

Import Administration Policy Bulletin

Number: 03.2

Topic: Combination Rates in New Shipper Reviews

Approved: _____

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This policy bulletin explains a recent change in practice regarding new shipper reviews: limiting the bonding option and post-review cash deposit rate to subject merchandise produced and exported by the particular producer/exporter combination that qualified for the review, as opposed to all merchandise shipped by the exporter.

Background

Article 9.5 of the WTO Antidumping Agreement⁽¹⁾ establishes the right to an expedited review to determine individual dumping margins for exporters or producers that did not export subject merchandise during the initial period of investigation (POI) and that are not affiliated with companies subject to antidumping duties on the subject merchandise. Antidumping duties may not be levied on imports from such exporters or producers while the "new shipper" review is conducted; however, investigating authorities may withhold appraisement and/or request guarantees to ensure that, should the review result in a determination of dumping, antidumping duties can be levied retroactively to the date of the initiation of the review.⁽²⁾

Section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act), implements this provision by providing for expedited reviews upon request from entities establishing that: (1) they did not export subject merchandise to the United States during the POI; and (2) they are not affiliated with any company that exported subject merchandise to the United States during the POI.⁽³⁾ A company that meets these requirements gets the benefits of (1) a bond or security allowed, at the option of the importer, in *lieu* of a cash deposit on imports while the review is being conducted;⁽⁴⁾ (2) an accelerated review schedule;⁽⁵⁾ and (3) an individual dumping margin or countervailing duty rate at the completion of the review.⁽⁶⁾ As with regular administrative reviews, the results of new shipper reviews serve as the basis for assessment for merchandise entered during the review period and for a prospective cash deposit rate.

Neither the AD Agreement nor the Act provides guidance on applying the new shipper provisions where the exporter and the producer are different entities. In the AD Agreement and the U.S. statute, the term "exporters or producers" is used generically to describe entities covered by new shipper reviews without specifying the treatment of non-producing exporters. Moreover,

the statutory definition of the term "exporter or producer" - "the exporter of the subject merchandise, the producer of the subject merchandise, or both, where appropriate"⁽⁷⁾ - does not shed light on the application of the new shipper provisions where the exporter is not the producer. In the absence of clear statutory guidance, our practice in such circumstances has until recently been to apply the bonding option and new shipper cash deposit rate to all shipments of merchandise by an exporter that qualifies as a new shipper, even where the producer of such merchandise was not involved in the shipment(s) covered by the new shipper review request and does not participate in the review.

Based on our experience in conducting these reviews, there are concerns that the overly broad application of the bonding privilege and new shipper cash deposit rate diminishes the discipline of an order, particularly where other producers export through the new shipper to take advantage of benefits intended to apply solely to parties involved in the requested new shipper review. Once a new shipper review is initiated, and even after it is concluded, an exporter designated as a new shipper may become a conduit for exports from producers not involved in the new shipper review, as such producers would typically find it financially advantageous to channel their merchandise through the new shipper.

The appropriate response to these concerns is to ensure that the benefits of new shipper reviews, as described above, apply only with respect to merchandise produced and exported by parties who have met all requirements for the initiation of the review, who successfully participate in the review, and whose shipments form the basis of the "new shipper" rate established therein. The Department's regulations, which set forth the requirements that must be met by such exporters and producers, support this change in practice.

- Section 351.214(b)(2)(i) requires that, where the person requesting the review is both the exporter and producer of the merchandise subject to review, this entity must provide a certification that it did not export subject merchandise to the United States during the initial period of investigation.
- Section 351.214(b)(2)(ii) requires that, if the person requesting the review is the exporter but not the producer of the subject merchandise, the entity requesting the review must provide two certifications regarding shipments to the United States during the POI:
 - A certification that the person requesting the review did not export subject merchandise to the United States during the POI; and
 - A certification from the person that produced or supplied the subject merchandise to the person requesting the review that the producer or supplier did not export the subject merchandise to the United States during the POI.⁽⁸⁾

The requirement that certifications be submitted not only by the exporter requesting the review, but also by the producer or supplier of subject merchandise where the exporter is not the producer, suggests that the new shipper regulations are appropriately read to limit the benefits of a new shipper review to those entities involved in the production and sale of the merchandise that forms the basis for the review. Under this interpretation, the benefits would apply to the following types of transactions:

- Sales by the exporter of subject merchandise produced by the exporter, and
- Sales by the exporter of subject merchandise produced or supplied by companies that provided the required certifications in the exporter's request for a new shipper review and cooperated in responding to any information requests during the new shipper review.

Conversely, the benefits of the new shipper review would *not* apply to:

- Sales by the exporter of subject merchandise produced or supplied by companies that did not provide required certifications, or
- Sales by the exporter of subject merchandise produced or supplied by companies that did not cooperate in responding to any information requests during the new shipper review.

Statement of Policy

The bonding privilege in effect during a new shipper review, along with the prospective cash deposit rate established in that review for the new shipper, is applicable only with respect to merchandise produced/supplied and exported by the parties who have met all necessary certification requirements, who successfully participate in the review, and whose sales form the basis for the Department's analysis in the new shipper review. Where a party certifies that it is both the producer and exporter of subject merchandise pursuant to section 351.214(b)(2)(i) of the Department's regulations, the bonding option and post-final new shipper cash deposit rate will apply only with respect to subject merchandise produced and exported by this entity. Where a party is the exporter but not the producer of subject merchandise, the bonding option and post-final new shipper deposit rate will apply only with respect to subject merchandise exported by the entity requesting the review and produced or supplied⁽⁹⁾ by those parties that provided the necessary certification under section 351.214(b)(2)(ii) and cooperated in responding to any information requests during the new shipper review.

Implementation

With respect to limiting the bonding option to combinations the Department is reviewing, this policy went into effect in October 2002.⁽¹⁰⁾ For all ongoing reviews initiated prior to October 2002, the Department will apply the bonding-option policy to all entries made after 30 days from the date of issuance of this policy bulletin. With respect to the new shipper cash deposit rate applied to entries made after the conclusion of each new shipper review, this policy has been applied in recent new shipper reviews and will continue to apply in all final results of new shipper reviews completed after the signature date of this policy bulletin.⁽¹¹⁾

footnotes:

1. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).

2. Certain aspects of this provision require clarification as applied to the U.S. antidumping regime, which is retrospective and which imposes antidumping duties on all exports from a country under order, except for individual exporters found not to be dumping during the initial investigation. Under a retrospective system, antidumping duties in general (not only in new shipper reviews) are not levied on merchandise upon entry, but only upon subsequent administrative review or upon the absence of a timely request for administrative review. Further, the results of antidumping reviews, including new shipper reviews, generally apply to POR entries; they do not apply "retroactively to the date of the initiation of the review," which normally is a date subsequent to the review period. As discussed in the main body of this bulletin, U.S. law implements these provisions by providing the additional benefit, in new shipper reviews, of a bonding option for entries made while the new shipper review is being conducted. Moreover, while under the U.S. system all exporters or producers from the country in question are "subject to the anti-dumping duties on the product" (except those found not to be dumping in the initial investigation), a new shipper does not have to demonstrate a lack of affiliation with *any* such company. Instead, it must demonstrate lack of affiliation with any company that exported subject merchandise during the POI.

3. While the relevant WTO "new shipper" provision is contained in the Antidumping Agreement, the corresponding provision in the U.S. statute applies to both antidumping and countervailing duty proceedings.

4. Section 751(a)(2)(B)(iii).

5. Section 751(a)(2)(B)(iv).

6. Section 751(a)(2)(B)(i).

7. Section 771(28).

8. In addition to these certification requirements, the entity requesting the review must also provide the following items in its request: a certification that, since the investigation was initiated, it has never been affiliated with any exporter or producer that exported the subject merchandise during the POI (19 CFR 351.214(b)(2)(iii)(A)); in NME proceedings, a certification that its export activities are not controlled by the central government (19 CFR 351.214(b)(2)(iii)(B)); documentation establishing the date of first entry or shipment, the volume of that and subsequent shipments, and the date of first sale to an unaffiliated customer in the United States (19 CFR 351.214(b)(2)(iv)); and, in a CVD proceeding, a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire (19 CFR 351.214(b)(2)(v)).

9. In general, in cases involving a non-producing supplier, the applicable "combination" should include the producer and the non-producing supplier. While there may be exceptions in certain situations, just as there may be exceptions in certain cases involving only producers and exporters, the concerns addressed by this policy would continue to exist if we disregarded either the producer or the non-producing supplier.

10. See, e.g., *Preserved Mushrooms from Indonesia: Initiation of New Shipper Antidumping Duty Review*, 67 FR 62437, 62438 (October 7, 2002); see also, *Freshwater Crawfish Tail Meat from the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 67 FR 67822 (November 7, 2002).

11. See *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 FR 72139, 72140 (December 4, 2002) (applying the cash deposit rate established for new shipper Jinan Yipin to "subject merchandise manufactured (i.e., grown) and exported by Jinan Yipin," where Jinan Yipin certified that it was both producer and exporter of subject merchandise under review); see also *Notice of Final Results of Antidumping Duty New Shipper Review: Certain In-Shell Raw Pistachios from Iran*, 68 FR 353, 354 (January 3, 2003) (applying the cash deposit rate established to the particular exporter/producer combination involved in the new shipper review, where the exporter and producer were not the same entity); see also *Certain Forged Stainless Steel Flanges from India: Final Results of Antidumping Duty New Shipper Review*, 68 FR 351 (January 3, 2002).