

Import Administration Policy Bulletin

Number: 03.3

Topic: Application of the interest provisions in section 778(a) of the Tariff Act to entries made pursuant to a subsequently rescinded new shipper bonding privilege.

Approved: _____

James J. Jochum

Assistant Secretary

for Import Administration

(Date)

This policy bulletin explains a clarification in practice regarding the application of the interest provisions of section 778(a) of the Tariff Act in the context of new shipper reviews: the Department is clarifying its practice to require that entries of merchandise subject to an AD/CVD order made while a new shipper review is conducted that are secured by a bond in lieu of a cash deposit be subject to the interest provisions of section 778(a) if and when the Department rescinds that new shipper review.

Background

Section 751(a)(2)(B) of the Tariff Act of 1930, as amended ("the Act"), authorizes the Department to conduct periodic administrative reviews "for new exporters and producers"⁽¹⁾ for the purpose of establishing an individual weighted-average antidumping ("AD") duty rate or countervailing duty ("CVD") rate for exporters or producers that did not ship subject merchandise during the original period of investigation ("POI").⁽²⁾ Upon initiation of a new shipper review, the statute requires the Department to direct the Bureau of Customs and Border Protection ("Customs") to allow, at the option of the importer, the posting "of a bond or security in lieu of a cash deposit" for each entry of subject merchandise pending completion of the review.⁽³⁾

Upon completion of a new shipper review, the Department instructs Customs to terminate the bonding privilege for the new shipper and instead collect cash deposits of estimated AD or CVD duties on future entries at the final company-specific rate determined in the new shipper review. See 19 CFR 351.214(h) and 351.221(b). The Department also instructs Customs to liquidate the reviewed entry(ies) at the final assessment rate. See *id.* Subsequent to the completion of the new shipper review, the Department will determine the final duties to be assessed on any merchandise that entered while the new shipper review was conducted, *i.e.*, entries on which the importer was granted the option of posting bond instead of cash deposit.⁽⁴⁾

Based on its experience in conducting new shipper reviews, the Department is aware that questions about the legitimacy of new shippers, and the bonding option extended to their imports, arise frequently in the context of the review process.⁽⁵⁾ For example, in a recent new shipper review involving potassium permanganate from the People's Republic of China, the Department discovered that a business license submitted by the respondent had been altered and the respondent's new shipper certifications were flawed. Based on these facts, the Department rescinded the review. The petitioner in that case argued that, since the respondent was never a legitimate new shipper, it should not have been permitted to benefit from the bonding privilege afforded to new shippers during the conduct of the review.⁽⁶⁾

This case highlights the fact that, while the bonding privilege is intended to be limited to legitimate new shippers, in many instances such reviews are initiated and the bonding privilege is granted - typically for a number of months and often over a year⁽⁷⁾ - prior to a determination to rescind the review. In addition to the new shipper review of potassium permanganate from the People's Republic of China, the Department recently rescinded several other new shipper reviews after discovering, *inter alia*, that the reviewed companies either: a) provided flawed or incorrect certifications; b) were unable to substantiate the producer or exporter of the subject merchandise; or c) otherwise did not demonstrate the existence or "bona fides" of the sales upon which the Department relied when it initiated the review.⁽⁸⁾

In rescinding the new shipper reviews in these instances, the Department has determined, in effect, that a new shipper review was not warranted and that the reviewed company's imports were not eligible for the bonding privilege.⁽⁹⁾ Because the time between initiation and rescission is often extensive, however, the party(ies) requesting the review may already have exported subject merchandise in significant volumes under the invalid bonding privilege. In certain cases, the Department has found that the volume of such entries is exceptionally high; that is, upon making the single shipment that typically provides the basis for initiation of the new shipper review, respondents may increase the volume of shipments drastically once the bonding privilege is in place but prior to the Department's rescission.⁽¹⁰⁾

Although the Department scrutinizes requests for new shipper reviews prior to initiation,⁽¹¹⁾ given the deadlines for initiating such reviews - along with the corresponding need to ensure that legitimate new shipper requests are granted on a timely basis - it is likely that there will continue to be instances where failure to satisfy all requirements becomes apparent only after initiation, at which point the Department must rescind the review. This is particularly true considering the problems that often arise with information supplied by new shippers, who are, by definition, not established in the U.S. market and with whom we may have little or no familiarity.

One appropriate response to these concerns is to clarify the Department's application of the interest provisions of section 778(a) of the Act with respect to merchandise entered under the bonding privilege during the conduct of a new shipper review that is subsequently rescinded. In such instances, the Department will instruct Customs to apply the interest provisions of section 778(a) at the time of liquidation to any imports entered under the new shipper bond since initiation of the rescinded new shipper review. Pursuant to section 778(a), such interest would accrue based on the difference between the amount of cash deposited (zero) and the final amount assessed.

The Department's new shipper regulations, which set forth the eligibility requirements that must be met by such exporters and producers to qualify as new shippers for purposes of initiating and conducting the review and for obtaining the bonding privilege, support this clarification in practice.⁽¹²⁾ Notably, the

Department's new shipper regulations condition eligibility for the review (and the bonding privilege) on various "certifications" from the new shipper attesting to the specific requirements of the statute, including the fact that the new shipper did not export subject merchandise to the United States during the original POI and has never been affiliated with any company that exported subject merchandise to the United States during the original POI.⁽¹³⁾ As part of its analysis, the Department also scrutinizes the "bona fides" of sales or exports that formed the basis of the review to ensure that new shipper bonding privileges are limited only to imports from those entities genuinely entitled to receive them.⁽¹⁴⁾

Moreover, this option is consistent with court decisions interpreting section 778 of the Act, which concerns collection of interest upon final assessment of AD/CVD duties. Section 778(a) sets forth the "general rule" that interest is payable on "overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after . . . the date of publication of a countervailing or antidumping duty order . . ." While the Court of Appeals for the Federal Circuit ("CAFC") has indicated that, normally, the interest provisions of section 778(a) of the Act do not apply to entries on which bonds were appropriately allowed in lieu of cash deposits,⁽¹⁵⁾ in Sharp Electronics v. United States the Court interpreted this provision to mean that interest may be assessed "when an importer is *statutorily obligated to make a cash deposit*."⁽¹⁶⁾ The Court clarified that the section 778(a) interest provisions are triggered "whenever such amounts are *statutorily owed, whether or not actually deposited* . . ."⁽¹⁷⁾

Thus, if the Department rescinds a new shipper review, the Department has the authority to instruct Customs to terminate the invalid new shipper bonding privilege and subject any unliquidated imports that entered under bond to the interest provisions of section 778(a).⁽¹⁸⁾ By rescinding the review, the Department has effectively determined that the party claiming "new shipper" status is not entitled to such status or to the bonding privilege allowed since initiation of the new shipper review. Therefore, the new shipper's importers remained statutorily required to pay cash deposits on all entries of the rescinded new shipper's exports. As recognized in Sharp Electronics, the fact that an importer did not actually make the statutorily required cash deposits at the time of entry (but instead entered its imports under the invalid bonding privilege) does not relieve the importer of its ultimate liability for interest on the entry under section 778(a).

Statement of Policy

For the reasons stated above, the Department is clarifying its policy concerning interest liability for entries of merchandise subject to an AD or CVD order secured by a bond posted during the conduct of a new shipper review. Where it rescinds any such review, the Department will terminate the new shipper bonding privilege for all future entries and, at the appropriate point in the proceeding, instruct Customs that imports entered under bond shall be subject to the interest provisions of section 778(a), *i.e.*, that importers or their sureties are liable for any interest accrued on unliquidated entries of merchandise secured by such bonds since initiation of the new shipper review. As with assessment of AD/CVD duties generally on such entries, interest will be calculated based on the difference between the zero cash deposited at the time of entry and the ultimate AD/CVD duties determined to be due.

Implementation

The Department will implement this policy clarification with respect to merchandise entered under the bonding privilege during the conduct of new shipper reviews initiated after the signature date of this bulletin.

1. The statute and Statement of Administrative Action ("SAA") make clear that the term "new exporters and producers" means exporters and producers who demonstrate in their review request that they 1) did not export subject merchandise to the United States during the original period of investigation ("POI"), and 2) are not affiliated with any exporter or producer who exported subject merchandise to the United States during the original POI. See section 751(a)(2)(B)(i) and SAA at 875; see also footnotes 11 and 12, *infra*, regarding certification requirements contained in the Department's regulations.

2. This provision implements Article 9.5 of the Antidumping Agreement by providing new shippers with an expedited review process to establish their own individual AD rates based on their own sales. SAA at 875.

3. Section 751(a)(2)(B)(iii). The new shipper review is a unique process which generally is conducted on an expedited basis and provides a benefit (*i.e.*, the importer has the option of posting a bond in lieu of a cash deposit) not available while the Department conducts regular administrative reviews.

4. Generally, such imports secured by bonds obtained pursuant to a new shipper review enter the United States during subsequent administrative review periods and therefore are not reviewed as part of the new shipper review process. Rather, final assessment on such bonded entries does not occur until completion of the subsequent administrative review or, if no such administrative review is requested, pursuant to the automatic liquidation and assessment provisions. See 19 CFR 351.212.

5. Aside from entries made during a new shipper review, a similar bonding privilege is also granted on entries made during the provisional-measures period before a final affirmative decision of material injury by the International Trade Commission. Since the bonding privilege during the provisional-measures period is granted uniformly to all importers during a statutorily defined period, there is generally no question as to whether the bonding privilege, as opposed to a required cash deposit, was granted appropriately on particular entries made during this period.

6. Potassium Permanganate from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review, 67 Fed. Reg. 38254 (June 3, 2002) (Potassium Permanganate). See also letter to the Department of Commerce from the petitioner regarding change in deposit requirements for the respondent (April 25, 2002).

7. This period covers the time in which the Department must collect the necessary information, evaluate it, and issue the rescission notice. See e.g., Potassium Permanganate, 67 Fed. Reg. 38254 (June 3, 2002) (review rescinded sixteen months after initiation); Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 Fed. Reg. 11283 (March 13, 2002) (review rescinded fourteen months after initiation); Fresh Garlic from the People's Republic of China: Rescission of New Shipper Antidumping Duty Review and Initiation of New Shipper Antidumping Duty Review, 67 Fed. Reg. 44594 (July 3, 2002) (review rescinded six months after

initiation); Silicon Metal from the People's Republic of China, 67 Fed. Reg. 38255 (June 3, 2002) (review rescinded eleven months after initiation).

8. See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 Fed. Reg. 11283 (March 13, 2002) (review rescinded because requester did not demonstrate "bona fide" sale); Fresh Garlic from the People's Republic of China: Rescission of New Shipper Antidumping Duty Review and Initiation of New Shipper Antidumping Duty Review, 67 Fed. Reg. 44594 (July 3, 2002) (review rescinded for failure to document actual sale or entry during POR); Silicon Metal from the People's Republic of China, 67 Fed. Reg. 38255 (June 3, 2002) (review rescinded because requester provided inaccurate and incomplete information in required certifications and did not report all sales subject to review); Freshwater Crawfish Tail Meat from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review, 68 Fed. Reg. 37115 (June 23, 2003) (review rescinded because requester provided incorrect information in required certifications); Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty New Shipper Review, 67 Fed. Reg. 65782 (October 28, 2002) (review rescinded because separate-rate requirements not met and actual producer of merchandise not certified).

9. This would also be true for a rescission based on a voluntary withdrawal of a new shipper review request.

10. For instance, this fact pattern has occurred in new shipper reviews involving freshwater crawfish tail meat from the PRC and fresh garlic from the PRC.

11. In this regard, we have recently developed a detailed initiation checklist which we will use in evaluating all new shipper review requests. This checklist is available at <https://enforcement.trade.gov>.

12. See 19 CFR 351.214(b).

13. The Department's regulations at 19 CFR 351.214(b)(2)(ii) provide further that, if the company requesting the review is the exporter but not the producer of the subject merchandise, then the request must also contain: (1) a certification that the entity requesting the review did not export subject merchandise to the United States during the POI and (2) a certification from the person or company that produced or supplied the subject merchandise to the company requesting the review that the producer or supplier did not export the subject merchandise to the United States during the POI. In a non-market-economy ("NME") proceeding, the exporter or producer making the request must also certify that the "export activities of such exporter or producer are not controlled by the central government." 19 CFR 351.214(b)(2)(iii). In a CVD proceeding, a certification is required demonstrating 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). In addition to these certification requirements, the entity requesting the review must also provide 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).

14. See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 Fed. Reg. 11283 (March 13, 2002) (Issue and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd., at comment 5). The Department's scrutiny of the "bona fides" of the sale is based upon the requirements of 19 CFR

351.214(b)(2)(iv)(C), which requires new shippers to document the date of the first "sale" to an unaffiliated customer in the United States. See id. The Courts have recognized the Department's discretion to disregard non-bona-fide sales generally, including those that have been "artificially orchestrated" or otherwise are "unrepresentative or distortive." See, e.g., Chang Tieh Industry Co., Ltd. v. United States, 840 F. Supp. 141, 146 (CIT 1993), and Windmill v. United States, 193 F. Supp. 2d. 1303 (CIT 2002).

15. In Timken v. United States, 37 F.3d 1470 (Fed. Cir. 1994), the CAFC held that importers or exporters are only liable for interest under this provision for underpayment of final AD duties when they have made cash deposits of estimated duties, rather than when estimated duties are secured by bonds. See id., at 1476 - 1477 (emphasis added).

16. Sharp Electronics v. United States, 124 F. 3d. 1447, 1449 (Fed. Cir. 1997) (emphasis added).

17. Id. (emphasis added).

18. If the Department has not reached a final decision in the new shipper review by the end of the order's anniversary month and there is no request for review affecting bonded entries, instructions may be issued to Customs to liquidate automatically some of these entries under 19 CFR 351.212(c) prior to a decision in the new shipper review.