

www.dachenglaw.com

北京市东直门南大街3号国华投资大厦5/12/15层 (100007)
5/12/15/F. Guohua Plaza, No. 3 Dongzhimennan Avenue,
Beijing, 100007, China
Tel: 8610-58137777 Fax: 8610-58137778
Email: Paul.Lee@dachenglaw.com



PUBLIC FILE

FOLIO 137

DACHENG

LAW

OFFICES

大成律师事务所

May 17, 2012

VIA EMAIL

Director Operation 2
International Trade Remedies Branch
Australian Customs and Border Protection
Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601
AUSTRALIA

Total Pages: 6

Investigation

1 July 2010 - 30 June 2011

PUBLIC VERSION

**Re: Aluminium Road Wheels from Peoples Republic of China:
Comments to the Statement of Essential Facts (NO.181)**

Dear Mr. David Turner,

On behalf of Zhejiang Shuguang Industrial Co., Ltd. ("PDW"), we hereby submit the following comments to the Customs and Border Protection Service (the "Customs") on the No. 181 Statement of Essential Facts (the "SEF"). As demonstrated below, some calculation methods adopted are not correct, and some preliminary determination for certain key issues of subsidy still need further clarification and evidencing documents to establish their compliance with the relevant provisions of *the Customs Act 1901* (the "Act") as well as *the Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). We request that the Customs provide enough consideration and make necessary correction in the final finding.

I. Aluminum purchased via private owned trading company

In accordance with s.269T(a) of the Act, there are only three kinds of eligible entities that

may be deemed as a subsidy provider: “government”, “public body” or “a private body entrusted or directed by that government or public body to carry out a governmental function”. This is a condition precedent to assess whether a “financial contribution” may be defined as a “subsidy”, namely, in case a benefit provider does not belong to any of the said three categories, even though there might be some financial contribution received from the said provider, such contribution shall not be defined as “subsidy” either. Or, in another words, “financial contribution” received from private entity without government entrustment or direction shall not be defined as “subsidy”.

It is quite obvious that a private owned company is not a “government”. We does not find any discussion or evidence in the SEF on whether a private owned company shall be deemed as “public body” or “being entrusted/directed” to carry out “government functions”, therefore, we take the view that the Customs consider private owned companies are NOT “public body”, i.e. private companies are NOT eligible entities of “subsidy provider”.

We noticed that, in the SEF, the Customs quoted s.269T(2AC)(a) as the legal basis to justify the inclusion of Aluminum purchase via private intermediaries into Program 1. However, we take different view on this issue.

s.269T(2AC)(a) of the Act specify that:

“A subsidy is taken to have been received in respect of particular goods: (a) whether the benefit conferred by the subsidy is conferred directly or indirectly in relation to those goods;”

Such provision only stipulate that a subsidy may be conferred in form of indirect, or in another words, a subsidy cannot be taken as “not received” just because the benefits concerned are conferred “indirectly”. However, the said provision shall not be misconstrued as an expansion interpretation of the definition of eligible “subsidy provider”.

Suppose a private company received a sum of subsidy from the government, and, based on the said subsidy the company “voluntarily” provides a discount to its clients. Can we challenge the clients concerned received an “indirect subsidy” from the government? The answer obviously shall be “NO”, because, there were no governmental “entrust or direct” behavior involved. The discount is a promotion behavior voluntarily taken by a private entity, which does NOT reflect any entrust or direct intention of government toward the client.

The company can use the subsidy to provide a discount, but, it also can use the same to raise the salary of its employee, or, to upgrade its equipment, all up to its full discretion.

Therefore, a subsidy cannot be deemed as automatically “pass over” to the downstream industry, unless there is confirmative evidence demonstrating that government or public body entrust or direct the firsthand subsidy recipient to do so. The same logic shall also be adopted in the current proceeding.

Moreover, “receiving subsidies from government or public body” is quite different from purchasing materials with “distorted low price”. In a perfect competition market, no sellers can sell products at special higher price, although the low level of the market price may be caused by unfair competition or improper involvement of government. But, whatever the reason might be, the only fact of purchasing materials with “distorted low price” shall not be subject to any countervailing measures, because, it does not sufficiently indicate the buyer received any subsidies.

In brief, for the Aluminum resold by private trading company to PDW, in case there were no confirmative or verifiable evidences demonstrating government or public body “direct or entrust” the trader to “pass over” any benefits to PDW, then, PDW shall not be determined as received subsidy as stipulated in Program 1.

II. Allocation method of Program 1

As verified by the Customs, PDW manufactured two kinds of products, the ARWs and Motorcycle wheels. Both of the said two products use the Aluminum as major inputs, and during the POI around [a number] % of the Aluminum purchased was used to produce Motorcycle wheels. Therefore, when calculating the per unit subsidy amount of Program 1, the production quantity of Motorcycle wheels shall be included in the allocation basis.

Moreover, due to the unit weight of different models of ARWs and motorcycle wheels are quite different, it is not reasonable to use “pieces” as quantity unit to calculate the per unit subsidy quantity or subsidy rate. Considering all standard weight of the different models, total purchased weight of Aluminum and total weight of Australian export sold products have been submitted and verified by the Customs, PDW requests to use “weight” as quantity unit to

calculate the per unit subsidy or subsidy rate.

Please refer to the inserted columns in blue of Confidential Attachment 1 for the correction suggestion of PDW with respect to the subsidy rate of Program 1.

III. Income Tax Deduction does not have “specific” nature

We noticed that in section IV.1 of Appendix B, PDW was listed as one of the beneficiaries of the Program 4, i.e. receiving preferential income tax rate for hi-tech enterprise, which is not correct. PDW has never enjoyed any preferential rate with respect to income tax. The income tax rate applicable to PDW has always been 25% from its establishment to date.

However, a sum of income tax deduction was received by PDW for the financial year of 2010. As indicated by the relevant regulations submitted by PDW, the income tax deduction policy has the following characters:

- (1) It was widely applicable to domestic funded companies and foreign invested enterprises, and there were no limitation with respect to the capital nature or belonging industry of the applicant, thus, it was not “specific” with respect to the industry or ownership nature;
- (2) It was widely applicable to all over the country, thus, it has no regional “specific”;
- (3) The criteria were publicly stipulated by regulations, so that any company may apply and receive the deduction as long as it satisfied the criteria concerned, thus, it’s not “de facto” specific; and
- (4) It has ceased as of January 1, 2008.

In sum, the income tax deduction policy does not have the necessary nature of “specific”, therefore, it shall not be deemed as a “subsidy” in accordance with Article 2 of the SCM Agreement.

IV. Allocation of Tax Deduction

We noticed that when calculating the subsidy rate of Program 4, the Customs allocates the tax deduction amount only by the total sales quantity of ARWs, which is not correct. Since a significant proportion of revenue of PDW was realized by sales of Motorcycle wheels, and the income tax deduction directly in connection with sales revenue, the deduction amount shall be firstly allocated by revenue of ARWs and Motorcycle wheels, and then, further allocated by the sales quantity of ARWs so as to calculate the correct subsidy rate.

Further, due to 2010 is the last year that PDW may enjoy the said income tax deduction, and there are only six months of 2010 belongs to the POI, thus, the total amount of deduction shall be allocated by the revenue of the second half year of 2010 so as to calculate the correct deduction amount incurred in the POI.

Please refer to the inserted columns in blue of Confidential Attachment 2 for the proposed calculation method in this regard.

In brief, we sincerely hope that the Custom may take into account of the following:

- (1) Purchase Aluminum via private owned trade company shall not be deemed as receiving indirect subsidy of Program 1;
- (2) When calculating subsidy rate for Program 1, production quantity of Motorcycle wheels shall be included in the allocation basis and use "weight" as quantity unit;
- (3) Income tax deduction received by PDW shall not be deemed as subsidy due to it is lacking of the necessary nature of "specific"; and
- (4) Income tax deduct shall be allocated by revenues of the second half year of 2010, and further allocated by revenue of ARWs and Motorcycle wheels to get the correct amount attributable to GUC during the POI.

Based on the above, as long as the motorcycle wheels' production and sales revenue can be correctly taken into account, the total subsidy rate of PDW shall be far less than 2%. Therefore, we sincerely request the Customs terminate the subsidy investigation with respect to PDW.

Should you have any questions, please do not hesitate to contact us.

Respectfully submitted,



Paul Lee

Dacheng Law Offices

Counsel to PDW