid paying duties.

Petitioners rebut Atar's claim that it locates and purchases raw materials and arranges delivery to the subcontractors; provides instructions on what to produce and how to pack the pasta; and controls the quality of the pasta by virtue of its selection of the semolina type and grade. Petitioners argue that Atar sources semolina from the same suppliers as its subcontractors, buys the same grades and types of semolina, and sometimes purchased semolina from the subcontractor. Petitioners contend that Atar did not add any new, different or meaningful value to the production process.

Department's Position

The Department reviews the "totality of the circumstances" to determine if a respondent should be considered a toll producer. See PVA. Accordingly, we have examined all relevant facts surrounding the tolling agreement to determine whether Atar is the producer. As petitioners point out, Atar did not contest the majority of findings that the Department made in the Atar Status Memo. Moreover, Atar's mischaracterization of the Department's preliminary analysis as being based solely on a comparison between Atar and Corex undermines the merit of its arguments. Specifically, in making its preliminary determination, the Department relied upon the analysis set out in its decision in PVA, which describes the Department's practice of examining the totality of circumstances surrounding the "tolling" arrangement and not relying solely upon the "tolling" contract. Atar did not address PVA in its case brief.

Although there are similarities between Atar's circumstances and the arrangements at issue in both Corex and PVA, our analysis also relies upon Atar's unique circumstances, such as: 1) Atar's history of business relationships between the parties; 2) the timing of the decision to begin a "toll" production operation; 3) the close and ongoing relationships between the U.S. importer and the manufacturers who produce pursuant to Atar's "tolling" contract; 4) Atar's purchases of inputs from these manufacturers, and 5) the overall arrangement through which the purchase and sale of subject merchandise takes place. While the specific circumstances of Corex and PVA may differ to some degree, and these differences provide relevant background to our

analysis, we also recognize that each respondent may have unique circumstances. In other words, there is no exhaustive list of factors that the Department may consider or a bright-line test for determining when the totality of circumstances demonstrates that a particular respondent is or is not a toll producer. Based upon our analysis of the totality of circumstances in this case, we continue to find that Atar is not properly treated as a toll producer. This finding is supported by both similarities between Atar's circumstances and the circumstances in PVA as well as by certain unique factual aspects of Atar's arrangement.

The decision by subcontractors to sign a contract with Atar for selling pasta to the U.S. market followed an administrative review in which some of these subcontractors received a high antidumping rate, which impacted Atar's largest U.S. customer. As noted in PVA, the timing of and basis for the decision to begin a toll operation are incorporated into the Department's analysis. See PVA,63 FR at 32813, at Comment 1. In addition, Atar is selling the same brands to the same customers as the pasta producers themselves. See Atar Status Memo at 3. Evidence on the record demonstrates that Atar was a two-man operation and mainly involved in acting as a reseller or commissioned agent for the same subcontractors prior to hiring the subcontractors to produce pasta. See Atar's November 13, 2006, submission at section A.2.a. Furthermore, Atar's contention that its U.S. customer had no contact with the subcontractor is incorrect. The record evidence demonstrates that the subcontractors had a longstanding business relationship with Atar's customers. Moreover, the subcontractor was aware of the brands they produce and sell. See Memorandum from Maura B. Jeffords to the File, entitled "Information from 7th Review Placed on the record of this Review," dated July 30, 2007 ("7th Review Memo"). In contrast, Atar did not know who owns the brand of pasta that Atar purportedly produces. See Exhibit DR-5(a) of Atar's May 11, 2007, supplemental response.

As stated in the Atar Status Memo, the record evidence demonstrates that Atar's toll producers had knowledge, not only that the ultimate destination of Atar's sales was the United States, but also who Atar's customers are, because they packaged the pasta into containers using the customers' brand names. See 7th Review Memo. In fact, Atar's subcontractors sold the same brand names of pasta to the same customers directly without involvement of Atar. See Atar Status Memo at 5; and Memorandum from Maura Jeffords to the File, entitled "Customs Information for Certain Importers of Pasta from Italy between April 2004 and April 2006," dated March 1, 2007 ("Customs Data Memo"). For this reason, we did not agree with Atar's claim that it is solely responsible for the marketing and sale of the product. Further, the Department found that there is no evidence on the record to demonstrate that Atar conducts independent product testing, independently makes arrangements for warehousing, does quality control, receives deliveries of inputs for the finished product, oversees the state of the products or prepares the pasta at any phase for delivery to the customer. See Atar Status Memo at 5. Unlike Atar, other pasta producers routinely perform these functions. For instance, in the eighth review of Pasta, in Comment 7, we state, "We typically analyze selling functions in terms of the extent to which the producer provides sales and marketing support, services associated with freight and delivery, activities related to warehousing, and support in the form of advertising or quality assurance." See Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part, 70 FR 71464 (November 29, 2005). In contrast, Atar's role is largely limited to issuing invoices and receiving payment, and does not contribute meaningful value to the production process. See U.S. Sales Documents in

Exhibit 5 of Atar's Section A response, dated November 14, 2006. In other words, it appears that similar to the respondent in PVA, Atar, Atar's subcontractors, and their customers merely restructured their relationship to avoid payment of antidumping duties.

Atar's assertion that it adds meaningful value by purchasing all of the inputs used to produce subject merchandise is without merit. First, the toll producers did not use different raw materials than they had in their inventory to produce the pasta under these "tolling" arrangements with Atar. In addition to semolina, one of the primary material inputs, the toll producers supplied vegetables, spices, cheeses and other inputs. (See, e.g., Exhibit SD-7 of Atar's April 12, 2007, questionnaire response). Thus, the toll producers themselves were important sources of material inputs used in producing subject merchandise. Atar pays the same prices for semolina purchased from all sources. (See, e.g., Exhibit SD-6 of Atar's April 12, 2007, questionnaire response). Atar paid the same tolling fee regardless of whether its toll producers purchased semolina from their own sources or whether Atar itself purchased semolina from other semolina suppliers. Thus, whatever value Atar allegedly contributed to the production process, such value was not reflected in the total price paid for pasta.

In the Atar Status Memo, the Department identified additional reasons, besides those mentioned by Atar in its case brief, in support of its decision not to consider Atar a producer. For instance, although Atar tries to distinguish its purchases from its toll producers and other suppliers, purchasing semolina from its toll producers does not demonstrate that Atar necessarily maintained ownership of or control over the raw material at all times. In PVA, we recognized that the manufacturer of the subject merchandise was the owner of the merchandise because it maintained possession of the raw material. See PVA, 63 FR at 32813 and 32814, at Comment 1. In PVA, there were two companies that claimed they were the manufacturer of the tolled merchandise. One company clearly produced and owned the material input used to produce the merchandise, while the other company did not demonstrate ownership. In the case of the latter company, the subcontractor maintained control of the input before it underwent processing. See PVA, 63 FR at 32814, at Comment 1. In Atar's case, the subcontractor also maintained control of the semolina up until the time of manufacture and in some instances even purchased the input from the subcontractor's own suppliers.

There is no new evidence on the record that contradicts the Department's findings in the Atar Status Memo. Atar did not establish that it purchased all of the inputs and maintained ownership of inputs and the finished product at all times. See Atar Status Memo at 4. Further, Atar did not purchase inputs from independent sources but rather from the same suppliers that supplied inputs to its toll producers themselves. See Atar Status Memo at 4.

Atar's analysis of Corex is incorrect. As noted earlier, our analysis is based on the totality of the circumstances. In contrast to Corex, Atar did not establish whether it purchased all of the inputs, paid the subcontractor a processing fee, and maintained ownership at all times of the inputs as well as the final product. For example, Atar was not able to tie the purchase of its inputs to the corresponding sale of the finished product. In addition, Atar did not conduct independent product testing as other pasta manufacturers do. See Corex. Atar did not establish that it had complete control over the marketing and sales of the product considering its U.S. customers purchased pasta from the same manufacturers used as subcontractors by Atar. In

addition, there is evidence on the record that there was a preexisting business relationship between the subcontractors and Atar's U.S. customers, which changed only after some of the subcontractors received a high antidumping duty rate. See Atar Status Memo at 5; and Customs Data Memo. Moreover, record evidence demonstrates that the subcontractors continue to maintain contact with Atar's main customer. See ibid. In fact, Atar's U.S. customers continue to buy pasta directly from the same manufacturers which Atar claims are supplying Atar with tolling services. See ibid. In other words, Atar is more similar to the respondent in PVA where the Department determined that the respondent was not a toll manufacturer, rather than to the respondent in Corex.

Comment 3: Treatment of Atar as a Reseller/Exporter

Atar argues that the Department's termination of the review based on its finding that Atar was not a producer is without merit. Atar contends that the Department could have considered Atar a reseller and not rescinded the review. Atar explains that the Department has numerous regulations concerning resellers such as the May 6, 2003 Federal Register "Notice of Policy Concerning Assessment of Anti dumping Duties," which supports Atar's claim for a review as an exporter.

Although the above policy notice was limited to automatic assessment situations, Atar believes it is instructive in this case. Atar emphasizes on page 23954 of the notice, "if there was no company-specific review of the reseller for that review period," asserting that if no review was requested, the Department should liquidate at the entered deposit rate. Atar argues that assuming Atar is not the producer and that no one requested a review of its subcontractors and the subcontractor was not aware of the destination and a review was not requested of Atar as a reseller, then the only applicable rate is Atar's deposit rate.

Further, Atar argues that it requested the review as an exporter as well as a producer. In addition, Atar argues that petitioners' request for review was not limited only to producers that export but it also included exporters. Atar asserts that petitioners requested a review for producers/exporters, which uses a double plural indicating that petitioners did not intend to limit the request to only producers. Atar also notes that the Department cannot initiate a subsequent review when the Department rescinded the 2005/06 Review. Finally, Atar contends that the Department should have calculated a margin and allowed Atar to comment in its brief reasoning that the Department could decide to treat Atar as an exporter.

Atar argues that 19 CFR 351(d) permits the Department to rescind a review under the following circumstances. The circumstances include a withdrawal of the request for review, a rescission based on a self-initiated review, and no shipments. Atar maintains that two separate requests for review were made, the review was not self-initiated, and Atar made shipments. Therefore, Atar asserts that the Department has no authority to rescind the review.

Petitioners assert that Atar is not entitled to a reseller rate. First, petitioners argue that because the Department found that Atar's shipments were not Atar's production, the rate for entries by Atar should be either those of the actual producer of the pasta or the all-others rate. Petitioners also argue that there was no reported upstream sale of pasta to Atar by the actual

producer for shipments to the United States, thus Atar cannot be considered a "reseller" in this review.

Further, petitioners argue that the actual producer had knowledge that the pasta sold by Atar was destined for the United States. Petitioners maintain that Atar reported in its Section A questionnaire response on page 30 that it provided packing material displaying the U.S. customer's brand name and U.S. location to its suppliers, and that some pasta is enriched to meet U.S. requirements. Petitioners assert that even if there was an upstream sale by the producers to Atar, because the producers had knowledge that their pasta was destined for the U.S., under the statute, Atar would properly be regarded as the first United States customer in the distribution chain, and not a reseller.

Petitioners state that the entered deposit rate for Atar was incorrect, and that the rate at which entries should have been suspended is the rate applicable to the actual producer of the pasta. Petitioners argue that assessment of antidumping duties based on the deposit rate of zero, assigned by the Department in Atar's new shipper review is inappropriate in this case.

Petitioners argue that the correct deposit rate for entries by Atar should be the rates assigned to the individual pasta producers; 12.41 percent for pasta produced by Liguori and 12.09 percent for pasta produced by Chirico Molini, De Luca or De Sortis. Petitioners further argue that because no producer rates for the current POR were calculated for these four companies, the appropriate assessment rate for Atar is the all others rate. Petitioners argue that, because the producers sales to the United States were not investigated during the current review because Atar claimed that it was the producer, the Department should not use the individual producers' rates.

Petitioners argue that if the Department does not assign the all-others rate to Atar for the current review, it should use a rate higher than the existing company-specific rates for the four companies that produced the pasta exported to the United States by Atar. Petitioners state that Atar concealed the true producer and exporter identities, precluding a proper analysis of the proper U.S. price. Petitioners argue that if the all-others rate is not applied, an adverse inference should be made and Atar should receive the highest rate calculated for any other exporter in any prior review.

Petitioners argue that the Department has rescinded reviews where the company was not the producer under investigation but essentially had no shipments. Petitioners cite Certain Cut-to-Length Carbon Steel Plate From Romania; Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part, 72 FR 36658, 36659 (July 5, 2007); and Certain Fresh Cut Flowers From Ecuador; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 64 FR 18878, 18879 (April 16, 1999). Petitioners also cite Windmill Int'l Pte v. United States, 193 F. Supp. 2d 1303, 1310-11, 1313-14 (CIT 2002); and Taiwan Semiconductor Mfg. Co. v. United States, 143 F. Supp. 2d 958, 965-67 (CIT 2001). Petitioners claim that Atar incorrectly applied the Department's regulations.

Petitioners argue that the Department previously rescinded a review involving the same importer, JCM,[4] because the exporter, GSA, was found not to be the producer. See Certain Pasta From Italy: Termination of New Shipper Antidumping Duty Administrative Review, 62 FR 66602 (December 19, 1997). Petitioners reason that GSA's unaffiliated producer had knowledge that pasta was destined for the United States at the time it sold pasta to GSA and that the unaffiliated producer was the proper party to be reviewed. Moreover, petitioners maintain that the CIT upheld the Department's decision. See GSA S.r.L. v. United States, 77 F. Supp. 2d 1349, 1353 (CIT 1999) ("GSA v. Unites States").

Petitioners assert that the Courts have upheld the Department's decision to rescind a review in other administrative reviews when the Department determined that the requesting party was not the proper respondent. Petitioners cite Baolong Biochemical Prods. Co. v. United States, 337 F.3d 1332, 1334 (Fed. Cir. 2003), and the lower court's decision to uphold the Department's decision to rescind the review because another affiliated company controlled the sales. Petitioners argue that Atar also did not control the price setting, is a price follower, and contributes no meaningful value to the production process. See Atar Status Memo at 4-5.

Department's Position

We disagree with Atar's claim that the Department should treat Atar as an exporter (reseller) if the Department is not going to treat Atar as a producer. In the new shipper review, previous review, and this review, Atar has characterized itself as a toll producer of subject merchandise entitled to a calculated antidumping duty rate based on that status. We have determined in this review, based on the record of this review, that Atar is not a manufacturer.

The fact that we do not consider Atar a producer does not automatically entitle it to have a rate based on it status as a reseller. The record demonstrates that the producers of the pasta resold by Atar had knowledge that the pasta was destined for the U.S. market. Atar acknowledges in its response that its customers may know the identity of Atar's toll producers. See Atar Status Memo at 3. We stated:

> the record evidence demonstrates that Atar's toll producers had knowledge not only that the ultimate destination of Atar's sales was the United States, but also had knowledge of who Atar's customers are, because they packaged the pasta into containers using the customers' brand names - names they were long aware of because as producers they also produced, packaged, and sold to the same customers using the same brand names.
>
> See Atar Staus Memo at 5 and 7th Review Memo.

We disagree with Atar's claim that the Department does not have the authority to rescind the review for Atar. Atar's reference to 19 CFR 351.213(d) is misplaced. The regulation states:

> The Secretary may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during

[4] JCM was one of Atar's U.S. customers during the POR.

> the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.
>
> See 19 CFR 351.213(d)(3).

We determined in accordance with 19 CFR 351.401(h) that Atar is not the producer. See Atar Status Memo. In addition, because the producers had knowledge that the pasta sold by Atar was destined for the U.S. market, Atar is not the proper respondent. In an earlier administrative review of pasta, involving JCM and GSA, the court upheld the Department's decision to rescind the review, where GSA's suppliers were found to have knowledge of the U.S. destination of the sale. The court agreed that the Department's EP analysis indicated that GSA was not the proper party for a new shipper review. The Department relied on section 751(a)(2)(B) of the Act, which defines the term "exporter or producer," and the definition of EP at section 772(a) of the Act. See GSA v. United States at 13. The Department found that the producer knew the pasta was destined for the United States, and therefore, GSA was no longer the correct respondent. See GSA v. United States at 17. Here, we also find that Atar is not a producer. Moreover, the record evidence demonstrates that Atar's toll producers had knowledge not only that the ultimate destination of Atar's sales was the United States, but also who Atar's customers are, because they packaged the pasta into containers using the customers' brand names - names they were long aware of because as producers they also produced, packaged, and sold to the same customers using the same brand names. See Atar Status Memo at 5; and 7th Review Memo. Because the Department concluded that toll producers knew that the pasta was destined for the United States, the producers' sales constitute the first sale to an unaffiliated customer in the United States and are the proper basis upon which to calculate EP. See sections 751(a)(2)(A) and 772(a) of the Act. Atar is not the correct respondent. Accordingly, we are rescinding the review of Atar.

Comment 4: Atar's Assessment Rate

Atar argues that if the Department determines to rescind the review, then the Department has no legal authority to order liquidation at another rate of duty absent a review. Atar cites 19 CFR 351.212(c)(i) of the Department's regulations, which instructs the Department to liquidate at the rate in effect at the time of entry. Atar also argues that petitioners have made factual allegations without an accompanying certification of factual accuracy and that the Department has not acted on this objection. Finally, Atar contends that two of its four producers have their own rates and that the Department must take into account the individual rate of Atar's producers.

Petitioners made certain arguments concerning Atar's assessment rate, in Comment 3 above, which also relate to the treatment of Atar as a reseller/exporter.

Department's Position

The Department normally assigns the producer's cash deposit rate to a reseller. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 63 FR 55361, 55363 (October 15, 1998). For assessment purposes, this rate will apply if it is established during the course of an administrative review that the producer had knowledge that

the merchandise is going to the United States. Accordingly, if the merchandise at issue were entered at the producer's cash deposit rate, this rate would be the appropriate assessment rate. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003). However, during this POR, Atar entered the merchandise at its own previous rate claiming to be the producer and did not provide the name of the actual producers tied to specific entries. Absent such information, we are not in a position to instruct CBP to liquidate entries at the producer's rate. We note that most of the producers used by Atar during this review did not have a company-specific cash deposit rate and, for those companies, the Department normally instructs CBP to liquidate at the all-others rate. See 19 CFR 351.107(c).

Accordingly, we find that the most appropriate assessment rate for Atar's entries is the all-others rate and will instruct CBP to liquidate at 11.26 percent, which was the all-others rate in effect at the time of entry.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results and the final weighted-average dumping margins in the Federal Register.

Agree _____ Disagree _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date