

FINAL REMAND DETERMINATION

Atar S.r.L. v. United States

Court No. 08-00004

SUMMARY

This remand determination, issued in accordance with the November 10, 2009 Remand Order of the U.S. Court of International Trade, concerns the determination of the U.S. Department of Commerce (“the Department”) for Atar S.r.L. (“Atar”) in the tenth administrative review of the antidumping duty order on certain pasta from Italy (Notice of Final Results and Partial Rescission of the Tenth Administrative Review of the Antidumping Order on Certain Pasta from Italy, 72 FR 44,082 (August 07, 2007) (“Final Results of the Tenth Review”). The review covered the period of review (“POR”) July 1, 2005, through June 30, 2006.

Pursuant to the Court’s Remand Order, the Department has reconsidered its findings in this review. As we discuss further below, the Department has determined to issue final results of review with respect to Atar rather than rescind the review. In addition, the Department collected additional information from Atar during this remand and, thus, was able to identify the appropriate producer-specific assessment rate for each entry. Two of the four producers were subsidiaries of another company which had its own rate.¹ The other two producers did not have a producer-specific cash deposit rate at the time of entry and were subject to the all others rate of 11.26 percent in effect during the POR. Consistent with the reasoning underlying our reseller policy,² because the producers knew that the merchandise they sold to Atar was destined for the United States, we determine in this remand that it is appropriate to complete the administrative review with respect to Atar and to issue instructions to U.S. Customs and Border Protection

¹ These producers were consolidated in that company’s questionnaire response in prior reviews and the Department accepted this consolidated treatment. See March 31, 2010, Memorandum From Dennis McClure to The File; SUBJECT: Placing on the Record of Information from the Seventh Administrative Review (Memo Placing Information on the Record).

² See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties: Notice of policy concerning assessment of antidumping duties, 68 FR 23954 (May 6, 2003).

(“CBP”) to liquidate entries at the rate applicable to each producer (i.e., either the relevant producer-specific rate or all others rate).

BACKGROUND

On August 7, 2007, the Department issued the Final Results of the Tenth Review, 72 FR 44,082 (August 07, 2007). Atar appealed the Final Results of the Tenth Review to the Court of International Trade arguing, among other things, that the Department should not have rescinded the review with respect to Atar. On October 23, 2009, the defendant, the United States, filed the Memorandum in Response to Plaintiff’s Motion for Judgment upon the Agency Record, where it requested a voluntary remand “to allow the Department to reconsider its rescission of the administrative review with respect to Atar.” See Defendant’s Memorandum at 4 (Docket entry No. 55). On November 10, 2009, the Court granted the Department’s request for a remand to reconsider its rescission of the administrative review with respect to Atar. See November 10, 2009 Remand Order (Docket entry No. 59).

On December 23, 2009, we requested certain information from Atar, and Atar responded to our request on December 31, 2009. On January 7, 2010, we requested certain additional information from Atar, and Atar responded to this request on January 21, 2010. On February 1, 2010, we issued a second letter requesting additional clarification, and Atar responded on February 16, 2010. On March 9, 2010, we received comments from the petitioners concerning Atar’s February 16, 2010, response to the Department’s questionnaire. On March 12, 2010, we received Atar’s response to the petitioner’s March 9, 2010, submission.

ANALYSIS

In reconsidering its determination, the Department carefully evaluated the implications of facts presented in this case in light of its regulations and several important policies, in particular the reseller policy. In the course of the administrative review, the Department determined that Atar was not the producer of pasta which it sold to the United States and that the actual pasta producers knew the goods were destined for the United States.³ However, importers of this merchandise posted zero cash deposits, bringing these entries in at Atar's cash deposit rate of zero instead of posting cash deposit rates applicable to the relevant producers.⁴ In this remand the Department has reconsidered the appropriate assessment and liquidation rate for such entries and whether rescission of review is appropriate.

The facts of this case are unusual, but raise the same concerns as that underlying our reseller policy. Our evaluation on remand has led us to the conclusion that the core principles underlying our reseller policy, which ensure that entries are liquidated at correct assessment rates, apply to the entries at issue.

The Department previously articulated its reseller policy as follows:

As described in the October 15, 1998, Federal Register notice, automatic liquidation at the cash-deposit rate required at the time of entry can only apply to a reseller which does not have its own rate if no administrative review has been requested, either of the reseller or of any producer of merchandise the reseller exported to the United States. If the Department conducts a review of a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales. If, in the course of an administrative review, the Department determines that the producer knew, or should have known, that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will be liquidated at

³ See Certain Pasta from Italy: Notice of Final Results of the Tenth Administrative Review and Partial Rescission of Review, 72 FR 70298 (December 11, 2007), and accompanying Issues and Decision Memorandum at Comment 3 (10th Review I & D Memo).

⁴ See Atar's November 13, 2006, Section A Questionnaire Response at 4-9.

the producer's assessment rate which the Department calculates for the producer in the review. If, on the other hand, the Department determines in the administrative review that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all others rate if there was no company-specific review of the reseller for that review period.

See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties: Notice of policy concerning assessment of antidumping duties 68 FR 23954 (May 6, 2003).

The Court of International Trade upheld the Department's reseller policy in Parkdale Int'l, Ltd. v. United States, 508 F. Supp. 2d 1338, 1343-44 (Ct. Int'l Trade, August 8, 2007) ("Parkdale").

In its decision, the Court described the Department's reseller policy, including the producer's knowledge of whether its product was destined for the United States as a critical factor in determining the appropriate dumping duty rate:

If a review is requested for a reseller, Commerce will cease to assume that the producer was aware of the reseller's entries, and set a rate specific to the reseller if Commerce determines it was unaffiliated with a producer. If someone requests a review of a producer, Commerce will determine whether the producer in question was aware of the ultimate destination of sales to a given reseller. If Commerce discovers that the producer was aware of the destination of a sale to a reseller, Commerce will find that the producer set the price of sale into the United States and assess antidumping duties accordingly. If, however, Commerce finds that a producer is unaware of the ultimate destination of the sales to a reseller, it can no longer rely on its prior assumption to apply the producer's assessment rate calculated during the administrative review.

Id. at 1343-44. In affirming the Department's reseller policy, the Court held that the policy permissibly filled a gap in the Department's automatic assessment regulation (19 C.F.R. § 351.212(c)), stating that the regulation "applies only to entries that are not covered by the request for review; it says nothing about entries that were covered by the request for review, but are not within the scope of the final results of the review." Id. at 1353. The Court further explained:

To require Commerce to adhere to a producer's cash deposit rate in liquidating entries, even after it discovers that the assumption upon which the use of that rate was based is false, would not result in the rate the reseller should have received, *i.e.*, the "proper rate." . . . Under the *Reseller Policy*, Commerce has chosen to apply the rate the reseller would have been assigned had Commerce initially known that the reseller, rather than the producer, was the first party in the commercial chain to know of the destination of the merchandise. Use of the all others rate most closely adheres to Commerce's policy of setting antidumping duty rates based on the first entity in the commercial chain that has knowledge of the destination of the subject merchandise. Thus, the all others rate is the "proper rate."

Id.

In light of the principles affirmed in Parkdale and our findings that entities other than Atar were producers of the subject pasta and had knowledge that pasta was destined for the United States, we conclude that liquidation should not occur at the cash deposit rate applicable to Atar at the time of entry. Two further questions arise, however, which we address in this remand: 1) whether the Department must rescind this administrative review, because Atar had no shipments of subject merchandise during the POR for which it was the first party in the transaction chain with knowledge of U.S. destination; and 2) at what rate each entry subject to Atar's review request should be liquidated.

1) Whether the Department Must Rescind the Review

Pursuant to the Department's regulations, "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 the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." 19 CFR § 351.213(d)(3) (emphasis added). As is clear from the use of the term "may" in the Department's regulation, the Department has discretion in determining whether to rescind a review in a situation where "there were no entries, exports, or sales of the subject merchandise, as the case may be." In exercising this discretion,

the Department has normally rescinded reviews when the exporter or producer covered by the review had no entries of subject merchandise during the POR.⁵

The factual record in this review, however, is more akin to the typical reseller situation. In the review, Atar claimed to be both the producer and exporter of the entries of subject merchandise during the POR. During the course of the review, however, we found that Atar was not the producer, and that the producers of this merchandise had knowledge that the goods were destined for the United States. Although Atar was found not to be the producer, entries were made under the Atar cash deposit rate in effect at the time, which was zero based on the rate determined in Atar's new shipper review.⁶ As with our reseller policy, the Department's finding that other parties, in this case the producers, had knowledge that subject merchandise was destined for the United States is critical because it affects the rate required at the time of entry. In this case the Department found during the course of the review that that rate should have been the producer-specific rate or the all others rate.

Because these entries came in under Atar's rate rather than the rate of the companies that produced the pasta and had knowledge that the pasta was destined for the United States, our normal practice, absent an administrative review, of using automatic liquidation instructions and instructing CBP to liquidate at the rate required at the time of entry could potentially lead to unintended consequences. Because it is possible that CBP may not have all relevant information regarding the identity (or role) of the producers readily available on the entry forms, the relevant entries of subject merchandise could potentially be liquidated at the incorrect rate, *i.e.*, in this case at Atar's zero cash deposit rate rather than at the rates applicable to the producers that

⁵ See, e.g., Certain Stainless Steel Butt-Welded Pipe Fittings from Taiwan: Final Results and Final Rescission of Antidumping Duty Administrative Review, 74 FR 66620 (December 16, 2009); Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Silicon Metal from the People's Republic of China, 73 FR 46578 (August 11, 2008).

⁶ See Notice of Final Results of New Shipper Review of the Antidumping Duty Order on Certain Pasta from Italy, 70 FR 30083 (May 25, 2005). See also Atar's November 13, 2006, Section C Questionnaire Response at 39.

produced the pasta and knowingly shipped it to the United States.⁷ In light of the evidence found during the administrative review, the Department has reconsidered its decision to rescind, determining that the facts are more closely akin to those found in a reseller situation.

Moreover, in this remand, the Department has obtained and considered additional information about the covered entries, which Atar provided.⁸ Because of these unique circumstances, and consistent with our reseller policy, we find that it is more appropriate to issue final results of review with respect to Atar and to issue importer specific liquidation instructions, which would accurately reflect the appropriate producer-specific rate for each entry.

2) **The Appropriate Assessment Rate**

In the tenth administrative review, we indicated that given the circumstances of this case, the merchandise at issue should have been subject to the relevant producer's rate.⁹ However, because several producers were involved and Atar's questionnaire responses did not tie the identities of the producer to each entry, the Department was unable to instruct CBP to liquidate at the relevant producer-specific rate. As a result, the Department determined that the most appropriate assessment rate for these entries was the all others rate in effect at the time of entry.

On remand, however, the Department collected additional information that enabled it to determine a more accurate assessment rate for each entry by taking into account differences between the rates applicable to the actual producers of pasta at issue. Specifically, at our request, Atar provided information to link specific producers to specific pasta products and explained how this information could be tied to specific entries.¹⁰ Atar provided a computer tape in which it included a new field called "Toller" identifying of the actual producer for each entry by

⁷ See Atar's November 13, 2006, Section D Questionnaire Response at 3 (Section II (A)(1)).

⁸ See Atar's February 16, 2010, submission obtained during remand (February 16, 2010, Submission).

⁹ See 10th Review I & D Memo at Comment 4.

¹⁰ See February 16, 2010, Submission at 2-3.

reviewing the Bill of Lading for the transaction. The Department compared this information to the original questionnaire response where the producer for each product was identified (in some cases there were multiple producers). The Department found that these two sources of information contained different quantities.¹¹ After evaluating this information, the Department used a reasonable method for determining the appropriate producer-specific rate to use for purposes of assessment. Specifically, because the Department can identify the producer(s) of every product, and the applicable rate for that producer is known, the Department can apply that rate to every product in every shipment on Atar's sales list. Every observation on Atar's sales list is a specific product, shipped to a specific customer on a specific date.¹² By assigning the appropriate producer's rate for each product, the Department is able to calculate the appropriate assessment rate by model for every entry. Because the great majority of the products are produced by only one producer, this is a reliable and accurate method.¹³ In a small number of cases, where the product was produced by two producers with different rates, the Department applied a weighted average of the two producers' rates to that model.¹⁴ The Department believes the methodology for determining the appropriate assessment rate is reasonable, non-distortive, and represents the most accurate methodology in light of Atar's existing records.

As further explained in the business proprietary Memorandum From Dennis McClure to The File Concerning Liquidation Rates for Atar, S.r.L. Sales Entries During the Period of Review, we intend to apply the rates determined in this remand based upon the rates applicable to the actual producers of the entries, which were entered into the United States during the POR.

¹¹ The information concerning quantities in the "Toller" field does not match the information in the original questionnaire response. We note, however, that the magnitude of this discrepancy is relatively small. It appears that the original information in the questionnaire response is more reliable, because the "Toller" field in the later submission was derived from secondary sources.

¹² See Atar's November 13, 2006, Section C Questionnaire Response at Exhibit 7.

¹³ See Atar's November 13, 2006, Section D Questionnaire Response at Exhibit D-8(A).

¹⁴ See March 31, 2010, Memorandum From Dennis McClure to The File; SUBJECT: Liquidation Rates for Atar, S.r.L. Sales Entries During the Period of Review.

On March 31, 2010, we issued our Draft Results Of Determination Pursuant To Court Remand. On April 7, 2010, and April 13, 2010, we received comments and rebuttal comments, respectively, concerning the draft results from the petitioners and from Atar.

Comments:

1. Whether the Department Should Issue Final Results

The petitioners assert that the Department should issue final results for Atar instead of a rescission. Atar did not comment with regard to this issue.

Department's Position:

We agree with the petitioners. As explained above, because we have developed a factual record in this review relevant to the entries at issue, we no longer believe rescission to be appropriate. In this review, Atar was found not to be the producer while entries were made under Atar's cash deposit rate.¹⁵ We further found that the producers had knowledge that the subject merchandise sold was destined for the United States. We also collected additional information during this remand to identify the producer of the subject merchandise.

Accordingly, consistent with the principles and concerns outlined in the reseller policy, affirmed by Parkdale, assessment pursuant to the Department's automatic assessment regulation would result in liquidation that is not at the "proper rate" in this case, the rates applicable to the actual producers and sellers of the subject merchandise. As in the reseller situation, these are entries that are "covered by the request for review, but are not within the scope of the final results of review," Parkdale, 508 F.Supp.2d at 1353, in that no new antidumping duty rate is determined for these entries. Because of the factual record developed, and in the interests of transparency

¹⁵ At the time of entry, Atar was subject to the cash deposit instructions contained in the final results of its new shipper review, that permitted a cash deposit rate of zero only in the event Atar was both the producer and exporter of the subject merchandise. See Notice of Final Results of New Shipper Review of the Antidumping Duty Order on Certain Pasta from Italy, 70 FR 30083, 30084 (May 25, 2005).

and procedural consistency, the Department should not rescind the review, but rather complete its review and thereby apply what it has determined as to these entries, just as it does when applying the reseller policy. Therefore, consistent with our reseller policy, we find that it is more appropriate to issue final results of review which would accurately reflect the producer-specific rate for each entry.

2. Whether the Department Should Order Liquidation at the All Others Rate

The petitioners assert that in the final results, the Department re-affirmed its preliminary intention to instruct CBP to assess antidumping duties based on the all others rate. The petitioners argue that the Department previously rejected various alternatives, such as receiving a reseller rate and liquidating at the rates as entered or basing the liquidation on the individual rates of the factories which acted as subcontractors for Atar.

The petitioners claim that rejecting Atar's claim that it was a producer does not allow the company to be considered as a reseller or entitled to a reseller rate. The petitioners assert that Atar's entries were neither produced nor exported by Atar, but their identification as Atar products resulted in entries being erroneously suspended at the wrong ad valorem deposit rate. Furthermore, the petitioners state that Atar cannot be considered a reseller of these shipments to the U.S. market because there was no upstream sale of finished pasta by the actual producer. Moreover, the petitioners assert that the proper price for the Department to consider in its analysis would be the price from the supplier to Atar.

The petitioners assert that the Department should continue to assess Atar's entries at an "all others" rate that should be considered non-punitive neutral facts available. Moreover, the petitioners assert that using a company-specific rate associated with Atar's toll processors, would be a reward for the parties' efforts to circumvent the normal antidumping analysis.

The petitioners agree with the Department's conclusion that Atar is not a producer which means that the entries should have been suspended at the rates applicable to the producer of the pasta. The petitioners argue that each of Atar's producers' rates is subject to approximately a 12 percent deposit rate and that Atar established itself as a producer in order to avoid the higher deposit rate.

The petitioners assert that applying the all others rate was reasonable under the circumstances but that the Department could also have used a higher 11.58 percent rate based on the rate in effect for Liguori. The petitioners also maintain, however, that the record does not indicate whether any of the producers are affiliated as asserted by Atar. Moreover, the petitioners argue that because none of the producers were investigated, assessment cannot be at the producers' rates. Thus, the petitioners argue that it is reasonable to apply the "all others" rate as neutral facts available in the face of the importers' misreporting of the rate to CBP.

The petitioners further argue if the Department cannot reasonably determine on remand to apply the "all others" rate to Atar's entries, the Department should apply a rate that is more adverse than the "all others" rate. Specifically, the petitioners assert that Atar willfully attempted to manipulate the antidumping process to conceal the true producer and exporter. Therefore, the petitioners argue that the producers were not timely identified and the parties avoided properly reporting price and cost data. Thus, the petitioners argue that Atar's entries subject to the review should be assessed at the highest rate calculated for any exporter in any prior review.

The petitioners argue that as a third alternative the Department should apply Liguori's rate from the 2002-2003 administrative review, because Liguori accounts for a portion of Atar's sales to the United States. Furthermore, the petitioners argue that the Department's previous determination to consider P.A.M., S.r.l. and Liguori affiliated should not imply that Atar should

receive P.A.M.'s rate. The petitioners claim that Atar and Liguori entered into a scheme to avoid paying duty deposit rates and avoid review of the actual normal value and U.S. prices. The petitioners assert that they could have requested a review had they known the sales were actually made by Liguori.

Atar agrees that the Department's calculation using the producer-specific rates is correct and will produce the very rate that would have otherwise applied, even though it disagrees with the Department's determination that it is not a producer.

Department's Position:

We disagree with the petitioners that the Department reaffirmed its intention to issue assessment instructions at the all others rate. As we explained in the draft remand results, the Department collected additional information that enabled it to determine a more accurate assessment rate for each entry by taking into account differences between the rates applicable to the actual producers of pasta at issue. Furthermore, with respect to the petitioners' concern about liquidation being wrongly suspended for Atar, all entries related to Atar were correctly suspended (not automatically liquidated) based on petitioners' request for review and the Department's initiation of the review and are now enjoined from liquidation pursuant to court order.

Regarding the petitioners' suggestion to apply the all others rate to each entry, our evaluation on remand has led us to the conclusion that the core principles underlying our reseller policy, which ensure that entries are liquidated at correct assessment rates, apply to the entries at issue. In Parkdale, the Court explained that the producer's knowledge of whether its product was destined for the United States is a critical factor in determining the appropriate dumping duty rate:

If a review is requested for a reseller, Commerce will cease to assume that the producer was aware of the reseller's entries, and set a rate specific to the reseller if Commerce determines it was unaffiliated with a producer. If someone requests a review of a producer, Commerce will determine whether the producer in question was aware of the ultimate destination of sales to a given reseller. If Commerce discovers that the producer was aware of the destination of a sale to a reseller, Commerce will find that the producer set the price of sale into the United States and assess antidumping duties accordingly.

Id. at 1343-44.

Accordingly, the issue is what is the appropriate assessment rate for the entries at issue. In light of our findings during the proceeding that entities other than Atar were producers of the subject pasta and had knowledge that pasta was destined for the United States, our task is to determine an appropriate rate for these entries. We note that petitioners do not dispute our finding that the entries at issue were produced by four specific companies. Two of the four producers were subsidiaries of another company which had its own rate,¹⁶ and the other two producers did not have a producer-specific rate and were subject to the all others rate of 11.26 percent in effect during the POR. Although we agree that the all others rate would be an appropriate rate with respect to the producers that did not have a producer-specific rate, we disagree that the Department should assign the all others rate to the entries produced by companies that had their own rate and sold the subject merchandise with knowledge that it was destined for the United States. Furthermore, while we are mindful of petitioners' concerns about the unusual nature of these transactions, it is undisputed that these producers produced and sold the finished pasta and were aware that the pasta was destined for the United States. Accordingly,

¹⁶ These producers were consolidated in that company's questionnaire response in prior reviews and the Department accepted this consolidated treatment. See March 31, 2010, Memorandum From Dennis McClure to The File; SUBJECT: Placing on the Record of Information from the Seventh Administrative Review (Memo Placing Information on the Record); Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy, 67 FR 300 (January 3, 2002) ("Pasta 2007 Final Results").

we will not revise the rates applicable to entries of pasta produced by those producers having an established producer-specific rate.

We disagree with the petitioners that none of the producer(s) have established deposit rates which were in effect at the time of entry. In this review, the Department only collected data related to Atar because it was named as a respondent in the review and none of the producers were subject to this review. Therefore, the Department relied on information placed on the record of this remand which demonstrates certain producers were subject to a company-specific deposit rate, while Atar's other producers were subject to the "all others" rate.¹⁷

Further, we disagree with the petitioners' argument that the Department should apply an adverse facts available rate based on the highest rate calculated for any exporter in any prior review. Petitioners did not request review of the four producers that produced the pasta at issue. During the course of review, however, the Department determined that pasta exported by Atar was not produced by Atar but rather by these four producers. Accordingly, the only determination required for the Department to make is what are the appropriate cash deposit rates which would have been required at the time of entry with respect to these four producers, and thus what liquidation rate is appropriate in the Department's instructions to CBP. All the necessary information for making this determination is on the record, and the absence of necessary information on the record is a prerequisite for using facts available. See section 776(a) of the Tariff Act of 1930, as amended ("the Act"). Because we find that there is no basis to apply facts available, an adverse inference is similarly not warranted. See section 776(b) of the Act.

¹⁷ The identity of these producers is BPI. See also Memo Placing Information on the Record; Pasta 2007 Final Results.

Finally, the Department does not agree with the petitioners' argument that we should apply PAM/Liguori's rate from 2003-2004 review to all four producers. Again, the Department has collected the necessary information to issue liquidation instructions for the entries in question based on the applicable rate in effect for the relevant producer of the subject merchandise at the time of entry. Therefore, we are relying on these rates for purposes of this remand.

3. Whether Atar Was Engaged in an Illegal or Fraudulent Activity

The petitioners comment that Atar, its suppliers, and U.S. importers conspired to establish Atar as a straw exporter to avoid legally imposed antidumping duties. The petitioners argue that Atar acknowledged that its competitors, when acting in their dual role as toll suppliers, knew the destination of their production, and knew all of its Italian pasta sales were destined for the United States. The petitioners claim that Atar's unaffiliated suppliers had reason to know the ultimate market destination was the United States because Atar provided packing material displaying the U.S. customer's brand name and location and Atar shipped finished product to one toll producer for consolidation, and some pasta was enriched to meet U.S. requirements.

Atar comments that it provided all of the information related to its transactions, underwent multiple reviews, and was verified prior to this review. Atar states that its operation as a producer by tolling was accepted by the Department in prior reviews and nothing has changed for this instant review. Atar asserts that the Department did not find fraud on the part of Atar and this issue was not appealed to the Court by the petitioners. As such, Atar asserts that there is no formal allegation of fraud before the court, so this claim is without basis as a matter of law.

Moreover, Atar argues that its zero deposit rate was the result of a finding by the Department in the New Shipper Review that Atar was a producer by means of tolling. Atar asserts that the petitioners did not participate in the New Shipper Review and the petitioners' claim that Atar's declarations were incorrect is simply without basis in law or fact.

Furthermore, Atar affirms that at the time the entries subject to the review were made, it was under a legal requirement to enter these goods as manufactured by Atar. Atar argues that the Department had made an affirmative finding that Atar was a producer of pasta by means of tolling, had issued a determination, and had ordered deposit of duties at a specified rate. Moreover, Atar asserts that it correctly made its entries and it did exactly as it was required to do at the time of entry and its entry documentation correctly reflected the express determination and direction of the Department.

In the petitioners' rebuttal comments, they argue that they never claimed that Atar falsely stated that it was the producer of the goods on the entry documents. The petitioners assert that this record is only concerned with the 2005-2006 review period entries for which Atar was found not to be the producer. Although the Department found in previous reviews that Atar was entitled to its own deposit rates established in those reviews, the Department had "serious concerns with respect to the overall nature of Atar's operation and its claim to be a producer of pasta under the tolling regulation." Furthermore, the Department did not have "on the record of this review sufficient information to conduct a full analysis of Atar's tolling operation" as noted in the 2004-2005 review using the criteria in *Polyvinyl Alcohol From Taiwan: Preliminary Results of Antidumping*, 63 FR 32810 (February 9, 1998) and the *Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

In Atar's rebuttal comments, Atar asserts that it did not mislead the petitioners or the Department with respect to who was producing the pasta. Atar argues that any suggestion by the petitioners of an "erroneously-declared deposit rate of zero" and suggestion that Atar improperly made deposit at such rate is a misstatement of facts and law. Atar argues that the petitioners could have participated in prior reviews and taken the determinations to court. Atar asserts that it was the producer and subject to liability according to 19 U.S.C. §1592.

Department's Position:

In this review, the Department made a finding that Atar is not a producer of the entries at issue; the Department did not make any finding of fraud. Atar is correct that the Department treated Atar as a producer in the New Shipper Review and the Ninth Administrative Review, albeit expressing serious concerns about Atar's status as a toller in the Ninth Administrative Review. Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (February 14, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

In the current review, however, based on record evidence and a re-evaluation of the facts, we determined that Atar was not the producer of the pasta it exported to the United States. We believe that Atar responded to our questionnaires and provided sufficient information for us to adequately determine the identity of the producers. Whether or not information placed on Customs documentation was in error is a matter for CBP. Our finding in this review is that the entries at issue were produced by other entities, which had knowledge that the subject merchandise was destined for the United States. The appropriate rate at the time of entry was therefore the rate applicable to each producer.

4. Whether the Department Should Order Liquidation at a Zero Rate Rather than at the Relevant Producers' Rate

Atar asserts that if the Department were to assign a rate, it should assign a rate to Atar based on the rates applicable to the entities used by Atar to produce pasta through its tolling arrangements. Atar argues that the Department should be consistent with its reseller policy and if it continues to find Atar was not a producer by means of tolling, the Department should order that the entries be liquidated as entered because no reviews were requested of the actual producers.

The petitioners argue that the Department cannot liquidate the entries at a zero rate because Atar was not the producer of the merchandise for the 2005-2006 entries. The petitioners assert that the Department would have had to decide that Atar was the actual producer. Furthermore, the Department would have had to determine that Atar would have to be found not dumping during the period of review. The petitioners argue that had Atar not tried to circumvent the duties lawfully owed by the producers, their identity would have been known and the petitioners could have requested reviews for each of those producers.

Finally, in the petitioners' rebuttal comments they argue that Atar inconsistently challenges the Department's conclusion that CBP "may not have all relevant information regarding the identity of the {actual} producers on the entry form . . ." Atar Comments at 3. The petitioners assert that the Department is only explaining that Atar is not the actual producer and that CBP must have the identity of the producer for assessment. The petitioners assert that the Department's determinations in prior reviews have nothing to do with this remand and that the Department gave Atar the benefit of the doubt, in prior reviews, even though Atar bore the burden of creating a complete and accurate record.

In Atar's rebuttal, they argue that the petitioners' comments in this matter should be rejected and the Department should not make any changes in the draft remand determination. Atar asserts that most of its comments are reflected in its March 12, 2010, letter and incorporates the letter as part of its rebuttal comments. Atar contends that the Department has calculated a rate which will produce the very rate that would have applied if the Department had not considered Atar a producer.

Department's Position:

We disagree with Atar that we should order the entries to be liquidated at the rate deposited by the importer (the "applied rate"). Contrary to Atar's arguments, there are circumstances in which the Department may liquidate at a rate other than the rate deposited by the importer. In Mittal Canada, Inc. v. United States, 461 F. Supp. 2d 1325, 1337-38 (Ct. Int'l Trade, September 22, 2006) the Court found:

Commerce has never read 19 C.F.R. 351.212(c)'s mention of the rates "required at the time of entry" as referring to the amounts that the importer actually deposited (i.e., the rates "applied"). For instance, an importer may enter merchandise at a rate inferior to the rate that corresponds to its entries. In fact, the clarification in the Reseller Policy was aimed at curtailing precisely this abuse. In such a case, the amount and rate of duties deposited is lower than the amount and rate of duties that a proper application of U.S. antidumping duty law would have yielded for those entries. The Reseller Policy interprets 19 C.F.R. 351.212(c) to mandate automatic liquidation at the proper antidumping duty rates as determined by Commerce in an administrative review of the producer. These rates, then, are the rates "required on . . . merchandise at the time of entry," 19 C.F.R. 351.212(c).

Our finding in this case is that the producers of the subject merchandise knew the merchandise was destined for the United States. Under these circumstances, the rate required at the time of entry is the relevant producer's rate, not the reseller rate.

We also disagree with Atar that the Department's findings with regard to Atar in previous segments require us to liquidate these entries at the rate deposited by the importer. The Department makes its findings in each segment of a proceeding based on the factual record of that segment; although the Department strives to be consistent across segments of a proceeding, the factual record in each segment may be different and warrant different conclusions. We also note that in the ninth administrative review, while we did not reject Atar's claims of being a toll producer, we expressed serious concerns about Atar's status as a producer, but could not resolve this issue due to limitations of the factual record in that review. See Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (February 14, 2007), and accompanying Issues and Decision Memorandum at Comment 1. However, we put Atar on notice that we intended to fully develop the record and reexamine this issue carefully in this review.¹⁸

In this review, we collected extensive factual information revealing the overall nature of Atar's operations, examined the totality of the circumstances, and made our determination that Atar is not a producer based on the factual record of this review. Among other things, the Department examined historical business relationships and the timing of Atar's decision to begin "toll production," close continuous relationships between the primary importer and the pasta producers, the fact that Atar failed to add any meaningful value to the inputs, and the failure of Atar to maintain ownership of the inputs from the time of purchase to the time of sale and other business details of the whole arrangement. For example, with respect to one of the many factors considered, the Department concluded that no evidence existed upon the record "to demonstrate that Atar conducted independent product testing, independently made arrangements for

¹⁸ See Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (February 14, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

warehousing, did quality control, received deliveries on inputs for the finished product, oversaw the state of the products or prepared that pasta at any phase for delivery to the customer.”¹⁹

Finally, we note that, while arguing that entries should be liquidated at the rates deposited by importers, Atar acknowledges that the Department’s calculations of the producer-specific rates are correct: “Atar believes that if the Department were to assign a rate to Atar based on the rates applicable to the entities used by Atar to produce pasta through tolling that the Department’s calculation is correct.” See Atar’s April 7, 2010, comments on the draft remand.

Conclusion:

Based on the forgoing analysis and discussion, the Department has decided, pursuant to the remand order of the U.S. Court of International Trade, to issue final results of review with respect to Atar, rather than rescind the review, and to issue instructions to CBP to liquidate entries at the rate applicable to each producer.

/Ronald K. Lorentzen/

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date

¹⁹ 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), and accompanying Issues and Decision Memorandum at Comment 2.