

Date: 27 May 2024

By Email

The Director - Investigations
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2600

Dear Director,

RE: Review of anti-dumping measures – Review 640

I refer to the abovementioned review, Review 640, of anti-dumping measures applying to exports of certain aluminium extrusion products from Malaysia by my client, PMB Aluminium Sdn Bhd (**PMBA**). In particular, I refer to the Anti-Dumping Commission's (**Commission**) request for a submission on the required level of trade adjustment to the normal value determination.

The background to the request and my client's submission are set out below.

Background

I am instructed that during the course of the verification of the information contained in PMBA's response to the Exporter Questionnaire, the verification team sought justification, that is, the reasons for the requested level of trade adjustment to the normal value.

This came as a surprise to my client and to its related body corporate, Press Metal Aluminium (Australia) Pty Limited (**PMAA**). It was a surprise because the level of trade adjustment had been made by the Commission in past investigations, reviews and inquiries. Further, while the level of trade adjustment had been and is the subject of dispute in Continuation Inquiry 591, in recent dumping duty assessments the issue had been reconsidered by both the Commission and the Anti-Dumping Review Panel (**ADRP**). Both the Commission and the ADRP confirmed that the level of trade adjustment was required.

I am instructed that the verification team advised my client during verification that it was unaware that the level of trade adjustment had been addressed and dealt with as described above. That is, apparently during the internal pre-verification briefing in preparation of the verification, the verification team had not been appraised of the fact that the level of trade adjustment had ceased to be an issue and that it was required to be made. This does not seem credible given the relative importance of adjustments such as level of trade adjustments to dumping determinations and contrary to standard verification preparations.

It is a concern that my client not only is cooperating with the requirements of the Commission but devoting substantial time and resources to the verification process at substantial cost and expense to it only to be advised that the verification team have not been properly prepared for the verification. This reflects poorly on the processes of the Commission and its management, erodes confidence in the Commission's ability to properly carry out its functions and otherwise brings the administration of Australia's anti-dumping regime into disrepute.

Such lack of preparation of a verification team undertaking verification is not acceptable. My client reserves its rights in this regard.

Submission

Requirement for a level of trade adjustment

As the Commission has verified on numerous occasions, including this review, aluminium extrusions produced by PMBA are supplied into the Malaysian market through these five (5) regional distribution centres, namely:

- PMB Northern – which distributes PMBA products in the north of Malaysia;
- PMB Eastern – which distributes PMBA products in the east of Malaysia;
- PMB Central – which distributes PMBA products in central Malaysia;
- PMBA Sabah – which distributes PMBA products in Northern Borneo; and
- PMB Johor Bahru – which retails PMBA products in the south of Malaysia.

The first four distribution centres are operated, that is, carried out by four subsidiary companies of PMBA, namely: PMB Central Sdn Bhd, PMB Northern Sdn Bhd, PMB Eastern Sdn Bhd and PMB Sabah Aluminium Sdn Bhd.¹

The fifth distribution centre is a division of PMBA itself, namely JB. Again, as has been repeatedly verified, JB has been set up within PMBA as if it were a separate legal entity notwithstanding that it is a division within PMBA. That is, it has its own separate financial and management records and accounts

[Confidential information redacted] and generally operates as a separate entity to PMBA, including as a separate financial entity, notwithstanding that it is a division within PMBA and, therefore, not a separate legal entity.

The customers of the four subsidiary companies are retailers in each of their respective regions. Accordingly, each subsidiary operates as a distributor of PMBA products to those retailers. Hence PMBA's sales to the four subsidiaries are to distributors, that is, at the distributor level of trade. This is reflected in

¹ Please refer to the **confidential** document provided during verification in response to Item 59A and items 23, 24, 25 and 26 of the verification list of items

the pricing to those subsidiaries. [REDACTED]

²

In the case of JB, because it is not a separate legal entity but a division within PMBA, JB's customers are PMBA's customers. Those customers, as far as PMBA is aware, are retailers who on-sell products purchased from JB to entities such as fabricators, manufacturers and other end-users in the domestic market in Malaysia as opposed to resellers. Sales by PMBA (via JB) are to retailers and, therefore, at the retail level of trade. This is reflected in the pricing to those customers, which is different from the PMBA's pricing in sales to the four subsidiary companies, who operate as distributors within the domestic market. Again, this has been repeatedly verified and was verified in this review.

In the case of JB's pricing, as, I am instructed, was explained during verification to the verification [REDACTED]

³

Finally, it must be noted that, as was explained to the verification team, neither the four subsidiary distributors nor JB are constrained from sourcing aluminium extrusion products from PMBA.

[REDACTED] Hence PMBA's pricing and terms of trade must be competitive

In particular, I am instructed that during verification, the verification was taken through the different sales processes at the different levels of trade for the supply of PMBA's products to the domestic market in Malaysia by the four subsidiary company distributors and by JB as a division of PMBA to retail customers, as well as being provided with supporting evidence. I am further instructed that there were no outstanding queries following such explanation and provision of information and evidence of the different levels of trade at which PMBA's products are supplied to the domestic Malaysian market.

Although for the Australian market, these levels of trade were recognised in the Commission's Reinvestigation Report 591 (refer Figure 1, page 17). Further, The Commission acknowledged that those levels of trade affected pricing:

"The commission considers that the Australian market for aluminium extrusions contains different levels of trade including distributors, fabricators, manufacturers and end users. The commission's pricing analysis identified that these levels of trade affected pricing." (Reinvestigation Report 591, page 20)

² Please refer to the **confidential** document provided in response to Item 7 of the verification list of items.

³ Please refer to the following **confidential** Items and documents provided in support of JB operating as a separate entity: Item 3B: [REDACTED].xlsx; Item 3A: [REDACTED].pdf, Row [REDACTED], Tab "[REDACTED]" of EQ upload [REDACTED].xlsx" and see also in particular documents provided in response to Items 2, 5, 6, 8, 9, 10 and 40 of the verification list of items.

The position, of course, is no different in other aluminium extrusion products markets including the domestic market in Malaysia.

The consequence of the foregoing is that, whereas sales by PMBA to the four subsidiaries are at the same level of trade as PMBA's export sales to PMAA given that PMAA is a distributor of PMBA products in the Australian market, sales by PMBA through its Division JB to retailers are at a different level of trade. Hence, the prices at which PMBA's products were sold to such retailers were at retail prices and, therefore, different from the distributor prices to the four subsidiaries. This affected the comparability of the prices in sales by PMBA through JB with the export prices to PMAA.⁴

"... the ADC agreed with the applicant that PMBA's retail selling prices, through the JB division, were to a different level of trade and had other significant differences to that of the export sales to the importer, Press Metal Australia, who distributes the goods. It claimed this impacted their comparability." [Redacted] **[Extract from Confidential ADRP Report Concerning a Dumping Duty Assessment]**

In other words, it confirmed that PMBA's retail sales through its Division JB were at a different level of trade and, amongst other things, this was different to the export sales to PMAA, a distributor, and that this affected comparability. Accordingly, an adjustment to take account of such differences in the level of trade in the export and domestic sales transactions was required and, indeed, mandated by Section 269TAC(8)(c) of the *Customs Act 1901*.

The position is the same here for the same reasons. Hence a level of trade adjustment is required to the prices of PMBA's domestic sales through its Division JB to retailers for their proper comparison with the export prices to PMAA.

Amount of the level of trade adjustment

Regarding the level of trade adjustment, the ADRP has been clear that it is 'prices' in PMBA's domestic sales through its Division JB that require adjustment to ensure a proper comparison with export prices:

"Section 269TAC(8) of the Act requires an adjustment to the domestic selling price to enable its comparison with the export price: '...that price paid or payable for like goods is to be taken to be such a price adjusted...' (my emphasis). That is, the price must be adjusted by an amount."
[Redacted] **[Extract from Confidential ADRP Report Concerning a Duty Assessment]**

That is, the 'price' paid or payable for like goods is to be adjusted to take account of the difference in 'prices' arising from the differences in the levels of trade of the relevant sales transaction. This is made explicit in the following statement by the ADRP:

⁴ Please refer to the **confidential** document provided in response to Item 59 of the verification items.

“The adjustment should be made to the JB division selling prices to the extent of the difference between such prices and the level of the intra-company transfers between PMBA and the JB division.”

██████████ [Extract from Confidential ADRP Report Concerning a Duty Assessment]

The ADRP’s reasoning was that the ██████████ between PMBA and its JB Division were at amounts that were the same as the prices at which PMBA sold its products to its four distributor subsidiaries. Hence the difference between those ██████████ amounts and the selling prices in sales by PMBA through its JB Division accurately reflected the difference in price arising from the difference in the level of trade.

That an adjustment was not made by the ADRP in this manner was due to sufficient information enabling it to make the necessary calculation to make the adjustment. That is not the problem here. I am instructed that information and evidence necessary to make such an adjustment has been provided and verified.

Further matters concerning the level of trade adjustment

I note that in ██████████ [Duty Assessment] the amount of the level of trade adjustment made by the Commission consisted of the following:

“The VT found that PMBA’s JB arm sells at a materially higher price compared to other domestic sales channels. The VT notes that PMBA’s JB arm sales incur warehousing costs, whereas all other domestic and Australian sales do not. The VT therefore applied a normal value adjustment by reducing JB sales prices by an SG&A percentage representing the extra SG&A expenses incurred for JB sales.” ██████████ [Extract from Confidential Duty Assessment Report]

and:

“As explained in 4.2.3 above, a level of trade adjustment to the normal value has been made. For this duty assessment, the commission noted that it made this adjustment based on the fact that it is satisfied that JB is an arm of PMBA, whereby sales that PMBA made through this sales channel were not at the same level as sales made through other channels. The commission further noted that the JB sales incurred warehousing costs, whereas the sales through all other channels did not.”

██████████ [Extract from Confidential Duty Assessment Report]

That adjustment apparently was based on the Commission’s *Dumping and Subsidy Manual*.

Unfortunately, the determination of the amount of the adjustment was misconceived. It was based on differences in costs, specifically warehousing costs, incurred by PMBA’s Division JB, which warehousing costs were not incurred by the domestic sales by PMBA to its subsidiary distributors. However, this is a difference in ‘cost’, not in ‘price’ and it is the difference in ‘prices’ due to the different level of trade that must be adjusted for.

This is not to contend that differences in ‘costs’ may not affect ‘prices’. Clearly they can. However, that is not the reason for the adjustment. A difference in ‘costs’ is not the same as a difference in ‘prices’. Further,

a difference in 'costs' arising from differences in levels of trade may or may not be reflected or be fully reflected in differences in 'prices' in sales at the different levels of trade.

Importantly, differences in prices arising from sales at different levels of trade may and is likely to reflect more than simply differences in costs incurred at different levels of trade. Whatever the reasons for the differences in prices in sales at different levels of trade, those differences in 'prices' must be quantified and the requisite adjustment made to ensure price comparability.

Here the adjustment is for differences in 'prices' resulting from sales being at different levels of trade, not for differences in 'costs' incurred at different levels of trade that are reflected in differences in prices. The latter would be captured in the former, but the former would not be captured in the latter.

This did not occur in [REDACTED] [Duty Assessment]. Because the level of trade adjustment made in that duty assessment was based on 'costs' it did not properly reflect the 'price' differences arising from the sales by PMBA through JB being at a different level of trade to those to PMAA.

Conclusion

In light of the foregoing:

- the level of trade adjustment requested by my client is required to be made pursuant to the Section 269TAC(8)(c) of the *Customs Act 1901*; and
- the adjustment is to be made to the domestic selling prices of PMBA via its Division JB; and
- the amount of the adjustment is to be calculated in the manner determined by the ADRP, that is, it be based on the differences between the selling prices in question and the intra-company transfers between PMBA and its Division JB; and
- the Commission has sufficient verified information and evidence to make that adjustment in the required manner.

If you have any questions, please let me know.

Yours faithfully,



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