Percival Legal

Non-Confidential

5 July 2023

By Email

Mr Bradley Armstrong PMC
Anti-Dumping Commissioner
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Dear Commissioner,

RE: Review 609 - review of anti-dumping measures on exports of aluminium extrusion products from the People's Republic of China - supplementary submission

I refer to my previous submission on behalf of my clients, Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (**KAE**) and Kam Kiu (Hong Kong) Limited **(KHK)** and their related bodies corporate (collectively **Kam Kiu**), in response to the recent publication of the Statement of Essential Facts (**SEF**) in Review 609.

In that submission, amongst other matters, I drew attention to the determination of 'export prices' and, specifically, the 'deductive export prices' calculated pursuant to section 269TAB(1)(b) of the *Customs Act 1901* for Kam Kiu's exports. It is perhaps useful to clarify the matters raised in that submission regarding the calculation and use of a 'deductive export price'. Hence the principal reason for this supplementary submission.

Putting aside determining export prices under section 269TAB(1)(c) of the *Customs Act 1901*, the two principal methodologies are those in TAB(1)(a) and (b). The fundamental difference between the two methods is that one determines export prices on a prospective basis, whereas the other on a retrospective basis. That is:

(i) **TAB(1)(a)**: here the 'export price' is the price actually paid or payable from which post-exportation costs and expenses are deducted, if any, from that 'price'. Because it is a 'price' for the sale and purchase of goods at a time in the future, that price is set, that is, agreed between the seller and buyer, typically, as here, when a purchase order is placed and confirmed. At that time the 'price' is being agreed in advance of the production, shipment and delivery to the customer. Accordingly, the costs of production, sale, shipment and delivery, including charges such port charges and customs duties, would not have been incurred. The 'acutal' amounts of those costs and charges for that

shipment are unknown because they have not been incurred. So, in order to agree the 'price', the seller will need to estimate those costs and typically would do so based on recent historical amounts for such costs plus some estimate as to what they will be for the shipment in question. Hence the reason why the word 'represents' is used in this provision – the 'actual' cost would be unknown when setting the 'price'. For this reason, actual post-exportation costs are not to be deducted but post-exportation costs as 'represented' in the 'price' are to be deducted. Actual costs ultimately incurred will inform whether they have been accurately estimated and 'represented' in the 'price' and, therefore, whether and to what extent the 'price' is profitable. Accordingly, the inquiry using this methodology is what post-exportation expenses are 'represented' in the 'price' and, if 'represented', to what extent and not what post-exportation costs are actually incurred as they are not and cannot be 'represented' in the 'price'; and

(ii) **TAB(1)(b)**: the determination of export price under this provision proceeds on the 'price' actually paid to the importer by its customers on the on-sale of the product by the importer and then deducting from that amount so paid the 'prescribed deductions', being the amounts specified in section 269TAB(2) of the *Customs Act 1901*. These also are acutal amounts because they would have been incurred and, therefore, their amounts known for deduction from the relevant amount paid by the importer's customers to the importer. This distinguishes such deductions from those in the methodology in Tab(1)(a) being actual amounts, as opposed to estimated amounts. This is possible because under this methodology the deductions are being made retrospectively on transactions that have occurred and hence the amounts to be deducted have been incurred and, therefore, are known.

The difference in methodology between the two provisions is, therefore, self-evident – namely, the prospective versus retrospective nature of the methodologies.

Here it has been determined that the amount actually paid by KHK to KAE for the sale and purchase of aluminium extrusion products was not to be the actual 'export price' paid but, rather, a 'deductive export price', which was determined to be, and calculated by the Commission as, the 'export price' notwithstanding that it was not an amount actually paid by anyone for the purchase of anything from anyone.

The consequence of determining 'export prices' under section 269TAB(1)(b) of the *Customs Act 1901* for future exports for the purposes of working out any interim dumping duty payable is as follows:

(i) the price paid by KHK's Australian customers to KHK is agreed in the manner set out in sub-paragraph (i) above because it is and can only be prospective in nature;

(ii) however, the 'deductive export price' cannot be determined at that time because the 'prescribed deductions' are not known until incurred, which is not until the product in question has been produced, shipped, cleared through customs and delivered to the customer – that is until the transactions in question have been performed (refer sub-paragraph (ii) above); and

(iii) in the case of the duties of customs to be deducted (i.e., interim dumping duties), they cannot be determined until the 'deductive export price' itself has been worked out because the dumping margin is required to be applied to that 'deductive export price' in order to work out the interim dumping duty payable, which is obviously circular.

Self-evidently, a deductive export price cannot be ascertained for future shipments in advance, that is, prospectively, including for working out the amount of any interim dumping duties payable. The question then is how is the 'export price' to be worked out for the purposes of working out the amount of any interim dumping duty payable. Hence the problems referred to in the submission and for which the Commission's guidance was requested, which request is here reiterated.

In addition, the 'constructed normal values' appear to have been incorrectly calculated, including for Kam Kiu's exports, in that:

- they do not reflect the cost of production in China due to the adjustment of the cost of primary aluminium by reference to a benchmark; and
- they include a margin for profit based on the profit in sales of like goods in the domestic market, which market the Commission preliminary found to be affected by a 'particular market situation' and, therefore, those prices (and presumably profit) in those sales in that market were unsuitable for use in determining normal values; and
- the margin of profit was for a different level of trade as compared with the level of trade between KAE and KHK.

As indicated in my previous submission, it would have been useful for matters such as these to have been addressed prior to the Commission finalising and publishing its preliminary dumping margins determinations for Kam Kiu.

Would you please advise, therefore, how it is proposed to correct these errors. It is my clients view that a 'particular market situation' does not exist as the aluminium extrusion products market in China is an open competitive market, including to import competition and in which Australian exporters can compete with the added advantage of the benefit of a preferential trade agreement between China and Australia. It also is unclear what adjustment was made to the cost of primary aluminium when, according to Capral's application, LME aluminium prices were less than those of the SHFE.

Finally and as a separate matter, I note that Capral Limited has made a submission in response to the SEF but wrongly states that the effective dumping and subsidy margin for the residual exporters is +48.1% when it actually is, as preliminary found, +0.9%, that is, un-dumped.

Further, Capral's proposal that the 'combination fixed and variable' duty method be the applicable duty method effectively for all exports from China supports the contention that Capral Limited was and is seeking the proposed variation to the variable factors for a purpose other than to prevent of remove injurious dumping. That is, it is for an ulterior, improper purpose unrelated to removing or preventing injurious dumping by exports from China of which there is no evidence.

That ulterior, improper purpose seemingly could only be of reducing or eliminating import competition by exports from China in the Australian market. However, in the circumstances, it could also be to artificially inflate prices of aluminium extrusion products in the Australian market by increasing and setting prices in that market through the artificially high 'constructed normal value' floor price to apply to all exports from China.

In this respect, query what is the difference is between this and the conduct that BlueScope Steel was found to have been engaging in as found by the Federal Court in *Australian Competition and Consumer Commission v BlueScope Steel Limited* (No 5) [2022] FCA 1475 other than the latter involved price-fixing through cartel arrangements, whereas here artificially high prices are being sought to be established and maintained via anti-dumping measures notwithstanding the absence of evidence of injurious dumping by exports from China

In the absence of dumped and subsidised exports from China or at least the majority of such exports with Kam Kiu's exports being wrongly determined as being dumped and in the absence of the Australian industry incurring any injury, let alone caused by exports from China, as the Commission would be aware, the relevant issue is not whether and to what extent the variable factors require alteration, for which there is no justification, but, rather, whether the anti-dumping measures should be revoked as no longer being warranted. That is the only relevant question.

Also, the absence of inquiry into a non-injurious price is perhaps explicable given the foregoing. That is, such inquiries would, presumably, inconveniently merely confirm the absence of any injury, let alone injurious dumping by exports from China and, therefore, there was no requirement for a non-injurious price or any other anti-dumping measures as there is no injury caused by dumping to be removed or prevented.

Please let me know if you have any questions.

Yours sincerely,

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