

Pasta Zara SpA v. United States
Court No. 09-00001
Slip Op. 10-36 (Ct. Int'l Trade April 7, 2010)

FINAL RESULTS OF REDETERMINATION
PURSUANT TO REMAND

SUMMARY

The Department of Commerce (the Department or Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or Court) in Pasta Zara SpA v. United States, Slip Op. 10-36 (Ct. Int'l Trade April 7, 2010) (Opinion).

In accordance with the Court's instructions, the Department has reviewed and reconsidered information on the record to determine whether to treat the accounting expenses of Pasta Zara-USA Inc. (Zara-USA), the U.S. affiliate of Pasta Zara SpA (Zara), as indirect sales expenses for purposes of calculating constructed export price (CEP). The Department has also reconsidered its decision to base normal value on all home market sales, including the sales made by Zara to traditional local customers that Zara claims take place at a different level of trade (LOT).

After the analysis, and for the reasons explained below, the Department finds that record evidence supports (1) the continued deduction of Zara-USA's accounting expenses from the U.S. gross price as part of the antidumping duty calculation and (2) the finding of one LOT in the home market.

BACKGROUND

The Department initiated the eleventh review of an antidumping duty order on certain pasta from Italy on August 24, 2007. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 72 FR 48613, 48614 (August 24 2007). The Department published the preliminary results of the eleventh review on August 6, 2008, in which it determined for Zara a preliminary weighted-average dumping margin of 10.34 percent. See Certain Pasta from Italy: Notice of Preliminary Results of Eleventh Antidumping Duty Administrative Review, 73 FR 45716, 45720 (August 6, 2008) (Preliminary Results). In its final results, the Department assigned Zara a margin of 9.71 percent. See Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 73 FR 75400, 75401 (December 11, 2008) (Final Results), and accompanying Issues and Decision Memorandum.

In the Final Results, the Department calculated CEP, rather than export price (EP), for Zara's U.S. sales upon finding that those sales were made through Zara's U.S. affiliate rather than Zara itself. See Issues and Decision Memorandum at Comment 7. The Department also determined that only a single LOT existed for Zara's home market sales because the claimed differences in Zara's selling activities for its mass retail customers and for what Zara characterized as its traditional local customers did not rise to a level of substantial differences that supported a finding for two levels of trade. See id. at Comment 8. Lastly, the Department did not address in the Final Results the argument raised in Zara's administrative case brief that accounting expenses incurred by Zara-USA should be treated as indirect selling expenses because they were not related to specific sales, but were incurred regardless of the number of sales made in any given time period. See Zara Case Brief, dated October 17, 2008, at 37-38.

On January 5, 2009, Zara filed suit with the CIT challenging those three aspects of the Final Results. The Department sought and obtained a remand with respect to the treatment of the accounting fees because Zara's arguments raised in its administrative case brief were not adequately addressed in the Final Results. Opinion at 10-11. On the remaining issues, the Court upheld the Department's CEP calculation for Zara's U.S. sales, but remanded the LOT issue to the agency for reconsideration. The Court found that Commerce did not "address specifically the selling activities required for servicing {Zara's} traditional local customers and does not confront directly the issue of whether these activities constituted a substantially different selling function." Id. at 19. The Court instructed the Department as part of its reconsideration to "conduct an analysis of whether {Zara} performed a separate selling function in making the sales to the traditional local customers." Id. at 22.

ANALYSIS

1. Treatment of Accounting Fees

In its administrative case and court briefs, Zara argued that in the Preliminary Results, the Department incorrectly treated accounting expenses incurred by Zara's U.S. affiliate, Zara USA, as direct selling expenses. Zara asserted that the accounting fees are indirect in nature because they are billed and paid on a fixed-fee monthly basis, regardless of the level of sales in the particular month. Thus, Zara contended that they do not bear a direct relationship to a given sale, nor do they result from a given sale. Moreover, in its court brief, Zara argued that the Department failed to address this issue in its Final Results.

In its administrative rebuttal and court briefs, petitioners¹ contended that the payments to Zara USA from Zara are for services that are specifically provided for individual U.S. sales, thus, the Department properly treated these fees as direct expenses.

On remand, the Department finds the accounting expenses to be indirect in nature because those expenses did not result from, nor bear a direct relationship, to specific sales. Indirect selling expenses are selling expenses that the seller would incur regardless of whether particular sales were made but that reasonably may be attributed, in whole or in part, to such sales. While

¹ Petitioners are New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company.

common examples of direct selling expenses include credit expenses, commissions, and the variable portions of guarantees, warranty, technical assistance, and servicing expenses, common examples of indirect selling expenses include salespersons' salaries and product liability insurance. Record evidence indicates that "Zara USA is billed on a fixed monthly basis, regardless of the amount of accounting entries or services his companies performs on their behalf during the month." See Memorandum to the File through Melissa G. Skinner, Director, Office III and James Terpstra, Program Manager, Office III from Stephanie Moore and Christopher Hargett, Case Analysts, Office III regarding Verification of the Sales Response of Pasta Zara SpA (Zara) in the Antidumping Administrative Review of Certain Pasta from Italy, dated October 10, 2008, at 5 (Zara's Sales Verification Report). On this basis, we find those expenses to be indirect. However, because expenses incurred in the United States associated with the sale to the first unaffiliated U.S. customer, such as those for accounting expenses in this circumstance, are to be deducted from CEP under section 772(d)(1)(D) of the Tariff Act of 1930, as amended (the Act), we continue on remand to deduct Zara USA's accounting expenses from CEP.

Section 772(d)(1)(B) of the Act and section 351.410 (c) of the Department's regulations state that the price used to establish CEP shall be reduced by the amount of expenses that "result from, and bear a direct relationship to," the sale, such as credit expenses, guarantees and warranties. Section 772(d)(1)(D) of the Act allows for a CEP deduction for other selling expenses that are not covered under section 772(d)(1)(A), (B), or (C) of the Act. Thus, the issue before the Department is whether these expenses are deducted from CEP under subparagraph (B) or (D) of section 772(d)(1) of the Act. Accordingly, whether or not these are properly categorized as direct or indirect has no impact on the U.S. price calculation, as both types of expenses are deducted. However, in cases in which there are sales made at different levels of trade in the different markets, and the Department determines that a CEP offset adjustment be made to normal value, the offset is capped by the amount of indirect expenses deducted under subparagraph (D). See section 772(d)(1)(D) of the Act. Thus, in such situations, it is significant whether or not expenses are deducted under (D). Although the Department continues to find that there are no distinct levels of trade in the home market, as discussed below, and the merits of a level of trade or CEP offset adjustment are not an issue, Zara is contesting the level of trade determination.

2. Level of Trade

Upon reconsideration of record evidence and the arguments of the parties in compliance with the remand instructions of the Court, the Department continues to find that Zara's home market sales are conducted at a single LOT. Despite Zara's contention that its home market sales to traditional local customers constitute a unique LOT, the Department has identified three factors, discussed below, to support its finding of a single LOT. First, record evidence establishes that, despite some minor differences, Zara performs essentially the same distributive functions for all customers that enables Zara's product to enter into commerce in its home market. Second, the Department determines that Zara may not have accurately characterized certain factual information on the record. Third, Zara claims that the additional selling functions that it provides to its traditional local customers that are not provided to mass retailers are reflected in the higher prices charged to those traditional local customers. However, Zara does not compare

or elaborate on the effects of the selling activities that are unique to mass retailers, such as year-end rebates and promotional rebates, certain billing adjustments, early payment discounts and other discounts.

Section 773(a)(1)(B)(i) of the Act provides that normal value is to be determined according to the price at which the foreign like product is sold or offered for sale in the home market in the usual commercial quantities and in the ordinary course of trade “and, to the extent practicable, at the same level of trade as the export price or constructed export price.” In accordance with section 351.412(c)(2) of the Department’s regulations, the Department will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Because customers from both claimed LOTs purchased directly from Zara, the Court has determined that the proper inquiry on remand is “whether Commerce lawfully determined that these sales {to traditional local customers} were not made at the ‘equivalent’ of a ‘different marketing stage’ within the meaning” of 19 CFR 351.412(c)(2). Opinion at 13.

Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is the equivalent of a different marketing stage. See 19 CFR 351.412(c)(2); Antidumping Duties; Countervailing Duties, Part II, 62 FR 27296, 27371 (May 19, 1997) (“Preamble”). The Court summarized the nature of the LOT inquiry as follows:

“In summary, § 351.412(c)(2), as clarified by the Preamble, requires that the selling activities associated with the claimed LOT not only be “substantially different” but also be “characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function” in which the producer takes on the role of a reseller, such as a distributor. A respondent’s claim of a separate LOT may be aided by demonstrating “[s]ubstantial differences in the amount of selling expenses associated with two groups of sales,” but according to the Preamble’s clarifying language (in particular, the use of the word “also”), such a demonstration is not essential to a respondent’s establishing a more remote LOT.”

Opinion at 14-15 (internal citations omitted). As suggested by the Court in its Opinion, the nature of the Department’s inquiry in determining differences between LOTs is primarily qualitative in nature. See Prodotti Alimentari Meridionali, S.R.L. v. United States, 26 CIT 749, 754 (2002).

Zara claims that there are two LOTs in the home market, only one of which is at the same LOT as CEP. See Zara’s Questionnaire Response, dated December 12, 2007, at 9, and Zara’s Supplemental Questionnaire Response, dated April 8, 2008, at 3. That comparable LOT, referred to as LOTH 1, is comprised of mass retail customers such as wholesalers, distributors, and grocery chains who consistently buy in multiple-pallet quantities. The second LOT, referred to as

LOTH 2, is comprised of customers characterized by Zara as traditional local customers – *dettaglios* (delicatessens or small-scale shops that typically are family owned and not members of a buying cooperative), individual restaurants and hotels, catering customers, communities and associations, and “private” customers – who typically buy in less-than-full-pallet quantities and

tend to be located in close proximity to Zara's production facility. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 4-6.

The Department finds that the selling activities that Zara claims distinguishes its traditional local customers as a separate LOT are an insufficient basis upon which to find a separate and distinct marketing stage resulting in two distinct LOTs. We agree that Zara has shown in its selling activities chart that it performs a greater degree of certain activities for its traditional local customers (*i.e.*, order input/processing, freight and delivery, warehouse handling, and bounced checks). See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at Exhibit 8. However, we disagree that such differences in the intensity of activities undertaken demonstrates a substantial distinction with respect to selling functions and marketing stages. First, as detailed below, there are different types of activities and expenses incurred for the mass retailers that are similar to activities that have been identified by Zara as unique to traditional retailers. Additionally, while Zara provides details for some of its selling activities undertaken with respect to traditional local customers, Zara does not provide comparable detail for the same activities also undertaken, albeit with perhaps less intensity, with respect to mass retailers, notably differences in the processing of rebates and discounts. Accordingly, based on the record evidence, the Department does not find significant differences in those selling activities.

Record evidence demonstrates similarities between activities and expenses incurred for the mass retailers and those activities flagged by Zara as pertaining only to traditional local customers. For example, Zara contends that it takes on a distributorship role when selling to its traditional local customers, in part, because Zara disassembles full pallets out of inventory into smaller cartons in a particular section of the warehouse, loads the cartons into local delivery vans, and then delivers the pasta to these customers. Thus, Zara contends that those additional selling activities are tantamount to occupying a different place in the chain of distribution with respect to its traditional local customers than it does for sales to mass retailers. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 8 and 11. However, information on the record shows that Zara holds goods in its warehouses for sales in the domestic market regardless of the customer. Goods coming off the packing line are palletized and bar-coded, and the bar codes are read into Zara's information system as the goods are moved into inventory. Subsequent movement out of inventory is also recorded by the bar code reader. See Zara's Questionnaire Response, dated December 12, 2007, at 52. Zara performs this function for its traditional local customers, as well as its mass retailers. While Zara, as it claims, disassembles full pallets and repacks less-than-full pallets of pasta for traditional local customers, which requires additional handling than packing for mass retail customers, we do not find this additional step to constitute a substantial difference between LOTH 1 and LOTH 2 customers.

Moreover, Zara maintains that many pasta sales to LOTH 1 customers are for pasta that is produced to order while sales to LOTH 2 customers are mostly Zara brand which is a "permanent" stock. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 11-14. However, the home market data show that, although LOTH 1 customers bought more diverse pasta brands than LOTH 2 customers, LOTH 1 customers also bought a substantial amount of Zara brand pasta. Furthermore, both LOTH 1 and LOTH 2 customers bought Zara brands as well as "private-label" pasta. See Zara's July 1, 2008, home market sales database.

Zara also contends that it performs substantially different selling functions for its traditional local customers versus its mass retailers in the form of manual order taking through personal visits to the customer's location, receiving and processing payments by cash or check (including dealing with bounced checks) rather than electronic funds transfer, paying truck drivers a handling fee for taking and remitting the payments, employing vans rather than common carriers for delivery, setting aside warehouse space for storage and delivery assembly purposes. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 8-14.

Zara claims that it incurs additional personnel costs for manual order processing for its traditional local customers. By comparison, mass retailers have individual price lists, annual contracts, and other company specific modifications. Zara's questionnaire response states that the marketing activity for LOTH 1 customers is mainly performed by the president of Pasta Zara and for LOTH 2 customers by two area managers, who visit customers and negotiate terms of sale. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 12. We do not find, however, that the difference between taking orders manually through personal visits to traditional local customers versus order taking for customers using automated systems to be substantial in this case. With respect to the manual orders, the companies are in close proximity to Zara and the sales are sporadic, whereas the sales from the mass retailers are automated but more frequent. In any event, both methods require staff to process the information. For example, Zara officials would have expended a certain amount of time for LOTH 1 customers negotiating, drafting, and monitoring each company's specific price list and contract. In addition, Zara grants year-end and promotional rebates, certain billing adjustments, early payment discounts and other discounts (e.g., product, logistics and temporary discounts) only to mass retailers, thus requiring personnel to administer these rebates and discounts. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 9, and July 1, 2008, home market sales database. Thus, whether order input/processing is done manually or through an automated system, similar maintenance of customer relations and input data would have been necessary for both LOTH 1 and LOTH 2 customers.

With respect to Zara's claim that because "traditional" customers are tiny stores with no storage area, Zara must dedicate a separate and distinct section of its warehouse and loading area exclusively to serving them, the Department finds this claim not supported by the record evidence. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 6. Zara further claims that the personnel working in this section of the warehouse are assigned specifically to "traditional" customers and they do not handle loading work for the "modern" customers. See *id.* at 8. At Zara's verification, however, a company official stated that there is no separate storage area dedicated to small convenience shops. The official indicated that large export and domestic orders are stored separately from smaller export and domestic orders for efficiency when loading the trucks. See Zara's Sales Verification Report at 12. Thus, record evidence establishes that there is no storage or loading area that is specific to LOTH 2 customers.

Regarding Zara's contention that it provides specialized transportation for its traditional local customers, factual information shows that LOTH 1 and LOTH 2 customers both used the same means of delivery: ex works for customer pick-up, delivery by Zara's trucks, and delivery by common carrier. Contrary to Zara's contention that LOTH 2 customers required Zara to use its van extensively for pasta delivery, record evidence demonstrates that the majority of LOTH 2

customers picked up the products from Zara's factory, *i.e.*, ex works. See Zara's Questionnaire Response dated December 12, 2007, at 32 and July 1, 2008, home market sales database. Therefore, if the terms of sale are ex-factory, then freight and delivery selling activities should not be at a high level of intensity as claimed by Zara. Based on that finding, the Department determines that Zara's emphasis on modes of distribution to demonstrate the existence of a separate LOT is without merit. Moreover, because freight is a movement expense, it is deducted directly from the gross unit price in the margin calculation. See section 773(a)(6) of the Act.

With respect to Zara's contention that LOTH 2 customers, unlike LOTH 1 customers, generally make payments by bank draft or check, thereby exposing Zara to the risk of bounced checks or bank draft defaults, we find that the data does not support Zara's contention. See Zara's Questionnaire Response dated April 8, 2008, at 9. The home market sales database shows that both LOTH 1 and LOTH 2 customers used bank wire payments. The data also shows that Zara acted to recover receivables as "ricevuta bancarie" for both LOTH1 and LOTH 2 customers during the period of review. See Zara's July 1, 2008, home market sales database. Thus, although this payment term may be more applicable to LOTH 2 customers, Zara also engaged in this selling activity with respect to LOTH 1 customers.

Based on our reconsideration of record evidence and the arguments of the parties, we continue to find that differences in selling activities between LOTH 1 and LOTH 2 customers are not so substantial as to warrant a finding of separate LOTs. Record evidence demonstrates that, despite some differences in the precise details of how the activities were performed, Zara performed overlapping selling activities for both LOTs. While we continue to acknowledge that certain selling activities may have occurred at different levels of intensity, we are unable to conclude that such differences constituted "an additional layer of selling activities, amounting in the aggregate to a substantially different selling function." Preamble, 62 FR at 27371.

COMMENTS ON DRAFT REDETERMINATION

On July 8, 2010, we invited interested parties to comment on the Draft Results of Redetermination Pursuant to Remand (Draft Remand Results). On July 15, 2010, Zara submitted comments on the Draft Remand Results. Petitioners did not comment. At the request of the Department, the Court granted an extension for the filing of this redetermination on remand to July 30, 2010. Zara's comments and the Department's positions are summarized below.

Comment 1: Treatment of Accounting Fees

Stating that the Department has acknowledged that the accounting expenses of Zara USA are indirect in nature, Zara urges the Department's to reconsider its decision to treat Zara's U.S. sales on a CEP basis. Zara argues that it is "impermissibly arbitrary" for the Department to treat similarly situated respondents differently.² Zara cites three examples of similar cases in which the Department considered sales to be EP.³ Zara also contends that the Department has never

² See JKEKT Corp. v. United States, 675 F. Supp. 2d. 1206, 1240 (Ct. Int'l Trade 2009).

³ See Canned Pineapple Fruit from Thailand: Final Results of Antidumping Duty Administrative Review, 66 FR 52744 (October 17, 2001), and accompanying Issues and Decision Memorandum at Comment 16; Steel Reinforcing

demonstrated that it was appropriate to change its methodology in regard to EP versus CEP sales.

Department's Position

The Department disagrees with Zara. Zara does not take issue with the substance of the Department's above analysis in deducting Zara's USA accounting expenses from the price used to establish CEP, but instead seeks to re-litigate the already settled issue of Zara's CEP sales. The Court has already determined that substantial record evidence supported the Department's conclusion that sales of subject merchandise to the unaffiliated purchaser were made by the U.S. affiliate after the date of importation and sustained Commerce's calculation of Zara's U.S. sales on a CEP basis. See Opinion at 4-10. Moreover, in the Final Results, the Department clearly distinguished the three cases on which Zara again relies in seeking reconsideration of our CEP determination. See Final Results at Comment 7. The Department also thoroughly explained its rationale in the Final Results for finding Zara's U.S. sales to be CEP based on prevailing law and substantial record evidence. See id. Accordingly, the Department sees no basis to revisit its CEP determination. As a result, Zara USA's accounting expenses, even though indirect in nature, are to be deducted from the price used to establish CEP under section 772(d)(1)(D) of the Act in the manner explained above.

Comment 2: Legal Standard for LOT Determinations

Zara contends that the Department relied on a heightened legal standard in the Draft Remand Results requiring a "clear and unambiguous distinction with respect to selling functions and marketing stages." Draft Remand Results at 5. Zara argues that there is no suggestion in the statute or the Statement of Administrative Action that LOT decisions are subject to any higher evidentiary standard than other determinations made by the Department in the course of an antidumping duty proceeding. Zara asserts that the requirement of a "clear and unambiguous distinction" is at odds with the Department's regulations as well as the idea that a LOT analysis is inherently "qualitative in nature." Draft Remand Results at 4.

Department's Position

The Department acknowledges that the cited language in the Draft Remand Results may have created confusion or inadvertently suggested that LOT analyses are subject to a heightened evidentiary standard. That is not the case, and in order to avoid further confusion we have removed the "clear and unambiguous" language from these final remand results. However, the Department emphasizes that, as part of its qualitative LOT analysis, not every difference in selling activities and selling functions qualifies as a distinct level of trade. The preamble to the Department's regulations explains that "an analysis of selling activities alone is insufficient to establish" the level of trade and that the Department must also "analyze the selling functions to determine if levels of trade identified by a party are meaningful." Preamble, 62 FR at 27371. As

Bars from Turkey: Final Results Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part, 70 FR 67665 (November 8, 2005), and accompanying Issues and Decision Memorandum at Comment 22; Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 72 FR 52070 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 4.

explained by the Court, the “selling activities associated with the claimed LOT {must be} “substantially different’ {and} ‘characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function.’” Opinion at 14 (citing Preamble, 62 FR at 27371). It is this type of analysis that the Department has undertaken in these final remand results. The Department’s analysis is conducted on an overall basis that examines all selling activities in context with one another.

Comment 3: Distributorship Functions

Zara argues that the Department’s conclusion that disassembling full pallets and repacking into less-than-full pallets of pasta for traditional local customers does not constitute a substantial difference between LOTH 1 and LOTH 2 customers is unsupported by the record and ignores the legal proposition of whether Zara performs functions of a distributor in selling to traditional local customers. Zara also argues that this additional activity involving disassembling full pallets into their constituent cartons, then building up combinations of cartons for delivery to small customers is a function that is not performed to a substantial degree with respect to LOTH 1 mass retail customers, and is a function typically performed by distributor/wholesalers, not by manufacturers.

Zara asserts that the issue is not whether disassembling pallets and reassembling the constituents into case-size orders for delivery is “substantial,” but whether it is a function of a distributor. Zara continues to assert that if this work were not substantial, then Zara’s pricing for its traditional local customers would not be consistently higher than pricing for the mass retail customers, and that Zara would not maintain a separate warehouse area for disassembling and reassembling pasta for sales to its traditional local customers. Moreover, Zara argues that the fact that its facility located near Trieste, Italy (Zara 2) has foregone direct sales to LOTH 2 customers, and the fact that the traditional local customers outside the vicinity of its Treviso, Italy (Zara 1) plant must buy their Zara pasta from distributors and wholesalers is strong evidence that Zara’s facility in Treviso performs distributorship functions for its LOTH 2 customers.

Department’s Position

As stated above, the Court has determined that the proper inquiry on remand is “whether Commerce lawfully determined that these sales {to traditional local customers} were not made at the ‘equivalent’ of a ‘different marketing stage’ within the meaning” of 19 CFR 351.412(c)(2).” Opinion at 13.

The record shows that mass retailers and traditional local customers purchased subject merchandise directly from Zara. The Department analyzes the selling activities and selling functions of those transactions to determine whether LOTs identified by Zara are meaningful. We find that although Zara performs the added step of re-packing full pallets into case-size orders for its traditional local customers, the selling activity associated with these sales has to be evaluated in the context of Zara’s entire marketing scheme. See Preamble, 62 FR at 27371. The fact that one class of customers purchases more or less pasta than another does not necessarily mean that they are at different LOTs. Zara’s argument is based on sales volume and net prices.

However, net pricing analysis is not used to determine LOT.⁴ Moreover, although the type of customer is an important indicator in identifying differences in LOTs, “the existence of different classes of customers is not sufficient to establish a difference in the levels of trade.” Preamble, 62 FR at 27371. The focus of our LOT analysis is the intensity of selling activities, including staff dedicated to perform these activities. As noted above, the record evidence shows that Zara holds inventory in its warehouses for sales in the domestic market for all customers. Likewise, all goods coming off the packing line are palletized and bar-coded, and the bar codes are read into Zara’s information system as the goods are moved into inventory. Subsequent movement out of inventory is also recorded by the bar code reader, a function that is performed for traditional local customers, as well as its mass retailers. See Zara’s Questionnaire Response, dated December 12, 2007, at 52.

As previously mentioned, we find that record evidence does not support Zara’s contention that it maintains a separate warehouse area solely dedicated for disassembling and reassembling pasta for sales to its traditional local customers. Zara acknowledges that it sells less-than-full-pallet shipments to both LOTH 1 and LOTH 2 customers, albeit at a different level of intensity. See Zara’s Draft Remand Comments at 6. While Zara, as it claims, disassembles full pallets and repacks less-than-full pallets of pasta that are kept in inventory and subsequently sold primarily to its traditional local customers, we continue to find that this additional step is not another layer of selling activity or a substantial difference in the selling activity between LOTH 1 and LOTH 2 customers.

We disagree with Zara’s reliance on the fact that one of its facilities does not sell to traditional local customers while another facility sells to this market as evidence of a unique distributorship role. Numerous factors may explain this, but Zara has not pointed to any specific evidence on

⁴ In the questionnaire sent to Zara, the Department explained how LOTs are determined:

Level of Trade

To the extent practicable, the Department calculates normal values based on sales made in the foreign market at the same level of trade as the constructed export price (“CEP”) or export price, or adjusts for the differences in levels of trade. In a CEP situation, economic activities occurring in the United States are not considered in determining the level of trade. The level of trade of the U.S. sale is that associated with the constructed export price.

In order to establish whether differences in levels of trade exist, the Department reviews distribution systems, including categories of customers, selling activities, and levels of selling expenses for each type of sale. Different levels of trade are typically characterized by purchasers at different stages in the chain of distribution and sellers performing qualitatively and/or quantitatively different selling activities. Different levels of trade necessarily involve differences in selling activities, although differences in selling activities alone are not sufficient to establish differences in levels of trade. Similarly, customer categories such as “distributor,” “wholesaler,” “retailer,” and “end-user” are often useful in identifying levels of trade, although they, too, are insufficient in themselves to establish differences in levels of trade. Rather, the Department evaluates differences in levels of trade based on a seller’s entire marketing process. (Section 773(a)(1) and 773(a)(7)(A) of the Act; sections 351.412(a)-(c) of the Department’s regulations.)

The Department’s Initial Questionnaire, dated October 15, 2007, at App. I, I-10.

the record that explains why one facility sells to traditional customers and the other does not. Zara has not demonstrated how this distinction is a function of different marketing stages.

Comment 4: Private Label Pasta

Zara argues that the Department's conclusions based on Zara's July 1, 2008, home market sales data are directly contradicted by the record and are made without factual support. Zara also argues that the Department did not conduct an analysis of the data nor did the Department provide the SAS output or other evidence of statistical analysis.

Zara claims that the Department's analysis of the home market data showing that both LOTH 1 and 2 customers bought Zara brand pasta and private label pasta is flawed. Zara states that the home market data shows that LOTH 1 customers accounted for 13 percent of Zara brand pasta sales and 87 percent of private label pasta compared to 83 percent of Zara brand pasta sales for LOTH 2 customers and 17 percent of private label pasta. Therefore, Zara argues that these significant brand purchase differences indicate a substantial difference between the two levels of trade.

Department's Position

The Department does not agree with Zara. Our analysis focuses primarily on the narrative descriptions and other documentary evidence of Zara's selling activities. The SAS programs were run to compare the accuracy and completeness of Zara's narrative descriptions regarding differences between LOTH 1 and 2 customers. For example, Zara states that many of the sales in LOTH 1 are private label sales and are produced to order. However, the narrative for LOTH 1 states that these sales are mostly Zara brand and there is a "permanent" stock of this product. See Zara's Supplemental Questionnaire Response, dated April 8, 2008, at 12. As stated above, the home market sales data shows that LOTH 2 customers also purchased private label pasta. Moreover, the exercise was not to analyze the volume of pasta or the brand of pasta sold to LOTH 1 and 2 customers, but to review the information Zara identified as differences in activities performed for LOTH 1 and LOTH 2 customers that resulted in Zara's claim that there are two LOTs in the home market. As discussed above, record evidence demonstrates a certain degree of interchangeability between private label brands and Zara brands.

Furthermore, we disagree with Zara that differences in the portion of private label brand compared to Zara brand sold to different customers is indicative of different LOTs. Such differences are relevant to the Department's LOT analysis only insofar as they represent different selling activities indicative of different selling functions. For example, there may be differences in how the pasta is produced and packaged, but it is not clear from record evidence that there are systematic differences in selling functions associated with private label brands and Zara brands.

Comment 5: Input/Order Processing

Zara argues that the Department's discussion of whether there is a difference in the amount of order processing required for LOTH 2 customers versus LOTH 1 customers is without basis in the record. Zara acknowledges that it is true that invoices for all customers are generated

automatically. However, the multiplicity of discounts on invoices for LOTH 1 customers does not give rise to an additional amount of clerical work because the discounts are generated automatically by the “invoicing software.” Billing adjustments require personal intervention, but because the number of billing adjustments is minuscule, they do not require substantial staff time for processing. Zara claims that the difference in intensity in order processing resides in the level of customer interaction to receive the order. In the case of mass retail customers, orders are received directly in Zara’s office, by fax or e-mail, whereas, for traditional local customers, the area sales managers solicit the orders personally.

Zara argues that the Department’s statement that LOTH 2 sales are “sporadic,” is an assertion without any basis in the record. Moreover, Zara claims that the area sales managers for the LOTH 2 customers are on the road daily, meeting with small shop-owners, and taking orders. Zara argues that this is a very different activity than for the mass retailers. Thus, Zara concludes that it is significant for the LOT analysis that, for the traditional local customers, orders are taken by managers, while there is nothing to suggest that orders from mass retailers are handled at the managerial level. Therefore, Zara argues that the Department’s assertion that LOTH 1 sales require essentially the same intensity of activity regarding input/order processing is unsupported by the record.

Department’s Position

We disagree that a finding of different LOTs is supported by the fact that certain selling activities are more automated for mass retailers than for traditional local customers. While our analysis of different selling functions may take into consideration the fact that some activities are more staff intensive than others, the record in this case does not demonstrate that such differences resulted in substantially different selling functions.

As Zara acknowledges, there are many activities undertaken by producers involved in the production, distribution and sales of subject merchandise that are becoming increasingly computerized and automated. While such automation may mean that input/order processing for mass retailers is less labor intensive on a per sale basis given the more personalized nature of Zara’s LOTH 2 sales, that distinction is not tantamount to different selling activities indicative of a different selling function. If mass retailers are purchasing larger quantities in more sales than traditional local customers, there are more processing and accompanying adjustments required for those orders within the automated system. Thus, the same selling function is being provided to traditional local customers and mass retailers, albeit in a somewhat different manner. See Zara’s Supplemental Questionnaire Response, dated April 8, 2008, at 9, and July 1, 2008, home market sales database. Those differences are not the bases for a finding of different LOTs.

We also disagree with Zara’s argument that the Department’s assertion that LOTH 2 sales are “sporadic” is without any basis in the record. Zara stated in its questionnaire response regarding *dettaglio* and similar customers, that “these are sporadic sales; they occur when the customer’s inventory is low, and are not made according to a fixed buying plan or schedule.” See Zara’s Supplemental Questionnaire dated April 8, 2008, at 9. We also find conflicting information in Zara’s response. Contrary to prior assertions, Zara acknowledges that it does not use “agents” in the home market for LOTH 2 sales. See Zara’s Comments on Draft Remand Results, dated July

15, 2010, at 12, n.2. Instead, Zara asserts that area managers visit LOTH 2 customers to generate sales. However, the level of personalized attention required for certain customer types suggests only a different level of intensity for the same order/input processing selling activity, not a different activity in and of itself.

Comment 6: Difference in Payment Terms

Zara argues that where the Department appears to believe there is substantial overlap in payment modalities, the opposite the true. Relying on SAS output, Zara claims that over 99 percent of all sales to LOTH 1 customers have a “bonifico” (electronic funds transfer - EFT) payment modality, and less than 1 percent “ricevuta bancaria,” (where Zara claims that it prepares a draft and sends it to its bank for processing). By contrast, for LOTH 2 customers, only 9 percent of sales are paid by “bonifico,” and a third of sales are paid by “ricevuta bancaria.” Moreover, Zara argues that “ricevuta bancaria” represents a more labor-intensive modality than the EFT modality, and the EFT modality is more prevalent in the LOTH 1 sales.

Department’s Position

We used Zara’s data to review claims made by Zara that it has two LOTs in its home market. For example, Zara states that traditional local customers do not make their payments by bank wire transfers, as do the LOTH 1 customers. See Zara’s Supplemental Questionnaire Response dated April 8, 2008, at 9. Zara continues that, for LOTH 1 customers, since payment is by wire transfer, there are no instances of dishonoring a payment. For LOTH 2, in the case of a defaulted bank draft, Zara claims that it must act to recover the receivable a “ricevite bancarie,” as they are called, are advanced by the bank. Id. Every month, the bank sends the list of unmet payments and Zara must recover the payment. Id. at 13. However, as noted above, Zara’s home market sales data shows that some payments were made by wire transfer by both LOTH 1 and LOTH 2 customers, and that customers in both classes had instances of dishonored payments. See Zara’s July 1, 2008, home market sales database.

Comment 7: Loading Area and Transportation Practices

Zara claims that, while the smaller domestic orders may consist entirely of orders for LOTH 2 customers, virtually every LOTH 2 sale is processed through the area for smaller orders compared to only 6.7 percent of the quantity of LOTH 1 sales. Zara also claims that 82 percent of the volume for LOTH 2 sales is processed in the less-than-full-pallet area, while 93 percent of the volume of LOTH 1 sales is shipped directly from palletized inventory. Thus, Zara argues that there is a clear pattern that LOTH 1 sales are made from palletized inventory, whereas LOTH 2 sales are made in less-than-full-pallet volumes.

Zara argues that the consistency of the differentiation between LOTH 1 and LOTH 2 sales demonstrates the error of the Department’s conclusion that there is no substantial difference in the selling activities and selling functions between the two LOTs. Zara states that the law does not require a complete segregation of activities between LOTs; it permits a degree of overlap. Zara argues that virtually none of the LOTH 2 sales are shipped from the full-pallet loading area, while virtually none of the LOTH 1 sales are shipped from the loading area dedicated to smaller-

volume sales.

Zara states that it agrees that ex works sales (*i.e.*, sales in which the customer picks up the goods at the factory) occur only in LOTH 2 sales, and only to a *de minimis* degree in LOTH 1 sales. However, Zara argues that the Draft Remand Results cite an overlap in sales terms as a reason that LOTH 1 and 2 should be collapsed, but that the Department's analysis ignores the quantities involved. Zara states that, at LOTH 1, 99 percent of all sales were on delivered sales terms, and the delivery was by common carrier, whereas, at LOTH 2, ex works delivery accounted for 44.5 percent, 22.7 percent were on the small vans owned by Zara, and about a third of sales were delivered by common carrier. Therefore, Zara asserts that there is much greater diversity of transport modality at LOTH 2 than LOTH 1. Moreover, Zara contends that there is a demonstrable difference in transport modality between LOTH 1 and LOTH 2, and thus a clear difference between LOTs.

Zara argues that the fact that freight is a movement expense that is deducted from gross price is irrelevant, and not a reason to deny a LOT differentiation. Zara asserts that the question of the existence of different LOTs is a qualitative one, determined by differences in activities, regardless of whether the differences are picked up in the margin calculations. Moreover, Zara argues that, aside from the freight modality, there is a clear and material difference in actual freight expenses by LOT, which must be taken into consideration when assessing whether there is a qualitative difference in freight activity at the two LOTs.

Department's Position

As stated above, the Department verified that there is no storage area or loading area specifically designated for sales to traditional local customers. In preparation for loading small vans and trucks efficiently, small orders for domestic or export sales are moved to a staging area for delivery. See Zara's Sales Verification Report at 12.

We disagree with Zara's argument that differing frequencies in use of transportation modes for different classes of customer constitute evidence of different LOTs. We do not dispute that more deliveries of merchandise to mass retailers, which purchase larger quantities than traditional local customers, were made by common carrier more often. We agree with Zara that the law does not require a complete segregation of activities between LOTs. However, as mentioned previously, we disagree with Zara's contention that it provides specialized transportation for its traditional local customers because all home market customers relied to differing degrees on the same means of delivery: ex works for customer pick-up, delivery by Zara's trucks, and delivery by common carrier. We also disagree with Zara's argument that the volume of merchandise shipped by different modes of transportation and freight costs is evidence of distinct LOTs. Because more than 40 percent of the volume of sales to traditional local customers were picked up from Zara's factory, *i.e.*, ex works, thus alleviating the need to enlist common carriers or put to use Zara's fleet of delivery trucks, it follows that freight and delivery selling activities should not be at a high level of intensity as claimed by Zara.

Contrary to Zara's argument, the Department did not deny a LOT differentiation on grounds that freight is a movement expense that is deducted from gross price. The Department's statement

that, because freight is a movement expense, it is deducted directly from the gross unit price in the margin calculation is made in response to Zara's comparison of freight expenses for mass retailers and traditional local customers. Consistent with its qualitative analysis of all relevant factors in its LOT determination, the Department reviewed the different freight modalities and determined that there were no meaningful differences in selling intensities between the home market customers to support a finding of different LOTs.

FINAL RESULTS OF REDETERMINATION

The Department finds on remand that, based on our reexamination, record evidence supports (1) the continued deduction of Zara-USA's accounting expenses from the U.S. gross price as part of the antidumping duty calculation and (2) the finding of one LOT in the home market.

/Paul Piquado/

Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

Date