70 FR 6834, February 9, 2005

A-489-805
Administrative Review 02/03
Public Document
Office III: LA/EBG

February 2, 2005

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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

RE: Certain Pasta from Turkey (Period of Review: July 1, 2002 through June 30, 2003)

SUBJECT: Issues and Decisions for the Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Turkey

Summary:

We have analyzed the case briefs 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 we have developed 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:

Tat Konserve A.S. (Tat)

Comment 1: Whether the Department Should Reject Tat's February 24, 2004, Submission
Comment 2: Calculation Error in Affiliated Party Arm's-Length Test
Comment 3: Whether the Department Should Continue to Collapse Tat's Wheat Codes
Comment 4: Whether the Department Should Correct Tat's Cost Test to Account for Different Levels of Trade
Comment 5: Whether the Department Double-Counted Tat's Countervailing Duties
Comment 6: Modification of Imputed Credit Calculations

Filiz Gida Sanayi ve Ticaret A.S. (Filiz)

Comment 7: The Department Should Continue to Collapse WHEAT Codes 1 and 2 But Correct for a Clerical Error

II. Background

On August 6, 2004, the Department published the preliminary results of its administrative review of the antidumping duty order on pasta from Turkey. See Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review, 69 FR 47876 (August 6, 2004) (Preliminary Results). The review covers two manufacturers/exporters. The POR is July 1, 2002, through June 30, 2003. We invited parties to comment on our preliminary results of review. We only received timely case briefs from Tat and petitioners[1] on September 7, 2004. We received rebuttal briefs from Tat, Filiz, and petitioners on September 13, 2004.[2] On September 17, 2004, Filiz submitted an untimely case brief, and requested that the Department consider it for these final results. On September 22, 2004, the Department returned Filiz's case brief as untimely filed new factual information pursuant to 19 CFR 351.301 (b)(2). See Letter to the File Re: Removal of Filiz Case Brief, dated September 22, 2004.

III. Wheat Codes

In the Preliminary Results, the Department discussed certain parties' proposed modifications to the two wheat codes identified in the Department's questionnaire. See 69 FR at 47883. The Department discussed how the two wheat codes used to determine the product match were established during the Pasta Italy Investigation where the wheat quality was determined to be commercially significant as measured by ash and gluten content and cost. See Id., and Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy, 61 FR 30326, 30346 (June 14, 1996) (Pasta Italy Investigation). We preliminary determined that both Filiz and Tat's second wheat code (Wheat Code 2) failed to meet the standards outlined in the Pasta Italy Investigation. See Preliminary Results, 69 FR at 47887. For these final results, we affirm our decision in the Preliminary Results that Filiz and Tat failed to provide evidence establishing that commercially significant differences in wheat quality exist as measured by ash content, gluten content and cost. For further discussion of parties' comments regarding wheat codes, see Comments 3 and 7, below.

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[1] Petitioners are New World Pasta Company, Dakota Growers Pasta Company, Borden Foods Corporation and American Italian Pasta Company.

[2] On September 13, 2004, Filiz filed a rebuttal brief stating that it would not address the issues raised by petitioners in their September 7, 2004 filing because Filiz had already addressed the issues in its case brief. However, Filiz had failed to file the referenced case brief with the Department.

IV. Discussion of Interested Party Comments

Tat

Comment 1: Whether the Department Should Reject Tat's February 24, 2004, Submission

Tat argues that, contrary to the Department's April 28, 2004, letter, the Department should not reject its February 24, 2004, submission (TMO Submission) concerning the Turkish Grain Board and Tat's U.S. exports (TMO program) during the POR. See Letter from the Department to Tat Concerning Unsolicited Questionnaire Responses, dated April 28, 2004, (Letter to Tat Regarding Untimely Submission). Tat's February 24, 2004, submission was its second voluntary submission to the Department. According to Tat, the Department's rejection of the TMO Submission was an abuse of discretion and contrary to law. Tat states that the Department's procedural regulations exist for convenience, and that the Department may waive its strict procedural requirements. Specifically, in the previous administrative review of pasta from Italy, the Department held that it was not bound by its rules concerning service of documents and that it is within the discretion an administrative agency to relax or modify its procedural rules. See Notice of Final Results of Administrative Review: Certain Pasta From Italy 69 FR 6255 (February 10, 2004) (Pasta Italy Six), and Decision Memorandum at comment 9. Further, Tat argues that the facts underlying the TMO submission did not come into existence until after the deadline had lapsed, and it could not have foreseen that the Turkish government would reinstate the TMO wheat program after the Department's deadline. Finally, Tat argues that the adjustments proposed by the TMO submission would have a material impact on the results of this review, and since the Department elected not to verify Tat in this review, the Department would have had considerable time to consider the TMO Submission. Therefore, for these final results, Tat argues that the Department should reconsider the TMO Submission.

Petitioners disagree with Tat that the Department should accept the TMO Submission. According to petitioners, the Department's regulations set specific deadlines for submission of new information. The deadline for this case was December 18, 2003, and the TMO Submission was more the two months after this date. See 19 CFR 353.301; see also, Letter to Tat Regarding Untimely Submission. Furthermore, petitioners contend that Tat had an opportunity to request to extend the deadline for submission of new factual information, which Tat chose not to exercise. See 19 CFR 353.301. Moreover, petitioners assert that Tat's reference to Pasta Italy Six is off point. In that case, the Department determined that a respondent had not been prejudiced by petitioners' failure to properly serve a respondent with a request for review. See Pasta Italy Six and accompanying Decision Memorandum at comment 9.

Petitioners also state that the Department has rejected petitioners' request to extend the deadline for new factual information in this proceeding and that the Department should therefore not grant an extension that was previously denied to petitioners. See Petitioners' Letter to the Department Regarding Tat's New Factual Information, dated February 25, 2004 (Petitioner's Letter), at 3. Finally,

petitioners argue that if the Department were to accept Tat's submission, the Department would have to reopen the case to give all parties time to comment on it. Therefore, for these final results, the Department should continue to reject Tat's TMO Submission.

Department's Position: Section 351.301(b)(2) of the Department's regulations governs the submission of factual information by parties to an administrative review. Tat did not request nor receive from the Department, prior to the expiration of the deadline, an extension of time within which to provide new information. In this review, the deadline for submitting new factual information was December 18, 2003. See Letter to Tat Regarding Untimely Submission. Tat's TMO Submission was filed February 24, 2004, more than two months after the deadline for submitting new factual information. With respect to Tat's reference of Pasta Italy Six, its argument is off point. In Pasta Italy Six, the Department determined that a respondent had not been prejudiced by petitioners' failure to properly serve a request for review, which is distinct from the facts of this review in which Tat failed to make a timely submission. See Pasta Italy Six and accompanying Decision Memorandum at comment 9.

We also disagree with Tat's argument that the Department had sufficient time to consider the TMO Submission because the Department elected not to verify during this review. Contrary to Tat's claim, the Department did indeed conduct verification of Tat's cost and sales submissions covering this segment of the proceeding. This verification took place from May 10 through 21, 2004. See the Department's Verification of Tat's Sales and Cost Questionnaire, dated July 30, 2004 (Tat's Sales and Cost Verification Report), at 1. Finally, the Department's rejection of Tat's TMO Submission is consistent with the Department's treatment of new factual information in this proceeding. See Petitioner's Letter at 3 and attachment 1. Therefore, for these final results the Department continues to consider Tat's TMO Submission as untimely filed new factual information.

Comment 2: Calculation Error in Affiliated Party Arm's-Length Test

Petitioners allege that the Department made an inadvertent error when determining whether Tat's sales to affiliates were made at arm's length. According to petitioners, the Department used generic language for the arm's-length test, assuming that Tat reported its affiliated sales as "(CUSRELH =2)" and unaffiliated sales as "(CUSRELH=1)." However, petitioners assert that Tat defined its customer relationship codes exactly opposite. See Tat's Response to the Department's Section Initial Questionnaire, dated October 31, 2003, at 46 (Tat's Questionnaire Response), see also, Memorandum from Mark Young, Case Analyst, to Eric Greynolds, Program Manager, Concerning Calculation Memorandum for Tat Konserve A.Ş. successor in interest to Pastavilla Makarnacilik San. V. Tic. A.Ş.: Preliminary Results of 2002-03 Administrative Review of the Antidumping Duty Order on Certain Pasta from Turkey, dated July 30, 2004 (Tat's Preliminary Calculation Memorandum), at 2. As a result, petitioners argue that the Department inadvertently disregarded Tat's sales to unaffiliated customers. For these final results, petitioners request that the Department correct this error.

Tat did not address this issue.

Department's Position: The Department agrees with petitioners that it inadvertently made an error when applying the affiliated party test to Tat's affiliated sales. Specifically, the Department used standard language in the program, assuming Tat assigned its affiliated sales as "CUSRELH = 2," as requested in the Department's questionnaire. See Tat's Questionnaire Response at 46. We have corrected this error for these final results. See Memorandum from Mark Young, Case Analyst, to Eric Greynolds, Program Manager, Concerning Calculation Memorandum for Tat Konserve A.Ş. successor-in-interest to Pastavilla Makarnacilik San. V. Tic. A.Ş.: Final Results of 2002-03 Administrative Review of the Antidumping Duty Order on Certain Pasta from Turkey, dated February 3, 2005 (Tat's Final Calculation Memorandum).

Comment 3: Whether the Department Should Continue to Collapse Tat's Wheat Codes

Tat argues that the Department should reconsider collapsing its wheat codes for superior and normal semolina. According to Tat, it uses two types of semolina for its pasta production, "superior semolina" used in the production of Pastavilla brand and "normal semolina" for its Kartal and Lunch and Dinner brands. See Tat's December 18, 2003, Submission to the Department, at 4. Further, Tat states that it provided evidence of daily reports and finished goods to the Department that these two types of wheat differed in ash and gluten content. See Tat's December 18, 2003, Submission at Exhibit 4. According to Tat, ash and gluten content are the two most significant differences in measuring the quality of semolina and the Department has recognized the commercial significance of these differences in past reviews. See Notice of Final Results of Administrative Review: Certain Pasta From Italy 68 FR 6882 (February 11, 2003) (Pasta Italy Five), and Decision Memorandum at comment 8.

Finally, Tat argues that it clearly demonstrated at verification that it uses separate silos for the production of "normal" and "superior" grades of pasta and that Tat provided the Department with documentation showing the yield rate for "superior" grade semolina. See Tat's Sales and Cost Verification Report at 33 through 36 and Exhibits 10 and 16. Therefore, Tat argues, for these final results the Department should accept Tat's classification of its wheat codes.

According to petitioners, the Department properly determined in the Preliminary Results that the new wheat code added by Tat (WHEAT Code 2) failed to meet the standards established in the original investigation and found no evidence supporting Tat's addition of another wheat code to define product matching. See Preliminary Results at 47877; see also, Tat's Preliminary Calculation Memorandum at 4. Petitioners claim that the Department correctly collapsed the two wheat codes (1 & 2) for Tat's home market sales, but failed to do so for Tat's reported cost, which petitioners argue the Department intended to do. See Tat's Preliminary Calculation Memorandum at 2. Therefore, for these final results, petitioners argue that the Department should continue to collapse the two wheat codes but should correct the clerical error so that the collapsing of the two wheat codes is consistent in the program.

In its rebuttal brief, Tat notes that petitioners' argument regarding the clerical error is rendered moot if the Department decides not to collapse Tat's wheat codes for these final results.

Petitioners, in their rebuttal brief, disagree with Tat and reiterate that the Department should continue to collapse wheat codes 1 & 2, for these final results. First, petitioners state that the Department's instructions in its antidumping questionnaire allow for differences in wheat if there are differences in the semolina that is purchased and used in production (e.g., 100 percent durum wheat, code =1; 100 percent whole wheat, code = 2). As such, Tat initially reported all of its wheat codes as a 1. See Tat's response to the Department's Initial Questionnaire Sections A through D responses, dated October 31, 2003 (Tat's Questionnaire Response), at 42. It was not until Tat's December 18 submission that it decided to change its wheat code designations. See Tat's December 18, 2003, Submission at 4.

Petitioners state that Tat's designation of such a wheat code is suspect for numerous reasons. First, it makes little sense that Tat would sell its premium product in the home market and sell inferior products to the United States. In support of its assertion, petitioners note that Tat initially stated that there was no difference between the semolina Tat purchases and consumes in the milling process and that there was no basis for a claimed difference. See Tat's Questionnaire Response at 42.

Second, petitioners argue that Tat's information submitted in its December 18 submission shows no differences in quality of semolina among the brands. While Tat states that pursuant to Turkish law semolina must meet a requirement of 0.92% ash content, petitioners argue that Tat's statements do not explain how this requirement results in differences of quality between its brands.

Third, petitioners note that Tat's characterization of Tat's Sales and Cost Verification Report fails to mention that the Department found no evidence for Tat's claimed wheat code difference. As stated in the report, when the Department asked Tat whether the semolina purchased for the production of subject merchandise varied by brand for wheat and ash content, they stated no. See Tat's Sales and Cost Verification Report at 36 through 37. The report goes on to say that all pasta is made from the same type of wheat. See Tat's Sales and Cost Verification Report at 36 through 37. With respect to Tat's reference to Pasta Italy Five, petitioners argue Tat is off point. The issue of acquiring semolina was based on acquisition costs and Tat has not shown or even claimed differences in semolina grades based on differences in purchasing of semolina. Finally, petitioners note that Tat's Preliminary Calculation Memorandum indicates that Tat failed to meet the standards outlined in the investigation of certain pasta from Italy and thus, the information submitted by Tat was not sufficient to warrant a new wheat code. See Tat's Preliminary Calculation Memorandum at 4. For these final results, the Department should continue to collapse Tat's wheat codes.

Department's Position: In Pasta Italy Investigation, we established that differences in wheat quality may be commercially significant as measured by ash content, gluten content and cost. See Pasta Italy Investigation at 30346. Where respondents have been able to justify differences due to ash and gluten content, as well as cost, the Department has found that these differences result in more appropriate

product matches, as contemplated by section 771(16) of the Tariff Act of 1930, as amended (the Act).

Initially, in its questionnaire response, Tat reported that there was no distinction in the wheat used for production of subject merchandise. Specifically, Tat stated that it "makes all of its pasta from 100% durum wheat," and therefore reported this field as 1. See Tat's Questionnaire Response at 42. In its December 18 submission, Tat revised this assertion stating that it used two types of semolina for its pasta production, "superior semolina" used in the production of the Pastavilla brand and "normal semolina" for its Kartal and Lunch and Dinner brands. See Tat's December 18, 2003 Submission at 4. Although Tat provided a summary report which it stated would show the difference of ash and gluten content for these two brands, a review of the documents shows that all brands of Tat pasta have the same potential for ash and gluten content. See Tat's December 18, 2003, Submission at Exhibit 5. Tat also argued that these two pasta types had different extrusion rates. While Tat provided information concerning the extrusion rate of "Pastavilla Brand" pasta, it failed to provide information concerning the extrusion rates for other brands of pasta produced by Tat. See Tat's December 18, 2003, Submission at Exhibit 6. Therefore, there was no way to use this documentation at verification to make a meaningful comparison between the two brands.

Moreover, at verification we asked Tat to explain how it derives the different extrusion rates for the brands of pasta. According to company officials, this extrusion rate was based on a study conducted in 1996 when Tat stopped production for 3 days to examine the production of semolina. See Tat's Sales and Cost Verification Report at Verification Exhibit 16. At verification, we asked company officials to explain further the results of this study. Company officials stated that they do not purchase special wheat to make Pastavilla pasta and the pasta is made from the same wheat purchased to make all brands of pasta. See Tat's Sales and Cost Verification Report at 37. Furthermore, at verification, Tat failed to provide clear information nor did company officials confirm that there was a distinction in the ash and gluten content of pasta. See Tat's Sales and Cost Verification Report at 38.

While Tat argued that its pasta brands had different production yields depending on the wheat quality used, we requested a Mill Monthly Production Report which provided no information on differences in the production of semolina by the mill and the different silos it is stored in. Thus, this report referenced no distinction in the production of semolina. See Tat's Sales and Cost Verification Report at 37 and Exhibit 17. Because Tat failed to provide any evidence that its wheat codes warrant distinction, we have continued to collapse them for these final results, correcting for the clerical error mentioned by petitioners. See Tat's Final Calculation Memorandum.

Comment 4: Whether the Department Should Correct Tat's Cost Test to Account for Different Levels of Trade

Petitioners argue that the Department should include sales made at home market level of trade (LOT) 2 for purposes of conducting the cost test. According to petitioners, the Department preliminary determined that there were two LOTs, and only one of the two LOTs, i.e., home market LOT 1 would be used as an appropriate comparison to Tat's U.S. EP sales. See Tat's Preliminary Calculation Memorandum at 2. Petitioners, however, state that sales made at different LOTs are still subject to the cost test. Therefore, for these final results, the Department should include sales made at all LOTs for determining whether sales were made above the cost of production.

Tat did not address this issue.

Department's Position: We agree with petitioners. The Department made an inadvertent error when it excluded home market sales made at home market LOT 2 for purposes of conducting the cost test analysis. For purposes of conducting the cost test the Department considers all sales regardless of LOT. See Carbon Steel Wire Rope from Mexico: Final Results of AD Administrative Review, 63 FR 46757 (September 2, 1998). See also Stainless Steel Wire Rod from Spain: Final Determination of Sales at Less Than Fair Value, 63 FR 40392 (July 29, 1998). Therefore, for these final results, the Department has included home market sales made at LOT 2 in determining whether sales were made below the cost of production. See Tat's Final Calculation Memorandum at 2.

Comment 5: Whether the Department Double-Counted Tat's Countervailing Duties

Petitioners claim that the Department double-counted Tat's countervailing duty expense (CVDU) when calculating Tat's net U.S. prices and should correct this error for purposes of the final results. Specifically, petitioners state that the Department added Tat's reported CVDU as well as the CVDU calculated by the Department. See Tat's Preliminary Calculation Memorandum at 3. Petitioners argue that the Department should eliminate the CVDU field reported by Tat and use the field calculated by the Department for purposes of these final results.

Tat does not disagree with petitioners that the Department double-counted the CVDU expense in determining the preliminary results. However, Tat argues that the Department should use the CVDU field reported by Tat and verified by the Department for purposes of these final results.

Department's Position: The Department agrees that it inadvertently double-counted the CVDU expense and will correct this error for these final results. See 19 CFR 351.401. We also disagree with Tat that the Department verified Tat's CVDU expense. At verification the Department did not discuss this expense with company officials nor did Tat report a description of this field in its questionnaire response. See Tat's Sales and Cost Verification Report; see also, Tat's Questionnaire Response. Typically, in this proceeding, the Department has calculated the CVDU expense for respondents by

using the most current CVD rate applicable to that company and multiplying it by the entered value. See Notice of Final Results of Administrative Review: Certain Pasta From Turkey, 67 FR 298 (January 3, 2002) (Pasta Turkey Four), and Decision Memorandum at comment 1; see also, Pasta Italy Five and Decision Memorandum at comment 15. Because Tat did not provide a description of how it calculated its reported CVDU expense, and the Department did not verify this expense, we have continued to calculate the expenses in accordance with the practice established in prior segments of this proceeding. See Tat's Final Calculation Memorandum.

Comment 6: Modification of Imputed Credit Calculations

Petitioners argue that the Department should modify Tat's daily interest rate calculations for credit expense and inventory carrying cost for these final results. Specifically, the Department should calculate the daily interest rate using 365 days rather than 360 days, given the huge disparity between the annual interest rates in Turkey and in the United States, and the impact that five days will have upon the Department's margin analysis. See Tat's Preliminary Margin Calculation Memorandum.

Tat did not comment on this issue.

Department's Position: We disagree with petitioners. Our determination as to whether to use 365 or 360 days is not based on the impact on the margin calculation. Rather, the Department verified Tat's calculation of credit expense, which was based on 360 days and noted no discrepancies. See Tat's Sales and Cost Verification Report at 20. Therefore, we will make no change to our credit calculations for these final results. See Tat's Final Calculation Memorandum.

Filiz

Comment 7: The Department Should Continue to Collapse Wheat Codes 1 and 2 But Correct for a Clerical Error

Petitioners argue that the Department should continue to collapse wheat codes 1 and 2 for these final results but should correct a clerical error in order that wheat codes 1 and 2 are consistently collapsed throughout the program. According to petitioners, the Department found no evidence supporting Filiz's addition of another wheat code to define product matching and determined in the Preliminary Results that the new wheat code added by Filiz failed to meet the standards established in the Department's original investigation. See Preliminary Results at 47877; see also, Filiz's July 30, 2004, Preliminary Calculation Memorandum (Filiz's Preliminary Calculation Memorandum) at 2. Petitioners claim that the Department correctly collapsed the two wheat codes for Filiz's home market sales, but failed to do so for Filiz's reported costs, which, petitioners argue, the Department intended to do. See Filiz's Preliminary Calculation Memorandum at 2. For these final results, petitioners argue that the

Department should continue to collapse the two wheat codes but should correct the clerical error with respect to Filiz's reported cost.

Filiz argued in its rebuttal brief that it would not address this issue but rely instead on arguments in its case brief. However, as discussed in the "Background" section of this Decision Memorandum Filiz, failed to file a case brief in a timely fashion.

Department's Position: The Department agrees with petitioners that it made an inadvertent error when it failed to collapse wheat codes 1 and 2 consistently throughout the program. See Preliminary Results at 47877; see also, Filiz's Preliminary Calculation Memorandum at 2. We have corrected this error for these final results. See Memorandum from Lyman Armstrong, Case Analyst, to Eric Greynolds, Program Manager, Concerning Calculation Memorandum for Filiz Gida Sanayi ve Ticaret A.S.: Final Results of 2002-03 Administrative Review of the Antidumping Duty Order on Certain Pasta from Turkey, dated February 2, 2005 ("Filiz's Final Calculation Memorandum"), at 2.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of 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 _____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date