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PUBLIC RECORD

SEF 291– Certain Hollow Structural Sections (HSS) – Anti-Circumvention Inquiry. Submission on behalf of Austube Mills Pty Ltd (ATM).

Introduction

1. We act for ATM in relation to the above matter.

2. We contend that the SEF is compromised by the following errors:
   - the failure of the Commission to identify correctly the relevant notices published under s.269TG(2) and 269TJ(2) of the *Customs Act 1901 (Cth)* (**Act**) in relation to which the Minister has the power, in prescribed conditions, to make alterations;
   - the failure to interpret Division 5A of Part XVB of the Act and Regulation 48 of the *Customs (International Obligations) Regulation 2015* [**Regulation**] in a manner that:
     - best achieves the purpose or object of the Act;
     - is compatible with the judgement in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* 2013 FCA 870 (**Panasia**);
     - recognises the requirements of Article 9.2 of the Anti-Dumping Agreement and Article 19.3 of the SCM Agreement; and
     - observes the most favoured nation rule in Article I of GATT 1994.
   - the Commissioner's unlawful purported rejection of our client's application in so far as it related to exports from Taiwan.

3. If one or more circumvention activities s.269ZDBE(2)(b) are established, the objective of this investigation is to identify the alterations to the specification of the goods in the dumping duty and countervailing duty notices (**original notices**) necessary to prevent the importation, without payment of dumping and countervailing duties, of alloyed HSS. Achievement of that objective restores the integrity of the original notices. However the integrity of the original notices, if altered in the manner proposed in the SEF, would continue to be compromised because the focus of those proposals is to penalise exporters found to have undertaken a circumvention activity rather than to fully restore the efficacy of the original measures.

Original Notices

4. At section 2.3.1 the SEF wrongly identifies the specification of the goods in the original notices as:

   Certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes.

In fact the original dumping duty and countervailing duty notices under s.269TG(2) and TJ(2) of the Act which were published in Gazette Nos. S108 and S106 respectively of 3 July 2012 specify the goods in the following terms:

…certain hollow structural sections (the goods) classified to tariff subheadings 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37), 7306.61.00 (statistical codes 21, 22 and 25) and 7306.69.00 (statistical code 10) in Schedule 3 of the Customs Tariff Act 1995.

It is only those terms that may be altered to counter the entry of slightly modified goods without payment of dumping and countervailing duties.

SEF Proposals

5. In addition to the misapprehension as to the specification of the relevant goods, the SEF proposals are based on a series of incorrect assumptions without any analysis of the relevant legislation or reference to authority. It assumes that alterations to a notice under the slight modification provisions can only be made in respect of countries and exporters in relation to which the circumvention activity has been established[1] and further assumes, in relation to the same provisions, that in addition to altering the specification of the goods s.269ZDBH somehow supports an inference that the Minister has some unqualified deeming power when specifying different countries and exporters[2]. The SEF also adopts the incongruous position that if the added alloy in a particular circumvention activity is known, the terms of an alteration can only apply to imported HSS containing that alloy but if the identity of the alloy is unknown the alteration can be expressed to apply to all added alloys. In addition, having asserted that the identification of an exporter engaging in the circumvention activity is a prerequisite for making an alteration to a notice that applies to that exporter, the SEF then proposes to apply alterations to three unknown exporters.

6. Leaving aside for the moment the legal issues that the SEF fails to address, it is instructive to consider the practical outcomes that would flow from the Commissioner's proposed recommendations. In relation to Taiwan, Australian importers would be able to avoid dumping duty by importing alloyed HSS from that country. They could achieve the same outcome by importing Chinese alloyed HSS from Dalian or Company C, provided the added alloy was other than boron, or from any other Chinese exporter except Company A and D. Alternatively importers could source alloyed HSS from Korea or Malaysia provided that the exporter was not Company F or E respectively. The revelation in a public document of these unregulated supply options available to importers for a substantial period of time before any further anti-circumvention activity

[1] SEF 291, p.23
[2] id. - *…section269ZDBH is extremely broad in its application and provides that the Parliamentary Secretary may make any alterations to the original notice deemed necessary.*

could be implemented basically results in an original application alleging minor modification of goods from some countries and/or exporters becoming an advertisement to unspecified exporters to avoid duties by the addition of an alloy. The prospects for an Australian industry in this situation of endless monitoring and analysis of import statistics and market intelligence, the chemical analysis of suspect imports and the very expensive and time consuming preparation, lodgement and prosecution of serial anti-circumvention applications, would be intolerable and inimical to the purpose and intent of the legislation.

7. Such an outcome would also be totally at odds with claims and aspirations recently expressed by the Commissioner:

> *Maintaining our robust and strong anti-circumvention framework is integral to ensuring the anti-dumping measures that are implemented are effective in providing the intended relief for Australian industry.*[3]
>
> *In my view there is absolutely no room for people to be avoiding these duties once they have been established. It is outrageous behaviour. …I have shown through the way we approached the first anti-circumvention activity that we absolutely mean business in this area*[4]*.*
>
> *We now have a much more prescribed approach to a key part of the circumvention behaviour, around the practice of slight modification of goods, through the regulation that becomes law on 1 April. This is a very powerful tool that we now have at our disposal.*[5]

8. The contrasting timorous approach in the SEF to countering circumvention activity appears to be influenced by the view that, because slight modification is undertaken by an exporter, it is only actionable in relation to those exporters who can be demonstrated to have modified the product. Apart from the fact that this construction fails to fulfil the purpose of Division 5A of PartXVB (**Division 5A**), it contrasts with the routine practice adopted by the Commission when undertaking original dumping investigations. At the conclusion of such investigations the prospective interim duty collection regime provides for the collection of duties on goods exported by entities other than specified exporters. Those entities include exporters who have not exported to Australia before the date of the dumping duty notice. Thus interim dumping duties are imposed and collected on entities in relation to which there is no specific finding of dumping.

Division 5A of PartXVB

9. Parliament has specified six practices described as circumvention activities and has provided that, if found to exist, the Minister can negate a proscribed activity by making alterations to the original notice. The SEF claims that …*the Parliamentary Secretary*

[3] House of Representatives – Standing committee on Agriculture and Industry: Hansard, 26 March 2015 – p.1
[4] ibid., pp.7-8
[5] ibid., p.9

may make any alterations deemed necessary[6] … that proposition can only be maintained if 'necessary' is understood to imply 'essential for the achievement of the purposes of the Act'. However the Minister's power under s.269ZDBH(1) is not without limits. To be 'necessary' any alteration that he makes must be essential to achieving the purpose of countering the particular type of circumvention activity under consideration. For example the power to specify different goods set out in s.269ZDBH(2)(a) is only relevant to the activities described as *Assembly of parts in Australia* and *Slight modification of goods*. In our submission it is only an alteration to the goods description that is relevant to the current inquiry.

10. Section 269ZDBB in general and subsection (6) in particular are concerned with circumvention activity in relation to the notice. In the relevant notices in the present matter the Minister, after making declarations under s.269TG(2) and 269TJ(2) that the Dumping Duty Act applies to like goods, states that:

> *This declaration applies in relation to all exporters of the goods and like goods from China, Korea, Malaysia and Taiwan.*

The application in this matter claimed that one or more circumvention activities in relation to the notice had occurred and the circumvention goods were alloyed HSS. The Commissioner accepted that there appeared to be reasonable grounds for that claim. The notice in question is not a collection of many notices even though it applies to many exporters. Similarly it is not four notices even though it applies to exports from four countries. It is assuredly one notice and must be treated as such. Consequently, unless specifically provided for in the Act or clearly necessary to fulfil the purpose of the legislation, it is not open to the Commissioner to recommend alterations involving deconstruction of the original notice into constituent parts relating to countries, exporters and types of alloys.

11. There are no specific provisions in Division 5A authorising the recommendations proposed in the SEF. In the making of an application and considering the acceptability of such an application the Division requires only that there are reasonable grounds for asserting the existence of … *one or more circumvention activities*[7]. In the present matter one established occurrence of the activity described as slight modification of goods that also exhibited the other features listed in Regulation 48 would be sufficient to support an investigation, a positive recommendation by the Commissioner and a declaration by the Minister of an alteration to the original notices. The Commission's recommendations then imply, however, that the declaration can only relate to the country, exporter and alloy subset involved in the particular activity or activities that it

[6] SEF291, p.23
[7] Act: s.269ZDBE(2)(b)

investigates. The resulting proposed notice at pages 85-86 of the SEF reflects this differentiated approach.

12. In our submission this approach finds no support in the relevant provisions of Division 5A. As already noted the Minister's declaratory power in s.269ZDBH is not unlimited. It is true that he may specify alterations other than those listed in subsection (2) of that subsection by, for example, specifying importers in an alteration designed to counter the type of circumvention activity defined in s.269ZDBB(5A). Such a specification may be 'necessary' in the sense discussed above[8].

13. However the 'remedies' set out in .269ZDBH(2) have been crafted to provide the usual means of countering each of the circumstances involved in the six specified activities. In responding to the 'arrangements between exporters' activity described in s.269ZDBB(5) it would be necessary for any alteration to specify the 'exporter' and the 'other exporter' and it may be necessary to specify variable factors to apply to the 'exporter'. In the case of the activity involving the 'avoidance of the intended effect of duty' described in s.269ZDBC(5A) a specification of the exporter and variable factors would be required together with the possibility, referred to above, of identifying importer(s).

14. The remedies for the remaining four circumvention activities are simple. In substantiated cases of assembly of parts in a third country or exports through third countries all that is required is an alteration specifying a different foreign country. Similarly in relation to 'assembly of parts in Australia' and 'slight modification' the only necessary alteration is a specification of different goods to be the subject of the notice.

Purpose & Object of Division 5A

15. There is no need to resort to a consideration of extrinsic materials to identify the purpose of Division 5A. It is clear from the use of the word 'circumvention' to describe conduct and 'anti-circumvention' to describe the investigative process and with both uses expressed to be 'in relation to the notice' that Parliament has established a statutory regime designed to ensure that the objectives of original notices published under Part XV are not circumvented by specified activities. In broad terms the impacts of those activities is the reduction or elimination of dumping and/or countervailing duties that would otherwise be payable and a consequential increase in the degree of injury to Australian industry caused by dumped exports.

16. Section 15AA of the *Acts Interpretation Act 1901* (**Interpretation Act**) provides:

[8] see ADRP Report - Certain Aluminium Extrusions

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

That section gives enlarged legislative expression to the common law principle of statutory interpretation known as the 'mischief rule' which, after the identification of both the mischief and the remedy in the provisions to be interpreted, requires a Court:

…always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.[9]

17. In the present matter the application of s.15AA requires an assessment of which interpretation of Division 5A would best achieve the purpose or object of the Act. In the present matter that purpose is to ensure that the remedy provided by the original notices is not undermined by the export of slightly modified goods and the consequential avoidance of duties. The choice of interpretation lies between:

- the proposal in the SEF to limit the specification of alterations to the original notices to those exporters who have undertaken the circumvention activity subject to the exclusion of such exporters in respect of future exports of HSS not containing the specific alloy found to have been used by them in that activity; and
- our client's contention that having established the existence of one or more occurrences of the circumvention activity, the alteration to the original notices must apply to all exports of alloyed HSS from all countries identified in the original notice.

18. Paragraph 6 of this submission identifies some of the consequences of introducing the alterations proposed in the SEF. Tacitly, the proposal concedes that in relation to circumvention goods the altered dumping notice will be both incomplete and porous and it effectively invites those exporters not specified in the alterations to slightly modify their production process so that they can continue, resume or commence exporting to Australia HSS that is not covered by the altered original notice. To the extent that the Commission might suggest that such future conduct could be circumscribed by eternal vigilance, our client wishes to stress that for the reasons set out in paragraph 6 an indeterminate series of anti-circumvention applications and investigations is not a commercially realistic proposal. It would also compromise the efficient use of the Commission's resources by diversion of experienced officers to successive, unnecessary inquiries rather than the robust investigation of matters of substance arising is investigations under Division 2 of Part XVB of the Act.

19. By contrast our client's contention involves minimal alterations to the notice, ensures equity of treatment by applying a uniform anti-dumping regime to all exporters and

[9] Heydon's Case (1584) 76 ER 637 at 638.

importers and provides a permanent solution not only to the 'mischief' that has been established but also suppresses any *… subtle inventions and evasions for the continuance of the mischief*. We submit that the application of s.15AA to the interpretation of Division 5A demands the abandonment of the proposed recommendations in the SEF and the adoption of our client's alternative contention as the interpretation that would best achieve the purpose or object of the Act.

The Original Notices

20. In addition to our submission on the application of s.15AA, we further contend that the altered original notices proposed in the SEF are unlawful. The present notices are consolidated notices applying to the complete class of goods under consideration in the original inquiry and to all exporters from the nominated countries found to be dumping the goods. The proposed altered notices expand that class of goods to include alloyed products when exported from certain countries by specified exporters but for all remaining exporters the terms of the unaltered original notice, limited to non-alloyed goods will apply. This differentiated application to countries and exporters is not authorised by the Act.

21 The question of consolidated and differentiated notices was considered at length by Nicholas J in **Panasia**. That case involved differentiation by way of specifying different variable factors for different classes of goods, a practice that his Honour concluded was not in accordance with the Act. In the course of his consideration of the issue Nicholas J acknowledged with tacit approval the Commonwealth's acceptance in that case that under s.269TG(2) the Minister's power to make a declaration applies only in respect of the entire class of goods under consideration[10]

22. The judgement also deals with the respondent's submission that the operation of s.33(3A) of the Acts Interpretation Act authorises the publication of differentiated duty notices under s.269TG. Section 33(3A) provides:

> Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) with respect to particular matters (however the matters are described), the power shall be construed as including a power to make, grant or issue such an instrument with respect to some only of those matters or with respect to a particular class or particular classes of those matters and to make different provision with respect to different matters or different classes of matters.

23. In rejecting the respondent's submission his Honour pointed out that in accordance with s.2 of the Interpretation Act, s.33(3A) will apply to s.269TG 'subject to a contrary intention' and concluded that having regard to the …*overall statutory scheme*[11] …such a contrary intention did exist and consequently the subsection did not authorise the

[10] Panasia at [129]
[11] ibid., at [136]

publication of differentiated dumping duty notices. On the same grounds we submit that s.33(3A) does not authorise the publication of the differentiated notices proposed in the SEF. The clear requirement of s.269TG(2) and (3) of the Act concerning the identification of goods in a notice is that the Minister confines the specification to … *like goods in relation to those goods of a particular kind*. Any proposal to limit the statutory goods description by reference to specified importers is manifestly inconsistent with those provisions.

International Obligations

24. A further objection to the proposed notices is that because they are differentiated they are necessarily discriminatory in that they do not apply equally to all exporters from the nominated countries found to be dumping. Consequently we submit that the SEF proposal is unequivocally in breach of Australia's international obligations under Article 9.2 of the *Anti-Dumping Agreement*[12] which provides:

> When an anti-dumping duty is imposed in respect of any product , such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury …[emphasis added]

25. This provision echoes the fundamental requirement of paragraph 1 of Article I of the General Agreement on Tariffs & Trade 1994:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

26. The SEF proposes to grant an advantage, favour, privilege or immunity to exporters of alloyed HSS from Taiwan and to those exporters from China, Korea and Malaysia that are not specified in the proposed alterations. In our submission the three contracting parties in which the specified exporters are located would have clear grounds to demand that Australia immediately and unconditionally extend the same treatment to all exports of alloyed HSS originating in their territories.

Taiwan

27. For all the reasons set out above we contend that the proposed exclusion of exports from Taiwan from the proposed alterations to the original notices cannot be maintained. However we also wish to restate the concerns expressed in our letter to the

[12] Article 19.3 of the SCM Agreement stipulates the same non-discriminatory requirement.

Commissioner of 27 October 2015[13] concerning the conduct of the investigation in relation to Taiwan.

28. The SEF misconstrues the Commissioner's obligations in relation to applications for anti-circumvention inquiries. Assertions such as … *there were no grounds for the initiation of an anti-circumvention inquiry into exports from Taiwan*[14] betray a misunderstanding of the overall scheme of Division 5A. Applications for an inquiry are made under s.269ZDBE(1) of the Act …*in relation to an original notice* …not in relation to individual countries. If an applicant demonstrates, as our client has, that there are reasonable grounds for concluding that one or more circumvention activities in relation to the original notice has occurred the Commissioner must initiate an inquiry in relation to the original notice that covers all nominated countries. This construction is reinforced by two further provisions. There is no requirement under s.269ZDBE(6) to describe the countries to which the inquiry relates because the inquiry must relate to all the countries subject to the original notice and the termination criterion in s.269ZDBEA only authorises the complete termination of the inquiry, not a selective termination concerning particular countries.

29. For these reasons we submit that it is not open to the Commissioner to give the Minister a report recommending that he declare specified alterations to the original notice only in respect of exports from China, Korea and Malaysia. While s.269ZDBH(2)(b) does contemplate the addition of foreign countries to be covered by the original notice (eg, to counter circumvention activities of the type set out in s.269ZDBB(3) and (4) of the Act) there is nothing in Division 5A that would authorise the exclusion of Taiwan from the application of the altered original notice.

Qingdao XiangXing Steel Pipe Co., Ltd

30. The Commission has found that no circumvention activity has occurred in relation to exports to Australia by Qingdao XiangXing and asserts that consequently the company should be excluded from the operation of any alteration to the original notices. Again this assertion is based on a misconstruction of the provisions of Division 5A. The original notices apply to the company and, for the reasons detailed above, any alteration to those notices based on circumvention activity by one or more other exporters must apply to Qingdao XiangXing. Considerations of patterns of trade, physical differences and customer expectations are irrelevant in determining the terms of the alterations to the original notice.

Alterations

[13] EPR 291: file 019
[14] SEF 291: p.23

31. For the reasons set out in paragraph 4 of this submission. the alteration proposed in the SEF, even if justified in law, cannot proceed because it does not reference the goods description contained in the original notices published by the Minister. To maintain compatibility with those notices, we propose the following alterations:

Certain Hollow Structural Sections being goods classified to the following tariff subheadings in Schedule 3 of the Customs Tariff Act 1995:

- *7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37);*
- *7306.50.00 (statistical code 45);*
- *7306.61.00 (statistical codes 21, 22, 25 and 90); or*
- *7306.69.00 (statistical code 10).*

but excluding:

- *conveyor tube made for high speed idler rolls on conveyor systems, with inner and outer fin protrusions removed by scarfing (not exceeding 0.1mm on outer surface and 0.25mm on inner surface), and out of round standards (i.e. ovality) which do not exceed 0.6mm in order to maintain vibration free rotation and minimum wind noise during operation;*
- *circular products having an outside diameter less than 22mm and greater than 165.1mm;*
- *oval, square and rectangular products having a perimeter greater than 1277.3mm;*
- *precision rectangular hollow sections with a nominal thickness of less than 1.6mm; and*
- *air heater tubes to Australian Standard (AS) 2556.*

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