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Australian Government
**Department of Industry,
Innovation and Science**

**Anti-Dumping
Commission**

CUSTOMS ACT 1901 - PART XVB

FINAL REPORT

NO. 351

**ACCELERATED REVIEW OF A DUMPING DUTY NOTICE
APPLYING TO**

CERTAIN PREPARED OR PRESERVED TOMATOES

EXPORTED FROM ITALY BY

LE SPECIALITÀ ITALIANE S.R.L.

14 July 2016

Report 351 - Prepared or Preserved Tomatoes - Italy

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1 SUMMARY AND RECOMMENDATIONS

This report has been prepared in response to an application under section 269ZF of the *Customs Act 1901*¹ (the Act) from Le Specialità Italiane S.R.L (Le Specialità) seeking an accelerated review of the dumping duty notice applying to prepared or preserved tomatoes exported to Australia from Italy, in so far as it affects Le Specialità.

1.1 Recommendation

The Commissioner of the Anti-Dumping Commission (the Commissioner) recommends that the dumping duty notice, the subject of the application, be altered so as to apply to the applicant as if different variable factors had been fixed.²

If the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary)³ accepts this recommendation, to give effect to the decision the Parliamentary Secretary must declare by notice published on the Commission's website that, with effect from the date the application is lodged, the Act and the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) have effect as if the original dumping duty notice had applied to the applicant but the Parliamentary Secretary had fixed specified different variable factors relevant to the determination of duty.⁴

1.2 Application of law to facts

Division 6 of Part XVB of the Act enables new exporters to apply for an accelerated review of anti-dumping measures.

Subsection 269ZE(1) sets out that a new exporter may apply for an accelerated review. A new exporter is defined by subsection 269T(1) as an exporter who did not export such goods to Australia at any time during the period after the start of the investigation period in relation to the application.

1.3 Findings and conclusions

Based on all relevant and available information, the Commissioner, in relation to the variable factors for Le Specialità's exports of prepared or preserved tomatoes to Australia, recommends that:

¹ Unless otherwise specified all legislative references in this report are to the *Customs Act 1901*.

² Subsection 269ZG(1)(b).

³ On 20 September 2015, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Science. The Minister for Industry, Innovation and Science has delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary, and accordingly, the Parliamentary Secretary is the relevant decision maker.

⁴ Subsection 269ZG(3)(b).

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- the normal value should be established by reference to Le Specialità's domestic sales which were arms length transactions and in the ordinary course of trade during the review period, with relevant adjustments;⁵
- the export price could not be determined based on historical sales, as Le Specialità is a new exporter and therefore the ascertained export price will be determined from the best available information;⁶ and
- the non-injurious price (NIP) should be based on an unsuppressed selling price that is the full cost to make and sell (CTMS) of the Australian manufacturer, SPC Ardmona Operations Limited (SPCA), adjusted to reflect export price at Free-on-Board (FOB).

As a result, the amount of interim dumping duty payable by importers of Le Specialità's exports to Australia should be calculated by reference to the same methodology as in the original investigation, being the combination of fixed and variable duty method. The amount of fixed duty will be set to zero, and the amount of variable duty will be the amount by which the actual export price of Le Specialità is below a specified (confidential) amount per kilogram.

⁵ Subsections 269TAC(1), (8).

⁶ Subsection 269TAB(3)

2 BACKGROUND

2.1 Existing measures

2.2.1 The original investigation (Investigation No. 217)

On 10 July 2013, an investigation (Investigation 217) into the alleged dumping of certain prepared or preserved tomatoes exported to Australia from Italy was initiated following an application lodged by SPC Ardmona Operations Ltd (SPCA). In that investigation, as outlined in *Anti-Dumping Commission Report No. 217* (REP 217), it was found that:

- in the case of two exporters, Feger di Gerardo Ferraioli S.p.A. (Feger) and La Doria S.p.A. (La Doria), the goods were exported to Australia from Italy at dumped prices, but the dumping margins were negligible (less than 2 per cent);
- for all other exporters, the goods were exported to Australia from Italy at dumped prices, with dumping margins ranging from 3.25 per cent to 26.35 per cent;
- the dumped goods caused material injury to the Australian industry producing like goods; and
- continued dumping may cause further material injury to the Australian industry.

Accordingly, the Commissioner recommended that the then Parliamentary Secretary to the Minister for Industry (the then Parliamentary Secretary) impose anti-dumping measures on the goods exported from Italy, with the exception of two exporters, Feger and La Doria, against whom the investigation was terminated. The then Parliamentary Secretary accepted that recommendation and, on 16 April 2014, notice of his decision was published in the *Commonwealth Gazette*⁷ and *The Australian* newspaper (Anti-Dumping Notice No. 2014/32 (ADN 2014/32) refers). This is the dumping duty notice for which Le Specialità sought an accelerated review.

2.1.2 Accelerated Review No. 261

On 4 September 2014, an accelerated review of the dumping duty notice applying to certain prepared or preserved tomatoes exported to Australia from Italy was initiated following an application lodged by Le Specialità. In *Anti-Dumping Commission Report No. 261* (REP 261) it was found that, based on all relevant and available information, Le Specialità:

- was not a manufacturer or producer of prepared or preserved tomatoes; and
- did not have the status of an exporter.

On this basis, Le Specialità could not be considered a new exporter for the purposes of an accelerated review and therefore was not eligible to apply for an accelerated review.⁸ Accordingly, the Commissioner recommended that the then Parliamentary Secretary declare that the original anti-dumping measures outlined in the subsection 269TG(1) and subsection 269TG(2) public notice remain unchanged. The then Parliamentary Secretary

⁷ Available at <https://www.legislation.gov.au/Details/C2014G00626>.

⁸ Subsection 269ZE(1).

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accepted that recommendation and, on 28 November 2014, notice of his decision was published in the Commonwealth *Gazette*.⁹

2.2 The current review

On 5 April 2016, Le Specialità lodged an application for an accelerated review. The Commission examined the application and considered at that time:

- Le Specialità was a new exporter;¹⁰
- the circumstances in which an accelerated review can be sought have been satisfied;¹¹
- there were no grounds to reject the application;¹² and
- the requirements of an application for accelerated review were satisfied.¹³

As the circumstances in which an accelerated review can be sought were satisfied, the Commissioner did not reject the application and commenced the accelerated review. *Consideration Report No. 351* provides further details in relation to the Commission's consideration of the application and the decision of the Commissioner. The report is available on the Commission's website at www.adcommission.gov.au.

The commencement of the accelerated review was publicly notified in ADN No. 2016/46, which was published on 26 April 2016. It also advised that the Commissioner's recommendation to the Parliamentary Secretary will be made in a report on or before 14 July 2016.

The ADN is available on the Commission's website at www.adcommission.gov.au.

The Commission sought information by requesting the applicant complete an exporter questionnaire. For the purposes of the accelerated review the period examined is 1 April 2015 to 31 March 2016 (referred to as the review period). This period has been used to ascertain the variable factors relevant to Le Specialità.

⁹ Available on the legislation.gov.au website at <https://www.legislation.gov.au/Details/C2014G01953>.

¹⁰ As defined in subsection 269T(1).

¹¹ In terms of subsection 269ZE(1).

¹² In terms of subsection 269ZE(2).

¹³ In terms of subsection 269ZF(1).

2.3 The goods

2.3.2 Description

The goods the subject of the application (the goods) are:

Tomatoes (peeled or unpeeled) prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

The goods excluded from this definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

2.3.3 Tariff classification

The goods are currently classified to subheading 2002.10.00 (statistical code 60) to Schedule 3 of the *Customs Tariff Act 1995*. The general rate of Customs duty is currently 5 per cent for the goods imported from Italy.

3 ASSESSMENT OF VARIABLE FACTORS

3.1 Findings

On the basis of Le Specialità's exporter questionnaire response and the verification of transactions, the Commissioner is satisfied that Le Specialità is the manufacturer of the goods. The Commission is satisfied that the exporter questionnaire response was sufficient to enable the Commissioner to determine a normal value and an export price.

3.2 Status as a manufacturer

Le Specialità provided evidence of production volumes, sales data, contracts for sale, and details of cost to make and sell in its exporter questionnaire response. The Commission sought and obtained invoices from suppliers matching specified purchase records, and invoices for sales. The exporter questionnaire response has been verified as being an accurate record of the information contained in the original documents.

The information has also been benchmarked against that provided by other manufacturers and which has been validated in-country by the Commission. The costs incurred and the sales prices are materially similar to these other manufacturers.¹⁴

Based on the information obtained, the Commissioner is satisfied that Le Specialità is a manufacturer of prepared or preserved tomatoes.

3.3 Normal value

3.3.1 Circumstances of the production and sale of the goods

The Commission notes that Le Specialità's domestic sales are made under a particular contractual arrangement with [confidential – customer name] that appear to be arms length transactions. [confidential – contractual arrangements with customer]

Le Specialità has acknowledged that its export sales to Australia would not be on the same contractual basis – it is intending to export a packed and packaged product, which would likely be labelled and ready for sale to the customer.

3.3.2 Arms length

The Commission considered whether Le Specialità's domestic sales were at arms length having regard to section 269TAA. The Commission has found no evidence to suggest that there has been any consideration payable for or in respect of the goods other than their price, that the price is influenced by a commercial or other relationship between Le Specialità and [confidential – customer name] or their associates, nor that any reimbursement, compensation or other benefit will be received for or in respect of the price.

¹⁴ The verification of other manufacturers' data occurred during *Investigation 276*.

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As none of the circumstances in subsection 269TAA(1) appear to exist and there is no other information to suggest that the sales between Le Specialità and its customer are not at arms length, the Commissioner is satisfied that those sales are at arms length.

3.3.3 Like goods

Subsection 269T(1) defines like goods as:

goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

As noted earlier in this report, Le Specialità has not exported the goods to Australia during the review period and its domestic sales are akin to a tolling basis. In these circumstances, the Commission has compared the goods produced by Le Specialità for sale on its domestic market to the goods that it *would* produce for export to Australia to assess whether the goods ought to properly be considered “like”.

Notwithstanding that the various components of the cost to make would differ [confidential – contractual arrangements with customer], the finished products would be essentially identical – they would be sold in similar product sizes of 400 g and 800 g cans, contain the same prepared or preserved tomato types, be sold to the same types of customers (expected to be wholesalers and retailers) and have the same end uses. Accordingly, the Commission is satisfied that the goods produced by Le Specialità for sale on its domestic market are like to the goods that it would export to Australia

3.3.4 Ordinary course of trade

The Commission considered whether Le Specialità’s domestic sales were in the ordinary course of trade having regard to section 269TAAD. The Commission observed that a sufficient quantity of Le Specialità’s sales were profitable to satisfy the tests in that section.

However, there will occasionally be circumstances in which the test established in section 269TAAD will be satisfied (i.e. that there is a sufficient proportion of profitable sales), but that the sales should nevertheless be considered as not being in the ordinary course of trade. The *Dumping and Subsidy Manual* indicates that these circumstances include sales that were sample sales, promotional sales, made at special prices, end of season sales, low quality sales, or sales in other unusual circumstances.¹⁵ The Commission considers that, whilst the sales which occur between Le Specialità [confidential – customer name] are not indicative of the sales which would occur when Le Specialità exports to Australia, it is not the case that these transactions are in “unusual circumstances”.

Accordingly, the Commission is satisfied that Le Specialità’s domestic sales occurred in the ordinary course of trade.

¹⁵ Page 31 of the *Dumping and Subsidy Manual* refers.

3.3.5 Calculation of normal value

The Commissioner has had regard to the findings made in *Anti-Dumping Commission Report 276* (REP 276) concerning the existence of the Single Payment Scheme (SPS) as a form of income support to growers of raw tomatoes. The Commissioner considers that the findings in REP 276 are relevant to the assessment of whether the costs recorded in Le Specialità's accounts are competitive market costs¹⁶ and the subsequent uplift to the cost of raw tomatoes that occurred in REP 276. However, during the course of the accelerated review process, the Commission has been unable to obtain evidence which indicates the value of grower payments that occurred under the SPS during the review period (1 April 2015 to 31 March 2016) to enable the same uplift. Accordingly, there has been no adjustment to Le Specialità's recorded cost of raw tomatoes to account for SPS payments to growers of raw tomatoes in the calculation of normal value.

As a result of the above analysis, the Commissioner is satisfied that he has sufficient information to rely on Le Specialità's domestic sales for the purposes of calculating a normal value under subsection 269TAC(1). However, noting the circumstances of those sales, the Commissioner considers it necessary to make a range of adjustments under subsection 269TAC(8)(b) to account for the differences between the goods sold domestically and the goods that would be exported. The Commissioner considers it most appropriate to do this on the basis that Le Specialità will export a packed and packaged product which has been labelled and is ready for sale to the customer.

The Commissioner has therefore made the following adjustments:

- an uplift to the **cost of production** by reference to the packing costs [confidential – contractual arrangements with customer], adjusted to maintain the proportionate gross profit margin achieved on Le Specialità's usual production costs (comprising the purchase of raw materials, production of differing models of tinned tomato products and associated labour and manufacturing overheads costs);
- an uplift to enable a comparison at the FOB level of trade, accounting for:
 - inland freight and handling costs; and
 - exportation costs, both of which are based on quotes obtained by Le Specialità and which are consistent with the costs reported by cooperating exporters in a previous investigation.¹⁷

The normal value is expressed as a weighted average price per kilogram, based on the volumes of comparable models sold by Le Specialità in the review period.

Normal value calculations are at **Confidential Attachment 1**.

3.4 Export price

As La Specialità has did not export to Australia during the investigation period, an export price is unable to be determined under subsection 269TAB(1). Accordingly, the Commissioner has determined the export price under subsection 269TAB(3), having

¹⁶ As per subsection 43(2)(b) of the Regulation.

¹⁷ The verification of other manufacturers' data occurred during *Investigation 276*.

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regard to all relevant information. On this basis, the ascertained export price is equal to the normal value.

3.5 Non-Injurious Price

The applicant has made no submissions with regard to the NIP. The Commissioner has therefore had regard to the best available information to determine the NIP, being the value calculated during REP 276.

As the NIP is lower than the normal value, the Parliamentary Secretary must have regard to the desirability of specifying a method of working out the interim dumping duty such that the sum of the ascertained export price and the interim dumping duty do not exceed the NIP (subsection 8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) refers).

None of the exceptions to this requirement specified in subsection 8(5BAA) of the Dumping Duty Act are present, as normal value was calculated under subsection 269TAC(1), and the Australian industry is not comprised of two or more small-medium enterprises.

The Commissioner recommends that the Parliamentary Secretary specify a method of calculating interim dumping duty such that the sum of the ascertained export price of the goods and the interim dumping duty payable does not exceed the NIP.

3.6 Form of measures

The relevant notice (for the reasons outlined in REP 217) established that dumping duty would be calculated by reference to the combination of fixed and variable duty method.

3.6.1 Dumping margin and fixed component of duty

As the Commissioner has determined that the ascertained export price is equal to the derived normal value, the dumping margin for the purpose of reviewing variable factors for this accelerated review and the fixed component for determining interim dumping duty is zero per cent.

3.6.2 Variable component of duty

A variable component of interim dumping duty will be applicable where the actual export price is below the ascertained export price.

4 EFFECT OF THE REVIEW

The existing dumping duties take the form of a fixed rate of duty per kilogram plus a variable amount of duty if the actual export price is below the ascertained export price.

The Commissioner recommends that the method of calculating duty payable in relation to Le Specialità's exports of prepared or preserved tomatoes not vary as a result of this accelerated review. However, the Commissioner recommends the fixed component of dumping duty applying to the goods exported by Le Specialità will be zero. This is because the ascertained export price is set at the same level of the weighted average normal value for Le Specialità.

Dumping duty will only be incurred in relation to Le Specialità's exports of prepared or preserved tomatoes where the actual export price is below the ascertained export price.

5 APPENDICES AND ATTACHMENTS

Confidential Attachment 1

Normal value calculations