

JINFU TRADING CO., LTD. v. UNITED STATES

Court No. 04-00597

Slip Op. 07-95 (June 13, 2007)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND**

SUMMARY

The U.S. Department of Commerce (the Department) has prepared these results of redetermination pursuant to the second remand order of the United States Court of International Trade (CIT) in Jinfu Trading Co., Ltd. v. United States, Slip Op. 07-95 (CIT June 13, 2007) (Jinfu II). In accordance with the Court's instructions, the Department has re-examined the one remanded issue of Final Results of Redetermination Pursuant to Court Remand (September 7, 2006) (Remand Results). Specifically, the Department has: 1) reopened the record in this case to allow Jinfu Trading Co., Ltd. (Jinfu PRC) and Jinfu Trading (U.S.A.) Co., Ltd. (Jinfu USA) (the successor to Yousheng Trading (USA) Co., Ltd. (Yousheng USA)) to put on the record new evidence regarding the credibility and reliability of facsimile transmissions allegedly exchanged during the POR, the circumstances surrounding Customer C's pre-payment of the sales price for the claimed new shipper sale, and the facts behind Mr. A's obtaining a loan from Customer C for a later transaction without first obtaining CEO B's approval;¹ and 2) taking into account the

¹ To maintain confidentiality in this case for purposes of public disclosure, the Department is maintaining the shorthand references used in the Court's first remand in this case. Specifically, the sole employee of Jinfu USA will be referred to as "Mr. A;" the CEO of Jinfu PRC will be referred to as "CEO B;" the unaffiliated U.S. buyer of the instant sale will be referred to as "Customer C;" the original owner of the former Yousheng USA will be referred

Court's opinion in Jinfu II, explained the Department's prior statement that the contents of certain facsimile transmissions exchanged between Jinfu PRC and Jinfu USA regarding the terms of the alleged new shipper sale, if credible and reliable, do not support a conclusion that Jinfu PRC controlled Jinfu USA.

In accordance with the Court's instructions, the Department reopened the record on July 31, 2007, to provide Jinfu PRC an opportunity to place thereon further evidence of: a) the credibility and reliability with respect to the facsimile transmissions; b) the pre-payment of the new shipper sale and the loan obtained from Customer C; and c) to provide an explanation of that evidence. See Letter from Angelica L. Mendoza, Program Manager, to Jinfu Trading Co., Ltd, dated July 31, 2007. In its letter to Jinfu PRC, the Department stated that the deadline for submitting the new evidence was August 10, 2007. However, by August 10, 2007, Jinfu PRC had failed to submit the requested evidence. Moreover, Jinfu PRC did not provide any explanation for its failure to place the new evidence on the record. To date, the Department has received no supplement to the record from Jinfu PRC. Therefore, as instructed by the Court, we have taken into consideration the Court's opinion and reviewed all record evidence and, for the reasons explained below, we have not changed our finding that Jinfu PRC did not have the potential to, or actually control Yousheng USA at the time of the relevant U.S. sale, i.e., November 2, 2002.² Accordingly, we continue to find that Jinfu PRC did not meet the certification requirements to qualify it for a new shipper review.

to as "Mr. D;" the attorney hired to assist in the transfer of ownership of the former Yousheng USA to CEO B will be referred to as "Attorney E."

² In order to be consistent with Court's first and second remand, we will refer to the alleged affiliated company, where appropriate, as Yousheng USA. See *Jinfu Trading Co., Ltd. v. United States*, Slip Op. 06-137 (CIT September 7, 2006) (Jinfu I).

BACKGROUND

On October 25, 2004, pursuant to section 735 of the Tariff Act of 1930, as amended (the Act), the Department issued its final results and final rescission, in part, of the new shipper review of honey from the People's Republic of China (PRC) with respect to Jinfu PRC, which were published on November 3, 2004. See Honey from the People's Republic of China; Notice of Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029 (November 2, 2004) (Final Results), and accompanying Issues and Decision memorandum (Decision Memo) at Comment 2. In its Final Results, the Department determined that Jinfu PRC failed to demonstrate its entitlement to a new shipper review. Therefore, the Department rescinded the new shipper review with respect to Jinfu PRC.

On November 29, 2004, Jinfu PRC brought suit before the Court, contesting the Department's conclusion that neither Yousheng USA nor its successor Jinfu USA was affiliated with Jinfu PRC, within the meaning of 19 U.S.C. § 1677(33)(F) or (G), on November 2, 2002, the date of the relevant U.S. sale. On September 7, 2006, the Court remanded this matter to the Department instructing it to find either that Jinfu PRC and Yousheng USA (or Jinfu USA) were affiliated as of November 2, 2002, and to reinstate its new shipper review, or to provide other record evidence to support its conclusion that the companies were not affiliated. The Court also instructed the Department to provide Jinfu PRC with an opportunity to present additional evidence and argument related to affiliation and to provide an explanation of that evidence. See *Jinfu I*, Slip Op. 06-137 at 24. Pursuant to the Court's instructions, the Department reopened the record on October 12, 2006, to allow Jinfu PRC to present such evidence. On October 23, 2006, Jinfu PRC filed a submission in response to the Department's request, addressing the issue of

ownership (i.e., whether Jinfu PRC owned Yousheng USA/Jinfu USA on November 2, 2002), rather than the question of operational control.³ On November 2, 2006, petitioners filed comments regarding Jinfu PRC's October 23, 2006, filing.⁴

On December 5, 2006, the Department filed with the Court its redetermination pursuant to the Court's remand in Jinfu I. See Remand Results. In its redetermination, the Department found that - after reviewing the totality of the evidence on the record, including Jinfu PRC's October 23, 2006, submission and petitioners' comments dated November 2, 2006 - the record still did not support a finding of affiliation between Jinfu PRC and Yousheng USA/Jinfu USA at the time of the new shipper sale, by way of operational control. The Department continued to question the veracity and reliability of the facsimile transmissions because the documents lacked the communications typically found at the top of most faxed transmissions and were, therefore, not credible evidence. Remand Results, at 11-12.

On June 13, 2007, the Court issued its opinion in Jinfu II. The Court held that the Department failed to adequately explain why the evidence on the record, as supplemented on remand, supported its finding that CEO B was not in control of Jinfu USA at the time of the claimed new shipper sale. See Jinfu II, Slip Op. 07-95 at 21. The Court stated that there was record evidence that CEO B not only "...had the potential to influence the pricing decisions of Jinfu USA, but actually exercised that control..." based upon the Department's verification report and facsimiles exchanged between CEO B and Mr. A. See Jinfu II, Slip Op. 07-95 at 5. The

³ The Court, however, previously upheld our determination in Jinfu I that Jinfu PRC did not own Yousheng USA or Jinfu USA at the time of the new shipper sale. See Jinfu I, Slip Op. 06-137 at 28.

⁴ Petitioners in this case are American Honey Producers Association and the Sioux Honey Association (collectively, petitioners).

Court specifically directed the Department to explain why the authorization contained in one facsimile transmission, and the exchange as a whole, “would not demonstrate that CEO B controlled Jinfu USA.” Id. at 22. Based upon Jinfu PRC’s comments on the Remand Results, the Court also held that Jinfu PRC was not afforded notice that the absence of a reference date on the facsimile transmissions would be pivotal to its case, or that the Department would rely so heavily on Customer C’s having made early and full payment for the new shipper sale, or having loaned Mr. A money to finance a later transaction without the latter having secured CEO B’s approval. Id. at 23. Accordingly, as requested by Jinfu PRC,⁵ the Court ordered the Department to “reopen the record and permit plaintiff to submit new evidence with respect to these matters.” Id. More specifically, the Court ordered the Department: 1) to reopen the record to allow Jinfu PRC to submit additional evidence regarding the facsimile transmissions, the circumstances concerning Customer C’s prepayment of the sales price and the facts concerning Mr. A obtaining a loan from Customer C; and 2) to explain why the facsimile transmissions, if credible and reliable, do not support a conclusion that Jinfu PRC controlled Jinfu USA. See Jinfu II, Slip Op. 07-95 at 24.

Notwithstanding Jinfu PRC’s request that it be allowed to supplement the record with new evidence regarding these matters,⁶ Jinfu PRC failed to submit any evidence at all despite the

⁵ Following the Department’s release of its Draft Remand Redetermination in Jinfu I, Jinfu PRC submitted comments to the Department regarding its Draft Remand Redetermination on November 20, 2006. In its comments, Jinfu PRC claims that the Department failed to provide it with an opportunity to place on the record additional evidence intended to address Commerce’s concerns regarding the credibility and reliability of the facsimile transmissions. In its comments, Jinfu PRC therefore requested that “in the event that this Court decides that the Department’s Redetermination should not be reversed,” it be allowed to supplement the record with additional evidence “which directly addresses the Department’s rationale.” See Jinfu PRC’s Comments on Draft Redetermination at Jinfu I, dated November 20, 2006 (“Jinfu Remand Comments”) at 20. See also, Jinfu II, Slip Op. 07-95 at 19.

⁶ See Jinfu Remand Comments at 20.

opportunity the Court provided by instructing the Department to again open the record. On September 26, 2007, the Department released its draft redetermination pursuant to remand to the parties for comment. The Department received no comments on its draft redetermination from either party by the close of the comment period, i.e., October 2, 2007.

ANALYSIS

In accordance with the Court's instructions on remand, the Department has re-examined its conclusion that, even if credible and reliable, the facsimiles in question would not constitute evidence of operational control by CEO B of Mr. A at the time of the new shipper sale in this case. In response to the Court's instructions, after careful examination of the record, we continue to find, for the reasons explained below, that given the facts and circumstances surrounding the new shipper sale and the overall credibility and reliability of Jinfu PRC's statements and submissions, there is no record evidence to support a finding that the facsimiles exchanged between Mr. A and CEO B demonstrate that CEO B had the potential to control or actually controlled Mr. A.

In Jinfu II, the Court states that it must decide whether the Department, in its redetermination at Jinfu I, has "supported with substantial evidence from the record its conclusion that Jinfu PRC did not control or have the potential to control the pricing decisions..." of Jinfu USA. See Jinfu II, Slip Op. 07-95 at 9. In its Remand Results to the Court, the Department found that Mr. A operated independently of CEO B when consummating the relevant sale. Specifically, Mr. A, acting on his own behalf: 1) established contact with Customer C; 2) initiated and finalized the price negotiations and sales terms with Customer C; and 3) accepted payment from Customer C. It was only after the sales terms were finalized and the shipment was

en route to the location of Customer C's end-user that Mr. A transmitted information regarding the alleged new shipper sale to CEO B via the facsimile transmissions, which are currently at issue.⁷

Based on this record evidence, the Department determined that CEO B did not have actual or potential control over Mr. A at the time of the relevant sale. Jinfu PRC failed to provide any further evidence of credibility and reliability with regard to the facsimile transmissions, Customer C's pre-payment of the claimed new shipper sale, and the facts behind Mr. A's obtaining a loan from Customer C for a later transaction without approval from CEO B. See Jinfu II, Slip Op. 07-95 at 24. Thus, the record remains unchanged from the first Remand Results. Therefore, in absence of any additional information from Jinfu PRC on this matter, the Department continues to find, based on the current record, that Jinfu PRC did not control Jinfu USA.

The Court determined that the facsimiles provided evidence of CEO B's exercise of control over Mr. A because they purport to authorize the alleged new shipper sale. The Court directed the Department to address this evidence specifically in its explanation of its determination that CEO B does not control Yousheng USA/Jinfu USA. To the extent there has been confusion regarding the Department's statement that "even if credible or reliable," the facsimiles do not demonstrate that CEO B controlled Yousheng USA/Jinfu USA, the Department clarifies that this statement was made in the context of its finding that the facsimiles lacked

⁷ The Department notes that in Jinfu I, the Court upheld the Department's finding that November 2, 2002, was the controlling date for its analysis, stating that "it must determine whether Commerce reasonably concluded that the evidence failed to demonstrate that on November 2, 2002, CEO B had, at a minimum, the potential to exercise control over the pricing decision of Yousheng USA." See Jinfu I, Slip Op. 06-137 at 16.

indicia of reliability. The Department reiterates that the credibility of these documents has been called into question not only by virtue of the missing recordings that typically evidence the date and time of transmission, but also by statements made by Mr. A during verification concerning the timing of the price negotiations.⁸ Moreover, as noted above, the fact that the shipment was already en route to Customer C's customer prior to CEO B's purported authorization via the facsimile transmission calls into question the reliability of these documents as evidence of control.

In evaluating the validity of that authorization, in order to determine whether CEO B had the potential or actually controlled the pricing of the subject merchandise at the time of the relevant sale, the Department must examine the nature of the relationship between CEO B and Mr. A. The Department's determination in these remand results is based upon sections 19 U.S.C. § 1677(33)(F) or (G), which provides that affiliation exists, where one party is in a position to exercise control over another party. The statute further provides that a person shall be considered to control another person if a party "is legally or operationally in a position to exercise restraint or direction over another." See 19 U.S.C. § 1677(33)(F) or (G). The Department's regulations clarify that a finding of control over another person will not be found unless the relationship has the potential to impact decisions concerning, inter alia, pricing of the subject merchandise. See 19 CFR § 351.102(b). For example, in another case where the Department did find evidence of affiliation by way of operational control, the Department

⁸ Pursuant to Jinfu I remand order, the Department opened the record to allow the Plaintiff an opportunity to place thereon further record evidence with respect to affiliation. See Jinfu I, Slip Op. 06-137 at 33. The Department notes that the facsimiles included in Plaintiff's remand submission dated October 23, 2006 at Exhibits 1 and 3 are identical to the facsimile transmissions submitted in its supplemental questionnaire response dated December 30, 2003 (Exhibit 4) and discussed with Mr. A at verification. See Jinfu I, Slip Op. 06-137 at 29.

determined that the chief executive of the foreign producer not only established, but also owned the property, and had regular access to the computerized accounting systems of two allegedly unaffiliated U.S.-based companies. Additionally, the chief executive of the foreign producer also negotiated the sales prices of all sales to be made by the two U.S. companies. See *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan; Final Results of Administrative Review*, 65 FR 2116, 2117-2139 (January 13, 2000) (Taiwan Stainless). While the fact pattern in Taiwan Stainless may not exist in every case, it does indicate the kind of circumstances and evidence the Department may rely upon in reaching a determination regarding operational control on the part of the foreign producer. Therefore, as the Department explains below, we continue to find that the record evidence, as supplemented by the evidence submitted in the Remand Results, demonstrates that Mr. A acted independently from CEO B at the time of the relevant sale. The Department finds that this independence was established at the outset of the relationship between CEO B and Mr. A.

Though substantially all of the documents submitted by Jinfu PRC during the first Remand Results relate to the formation of Yousheng USA and Jinfu USA, the documents also provide objective evidence of the relationship between Mr. A and CEO B and demonstrate that in substantive, operational matters, Mr. A operated with little or no direction or supervision by CEO B.⁹ Within a three-to four-week span, Mr. A accomplished the following on his own initiative: 1) filed the corporate formation documents for Yousheng USA and later filed a name change for Jinfu USA with the state of Washington Secretary of State; the filing of these corporate

⁹ As noted in Jinfu I, the Court has stated that CEO B did not legally own Yousheng USA/Jinfu USA at the time of the relevant U.S. sale.

documents is not an inconsequential matter because it obligates the owner of the company to abide by and be subject to the corporate laws of the state of Washington, as well as to be responsible and liable for any debts incurred by the company; 2) contacted and retained Attorney E, an attorney known to Mr. A but not to CEO B, and negotiated the fee for Attorney E's assistance in the preparation of Yousheng USA's charter documents; 3) sought a buyer for Yousheng USA when Mr. D was apparently no longer interested in the company; and 4) prepared Articles of Amendment for the corporate name of Jinfu USA in November 2002. See Jinfu Remand Comments at Exhibit 3 at 1.

In addition, not all of the activities undertaken by Mr. A were to the benefit of CEO B and Jinfu PRC. The affidavit discloses that when Mr. A filed the Master Application (as part of the corporate registration process with the State of Washington) on behalf of Jinfu USA, he indicated on the application that its purpose was to open the business rather than reflect the change in ownership. More importantly, CEO B's name was omitted as the owner of the entity where the application instructed the applicant to list the owners. See Jinfu Remand Comments at Exhibit 23 at 1-2. Again, this omission is not inconsequential, since the form includes an attestation provision that the information is true and correct under penalty of perjury. Mr. A explains that he did not list CEO B as the owner because he did not live in the state of Washington, but the form does not make that distinction. Also, given the importance of proper licensing, this would arguably be a decision that should have been taken up with CEO B if he was in a position of control.

The foregoing facts do not evidence CEO B exerting actual control over Mr. A; rather, they demonstrate that Mr. A made unilateral business decisions regarding the establishment and

day-to-day operations of Yousheng USA/Jinfu USA without the consent, direction or authorization of CEO B. Although CEO B states in his affidavit that he is the owner of Yousheng USA/Jinfu USA, he does not state what, if any, authorization he has given Mr. A in order to conduct the business of Yousheng USA/Jinfu USA, other than for Mr. A to hire an attorney to file the charter documents for Yousheng USA/Jinfu USA. CEO B's affidavit contains little evidence that he has either potential or actual control over Mr. A when it comes to conducting the business of Yousheng USA/Jinfu USA.

With respect to the new shipper sale, the prepayment of the sale, and the obtaining of a loan from Customer C, as explained in Remand Results, the Department received no new evidence from Jinfu PRC rebutting its prior conclusions in Remand Results, even though Jinfu PRC argued for such an opportunity following the Remand Results. Further, Jinfu PRC's request for an opportunity to submit additional information suggests that such information exists and is in the company's possession. Because no additional information was submitted to the Department, we have no information that contradicts the conclusions the Department made in its Final Results.

As previously noted, we continue to question the relationship between CEO B, Mr. A and Customer C with respect to the alleged new shipper sale, given the timing of the alleged new shipper sale, Customer C's prepayment, and the loan acquired by Mr. A from Customer C in order to cover freight forwarding expenses for a subsequent sale. Specifically, the U.S. customer's financing of Jinfu USA's freight costs and Mr. A's reluctance to allow direct contact between Jinfu PRC and the customer further undermined Jinfu PRC's assertion that CEO B controlled Jinfu USA's negotiations with the customer. These facts call into question the true

relationship between CEO B and Mr. A. In particular, the fact that Mr. A unilaterally entered into a loan agreement with its U.S. customer, Customer C, merely serves as an additional indication that CEO B has minimal control over Yousheng USA/Jinfu USA as well as the actions of Mr. A. Finally, as stated above, Jinfu USA's bylaws specifically prohibit the execution or acceptance of a loan unless authorized by the board of directors. There is no evidence that Mr. A sought or received authorization as required by the charter document. This fact again demonstrates that Mr. A operated Jinfu USA independently of the direction of CEO B, who as the purported sole shareholder and owner of Jinfu USA, should have been afforded an opportunity to approve or authorize the company incurring debt. The fact that Mr. A failed to secure authorization for the loan constitutes an ultra vires action by Mr. A, absent CEO B's authorization. This fact establishes that Mr. A unilaterally operated Jinfu USA and that CEO B did not have the potential or actual control over Mr. A.

As Jinfu PRC declined the opportunity to place additional information on the record that contradicts the Department's conclusions at the Final Results and Remand Results, we determine that the evidence currently on the record shows that CEO B did not have operational control over Mr. A. Rather, the facts surrounding the negotiation of the alleged new shipper sale indicate that all aspects of the sale were negotiated independently by Mr. A.

FINAL RESULTS OF REDETERMINATION

Based on our review of the record, we find that record evidence supports the conclusion that Mr. A negotiated the U.S. price of the subject new shipper sale without requiring the approval of CEO B. In reaching this conclusion, the Department examined the timing of the shipment, the price negotiations for the honey sold by Mr. A to the U.S. customer, the independent business decisions made by Mr. A, and the credibility of the facsimiles exchanged between Mr. A and CEO B. Thus, we find that Jinfu PRC and Yousheng USA/Jinfu USA were not “affiliated” within the meaning of 19 U.S.C. §1677(33) at the time of the relevant sale for purposes of the new shipper review. Accordingly, the Department has continued to determine that Jinfu PRC’s sale of honey to Jinfu USA was the first sale to an unaffiliated customer in the United States and, consistent with the Final Results, we continue to find that the new shipper review for Jinfu PRC should be rescinded because Jinfu PRC failed to submit the required new shipper certifications for the relevant U.S. sale.

David M. Spooner
Assistant Secretary
for Import Administration

Date