69 FR 51989, August 24, 2004

A-557-805
Changed Circ. Review
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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary
for Import Administration

DATE: August 11, 2004

SUBJECT: Issues and Decision Memorandum for the Changed Circumstances Review of Extruded Rubber Thread from Malaysia

Summary

We have analyzed the comments of interested parties in the changed circumstances review of extruded rubber thread from Malaysia. The sole issue raised by the parties pertains to the proper effective date of the revocation of the antidumping duty order in this case. We recommend that you approve the position we have developed in the "Discussion of the Issue" section of this memorandum.

Background

We conducted a review of the antidumping duty order on extruded rubber thread from Malaysia for the period October 1, 1995, through September 30, 1996. After the final results of this review were published, Heveafil Sdn. Bhd., Filmax Sdn. Bhd., and Heveafil USA Inc. (collectively "Heveafil"), a respondent, sued the Department. The 1995-1996 segment of this proceeding is still in litigation and, therefore, Heveafil's entries for this period have not been liquidated to date.

On January 23, 2004, Heveafil requested that the Department conduct a changed circumstances review regarding extruded rubber thread from Malaysia and revoke the antidumping duty order on the basis that the sole U.S. manufacturer, North American Rubber Thread Co., Inc. (North American) filed for Chapter 7 bankruptcy and ceased all business operations.

On March 9, 2004, the Department published in the Federal Register a notice of initiation and preliminary results of changed circumstances review for extruded rubber thread from Malaysia. See Notice of Initiation of Changed Circumstances Review of the Antidumping Duty Order, Preliminary

Results of Changed Circumstances Review, and Intent To Revoke Antidumping Duty Order, 69 FR 10980 (Mar. 9, 2004) (Preliminary Results). In the Preliminary Results, we stated our intention to revoke the order on extruded rubber thread from Malaysia and liquidate entries without regard to antidumping duties on or after October 1, 2003.

On March 24, 2004, Heveafil submitted a case brief. On May 12, 2004, the trustee in bankruptcy for North American, the domestic producer of the foreign like product and an interested party in this proceeding, submitted a rebuttal brief. We received no other comments from interested parties on the Department's preliminary results.

Discussion of the Issue

Comment 1*: Whether Revocation Applies to All Unliquidated Entries*

There are currently entries related to one period of review (POR) (i.e., 1995-1996) in this proceeding which have not been liquidated due to pending litigation.[1] In addition, there are also unliquidated entries made on or after October 1, 2003. Heveafil argues that the Department should revoke the order on extruded rubber thread from Malaysia and instruct U.S. Customs and Border Protection (CBP) to liquidate all unliquidated entries of extruded rubber thread from Malaysia without regard to antidumping duties, including those entries related to the 1995-1996 POR, because the domestic industry for extruded rubber thread no longer exists.

As support for its position, Heveafil cites section 751(d)(3) of the Tariff Act of 1930, as amended (the Act), which states that the Department's decision to revoke an order "shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority." According to Heveafil, section 351.222(g)(4) of the Department's regulations gives the Department the authority to revoke an order and liquidate all unliquidated entries. Heveafil notes that in Porcelain-on-Steel Cookware from Mexico: Final Results of Changed Circumstances Antidumping Duty Administrative Review, Revocation of the Antidumping Duty Order, and Rescission of Administrative Reviews, 67 FR 19553, 19554 (Apr. 22, 2002) (POS Cookware), the Department retroactively applied revocation of the antidumping order to a date prior to the most recent period for which an administrative review had been completed because the domestic industry expressed a lack of interest in the relief provided by the order. Heveafil argues that the situation in the instant review is similar to that in POS Cookware

[1] See Heveafil Sdn. Bhd. Et al. V. United States, 58 Fed. Appx. 843 (Mar. 17, 2003). See also the U.S. Court of Appeals for the Federal Circuit's Mandate of May 12, 2003, affirming in part, and remanding and reversing in part, the Opinion and Judgement of the Court of International Trade in Heveafil Sdn. Bhd. Et al. V. United States, No. 98-04-00908, 2001 WL 194986, Slip Op. 01-22 (CIT Feb. 27, 2001).

because a lack of a domestic industry here is equivalent to an expression of no interest by the domestic industry. Consequently, Heveafil asserts that the Department should set the effective date of revocation to cover all unliquidated entries since no relief can be provided absent a domestic industry.

According to Heveafil, the intent of the antidumping law is twofold: 1) to ensure that imported goods sold in the United States at less than fair value do not injure U.S. producers (see, e.g., Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983)); and 2) to impose duties sufficient to equalize competitive conditions between the exporter and the affected domestic industry (see, e.g., C.J. Tower & Sons v. United States, 71 F.2d 438, 445 (CCPA 1934)); and Chaparral Steel Co. v. United States, 901 F.2d. 1097, 1103-04 (Fed. Cir. 1990)). Heveafil contends that the Department acknowledged the absence of a domestic injury in its preliminary results when it stated that "the continued relief provided by the order with respect to extruded rubber thread from Malaysia is no longer of interest to domestic interested parties." See Preliminary Results, 69 FR at 10981. Heveafil alleges that the Department, if it does not instruct CBP to liquidate all unliquidated entries, would be providing relief that is no longer necessary or of interest to a non-existent domestic industry.

According to Heveafil, the Department has itself acknowledged that it lacks the authority to continue to assess duties where current information does not support an affirmative injury finding. As support for this position, Heveafil cites Fabricated Automotive Glass From Mexico; Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order, 56 FR 14234, 14234-14235 (Apr. 8, 1991) (Automotive Glass Final), where the Department: 1) initiated a changed circumstances review to examine whether injury to the domestic industry existed; and 2) relied on information provided by the International Trade Commission (ITC) in making its determination. See Automotive Glass Final, 56 FR at 14236; and Fabricated Automotive Glass From Mexico; Initiation and Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review and Intent To Revoke Countervailing Duty Order, 55 FR 32672, 32673 (Aug. 10, 1990) (Automotive Glass Prelim). Heveafil comments that the order in the automotive glass case was issued under section 303 of the Act, which did not require a finding that the subsidized imports were injuring the domestic industry prior to the imposition of countervailing duties. According to Heveafil, once Mexico acceded to the General Agreement on Tariffs and Trade (GATT), the Department determined that an injury test: 1) was necessary in order to continue the assessment of any additional duties; 2) was effective back to the date of Mexico's accession to the GATT; and 3) applied to all unliquidated entries after that date. See Automotive Glass Final, 56 FR at 14234-14235. Heveafil further alleges that in Automotive Glass Final, the Department found it appropriate to apply the injury test retroactively, because both the general countervailing duty rule in Article VI (6)(a) of the GATT and section 303(a)(2) of the Act (i.e., the U.S. countervailing duty law) require a finding of injury prior to assessment of duties.[2] Consequently, Heveafil contends that the determination in

[2] According to Heveafil, the terms "levy" and "imposed" used in the GATT and the Act, respectively, have the same meaning: the definitive or final legal assessment or collection of duties. See

Automotive Glass Final shows that once the Department finds that there is no injury to a domestic industry, it no longer has the authority to assess antidumping duties.[3]

Furthermore, Heveafil contends that assessing duties in the absence of a domestic industry is contrary to recent changes to the antidumping law under the "Continued Dumping And Subsidy Offset Act of 2000," 19 U.S.C. section 1675c (2000) (Byrd Amendment). Heveafil notes that this provision modified the antidumping statute to provide that duties collected under antidumping and countervailing duty orders would be held in accounts for distribution to "affected domestic producers."[4] According to Heveafil, the Byrd Amendment specifically: 1) defines "affected domestic producers" as producers remaining in operation; and 2) explains that a party cannot be an "affected domestic producer" when the product is no longer produced. See 19 CFR 159.61(b)(2)(i). Therefore, Heveafil asserts that, because the Byrd Amendment applies to antidumping duty assessments made on or after October 1, 2000, it would consequently apply to any duties to be assessed in this case. Heveafil further remarks that the courts have found that the ultimate intention of the Byrd Amendment is to strengthen the remedial purpose of the antidumping duty law. See Huaiyin Foreign Trade Corp. v. United States, 322 F. 3d 1369 (Fed. Cir. 2003) (Huaiyin v. United States).[5] Specifically, Heveafil asserts that in Huaiyin v. United States, the Federal Circuit determined that by paying collected antidumping duties to individuals harmed by anticompetitive conduct, the "duties now bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behaviors." See Huaiyin v. United States, 322 F.3d at 1380 (Fed. Cir. 2003). According to Heveafil, the Court further noted that congressional findings in support of the Byrd Amendment "underscored the statute's continued focus on assisting domestic producers and leveling competitive conditions through the

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Automotive Glass Final, 56 FR at 14234; and Certain Fasteners From India; Final Results of Administrative Review and Partial Revocation of Countervailing Duty Order, 47 FR 44129, 44130 (Oct. 6, 1982).

[3] Heveafil further notes that the Department employed the same or similar approaches in the following cases: Lime From Mexico; Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order, 54 FR 49324, 49325 (Nov. 30, 1989) (Lime From Mexico); Oil Country Tubular Goods From Argentina and Cold-Rolled Carbon Steel Flat Products From Argentina; Termination of Administrative Reviews, 62 FR 24639 (May 6, 1997) (OCTG and Cold-Rolled Products from Argentina); and Leather From Argentina, Wool From Argentina, Oil Country Tubular Goods From Argentina, and Carbon Steel Cold-Rolled Flat Products From Argentina; Final Results of Changed Circumstances Countervailing Duty Reviews, 62 FR 41361, 41362 (Aug. 1, 1997) (Leather, Wool, OCTG and Cold-Rolled Products from Argentina).

[4] See Pub. L. No. 106-387, 114 Stat. 1549, 1549A72-1549A73 (Byrd Amendment).

[5] See also Bergeron's Seafood v. United States, No. 03-00448, Slip op. 04-12, p. 2 (CIT 2004) citing Candle Corp. of America and Blyth Inc. v. USITC, 259 F. Supp. 1349, 1351 (2003).

negation of the unfair advantage gained by the price difference of the imported products." See Huaiyin v. United States, 322 F.3d at 1380-1381 (Fed. Cir. 2003).

Heveafil argues that the assessment of antidumping duties in the absence of a domestic industry also violates the principles set forth in the World Trade Organization's (WTO's) Antidumping Agreement on the Implementation of Article VI of the GATT (the Agreement). Specifically, Heveafil remarks that Article 11.2 of the Agreement provides for the immediate termination of duties upon a finding that they are no longer warranted, while Articles 1 and 9.2 establish the necessity of injury to collect them. Therefore, Heveafil asserts that the Department's preliminary results are unlawful because U.S. law must be interpreted in a manner that is consistent with the United States' international obligations. In support of this assertion, Heveafil cites Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) and Federal Mogul Corp. v. United States, 63 F.3d 1572 (Fed. Cir. 1995). Heveafil further notes that the Statement of Administrative Action (SAA) reinforces this principle. See The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. 103-316, Vol. 1, 103d Cong. 2d Sess., Vol I at 669, reprinted in 1994 USCCAN 4040.

Finally, Heveafil contends that the continued assessment of antidumping duties in the instant case would have the effect of harming another domestic industry. Specifically, Heveafil asserts that U.S. importers of the subject merchandise and the U.S. textile industry (i.e., the downstream consuming industry) would not be able to absorb the higher prices of extruded rubber thread that would result from the assessment of duties on unliquidated entries. Heveafil alleges that the Department, if it were to liquidate entries without regard to antidumping duties on or after October 1, 2003, as stated in the preliminary results, would force the importer into bankruptcy and create a supply shortage for the U.S. textile industry. Further, Heveafil speculates that U.S. textile manufacturers, who have historically relied on importers as their primary source for extruded rubber thread, would have difficulty locating an alternative rubber thread supply in the volumes necessary to maintain current production levels. Consequently, Heveafil implies that U.S. textile manufacturers would be forced to discontinue certain operations and instead source some finished products from foreign producers. According to Heveafil, this scenario would gravely injure an existing domestic industry and its workers.

Therefore, Heveafil argues that the Department should instruct CBP to liquidate without regard to antidumping duties all unliquidated entries of extruded rubber thread, consistent with the Department's practice, the purpose of the antidumping law, and the United States' obligations pursuant to the Agreement.

The petitioner in this case, North American, supports the Department's preliminary decision to revoke the order effective as of October 1, 2003. According to North American, relieving Heveafil of its obligation to pay antidumping duties assessed in prior reviews would be contrary to the antidumping statute. North American notes that the unliquidated entries at issue were dumped at a rate of 54.31 percent and Heveafil's argument here represents nothing more than an attempt to avoid the consequences of its dumping in violation of antidumping law.

North American asserts that, under section 782(h)(2) of the Act, the Department may revoke an antidumping duty order only if substantially all of the producers of the domestic like product have expressed a lack of interest in the order. North American maintains that it accounted for substantially all of the domestic production of extruded rubber thread when duties were assessed and it does not support the revocation of the order in this case prior to October 1, 2003. North American disagrees with Heveafil's allegation that the lack of current domestic production equates to a lack of interest in maintaining the order to cover past unliquidated entries. North American contends that this argument ignores that the unliquidated entries at issue are subject to duties because of the final results of an administrative review in which North American had production and was an active participant.

In any event, North American disagrees that the Department does not have the authority to assess duties on the entries in question. North American cites section 751(a)(2)(C) of the Act, which provides that the administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the review. Moreover, North American asserts that an importer becomes liable for all duties determined by the Department in the final results of an administrative review, and CBP merely collects the antidumping duties based on the Department's instructions (see Mitsubishi Electronics, Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994)).

North American asserts that, because it was a domestic producer and an active participant in all of the completed administrative reviews in this proceeding, it has an interest to ensure that the relief provided by the assessment of antidumping duties is maintained. According to North American, the Department recently ruled that a petitioner that ceases operation is still entitled to relief for duties imposed in the final results of a completed administrative review. See Coumarin from the People's Republic of China; Preliminary Results of Changed Circumstances and Intent To Revoke the Antidumping Duty Order, 69 FR 3543, 3544 (Jan. 26, 2004) (Coumarin from the PRC), unchanged in the final results.[6] North American remarks that in Coumarin from the PRC, the respondent argued that the effective revocation date in the changed circumstances review should be the day after the petitioner ceased operations. However, North American notes that the Department determined that the petitioner had an interest in maintaining the relief granted in the last completed administrative review, which included a period of several months after which the petitioner had ceased operations.

North American maintains that it is the Department's normal practice to revoke an antidumping duty order so that the effective date only covers unliquidated entries that have not been subject to a completed administrative review. See Coumarin from the PRC, 69 FR at 3544; Notice of Final Results of Antidumping Duty Changed Circumstances Review, and Determination to Revoke Order in Part: Certain Cased Pencils from the People's Republic of China, 68 FR 62428, 62429 (Nov. 4, 2003)

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[6] See Notice of Final Results of Changed Circumstances Review and Revocation of the Antidumping Order: Coumarin from the People's Republic of China, 69 FR 24122 (May 3, 2004) (Coumarin from the PRC Final Results).

(Pencils from the PRC); Fresh Atlantic Salmon from Chile: Final Results of Antidumping Duty Changed Circumstances Review, Revocation of Order, and Rescission of Administrative Review, 68 FR 44043, 44044 (Jul. 25, 2003) (Salmon from Chile); Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order, 68 FR 19970, 19973 (Apr. 23, 2003) (Carbon Steel Flat Products from Japan); and Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review, and Determination To Revoke the Order in Part: Certain Cut-to-Length Carbon-Quality Steel Plate Products From Japan, 68 FR 9975, 9977 (Mar. 3, 2003) (Carbon-Quality Steel Plate from Japan). Further, North American contends that Heveafil's reliance on POS Cookware is misplaced, because the petitioner in that case expressly stated its lack of interest in the relief provided by the antidumping duties assessed in several completed administrative reviews, unlike here where the petitioner has expressed interest in maintaining relief.

North American disagrees with Heveafil's assertion that Heveafil should be relieved of the antidumping duties assessed against it because there is no longer a domestic industry that could be injured by imported goods sold in the United States at less than fair value. Rather, North American contends that the Court has held that the purpose of the antidumping statute is to offset the unfair competitive advantage realized by foreign firms that sell products in the United States at less than fair value. In support of this assertion, North American cites Tung Mung Dev. v. United States, 219 F. Supp. 2d 1333, 1340 (CIT 2002). According to North American, Heveafil's argument ignores the retroactive nature of the antidumping duty statute set forth in 19 CFR 351.212(a). North American asserts that any duties which were assessed in prior completed administrative reviews were intended to remedy the injurious behavior of Heveafil during those review periods. Therefore, North American remarks that the continued production of the domestic industry is irrelevant to the issue under consideration. North American argues that granting Heveafil's request for revocation of the antidumping duty order with respect to all unliquidated entries would reward it for the very dumping that drove North American out of business. Consequently, North American asserts that the Department should issue final results of this changed circumstances review consistent with its preliminary results and liquidate without regard to antidumping duties only those entries made on or after October 1, 2003.

Department's Position

Pursuant to section 782(h)(2) of the Act, the Department may revoke an antidumping or countervailing duty order based on a review under section 751(b) of the Act (i.e., a changed circumstances review). Section 751(b)(1) of the Act requires a changed circumstances review to be conducted upon receipt of a request which shows changed circumstances sufficient to warrant a review. Section 351.222(g)(1) of the Department's regulations provides that:

> The Secretary may revoke an order, in whole or in part, or terminate a suspended investigation if the Secretary concludes that:

(i) Producers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) or suspended investigation pertains have expressed a lack of interest in the order, in whole or in part, or suspended investigation (*see* section 782(h) of the Act); or

(ii) Other changed circumstances sufficient to warrant revocation exist.

The parties in this case agree to revoke the antidumping order on extruded rubber thread from Malaysia; however, the effective date of revocation is in dispute. Heveafil's argument hinges on the absence of a domestic extruded rubber thread industry. However, as North American correctly notes, North American was an active domestic producer at the time duties were assessed on the unliquidated entries at issue and it has expressed an interest in the collection of duties on those entries. For that reason, we disagree with Heveafil that Automotive Glass Final applies here.

Rather, we find that the applicable precedent is set forth in Coumarin from the PRC Final Results, where the Department stated:

> The Department does not find the revocation dates proposed by Berjé and H. Reynaud to be appropriate for purposes of revoking the antidumping order on coumarin from the PRC. It is the Department's practice to revoke an antidumping duty order so that the effective date of revocation covers entries that have not been subject to a completed administrative review. See e.g., Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany: Notice of Final Results of Changed Circumstances Review, Revocation of the Antidumping Duty Order, and Rescission of Administrative Reviews, 67 FR 19551 (April 22, 2002). If an administrative review was not requested, the Department's practice is to revoke the order after the most recent period for which the Department has issued assessment instructions to U.S. Customs and Border Protection. See, e.g. Certain Cut-to Length Carbon-Quality Steel Plate Products from Japan: Final Results of Changed Circumstances Antidumping Duty Administrative Review, and Determination to Revoke the Order in Part, 68 FR 9975 (March 3, 2003) (CTL Plate from Japan).

See Coumarin from the PRC Final Results and the accompanying Issues and Decision Memorandum at Comment 1. See also Pencils from the PRC, 68 FR at 62429; Salmon from Chile, 68 FR at 44044; Carbon Steel Flat Products from Japan, 68 FR at 19973; Carbon-Quality Steel Plate from Japan, 68 FR at 9977, and Notice of Initiation and Preliminary Results of Changed Circumstances Review and Intent to Revoke the Antidumping Order: Bulk Aspirin from the People's Republic of China, 69 FR 35286, 35287 (June 24, 2004).

In the instant proceeding, Heveafil requested a changed circumstances review because North American had ceased production, similar to the facts present in Coumarin from the PRC. Further, like the

petitioner there, North American has stated that it supports the Department's intention of revoking the order as of the first day of the most recent period of administrative review, for which a final determination has not been issued. Therefore, we find that it is appropriate to follow our normal practice, as stated in Coumarin from the PRC and the Preliminary Results, and liquidate entries made on or after October 1, 2003, without regard to antidumping duties.

We similarly disagree with Heveafil that POS Cookware applies here. In that case, the domestic industry itself requested revocation of the order, stating that it no longer had an interest in the relief provided by it, which warranted revocation of the order in accordance with section 782(h)(2) of the Act. See POS Cookware, 67 FR at 19554. In contrast, North American opposes revocation of the antidumping order on extruded rubber thread retroactive to a time period in which it maintained business operations.

Furthermore, we disagree with Heveafil's argument that the absence of an active domestic industry negates the Department's authority to assess antidumping duties pursuant to completed reviews. As noted by North American, the Department addressed this issue in Coumarin from the PRC, 69 FR at 3544,[7] and reached a similar result.

While we agree with Heveafil that Congress passed the Byrd Amendment in order to distribute duties to affected domestic producers, we disagree that this law was intended to prevent the Department from collecting duties assessed pursuant to an administrative review in which the domestic industry expressed an active interest. We also note that, in the instant case, antidumping duties were assessed on the unliquidated entries at issue, i.e., entries subject to the 1995-1996 segment of this proceeding, when the Department published its final results for that POR. Consequently, the Department's authority to "assess" antidumping duties on those entries is not at issue in this changed circumstances review.

Finally, regarding Heveafil's assertion that the collection of antidumping duties on all unliquidated entries of extruded rubber thread from Malaysia would have a harmful effect on a downstream domestic industry, we note that the purpose of an antidumping order is to remedy unfair trade practices and provide relief to the domestic industry. It is contrary to the requirements of 19 CFR 351.222(g)(1) to revoke an order if the affected domestic industry expresses interest in it. The domestic industry is entitled to relief under law as long as there is an order in place.

Consequently, we agree with North American that it is appropriate to revoke the antidumping order effective as of October 1, 2003, and we have done so here.

Recommendation

[7] This was unchanged in Coumarin from the PRC Final Results.

Based on our analysis of the comments received, we recommend revoking the antidumping duty order on extruded rubber thread from Malaysia as of October 1, 2003, as stated in our Preliminary Results. If this recommendation is accepted, we will publish the final results of this changed circumstances review and revocation of the antidumping order on extruded rubber thread from Malaysia in the Federal Register.

Agree _____ Disagree _____

_____
James J. Jochum
Assistant Secretary
for Import Administration

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(Date)