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March 8, 2004

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Petroleum Wax Candles from the People's Republic of China

Summary

We have analyzed the comments and rebuttal comments of interested parties in the administrative review of the antidumping duty order covering Petroleum Wax Candles from the People's Republic of China (PRC), covering the period August 1, 2001 through July 31, 2002. As a result of our analysis, we have changed the margins. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments by parties:

1. Affiliation
2. Application of Adverse Facts Available
3. Status of Li & Fung (Trading) Ltd., (Li & Fung)
4. Paraffin Wax
5. Other Factors of Production

Background

On September 9, 2003 the Department published the preliminary results of its administrative review of the antidumping duty order on Petroleum Wax Candles from the People's Republic of China in the Federal Register. See Notice of Preliminary Results and Preliminary Partial Rescission of the Antidumping Administrative Review: Petroleum Wax Candles from the

People's Republic of China, 68 Fed. Reg. 53109 (September 9, 2003) (Preliminary Results). Since we issued the Preliminary Results, in summary, the following events have occurred.[1]

The Department conducted verification of the questionnaire responses of Dongguan Fay Candle Co., Ltd. (Fay Candle), and its U.S. importers, TIJID, Inc. (d/b/a DIJIT Inc.) (TIJID), and Palm Beach Home Accents, Inc. (Palm Beach), in Florida on November 6 and November 7, 2003. On November 13, 2003, we received case briefs from the Petitioner, National Candle Association (NCA), and Fay Candle. On November 18, 2003, we received rebuttal briefs from Petitioner; Fay Candle; Li & Fung (Trading) Ltd., (Li & Fung); and American Greetings Company (American), an importer of subject merchandise. The Department conducted the overseas verification of Fay Candle from November 17, 2003 to November 21, 2003. On December 24, 2003, the Department issued its verification reports for both verifications.

On January 16, 2004, the Department received comments from the Petitioner and Fay Candle on the verification reports. On January 23, 2004, the Department received rebuttal comments on the verification reports from the Petitioner and Fay Candle. On February 17, 2004, as requested by the Department, special case briefs were submitted by Li & Fung and the Petitioner. On February 19, 2004, special rebuttal briefs were submitted by Li & Fung and the Petitioner. On February 20, 2004, a public and closed hearing was held in this proceeding to address the issue of the status of Li & Fung in this review. We have now completed this administrative review in accordance with section 751 of the Act.

Discussion of Issues

Comment 1: Affiliation

Throughout this review, in questionnaire responses, comments before our preliminary results, case and rebuttal briefs, and comments on verification reports, Fay Candle, TIJID, and Palm Beach (collectively, the respondents) have placed information on the record concerning the interaction between Fay Candle and its U.S. importers. This information has concerned the importers' provision of technical assistance in the production of candles, quality control, PRC-based personnel, and their development of candle prototypes. It has also concerned the U.S. importers' relationship with the ultimate U.S. retailer customers, and the role played by the importers in obtaining those customers. In addition, it concerns the role played by the U.S. importers in sourcing inputs for the candle production in the PRC. The respondents have argued that all these facts, when viewed together, demonstrate that they are affiliated under the "control" standard of section 771(33)(G) of the Act, an argument that the Department rejected in the preliminary results. The details of these facts are contained in respondents' questionnaire responses, the Department's verification reports, and the preliminary affiliation memorandum. See Memorandum to Barbara E. Tillman, from Sebastian G. Wright, Petroleum Wax Candles from the People's Republic of China for the Period of August 1, 2001 through July 31, 2002: Analysis of the Relationship between Dongguan Fay Candle Co., Ltd., and TIJID, Inc. and Palm

[1] For a detailed discussion of events since the issuance of the Preliminary Results, see the accompanying Notice of Final Results and Rescission, In Part, of the Antidumping Administrative Review: Petroleum Wax Candles from the People's Republic of China, which will be published in the Federal Register.

Beach Home Accents, Inc., dated September 12, 2003 (Affiliation Memo). The Department's examination of those facts can be found in the Affiliation Memo. Below we discuss only the comments submitted to the Department after the preliminary results, including comments concerning verification, which occurred after the preliminary results, which we were not able to consider in making our preliminary affiliation decision.

Specifically, Fay Candle argues that the Department's preliminary determination finding that it is not affiliated with its importers failed to consider its "modern business arrangement" with the importers, to use the language of the Statement of Administrative Action. Statement of Administrative Action, Uruguay Round Trade Agreements, H. Doc. 103-316, 103d Cong. 2d Sess. (SAA) at 838.

Fay Candle goes on to argue that, in particular, the Department failed to consider (1) "the actual exercise of restraint or direction" exercised by TIJID and Palm Beach (hereinafter, "the importers") over Fay Candle, (2) the "corporate grouping," involving two Hong Kong companies related to the importers, and (3) the reliance of Fay Candle on the importers.

Regarding its first main contention, Fay Candle argues that the Department only needs to find the potential for control. It cites examples of what it argues reflects the Department's policy: Electrolytic Manganese Dioxide from Japan: Final Results of Antidumping Duty Administrative Review, 65 FR 55939 (Sept. 15, 2000), and accompanying Issues and Decision Memorandum at Comment 2, where we stated that "{W}e need not find evidence of actual control to satisfy the statutory definition;" and Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 63 FR 55573, 55582 (October 16, 1998) (Proposed Regulatons), where we stated that "section 771(33), which refers to a person being 'in a position to exercise restraint or direction,' properly focuses the Department on the ability to exercise 'control' rather than the actuality of control over specific decisions." Thus, according to Fay Candle, while the Department only requires a finding of the potential to exercise control, it has provided evidence of the actual exercise of control, therefore, far surpassing the low threshold established by the Department.

Regarding its second main contention, Fay Candle argues that section 771(33)(F) sets a bright line test for affiliation. According to its description of this test, the Department must find affiliation between any two persons who control a third person, without qualification concerning the third person's activities (e.g., whether it is involved in the sale of subject merchandise). In this case, the importers own two Hong Kong companies. Members of the importers and Fay Candle occupy the only two seats on the boards of directors of these two companies. Thus, argues Fay Candle, the two companies are jointly controlled by the importers and Fay Candle, and affiliation is proven between the importers and Fay Candle.

Regarding its third main contention, Fay Candle argues that its reliance on the importers is indisputable given past statements by the Department such as that, in finding parties to be affiliated, "business and economic reality suggest that these relationships must be significant and not easily replaced." Notice of Proposed Rulemaking and Request for Public Comment, 61

FR 7308, 7310 (February 27, 1996). Fay Candle contends that it would be impossible to conclude that Fay Candle could replace the importers for their actions in finding U.S. customers, providing production R&D, and sourcing inputs, given the record. Fay Candle argues that the Petitioner's case brief ignores its argument under section 771(33)(F) involving the two Hong Kong companies, and only speculates that Fay Candle could have replaced the importers if it had wanted to.

Finally, Fay Candle contends that the verification report only strengthens its arguments. It argues that the verification report confirms its responses regarding the two Hong Kong companies, and that it confirms its responses regarding the importers' role in Fay Candle's startup and production. It notes that new facts were discovered regarding the importers' role in Fay Candle's production, such as its quality control regulating the heating of paraffin wax, and its veto power over the printing quality on candle packaging. It argues that the report provides examples of how the importers' relationship with Fay Candle is different from that with other suppliers. For example, it compares this relationship with the description in the report of the importers' relationships with their suppliers in other countries, which involve far less interaction between the companies. It notes the report's description of the importers' irregular payment of Fay Candle as evidence that the relationship was unusual, and more like a "brotherly relationship" than a typical business relationship.

The Petitioner argues that there is still no "visible, objective means by which control could be transmitted in either direction" between the importers and Fay Candle (e.g., no family relations, no written agreements, etc.), and that Fay Candle is continuing to interpret an ordinary business relationship as evidence of the importers' control over Fay Candle. Therefore, according to the Petitioner, it argues that the Department should continue to find that no affiliation exists between the importers and Fay Candle. It compares this case to Notice of Final Determination of Sales at Less Than Fair Value: Certain Folding Gift Boxes From the People's Republic of China, 66 FR 58115 (Nov. 20, 2001) (Gift Boxes), and accompanying Issues and Decision Memorandum at Comment 4, where the Department concluded that two parties were not affiliated despite the fact that the U.S. importers provided R&D to the PRC manufacturer and despite the fact the there was a long-standing de facto exclusive supplier relationship between the two parties. It cites this language in particular from Gift Boxes: "Many companies throughout the manufacturing sector do their own R&D and then outsource to unaffiliated companies for all or even part of the fabrication or manufacture of the product." See Gift Boxes at Comment 4.

The Petitioner also disputes respondents' interpretation of some of the facts relevant to this decision. For example, the Petitioner argues that what Fay Candle refers to as "debt financing" is actually prepayment for sales (an argument also made before the preliminary results of this review, and considered therein).

The Petitioner argues that the verification report does not provide any new evidence of control, but in fact provides evidence against reaching that conclusion. It notes that the report mentions that members of Fay Candle have provided some of their own financing; that, according to respondents, the importers have not provided financing during the POR; and that members of Fay Candle provided some of their own technical expertise and were not completely reliant on

the importers. It also notes the report's references to a deteriorating relationship between the importers and Fay Candle after the POR. It claims the report contains evidence in an exhibit that Fay Candle made direct sales to a U.S. customer. It also faults the importers for not providing appropriate personnel at verification to answer all of the Department's questions.

The Petitioner disputes the claim that the importers and Fay Candle had an exclusive relationship based on control. It argues that the importers did not have the market power in the United States to control to whom Fay Candle sold. It also notes documents filed in a bankruptcy proceeding, commenced after the POR, wherein the importers' owner states that his companies have written exclusivity agreements with other suppliers. See Letters from the National Candle Association to the Department, dated August 28, 2003, attachment 4 at 3, and dated October 10, 2003, exhibit 2. Thus, argues the Petitioner, if the importers had a true exclusive relationship with Fay Candle, they would have reduced that relationship to writing in this case as well. It notes a past decision by the Department where we stated that de facto exclusivity is not the same as exclusivity based on control, because both parties remain free to look for other partners. Specifically, the Department stated that "Multiraya reported in its questionnaire response that it negotiated prices with the importer, that the importer is free to purchase MIDP from sources other than Multiraya (and has done so), and that Multiraya is free to sell to any customer in the United States. Therefore, we have preliminarily determined that Multiraya and the U.S. importer are not affiliated." Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Melamine Institutional Dinnerware Products From Indonesia, 61 FR 43333, 43335 (Aug. 22, 1996) (Melamine Dinnerware).

The Petitioner further argues that the deteriorating relationship between the importers and Fay Candle, evidenced in the verification report, while taking place after the POR, supports the conclusion that the two parties were not affiliated during the POR. It argues that, if Fay Candle were free after the POR to take actions adverse to the importers, then it must have been free to do so during the POR as well. Thus, the Petitioner argues, the relationship between the two parties during the POR was merely a matter of choice, not control.

The Petitioner disputes respondents' claim that the mere potential for control is enough to show affiliation under section 771(33)(G). It cites Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404, 18417 (April 15, 1997), where the Department stated: "The standard is not, as Petitioners claim, whether one company might be in a position to become reliant upon another by means of their supplier-buyer relationship; rather, the Department must find that a situation exists where the buyer has, in fact, become reliant on the seller, or vice versa."

Finally, regarding respondents' argument about the corporate grouping, the Petitioner claims that there is conflicting evidence on the record regarding whether the two Hong Kong companies, which Fay Candle argues are jointly controlled by itself and the importers, were active during the POR in the sale of subject merchandise. It claims that, at best, one of them was active in the sale of subject merchandise only outside the POR and only to customers outside the United States.

J.C. Penney Purchasing Corporation (J.C. Penney) and Wal-Mart Stores, Inc. (Wal-Mart), importers of subject candles, object to the Department's preliminary affiliation decision on the grounds that it "was apparently at odds with the intent and design of the pricing strategy between these interested parties and artificially raised Fay Candle's" antidumping margin.

Department's Position

We continue to find that the importers and Fay Candle are not affiliated. While verification resulted in the discovery of some new information relevant to this issue, and while parties have argued that we should examine some of the older information in a new light, we do not believe that there have been any significant changes to the factual information relevant to this issue. For example, respondents note that we discovered at verification that the importers established a mechanism for assuring paraffin wax was properly heated, and that the importers are able to veto the retail-oriented design of candle packaging. This information is relevant to the question of whether the importers control Fay Candle, but leads only to a conclusion that was well-supported in the preliminary results: that the importers provide a substantial amount of assistance to Fay Candle in the production of candles and are responsible for ensuring that the U.S. retail customers are satisfied. However, it does not lead us to change our conclusion that while this type of information "does suggest a high level of cooperation between Fay and the U.S. importers, the respondents have failed to satisfy their burden of demonstrating any actual reliance on the part of the companies that would demonstrate control." Affiliation Memo at 8. As we stated elsewhere in that same document:

> Many of the facts that respondents cite as demonstrating control and affiliation under subsection 771(33)(G) appear to be merely acts of cooperation that would take place between any two entities, affiliated or not affiliated, engaged in a business relationship, especially a business relationship that involves large sums of money, buyers with very specific needs, and an exporter who is somewhat inexperienced in its industry. Acts identified on the record of this case, such as providing specific guidance on product design and quality control, technical expertise concerning production, and other assistance with meeting the specific demands of important end-users such as {the U.S. retail customers}, provided by a U.S. importer seem in fact to be a natural result of a new, foreign supplier attempting to find business with large U.S. retailers. This is especially true when the importer is perhaps more sophisticated in its knowledge of the U.S. market and is in constant contact with the U.S. market. However, acts of cooperation that constitute a good business practice do not necessarily amount to being in a position "to exercise restraint or direction" over another person, as required by section 771(33)(G). These acts do not amount to control, but rather cooperative efforts that an importer and exporter in such a situation would undertake in order to improve their own business performances.

Id. at 6-7.

Regarding parties' arguments concerning our application of the law, we conclude that we did not err in the preliminary results. We recognize, as respondents note, that we must consider "modern business arrangements" in examining whether parties are affiliated. By referring to "modern business arrangements," the SAA is emphasizing that affiliation issues are not simply questions of stock ownership. Instead, the SAA notes that affiliation issues involve considering other ways in which one party might control another: "A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other." SAA at 838. We did consider these other means of control, and reached the conclusion that there is nothing atypical about this relationship that would suggest the importers have more control over their supplier than the typical buyer over the typical supplier. In fact, the Affiliation Memo provides a separate analysis of each of these different means mentioned in the SAA. See Affiliation Memo at 7-9.

We disagree with respondents that the mere potential for control is enough to conclude two parties are affiliated. Our statement in Manganese, referred to by respondents, was referring to situations where the mechanisms for control were already in place, but not yet being activated. We were not referring to the possibility that a relationship could plausibly change and lead to one party having control over another. We think this point is made clearer in the Proposed Regulations, also cited by respondent, where we stated that "section 771(33), which refers to a person being 'in a position to exercise restraint or direction,' properly focuses the Department on the ability to exercise 'control' rather than the actuality of control over specific decisions." Proposed Regulations, 61 FR at 55582. Thus, the person must already be in such a position.

In any case, whether the facts of this case are argued to be indicative of the potential for control, or actual control, we do not believe they indicate the degree of control or reliance necessary to conclude that the parties are affiliated. In this sense, we are not certain why respondents attempt to make this distinction, since they appear to be arguing that the facts indicate actual control.

We also disagree with respondents that we failed to consider whether Fay Candle is reliant upon the importers. As can be seen from the excerpted passages from the Affiliation Memo, we discussed reliance extensively in discussing section 771(33)(G) of the Act and control. We note here, however, that we agree with the distinction implied by Melamine Dinnerware, cited by the Petitioner, between de facto exclusivity and exclusivity based on control. Parties might engage in "exclusive" relationships because of their given situation at a point in time, but that does not mean that they are reliant upon one another, or bound to one another by the control of one over the other. For example, a new start-up producer might find that a single customer is able to consume its entire production capacity, and not have any need for additional customers at that time. It is worth mentioning here that many of the facts cited by respondents as evidence of control are subject to multiple interpretations. There simply is no evidence on the record of this case that compels a single interpretation – control – as opposed to alternative interpretations, such as good business practices.

Regarding respondents' contention that they are affiliated through Fay Candle's and the importers' joint control of the two Hong Kong companies, we conclude that this also does not

demonstrate that the importers and Fay Candle are affiliated. As we have stated previously, "the Department will not find affiliation on the basis of these factors {i.e., the factors listed in section 771(33) of the Act} unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." Oil Country Tubular Goods From Japan: Preliminary Results and Recission in Part of Antidumping Duty Administrative Review, 64 FR 48589, 48591 (Sept. 7, 1999). Thus, respondents are incorrect in arguing that section 771(33)(F) creates a bright line test, and that any two parties controlling a third party must therefore be found affiliated, regardless of what the third party does. In fact, the joint control over the third party must be significant and relevant to the question of whether one party controls the other. In this case, even disregarding possible inconsistencies on the record, at best, the two Hong Kong companies were involved in sales outside the United States after the POR. We cannot conclude that the importers' control over these two companies during the POR could have given them any leverage, or control, over Fay Candle. We cannot see how these two companies affected the relationship at all. They appear to have added nothing to the relationship beyond what was added by the importers themselves, namely assistance in making sales (after the POR). Moreover, arguably, Fay Candle might not even have control over the two companies. While the specific facts are proprietary, Fay Candle's involvement in the direction of these two companies is minor, especially in relation to such involvement by the importers. See Memorandum to Sally Gannon from Sebastian Wright, Final Analysis of Fay Candle, dated March 8, 2004 (Analysis Memo), for the proprietary facts related to this issue.

We cannot consider the Petitioner's information concerning what happened after the POR in making this determination, or, for that matter, the information we collected at verification concerning events after the POR. However, we can consider events taking place during or before the POR referred to by that information. In this case, the bankruptcy documents refer to the importers' practice of reducing exclusivity arrangements to writing. Presumably, this practice was in place during the POR. Thus, this fact reinforces the conclusion that if respondents had an exclusive relationship based on control, we would see evidence of it in writing. Therefore, we have continued to treat respondents as unaffiliated for these final results, and treated Fay Candle's sales to its importers as export price sales.

Comment 2: Application of Adverse Facts Available

The Petitioner argues that the Department properly applied adverse facts available (AFA) to the 97 companies that failed to respond to our questionnaires or were otherwise found to be ineligible for a separate rate in the Preliminary Results, in accordance with sections 776(a)(2)(A) and sections 776(b) of the Act. The Petitioner contends that the Department properly applied AFA because the companies failed to respond to questionnaires directed to them or otherwise failed to demonstrate that they were entitled to a separate rate. The Petitioner argues that the Department made factual findings about the participation of each of the companies in this review and identified the companies that did not respond to the Department's questionnaires or did not otherwise demonstrate they were entitled to a separate rate. See Preliminary Results.

The Petitioner argues that the Department properly applied an adverse inference in applying the facts available pursuant to section 776(b) of the Act because the entities failed to cooperate to the

best of their ability. Citing to Nippon Steel Corp. v. U.S., 337 F.3d 1373 (Fed. Cir. Aug. 8, 2003) (Nippon Steel), the Petitioner contends that the Department need not find an intent or willfulness on the part of the respondents in order to apply an adverse inference. The Petitioner notes that the information requested was solely within the control of the companies, and that none of the companies requested assistance or clarification from the Department about the requested information. According to the Petitioner, without the requested information, the Department could not calculate margins for these companies, nor determine if separate rates were appropriate.

The Petitioner argues that the Department properly exercised its discretion when it assigned the highest rate from any prior or current segment of the proceeding as the total AFA rate. The Petitioner notes that the Federal Circuit Court in Ta Chen Stainless Steel Pipe, Inc. v. United States, 2002 U.S.App. LEXIS 15421, 22-23 (Fed. Cir. 2002) affirmed the Department's broad exercise of discretion in the application of AFA to uncooperative respondents.

The Petitioner contends that the Department need not corroborate the dumping rate because the AFA rate was calculated from information obtained in the course of the review of Fay Candle. The Petitioner contends that section 776(c) requires the Department to corroborate the information used in calculating a dumping margin except when the Department relies on information obtained in the course of an investigation or review. The Petitioner notes that the information used to calculate the AFA rate was obtained from Fay Candle.

Finally, the Petitioner argues that the Department was correct to apply the AFA rate to the PRC entity. It cites Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Amended Final Results of Antidumping Duty Administrative Review, 66 FR 58115 (July 12, 2002), as an example of the Department's policy in this regard.

American Greetings Company (American), a U.S. importer of the subject merchandise, counters that the Department improperly applied AFA to the "PRC entity" which includes the 97 companies that failed to respond to our questionnaires or were otherwise found to be ineligible for a separate rate. American contends that the Department improperly exercised its discretion in applying AFA, instead of facts available. American notes that, according to section 776(b) of the Act, the use of AFA is appropriate where the Department finds that a respondent or interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the Department. American contends that changes in the Uruguay Round Agreements Act compel the Department to make factual findings on the record demonstrating how a party failed to act to the best of its ability before imposing any adverse inference.

American recognizes that the Department exercises its discretion in determining which of the facts available to use in calculating a dumping rate, but argues that the Court of International Trade's ruling in F. Lii de Cecco di Filipo Fara s. Marino S.p.A., 795 F. Supp. 1205, 1207 (Fed. Cir. 2000) (de Cecco) limits the Department's discretion to a rate that bears a relationship to the actual dumping rate. American argues that the margin of 95.74 percent bears no relation to the actual dumping margin. Rather, American contends, this rate is based upon a unique set of circumstances relevant to one responding company in the current review.

American contends that because this rate is much higher than the previous PRC entity dumping rate of 54.21 percent, the 95.74 percent rate must be the result of unique circumstances. American continues that the Department, in previous reviews, has departed from using higher rates because of unique circumstances. See Petroleum Wax Candles From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 68 FR 13264 (March 19, 2003) (Candles 2003). American contends that the rate imposed by the Department in the Preliminary Results is a punitive, aberrational margin which the Department should reject in its final results in favor of the prior PRC entity dumping margin of 54.21 percent.

J.C. Penney and Wal-Mart object to our application of Fay Candle's margin to non-cooperating respondents and to the PRC entity on the grounds that it is "contrary to law," "not based on substantial evidence," "discriminatory," and "unduly disruptive." They did not elaborate on those comments.

Department's Position

We have determined that it is appropriate to apply the highest rate from any segment of this proceeding to all of the companies determined by the Department to be non-responsive, including the PRC entity. Section 776(a) states that the application of facts available is warranted if (1) necessary information is not available on the record, or (2) an interested party or any other person withholds information that has been requested. Thus, there can be no question that the Department was correct in applying facts available to companies that did not respond to the Department's questionnaire as requested, or who did not provide any information of their own accord to warrant the determination that they deserved a separate rate. The necessary information to calculate a rate or to determine that a separate rate was warranted simply was not submitted to the Department.

Regarding the adverse inference made in applying facts available, we note that the Department informed all 97 parties of the consequences of not replying either to the Department's full questionnaire or at least the section necessary for a separate rate determination. The Department was willing to grant extensions if necessary and if requested. We did not deny any request for an extension made before a due date. Absent the parties providing information regarding their factors and sales and their entitlement to a separate rate, the Department cannot calculate accurate margins for these parties. Thus, we conclude that our determination to make an adverse inference under section 776(b) of the Act was appropriate, as each of these parties "has failed to cooperate by not acting to the best of its ability."

We agree with the Petitioner's interpretation of Nippon Steel that it is not necessary to find that the parties intentionally or willfully deceived or frustrated the Department's review. In that case, the Federal Circuit determined that "[t]he Court of International Trade's requirement that Commerce show that NSC made more than 'a simple mistake' or exercised a 'lack of due regard for its responsibilities in the investigation' is . . . not supported by the statute." Nippon Steel, 337 F.3d at 1383. Regardless, no one in this case has claimed that the 97 parties failed to

provide the necessary information by accident. As the Petitioner notes, this information was under their control, and they chose not to provide it.

We disagree with American that the Department incorrectly applied the AFA rate to the PRC entity. The PRC-entity rate, or PRC-wide rate, is only subject to change when the PRC entity is reviewed, which is the case when one of the companies under review fails to qualify for a separate rate. In this case, 97 companies failed to qualify for a separate rate by not submitting adequate information (for these final results, Qingdao Kingking is added to that list and will not receive a separate rate). Because they failed to qualify for a separate rate, they are deemed part of the PRC entity. Because they did not cooperate to the best of their ability, the PRC entity is deemed not to have cooperated to the best of its ability, and the AFA rate is applicable as the PRC- wide rate. See, e.g., Certain Cased Pencils from the People's Republic of China; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 69 FR 1965 (Jan. 13, 2004), and Honey from the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review, 68 FR 69988, 69991 (Dec. 16, 2003).

We also disagree with American that we selected the wrong rate to apply as the AFA rate. While we agree with American that we must, as stated by the Federal Circuit in de Cecco, select a rate that bears a relationship to the actual dumping rate, we believe we have done so in selecting the Fay Candle rate. There is no comparison to be made between the rate chosen in this case as the AFA rate, and the similar rate rejected as the AFA rate in Candles 2003. While the numbers are similar, the facts underlying these cases are entirely different. In the previous case, the highest rate available was rejected because it was derived from a new shipper review, based on two rates from a single sale, and the range between these two rates was unusually wide. Thus, we were unwilling to make such a significant departure from our previous AFA rate of only 54.21 percent.

In this case, however, Fay Candle has been producing and selling to the United States for four years, produces and sells a wide range of products, has been reviewed once before, and both the number of its sales and the quantity of each sale are large. Therefore, the weighted-average margin for its sales is not likely to be the result of "circumstances not germane to this analysis," to use the wording from Candles 2003; in fact, since the Fay Candle rate is a calculated rate based on numerous sales, it meets the criteria set forth in the de Cecco decision. Furthermore, because this rate is a calculated rate, we find that it must bear a closer relationship to the actual rate of dumping by those receiving the AFA and PRC-wide rates, than the 54.21 percent rate from the investigation, since that rate was not a calculated rate and since no exporters fully participated in the investigation.

Comment 3: Status of Li & Fung

Li & Fung argues that the sole basis for the preliminary decision that it acted as other than a buying agent during the POR is subject entry data provided by United States Customs and Border Protection ("CBP"). Li & Fung maintains that its inclusion in the CBP data is likely based on errors by customs brokers acting on behalf of the importers of record. Li & Fung states that this data does not list all of the transactions in which it was involved, and that it lists only

those transactions in which the company is identified incorrectly. It speculates that in the entry transactions summarized in the CBP data, the customs broker erred by creating the Manufacturer's ID based on Li & Fung's invoice, rather than the invoice of the producer or exporter. Li & Fung claims that it acted as a buying agent in hundreds of PRC candle transactions during the POR, and a few isolated instances where customs broker error led to the characterization of the company as an exporter or producer do not change its status as a buying agent during the POR.

Citing J.C. Penney Purchasing Corporation v. United States, 80 Cust. Ct. 84 (1978), Li & Fung argues that the significance of buying agent status is that the commission paid by the principal is not subject to antidumping duties, and that if CBP officials had made a determination that Li & Fung was not a buying agent, the importers of record (Li & Fung's principals) would have been required to pay duty on the commission remitted to Li & Fung. Li & Fung maintains that had that error occurred, the principals inevitably would have informed Li & Fung and sought reimbursement and/or damages. Li & Fung also notes that the CBP data suggest that many of the observations reflect what must be sample shipments, and thus, presumably not subject to the order. Li & Fung further notes certain ownership considerations which, in its view, explain other entries in the CBP data.

Li & Fung argues that a sale occurs when title and risk of loss pass, and that under these definitions, the exporter must be a principal party in interest. See J.L. Wood v. United States, 505 F.2d 1400, 1406 (CCPA 1974). The company maintains that it is not a principal party in interest and does not hold title to the candles at any time. Li & Fung holds that it just implements the instructions of its principal, the buyer-importer, and that it does not receive the primary monetary benefit from the transaction.

Finally, Li & Fung notes that as a practical matter, the status of the company as an agent, seller or exporter is of no consequence for the Department or Petitioner, and that all of the producers and exporters from whom the company's principals have purchased candles are still subject to the "all others" rate. Li & Fung contends that treating it as an agent will not change anything in terms of CBP assessment, and that the margin will not change. However, Li & Fung argues, the consequences for it and its principals could be significant because a federal agency will have concluded that it is not a buying agent. The company states that this conclusion could have an adverse impact on all of Li & Fung's principals, and not only on those who purchase candles from the PRC through Li & Fung.

The Petitioner argues that the Department properly refused to rescind the review with respect to Li & Fung, and that it gave Li & Fung ample opportunity to submit record evidence to explain the inconsistencies in the CBP data. Petitioner argues that Li & Fung can provide nothing more than "speculation" and unsupported presumptions that Li & Fung's broker sometimes received the entry summaries right, but when the information in the data was contrary to its interest, there must have been a broker error.

The Petitioner maintains that the shipment documents Li & Fung provided as evidence (of its buying agent status) in its February 6, 2003 submission do not show up on the CBP data, because

the shipping documents showed parties other than Li & Fung for these transactions, and thus the customs broker properly completed the CBP entry summary based on the information in the relevant shipping documents. The Petitioner contends that the CBP data lists Li & Fung because that is what the shipping documents actually showed for these imports. The Petitioner explains that there was no broker error anywhere because the shipping documents did not show Li & Fung acted only as a buyers agent for the shipments listed in the CBP data. Therefore, the Petitioner maintains, the broker correctly completed the entry summaries for all of the transactions in the CBP data and those transactions pertaining to the shipping documents submitted by Li & Fung. Furthermore, the Petitioner argues, the fact that Li & Fung may have acted as a buying agent with respect to the transactions in the shipping documents it submitted on the record does not mean it acted in that role for all shipments made during the POR, particularly those shipments listed in the CBP data.

In response to Li & Fung's argument, the Petitioner argues that it is common practice for a CBP entry to include multiple invoices for products sourced from different manufacturers, and that it is common for items in the same shipment to come from different manufacturers and/or countries of origin. Petitioner holds that it is such a common practice that Customs Directive 3550-061 provides specific instructions for preparation of the Entry Summary (CF 7501) when, as here, a single entry involves more than one manufacturer. Therefore, the Petitioner contends, the fact that a single entry might include items from different entities does not prove Li & Fung acted as a buying agent. In addition, the Petitioner argues that there is simply no evidence to show that any of the shipments listed in the CBP data were just samples, but even if true, that still would leave other shipments that remain unexplained. The Petitioner further maintains that Li & Fung, pursuant to 19 C.F.R. §351.301(b)(2), submitted untimely, unsolicited, new factual information with regard to ownership in connection with certain CBP data entries.

Finally, the Petitioner argues that if an error was made, clear procedures are provided to correct such errors, and that Li & Fung's argument concerning broker error is not credible because, once the discrepancies were brought to its attention by the Department in November 2002, Li & Fung should have fully investigated and taken action to correct the entry summaries. The Petitioner also rejects Li & Fung's argument that the CBP didn't include Li & Fung in the Customs data for the other candles transactions during the POR in which Li & Fung participated in, and thus confirmed Li & Fung's status as a buying agent. The Petitioner states that there is no evidence of any determination made by CBP that Li & Fung was a buying agent for any of the shipments listed in the CBP data.

Department's Position

We agree with the Petitioner. According to 19 C.F.R. § 351.213(d)(3):

> "No Shipments. 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."

The Department finds that Li & Fung has failed to demonstrate for these final results that the data which the Department obtained from CBP is incorrect and that the Department should, thus, rescind this review, in part, with respect to Li & Fung. In the preliminary results, the Department determined that Li & Fung's claim that it had no entries, exports, or sales of subject merchandise had not been substantiated, based on data obtained from CBP for the POR. See Preliminary Results. As such, Li & Fung bears the burden of proving to the Department that the CBP data is incorrect or is being misinterpreted. Li & Fung has failed to present material evidence to refute our decision in the Preliminary Results. While Li & Fung has provided an explanation in its briefs and some evidence in its February 6, 2003 submission which supports its claim that it had served as a buying agent, it provided no evidence that directly rebutted the information obtained from CBP. The Department's task in this administrative review is to determine whether or not Li & Fung has provided sufficient evidence that it did not sell or export subject merchandise during this POR such that the review should be rescinded, in part, with respect to Li & Fung.

Therefore, for the final results, because Li & Fung has not demonstrated that it did not sell or export the subject merchandise during the POR, the Department has not rescinded this review, in part, with respect to Li & Fung. The Department notes that most of our analysis relies on business proprietary information; therefore, for a full discussion, please see Memorandum to Barbara E. Tillman, through Sally C. Gannon, from Javier Barrientos; Petroleum Wax Candles from the People's Republic of China for the Period of August 1, 2001 through July 31, 2002: Status of Li & Fung (Trading) Ltd., for the Final Results, dated March 8, 2004 (Li & Fung Final Memo). We further note that we do not agree with the Petitioner that Li & Fung submitted new, untimely, and unsolicited information with respect to ownership issues. Id. Li & Fung simply provided a specific explanation for certain transactions, without attaching any new documentation to its brief, in response to the Departments request that Li & Fung explain its inclusion in the CBP data.

Comment 4: Paraffin Wax

The Petitioner contends that we should not use Fay Candle's data in calculating the surrogate value for paraffin wax because Fay Candle provides incomplete data and has discriminately chosen data from among the several chemical markets which provide it with a favorable rate. The Petitioner also contends that Fay Candle failed to submit data for two of the 52 weeks of the POR.

The Petitioner contends that the data set submitted by Fay Candle is inaccurate and should not be used to calculate the surrogate value for paraffin wax because it includes data for Indian imports which the Department's methodology rejects. The Petitioner states that the data for the Delhi market is flawed because it includes data for imports from Iran and the PRC. The Petitioner submits a page from Chemical Weekly dated September 9, 2003, which it argues indicates that the price data for paraffin from the Delhi market includes prices for paraffin imported from Iran and the PRC. The Petitioner points out that because the PRC is included in this data, the Department must reject the data derived from the Dehli market in its totality or must exclude the

data derived from PRC imports by calculating the range of prices exclusive of the PRC import prices.

The Petitioner points out that the Department has previously used the weekly series of domestic Indian prices limited to the Chennai market found in Chemical Weekly. See Notice of Final Results of the New Shipper Review for Petroleum Wax Candles from the People's Republic of China, 67 Fed. Reg. 41395 (June 18, 2002) (Shanghai New Star Im/Ex Co., Ltd.) (New Star). The Petitioner contends that the Department should continue this approach, which would result in a surrogate value of 34 Rs/kg.

Fay Candle contends that the September 9, 2003 issue of Chemical Weekly, which the Petitioner uses to support its argument that the Dehli data are flawed, is untimely, new factual information which the Department should reject pursuant to 19 C.F.R. section 351.301(c)(3)(ii). Fay Candle notes several deadlines for submitting new factual information: (1) under 19 C.F.R. section 351.301(b)(2) 140 days after the last day of the anniversary month; (2) under 19 C.F.R. section 351.301(c)(1) 10 days after another party's factual submission for rebuttal purposes; and (3) under 19 C.F.R. section 351.301(c)(3)(ii), 20 days after the publication of the preliminary results of an administrative review for surrogate value information. Fay Candle contends that the Petitioner has not submitted this new information within any of the above-described deadlines. Accordingly, Fay Candle concludes that the Department should reject the Petitioner's case brief in it entirety pursuant to 19 C.F.R. section 351.302(d)(1)(i).

Fay Candle cites the Final Determination of the Antidumping Duty Investigation of Barium Carbonate from the People's Republic of China, 68 Fed. Reg. 46577 (August 6, 2003) and accompanying Issues and Decision Memorandum at Comment 1 to support its contention that the Department prefers a larger, more representative and more contemporaneous sample of prices on which to base its calculation of surrogate value. Fay Candle argues that the Chemical Weekly prices are inherently suspect because the publication does not publish prices for actual transactions, but, instead, uses quotes obtained from "enquiries made by our correspondent." Accordingly, Fay Candle contends that the Department should capture as many observations as possible to minimize potential distortion.

In the alternative, Fay Candle notes that, should the Department decide to accept the information from the Petitioner, regardless of its timeliness, the Department should reject the Petitioner's claim that the data is flawed because it includes import prices from the PRC. Fay Candle contends that the prices published in Chemical Weekly for the Dehli market are not import prices, but, instead, are sales prices for domestic transactions, which may include imported paraffin wax. Fay Candle suggests that the Petitioner has mistaken the published prices for import prices when they are, in fact, prices for domestic sales, i.e., the price that a domestic buyer and a domestic seller at the Dehli market would pay for paraffin wax, including, but not limited to, imported paraffin wax.

Fay Candle further argues that the prices for imports from the PRC have been excluded from the data it previously submitted. Fay Candle notes that the domestic price which includes imports from the PRC has been deducted from the range of prices which Fay Candle submitted in its

Factor Value submission. Finally, Fay Candle submits the two weeks of data which Petitioner noted were missing from its Factor Value submission.

Department's Position

In the Preliminary Results, the Department used the average Indian price for paraffin wax derived from rates published in the Indian publication, Chemical Weekly, for the period August 2001 to July 2002. In our Preliminary Results, we stated that the Petitioner submitted part of this data in its July 30, 2003 surrogate value submission and that Kingking submitted part of this data in its August 1, 2003 surrogate value submission. See Memorandum from Mark Hoadley, Javier Barrientos, and Sebastian Wright through Sally Gannon to the File, Calculation of Surrogate Values for Use in Preliminary Results of the Administrative Review of Petroleum Wax Candles from the People's Republic of China, (September 2, 2003) (Preliminary Factor Values Memo). We also noted that, because the two parties reported somewhat different values using somewhat different Chemical Weekly information (31.32 Rs/kg and 34 Rs/kg, respectively), we averaged the two together for a value of 32.66 Rs/kg. We further noted that, because the Petitioner's and Kingking's Chemical Weekly price quotes were contemporaneous with the POR, we did not adjust for inflation; we did adjust to account for the Indian excise tax of 16 percent. See Preliminary Factor Values Memo.

We note at the outset that, in the Preliminary Factor Values Memo, we incorrectly identified the source of the data for the surrogate value of paraffin wax. We used the figure submitted by the Petitioner and the figure submitted by Fay Candle in calculating Fay's margin; we did not use Kingking's factor value data in calculating Fay's margin.

We disagree with Fay Candle and decline to reject the Petitioner's argument and the Chemical Weekly issue supporting its allegation. We find that the September 9, 2003 issue of Chemical Weekly is not new information; Fay Candle itself has submitted factual information on the record which indicates that the wax prices from the Delhi market contained in Chemical Weekly include imports from the PRC and Iran. See Fay Candle's Factor Value submission, dated August 1, 2003, (exhibit 1 Chemical Weekly, dated April 16, 2002). Because Fay Candle has previously submitted the same factual information on the record of this matter, we cannot agree with Fay Candle's contention that the Petitioner's submission is "new" information. Therefore, we find that the September 9, 2003 issue of Chemical Weekly is not "new" information which was untimely filed by the Petitioner.

We have examined the information in the September 9 issue of Chemical Weekly and based on our analysis we find that the data from the Delhi market should be excluded because the published prices include data for imports from the PRC. The Department's methodology dictates that we exclude prices from non-market economies. The PRC remains a non-market economy. See Preliminary Results. In accordance with our determination in New Star, we will use the data from the Chennai market and exclude data from the Delhi market. We do not agree with Fay Candle's argument that the Chemical Weekly prices for paraffin wax do not include import prices. We note that the language cited by both the Petitioner and Fay Candle mentions the source of the country from which the paraffin wax was imported. The range listed includes the

range for the PRC. We find that the price for the PRC has not been eliminated from the data because it is included within the overall price range. Accordingly, the Department finds that the data set from the Delhi market includes import data and should be excluded from the data set used by the Department for these final results.

Comment 5: Other Factors of Production

The Petitioner and Fay Candle dispute the Department's HTS classification of the following factors of production: Styrofoam, wicks, color boxes, PDQs, cardboard, sidekicks, mastercase, banding strap, metal plate, metal star, metal stand, Masonite board, and scrap packing material. Petitioner and Fay Candle also dispute the Department's methodology, computation, or sources of data for the following: Polyresin plate, VYBAR103, coal, packing costs, labor rate, scrap wax, scrap silicone, Masonite board, Indian exchange rate, electricity, truck freight, and packing overhead.

In support of its contentions regarding several of the disputed factors of production, Fay Candle alleges that the Petitioner has submitted untimely, new factual information in its case brief. Accordingly, Fay Candle contends that the Department should strike the Petitioner's brief in its entirety pursuant to 19 C.F.R. section 351.302(d)(1)(i), which provides that "Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding: (i) Untimely filed information, written argument or other materials . . . ." Fay Candle contends that the Petitioner improperly introduced new information to support its arguments regarding electricity, truck freight, Styrofoam, colorboxes, PDQs, sidekick displays, and cardboard. Fay Candle does not contend that the Petitioner submitted untimely, new factual information to support its position with respect to wicks, mastercase, banding strap, metal plate, metal star, metal stand, scrap packing material, and Masonite board, Polyresin plate, VYBAR103, coal, packing costs, labor rate, scrap wax, scrap silicone, Masonite board, Indian exchange rate, and packing overhead.

Department's Position

In the Preliminary Results, the Department calculated Normal Value (NV) based on our factors-of-production methodology in accordance with section 773(c) of the Act. Because the PRC is a NME, we assigned surrogate values to the factors of production using publicly available information from India. See Memorandum from Sebastian Wright through Sally Gannon to the File, Regarding Factor Values Memorandum in the Administrative Review of Petroleum Wax Candles from the People's Republic of China, dated September 2, 2003 (Preliminary Factor Values Memo). Except as otherwise noted in the Preliminary Results, we assigned classifications pursuant to the Harmonized Tariff Schedule of the United States, Annotated for Statistical Reporting Purposes (2004) (HTS) to raw material inputs and packing materials to obtain the appropriate surrogate values from the World Trade Atlas for use in our dumping margin calculations. Id.

Because of the large number of disputed classifications, we have decided to place our in-depth analysis of the parties arguments regarding the proper classification of the factors of production

in the Memorandum from Mark Hoadley and Sebastian Wright through Sally Gannon to the File, Regarding Factor Values in the Administrative Review of Petroleum Wax Candles from the People's Republic of China, dated March 8, 2004 (Final Factor Values Memo). Below we have listed each of the disputed factors and the determination reached by the Department for each factor.

We have also determined for these final results that the information submitted by Petitioner is not untimely new factual information pursuant to the Department's regulations. For an in-depth analysis of the timeliness dispute see the Final Factor Values Memo.

Paraffin Wax: The Department has determined to use the data set from Chemical Weekly which does not include the data for imports from the PRC to obtain a surrogate value for paraffin wax.

Banding Strap: The Department has decided to classify banding strap under HTS heading 3920.2000, "other plates, sheets film, foil an strip of plastics . . . . of polymers of propylene."

Metal Plate, Metal Star, and Metal Stand: The Department has classified these three inputs under HTS heading 8007.0010, "{o}ther articles of tin: articles not elsewhere specified or included of a type used for household, table or kitchen use; toilet and sanitary wares; all the foregoing not coated or plated with precious metal."

Masonite Board: The Department has classified Masonite board under HTS heading 4411.0000, "fiberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances."

Styrofoam: The Department has classified Styrofoam under HTS heading 3903.1100, "{p}olymers of styrene in primary forms: Expandable."

Wicks: The Department has classified wicks under HTS heading 5908.0000, "{t}extile wicks, woven, plaited or knitted, for lamps, stoves, lighters, candles or the like; incandescent gas mantles and tubular knitted gas mantle fabric therefore, whether or not impregnated."

Color Boxes: The Department has classified color boxes under HTS heading 4819.2000, "{o}ther folding cartons, boxes and cases of non-corrugated paper or paperboard."

PDQs and Sidekick Displays: The Department has classified PDQs and sidekick displays under HTS heading 4819.1000, "cartons, boxes and cases of corrugated paper or paperboard."

Cardboard and Mastercase: The Department has classified cardboard and mastercase under HTS heading 4819.1000, "cartons, boxes and cases of corrugated paper or paperboard."

Polyresin Plate: The Department will continue to exclude "aberrational" data from the Indian import statistics used in our calculations for this input.

Scrap Wax: In accordance with the Preliminary Results, the Department will continue to use the scrap wax sold during the POR in order to calculate the adjustment to NV. However, the Department will limit the adjustment to NV to the amount of scrap wax produced during the POR. We also decline to use the Chemical Weekly data for residue wax as the surrogate value for scrap wax.

Scrap Silicone: The Department has determined not to permit an adjustment to NV for the sale of scrap silicone because the Department considers silicone a part of overhead.

Scrap Packing: The Department has determined to average all of the packing material inputs, except for wood pallets, together to calculate a surrogate value for scrap packing material.

Electricity: The Department has updated the data from International Energy Agency's (IEA's) Energy Prices and Taxes as the source for the surrogate value for this input. The Department has also decided to use the electricity industry-specific inflator to adjust the surrogate value to account for inflation through the POR.

Inland Freight Distance for Paraffin Wax: In accordance with the Sigma rule, the Department has determined not to cap the inland freight distance for paraffin wax. The Department has determined that the data for this input does not include import statistics and therefore should not be capped.

Truck Freight Rate: The Department has decided to use the truck freight rate data from Chemical Weekly because this data provides a more accurate surrogate value than the data from Financial Express used in the Preliminary Results.

VYBAR103 Additive: The Department has corrected the ministerial error in the calculation of the surrogate value for this input.

Exchange Rate: The Department has corrected the ministerial error in the calculation of the average Indian exchange rate.

Packing Overhead Cost: The Department has determined not to calculate an adjustment to NV for packing overhead cost.

Coal: The Department has determined to continue to use Indian import statistics to calculate a surrogate value for coal.

Labor Rate: The Department has used updated data from the Department's website to calculate a surrogate value for the PRC labor rate. See Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in September 2003 and updated in February 2004, http://www.ia.ita.doc.gov/wages/01wages/01wages.html.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final weighted-average dumping margins and the final results of this administrative review in the Federal Register.

_____ _____

Agree Disagree

_____

James J. Jochum
Assistant Secretary
for Import Administration

_____

Date