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Department of Industry, Innovation and Science

Anti-Dumping Commission

CUSTOMS ACT 1901 - PART XVB

FINAL REPORT
NO. 397

APPLICATION FOR AN ACCELERATED REVIEW OF A DUMPING DUTY NOTICE APPLYING TO

CERTAIN CONSUMER PINEAPPLE EXPORTED FROM THE KINGDOM OF THAILAND

BY KUIBURI FRUIT CUP CO., LTD.

May 2017

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Abbreviations

the Act	*the Customs Act 1901*
ADN	Anti-Dumping Notice
the applicant, KFCup	Kuiburi Fruit Cup Co., Ltd.
the Commission	Anti-Dumping Commission
the Commissioner	the Commissioner of the Anti-Dumping Commission
DIBP	Department of Immigration and Border Protection
GCL	Golden Circle Limited
the goods	the goods the subject of the measures consumer pineapple
KFC	Kuiburi Fruit Canning Co., Ltd
the Manual	*Dumping and Subsidy Manual*, April 2017
the Parliamentary Secretary	the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science
REP 191	*International Trade Remedies Branch Report No. 191*
REP 333 and REP 334	*Anti-Dumping Commission Report No's 333 and 334*
Thailand	the Kingdom of Thailand

1 Summary and findings

This report has been prepared in response to an application under section 269ZE of the *Customs Act 1901* (the Act)[1] from Kuiburi Fruit Cup Co., Ltd. (KFCup, the applicant) seeking an accelerated review of the dumping duty notice applying to certain consumer pineapple exported to Australia from the Kingdom of Thailand (Thailand), in so far as it affects KFCup.

1.1 Application of law to facts

Division 6 of Part XVB of the *Customs Act 1901* (the Act)[2] sets out, among other things, the procedures to be followed by the Commissioner in dealing with an application for an accelerated review of a dumping duty notice by certain exporters of goods covered by the notice.

1.2 Findings and conclusions

The Commission has examined the application, KFCup's response to the exporter questionnaire (REQ) and other relevant information from both the applicant and previous investigations, inquiries and reviews concerning consumer pineapple and is satisfied that:

- KFCup and its parent company, Kuiburi Fruit Canning Co., Ltd (KFC) are related parties under subsection 269TAA(4)(c);
- KFCup and KFC are jointly the exporter of the goods to Australia from Thailand; and
- KFC is an exporter in respect of whom a declaration under 269ZG(3)(b) has previously been made in respect of a previous application in 2012.

The Commission concludes that KFCup and KFC, being related parties and jointly the exporter, means that KFCup is not eligible to apply for an accelerated review under subsection 269ZE(1).

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

[2] Unless stated otherwise, all legislative references in this report are to the *Customs Act 1901*.

2 Background

2.1 The goods the subject of the application

2.1.1 Goods description

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

Pineapple prepared or preserved in containers not exceeding one litre (consumer pineapple)

Glace and/or dehydrated pineapple are excluded from the measures

2.1.2 Tariff classification

The goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

Tariff	Statistical code	Description
2008.20.00	26	Pineapples – Canned, in containers not exceeding one litre
2008.20.00	28	Pineapples – Other

Table 1: Tariff classifications for consumer pineapple

Consumer pineapple imported from Thailand is not subject to Customs duty.

2.1.3 Goods to be exported

The specific goods to which this application for an accelerated review relates are preserved consumer pineapple packaged in plastic cups. While the goods subject to measures includes preserved pineapple in any type of container (not exceeding one litre), the Commission understands that the usual form of container for the goods is steel cans.

2.2 Existing measures

The original measures with respect to the goods exported from Thailand were published in *Commonwealth of Australia Gazette No. GN 41* dated 17 October 2001. Since that time, the measures have been continued three times, with the most recent decision to continue the measures published in *Anti-Dumping Notice No. 2016/82* (ADN 2016/82) on 12 September 2016, for measures on consumer pineapple exported from Thailand to continue for a further five years until 17 October 2021.[3]

2.3 The current review

On 16 February 2017, KFCup lodged an application for an accelerated review of the dumping duty notice that applies to consumer pineapple exported to Australia from Thailand in so far as the notice affects the applicant.

[3] For further information on the current measures in relation to the goods please refer to the Dumping Commodity Register on the Commission's website.

Based on the information in the application the Commissioner initiated the accelerated review. Public notice of this decision was given in *Anti-Dumping Notice No. 2017/24* (ADN 2017/24) published on the Commission's website on 7 March 2017.

3 Findings and conclusions

3.1 Findings

The Commissioner finds that KFCup and its parent company KFC are jointly the manufacturer and exporter of the goods. As KFC is not a new exporter and KFCup is related to KFC, the Commissioner finds that KFCup is not eligible to apply for an accelerated review

3.2 The relationship between KFCup and KFC

3.2.1 Ownership and management

KFCup advised in its REQ that it is a subsidiary of KFC and that KFC owns 99.999% of KFCup. The Commission verified that KFCup is a registered business incorporated in Thailand and that KFC's shares in KFCup are fully paid.

The Commission also verified from past exporter questionnaire responses received from KFC as a result of previous review and continuation inquiries that both companies are located at the same head office and factory addresses.

3.2.1.1 Contracted services

The Commission was advised by KFCup that KFCup pays KFC to provide contracted services in:

- management;
- procurement;
- warehousing;
- HR and administration;
- accounting;
- sales, including order management and invoicing and relationship management and obtaining new customers;
- maintenance; and
- shipping, including packing pallets into containers and making arrangements with the freight and handling company. KFC then bulk invoices KFCup for multiple freight and handling charges incurred.

KFCup has no active role in any of the above management, sales or maintenance activities.

3.2.1.2 Related party status under subsection 269TAA(4)(c):

For the purpose of assessing whether KFCup and KFC are related parties, the Commission has had regard to subsection 269TAA(4)(c):

> *one of them, being a body corporate is, directly or indirectly, controlled by the other (whether or not a body corporate)*

As KFC;

- own 99.999% of KFCup;
- is KFCup's parent company;

- manages and controls all business operations;
- provides the raw materials to KFCup at KFC's cost of production; and
- manages and controls all sales and exporting activities,

The Commission concludes that whilst outsourcing activities is a common business activity, KFCup's subsidiary relationship, being near wholly owned by KFC and the nature and extent of the outsourced services provided by its parent, means that KFCup has transferred to KFC, control over a substantial component of its business operations and is therefore not an independent operation from KFC.

KFC therefore, directly controls KFCup. Accordingly, KFCup and KFC are related parties under subsection 269TAA(4)(c).

3.2.2 The manufacturing process, branding and sales

Notwithstanding the related party status between KFCup and its parent, KFC, the Commission is required to examine the relationship between KFC and KFCup in the manufacture (which includes all supporting business functions) and export of the goods to identify the principal in an export transaction. The Commission has had regard to the *Dumping and Subsidy Manual*, April 2017 (the Manual)[4] at Chapter 6 "Determining an Export Price". That chapter states, *inter alia*, that the Commission should "…examine the role of the parties, their functions and responsibilities in the export transaction"[5]in determining the identity of the exporter.

The Commission considers, that in this case, the exporter will be identified as:

> *"a principal in the transaction located in the country of export from where the goods were shipped and who knowingly placed the goods in the hands of a carrier, courier, forwarding company, or their own vehicle for delivery to Australia."*[6]

3.2.2.1 Manufacturing process

KFCup advised that it pays KFC to manage the procurement and delivery of the following raw materials and utilities in relation to the manufacture of consumer pineapple in plastic cups:

- prepared pineapple (chunks and tidbits), prepared by KFC and transferred to KFCup at KFC's cost of production;
- pineapple juice and concentrate, prepared by KFC and transferred to KFCup at KFC's cost of production;
- electricity; and
- steam.

KFCup also advised that KFC manages the production schedule process from securing sales orders to advising KFCup to fulfil those orders. The single production and planning staff member who manages both KFC and KFCup's production planning is an employee of KFC.

KFCup provided a detailed production process flowchart, detailing the responsible entities for each individual activity after orders were confirmed and submitted to KFCup. The Commission has represented this process at Figure 1, below:

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[4] www.adcommission.gov.au

[5] The Manual at chapter 6.3

[6] The Manual at chapter 6.2

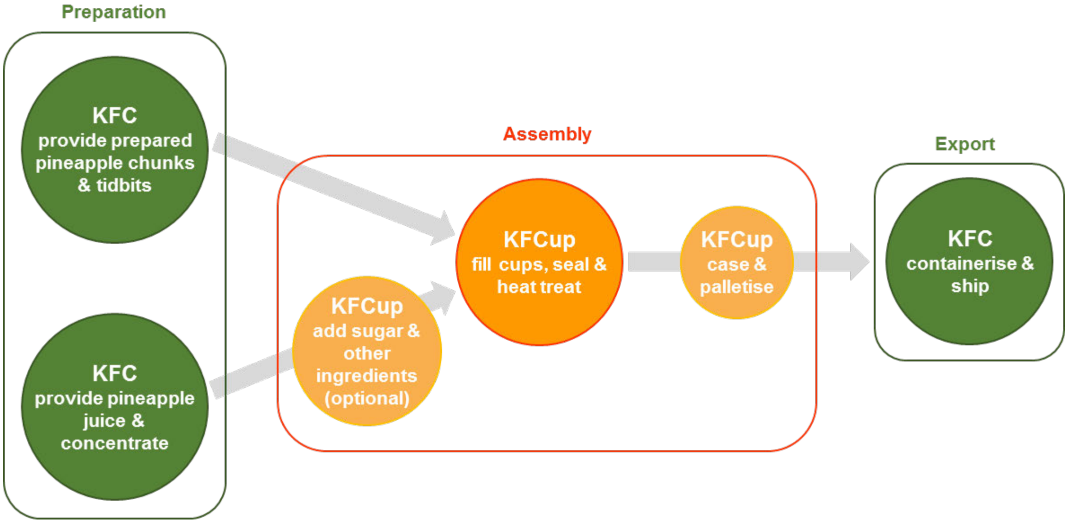

Figure 1: The Commission's representation of the consumer pineapple in plastic cups manufacturing process – after sales order

KFC also uses the same prepared raw materials in the manufacture and export of consumer pineapple in steel cans. The Commission considers that:

- KFCup performs the assembly component of the manufacture of consumer pineapple in plastic cups, and this assembly component is the sum of its production activity;
- KFCup performs the quality assurance (QA) procedures for the goods it produces;
- the difference in manufacture between KFC and KFCup is the packaging used (steel cans versus plastic cups, respectively);
- KFC provides pineapple preparation and export services for pineapple in both types of packaging; and
- KFCup's assembly of prepared pineapple and juice in plastic containers does not constitute a substantial and independent component of the manufacturing and selling process.

The Commission considers that KFCup and KFC jointly manufacture consumer pineapple in plastic cups by virtue of KFCup's role in the assembly process and KFC's controlling role in all other manufacturing and business activities.

3.2.2.2 Branding

KFC's website[7] states it is the manufacturer and seller of consumer pineapple in plastic cups. The brochure provided by KFCup showing pictures and specifications of the goods it manufactures are either identical or near identical to pictures and specifications listed on KFC's website as the products KFC states that it manufactures and sells. KFC also provided the same brochure (as KFCup) in its REQ for continuation inquiries 333 and 334 (for consumer pineapple and food service and industrial pineapple, or FSI pineapple, respectively). The brochure provided by both KFCup and KFC was generic and did not have any logos displayed.

The product specification documents for consumer pineapple in plastic cups provided by KFCup have KFCup listed in the document header indicating the documents belong to KFCup, but these documents are also stamped by KFC under the ISO 9000 Quality Management System. Given the

[7] http://www.ku buriruit.co.th/index1.php

relationship between KFCup and KFC, the Commission considers that the KFC stamp on these documents indicates that these are KFC approved documents and not independently created by or for the sole use of KFCup. Additionally, the product coding[8] which is printed onto the lid of each cup refers to KFC and not KFCup as the manufacturer.

KFCup advised that pineapple in plastic cups are not KFC or KFCup branded and that KFCup's role is as an "OEM" (original equipment manufacturer).[9] The Commission performed desktop research of the customers listed by KFCup and confirmed that these purchasers are not food brands or retailers, but intermediary traders who source the product on behalf of food brands or trade the goods under different brands. Given that:

- both KFC and KFCup have stated that they are both the manufacturer of consumer pineapple in plastic cups; and
- the product manufactured is generic and is branded for different food brands and the absence of branding does not identify who the manufacturer is,

the Commission is of the view that both KFCup and KFC are jointly responsible for the manufacture of consumer pineapple in plastic cups.

3.2.2.3 Sales

The Commission verified that KFCup primarily exports consumer pineapple to third countries and that its domestic sales are to KFC – selling defective product suitable for juicing for use in other products.

KFCup claimed that it is the exporter because:

- customer invoices are in KFCup's name; and
- customer payments are made directly to KFCup's bank account.

The Commission verified KFCup's claims and is of the view that merely the name of a company on an invoice and availing a bank account in that company's name to receive payments does not classify KFCup as the exporter.

In assessing the role, functions and responsibilities of KFCup and KFC in the manufacture and export of consumer pineapple, the Commission considers that:

- customers of consumer pineapple would identify both KFCup and KFC as the provider of the goods due to the combination of KFCup's logo on customer invoices and KFC's customer supply and relationships;
- packaging and promotional material are generic;
- the *business* of manufacturing and exporting consumer pineapple (management, manufacturing and selling) is jointly performed by KFCup and KFC;
- KFCup has an interest in the manufacture and sale of consumer pineapple and that it is responsible for the assembly component of the manufacturing process, including QA and receiving payments for the goods; and
- the *action* of knowingly placing consumer pineapple in the hands of a carrier, whether the carrier is identified as KFC (as performing export and handling functions on behalf of KFCup)

[8] Product coding on the lids of each cup identify the manufacturer, date of manufacture and machine lines used.

[9] The OEM terminology can be ambiguous and used in different contexts. The Commission understands that in this context, the use of OEM describes a company that produces goods to be sold under another company's brand.

or an independent freight business or the customer themselves, is knowingly performed jointly by KFCup and KFC.

With the exercise of KFC's control in its business operations, provision of raw materials and supply of customers, KFCup has relinquished the autonomy that would identify it as the sole principal in an export transaction, ie. it does not independently export consumer pineapple.

The Commission concludes that KFC and KFCup jointly perform the role, function and responsibility of the principal in an export transaction are hence are jointly the exporter.

3.3 KFC's 2012 accelerated review

KFC sought an accelerated review for consumer pineapple exported from Thailand in 2012. The then Minister for Home Affairs accepted the recommendations contained in *International Trade Remedies Branch Report No. 191* (REP 191)[10] and altered the notice so as to apply to KFC as if different variable factors had been fixed.[11]

Public notice of the decision was published in *Commonwealth of Australia Gazette No. 40* (GN 40) published 10 October 2012[12].

The effect of the 2012 accelerated review means that KFC is not eligible to apply for a second accelerated review as a declaration under subsection 269ZG(3)(b) was made in relation to its 2012 application.

3.4 KFCup's eligibility to apply for an accelerated review

The Commission considers that KFCup is not an independent exporter and is jointly the exporter of consumer pineapple with KFC.

As KFC is not eligible to apply for an accelerated review as a result of a declaration made under subsection 269ZG(3)(b), the role of KFC as the joint exporter with KFCup, means that KFCup is also not eligible to apply for an accelerated review.

3.5 Conclusion

The Commissioner is satisfied that KFCup is not eligible to apply for an accelerated review as it is jointly the exporter of consumer pineapple with an exporter who has had a declaration under subsection 269ZG(3)(b) in respect of a previous application made in 2012.

[10] Copies of REP 191 may be obtained by contacting the Commission at clientsupport@adcommission.gov.au

[11] Subsection 269ZG(3)(b)

[12] https://www.legislation.gov.au/content/HistoricGazettes2012

4 Effect of the accelerated review

- under subsection 269ZG(1)(a) the dumping duty notice the subject of the application will remain unaltered;
- exports by KFCup are subject to the “all other exporter” rate as published in the current notice; and
- any securities taken under section 42 will be converted to interim dumping duty.