STAUGHTONS

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PUBLIC RECORD VERSION
SEF 254

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July 6th 2015

Mr Bora Akdeniz
Assistant Director
Anti-Dumping Commission
55 Collins Street
Melbourne Vic 3000

Via email: Bora.akdeniz@adcommission.gov.au

Dear Mr Akdeniz

Having considered the ATM Public Record submissions No 46 of 30th June and No 42 of 24th June, we are compelled to provide the following response to ATM's views and assertions concerning Saha Thai Steel Pipe.

Introduction

The fundamental issue concerning the Commission's treatment and consideration of Saha Thai's normal value calculation is whether like goods are modified by taxes (duties) paid.

Saha Thai has strenuously submitted that they are and at the invitation of the Commission Saha Thai has provided evidence to support that claim.

The Commission has correctly observed in the SEF that the Exporters Questionnaire had not raised this appropriately, but this was sufficiently rectified at the verification stage and subsequent to that stage.

In any event the Commission did not close the door on this question and stated :

> **"**As a result, the Commission would like to invite Saha Thai's responses to how the duties paid for imported HRC that are used in production of domestically sold products modified its domestically sold products prices. As this issue is also discussed in the SEF, the Commission kindly asks Saha Thai to provide its response in confidential and public submissions within the legislative time frame (as Subsection 269TDAA (3) refers."

That is consistent with the Anti Dumping Agreement (ADA) obligations to make appropriate enquiries and submissions were then provided.

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1. BACKGROUND FACTUALS:

1.1 Whether it be an Australian or overseas producer, the cost to make the GUC, and thus the end-selling price of the GUC, is basically and essentially determined by the prevailing cost of the HRC input.

1.2 In the many previous investigations on this product from both Thailand and other Countries It has to be concluded, and accepted, that the cost of HRC input is the major factor in the fully absorbed cost to make the finished goods of the product in question.

1.3 As verified in this investigation and also in the previously investigation No 177 referred to by ATM, Saha Thai's domestic selling price of the GUC is set by the Managing Director based on the input cost of the HRC – ***refer para 6.3 of the Visit Report, Case No 254. and para 7.3*** of the 'Saha' Visit Report on ***Report No. 177*** re the Saha Thai domestic sales process.

For example Report No. 177 stated:

> "The selling price is set by the Managing Director based on the cost of HRC and the relativity of domestic and export prices."

1.4 This process has in fact been consistent with all of the Australian Anti-Dumping Investigations on Saha Thai in which this writer has been involved with dating back to year 1999.

1.5 The Commission has evidenced that Saha Thai sources both imported and locally produced HRC to produce the GUC.

1.6 Saha Thai's imported HRC is subject to Import Duty of 5%, and domestic VAT tax when used to produce domestically sold GUC.

1.7 No Import Duty is payable when imported HRC is used to produce GUC for export to Australia.

1.8 The total amount of Import Duty paid by Saha Thai on imported HRC used for locally sold GUC during the I.P. comprised two 'amounts' – namely import duty on HRC released ex the licenced warehouse (Bond) and import duty paid at the time of importation.

1.9 The Commission has verified that information on the Import Duties paid and the volumes of imported HRC used in domestically sold goods.

1.10 In conclusion, the Commission would be aware that like Australia, Thailand operates a licenced bond system whereby producers such as Saha Thai can store imported HRC into bond, never pay Import Duty if used in exports of finished goods, and only pay duty when used for home consumption.

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For practical purposes, when input goods are fungible and not easily traceable, authorities typically take producer figures on trust, and use computer analysis of import and export patterns, and spot checks of inventory, to ensure that duty free status is properly claimed. Australia therefore cannot be seen to ignore Thai Authorities using a similar approach.

2. Response to ATM's Submissions.

Saha Thai submits that on the one hand, it is for any interested party to make a case for adjustment, but on the other hand, once sufficient reliable data is before the Commission to warrant an adjustment , it should be made.

The WTO jurisprudence makes it clear it is mandatory for the Commission to call for and consider all relevant facts when a prima facie application has been made.

The fact that an exact amount cannot be determined with certainty , should not be a basis for rejecting an adjustment.

As the Commission is fully aware Section 269TAC (8) is the relevant legislative provision for this claimed adjustment and the Commission in an email of 2nd June 2015 stated:-

"Therefore, to allow for a duty drawback adjustment in the normal value , the Commission should be able to establish that Saha Thai's domestic sales prices for like products had been modified by the effect of duties paid."

Saha Thai submits that a proper reading of the statute should lead to the conclusion that if **either** price is so modified, an adjustment is appropriate. In any event, the word **"modified",** which is not found in the ADA , should not be given an unduly restrictive meaning. To do so in our view would be to alter the ADA norms, which cannot have been intended.

The ADA states:-

"2.4 A fair comparison shall be made between the export price and the normal value.

*This comparison shall be made at the same level of trade, normally at the **ex- factory level**, and in respect of sales made as nearly as possible the same time.*

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> *Due allowance shall be made in each case , on its merits, for differences which affect price comparability , including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."*
>
> (***emphasis added)***

This provision, on which the Australian legislation is based, only refers to differences affecting "comparability", not conscious modifications by a producer, although the latter could be a subset of the former. Hence the Commission's correspondence and/or the ATM submissions referred to were arguably wrong to see it as only being about whether Saha Thai actually accounted for this in local pricing decisions or was able to do so in the prevailing market conditions.

The SEF was also wrong to conclude that:-

> *"From the information provided by Saha Thai in its questionnaire response and later at the verification visit, the Commission considers the amount of duties paid for the imported HRC used in products sold in Thai domestic market do not appear to have modified Saha Thai's domestic like goods prices."*

Saha Thai submits that a number of points can be made based on the information provided during the verification visit , the comments of the investigation team, and the confidential submissions made post the SEF.

2.1 The Commission must base its recommendations on the best admissible information available that was provided in a reasonable time frame and has a positive duty to elicit such information, which the invitation to Saha Thai sought to comply with.

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2.2 Both domestic and foreign prices are primarily set in this global industry based on variations in the one key input cost, namely the HRC , which in turn is affected by iron ore and coking coal prices and currently, by worldwide over supply. That would be well known to the Commission from its numerous 'steel product' cases, which probably form the bulk of its overall work load.

2.3 HRC costs for pricing purposes have to be **real costs**, which demonstrably involve purchasing, transportation, and import duties if any.

2.4 A Thai manufacturer of the product group in question, who wishes to make profit and set target prices in that regard, must thus consider the **duty paid** HRC cost, plus intended, aim profit. There is no reasonable reason for the Commission to think otherwise and hence any duty known to be payable, **does "modify"** the price, as does the change in base HRC cost.

2.5 It certainly affects price **"comparability"** in terms of a fair comparison as per both the ADA and WTO jurisprudence.

2.6 The duty amount paid in the Saha Thai ledger, being import duty paid on ex bond releases, shown to and verified by the investigation team, clearly supports this. Additional to that amount of duty paid, import duty, as evidenced to the Commission was also paid at the time of importation in respect of two shipments and a third duty payment in respect of one shipment originally 'bonded' but subsequently released, was paid at the time of that shipment's release from 'bond'.

2.7 The Managing Director of Saha Thai would look at all such data in setting target prices.

2.8 It has been evidenced to the Commission that as outlined in point 2.6, the 'duty paid' ledger verified by the investigation team understates the duty paid position.

2.9 Saha Thai respectfully submits that the Commission must still decide to make the adjustment as all available evidence must be utilized.

2.10 Saha Thai also submits that it was entitled to rely on the investigation team assurance that it would come up with a formula to account for this, which they then did. On this basis there was a reasonable basis for Saha Thai to consider that the dumping duty margin was below the de minimus level. It may be considered a denial of due process for the investigation team to depart Thailand on that basis and for the Commission to then deny Saha Thai both the right to rely on that assurance and also deny the right to raise other relevant issues.

2.11 **In any event, there should only be two possible approaches by the Commission. The proper approach is to accept the formula and calculations adopted by the investigation team.**

2.12 The actual accounting information provided and verified at the Saha Thai site, is more determinative than the EQ responses and is clearly the best evidence at this point in time.

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3. ATM Submission No 41 & No 42 & 46.

3.1 ATM is wrong to assert in its submission No 41 on the public record that Saha Thai provided data "later" that was " unverified". ATM is also wrong in submission No 42 when it asserts that the post EQ response representations were "unaccompanied by supporting evidence". Evidence was provided during the verification visit and subsequent to that visit.

It is a nonsense for ATM to argue in submission No 42 that in light of the EQ responses, on the one hand there needs to be some defence to a false statement, but at the same time, the EQ responses somehow show what was really thought. The natural conclusion is that the EQ responses contained an oversight, which was remedied immediately during the verification visit.

3.2. ATM submission No 42 is also incorrect in suggesting some due process problem in allowing Saha Thai to correct the oversight. The very Manual provisions it quotes , clearly express the **obligation** on the Commission to consider adjustments based on evidence before it and contemplates requests being made after the verification visit , the situation mandated by the ADA.

3.3 ATM submission No 46 is also erroneous in its supposed logic and shows a misreading of ADA and WTO jurisprudence. It is valid to refer to Art. 2.4 ADA, and cases such as **US - Softwood Lumber V.** However, it ought to have been clear from the passages ATM quotes that the jurisprudence wishes to distinguish cases where physical differences do not have a potential influence on costs and hence would not impact upon cost/price comparability, given that prices must be more comparable when their costs are comparable. Saha Thai's situation is different. If import duty is paid in one market but not the other, that is a fundamental cost difference that the jurisprudence would hardly describe as analogous to red versus black cars.

3.2 ATM submission No 46 is also completely erroneous in law in suggesting that "comparability" is to be determined by current market power conditions. Whether certain costs can be passed on or not from time to time, depends upon supply/demand curves and demand elasticity, but this cannot be a proper way to interpret the notion of "comparability" in ADA. Price suppression does not negate a fair comparison and adjustment of differing duty/tax positions.

3.5 On this issue, ATM might have also referred to the Panel Report in *Egypt- Steel Rebar* which considered that Art. 2.4 in its entirety, has to deal with ensuring a **"fair comparison"**.

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3.6. The Appellate Body in *US-Zeroing (EC)* considered this to be an independent and general obligation and was not defined exhaustively in the Article. In *US-Hot Rolled Steel,* the Appellate Body considered that "the obligation to ensure a "fair comparison" under **Article 2.4 "**lies on the investigating authorities and not the exporters. It is those authorities which, as part of their investigation , are charged with comparing normal value and export price and determining whether there is dumping of imports (para 178).

3.7 **ATM's logic would mean that the WTO zeroing cases were wrongly decided, as they did not look at actual domestic price elasticity and simply looked at the differing methodologies that analytically made price comparisons difficult.**

3.8 That there is a clear duty on the Commission to take all steps to find and determine what adjustments should be made , is also made clear in *Egypt - Steel Rebar* where the Panel stated:-

> ***"(W)** read **Article 2.4** as explicitly requiring a fact-based, case- by- case analysis of differences that affect price comparability. In this regard, we take note in particular of the requirements in Article 2.4 that due allowance shall be made in each case , on its merits, for differences which affect price comparability . We note as well that in addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for any other differences which are also demonstrated to affect price comparability. Finally, we note the affirmative information-gathering burden on the investigating authority in this context , that it shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case-by -case basis, grounded in factual evidence."*

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4. Conclusions

As a result, it has to be concluded that Saha Thai sales are modified in different ways, as the Commission knows there is an equivalent to duty drawback for exports using imported HRC, but not for locally sold goods.

The Commission's consideration and treatment must be consistent with the mandatory language in the WTO Anti-Dumping Agreement.

The only alternative approach that the Commission might conceivably consider would be to make a calculation based on the worst case scenario from Saha Thai's perspective.

Whilst Saha Thai is not supportive of this approach, anything less would be improper based on the material evidence before the Commission, and importantly, this approach alone would greatly reduce any dumping duty margin applied to Saha Thai.

In summary our submission to the Commission dated 22nd May 2015 details the following relevant evidential cost factors that cause the Saha Thai domestic sales to be modified due to the payment of Import Duty, and taxes, namely:-

- HRC purchases
- Turnover of G.U.C. sector
- HRC content in CTM
- HRC content calculation
- Claimed adjustment factor of [redacted]

5. Constructed Normal Value AS 1163 model

My previous submission detailed reasons why Saha Thai rejects the Investigation teams normal value construction of the AS1163 black RHS sold domestically being an applied adjustment to a surrogate 'model'.

In terms of surrogate, WTO ADA 2.2 states:

> *"When there are no sales of the like product in the ordinary course of trade the domestic market of the exporting country or when because of the particular market situation or the low volume of the sales in the domestic market of the exporting country2, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs ad for profits."*

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This is mirrored in s269TAC(2). Thus it is clear that a production cost method should be used before surrogate based costing, if we are to be WTO consistent. Even if surrogates were accepted, this would require adjustments.

Production costs were given to the ADC team during the verification visit. Hence it is clear that such figures should have been used. Sales to third countries would not have been appropriate if they were not of goods made to that Australian standard. Using other goods as surrogates is not appropriate on the facts either, as there are none that have both similar features and market conditions as the case in question is unique.

Hence the approach taken in the SEF is clearly in violation of our domestic law and the WTO ADA.

6. In conclusion it needs to be recalled that ATM's application resulting in this Investigation was essentially accepted on the basis of ATM assertions relating to mass (weight) tolerances of Saha Thai domestic versus export product that in ATM's view required upward adjustments that 'demonstrated' Dumping Margins.

The Commission's verified evidence of Saha Thai's domestic versus export product demonstrated no adjustment was required for weight tolerances (*Section 8.3 Visit Report)*

7. Contact Details
Please contact the writer for any further information or clarification and thank you for your consideration.

Regards

M J Howard