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21 February 2012

Mr Geoff Gleeson
Director - International Trade Measures Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Our ref 11276/80125566

Dear Mr Gleeson

ITRB Report No 176 Certain Structural Timber Exported from Austria, Canada, Czech Republic, Estonia, Germany, Lithuania, Sweden and USA

We refer to the issue by-product set off as raised in your email dated 10 February 2012.

As a preliminary issue, we note that in the various exporter reports reference is made to by-product revenues being **set off** (page 39 Egger report) or **netted off** (page 36 SE Lithuania report) the CTMS calculations. You seek our clients' confirmation that a similar approach is warranted for the Czech Republic.

Our client has obtained advice from PwC Czech Republic in respect of the questions raised in your email (PwC report **attached**). As you will see, the conclusion is that Czech accounting law does not expressly deal with by-products. However, two accounting approaches have evolved and been applied in practice addressing this issue. The approaches are set out in the report.

The third question raised assumes that Czech law governs whether by-product revenues can be set off against production costs. That assumption is invalid because it:

(a) does not reflect regulation 180(2) *Customs Regulations 1926* (Cth);

(b) is inconsistent with the learning on clause 2.2.1.1 of the Anti-Dumping Agreement as reflected in the WTO panel case in *United States - Final Dumping Determination on Soft-wood Lumber from Canada (WTF/BS264)*;

(c) gives prominence to the tax laws of the Czech Republic when the real question is whether the accounting records of an exporter *accord* with generally accepted accounting principles.

We address the above matters below.

The purpose of regulation 180(2) (which is meant to reflect clause 2.2.1.1 of the Anti-Dumping Agreement) is to specify the *information* which the Minister must *use* to determine the *cost of production* of like goods in the country of manufacture. More specifically, the purpose of the regulation is to:

(a) permit the Minister to *use* the exporters records if they are kept in accordance with generally accepted accounting principles; and

(b) if they are so kept and reflect competitive market costs, the Minister *must work out* the costs of production and manufacture using the *information* in those records.

In the case of our client, there is no doubt that it keeps its accounts in accordance with generally accepted principles and there is no allegation that those records do not reasonably reflect competitive market costs associated with the production of goods. Given this fact, and noting the relationship between regulation

180 and clause 2.2.1.1 of the Anti-Dumping Agreement, we would point out that in *United States - Final Dumping Determination on Soft-wood Lumber from Canada (WTE/BS264)* the WTO panel said:

> 7.236 Article 2.2.1.1 contains a number of obligations relating to an investigating authority's cost calculations for the purpose of determining whether home market sales are in the ordinary course of trade and for calculating a constructed (normal) value. *First*, it provides guidance regarding ***the preferred data source for performing such calculations***. Specifically, Article 2.2.1.1 requires that costs be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Where records are not kept in accordance with the GAAP of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority may calculate costs on another basis. *Second, **Article 2.2.1.1 requires that investigating authorities consider all available evidence on the proper allocation of costs including that which is made available by respondents*** in the context of an anti-dumping investigation, provided that such allocations have been historically utilised by the exporter or producer. *Third*, and not at issue here, Article 2.2.1.1 provides for the adjustment of costs under certain circumstances.
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> 7.237 In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if ("*provided*") certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, ***Article 2.2.1.1 does not require that all allocations made by an investigating authority have been historically utilised by the exporter or producer***; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *insofar as* such allocations have been historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada's arguments relating to Article 2.2.1.1.[1] (our emphasis)

It follows that, since our client has provided all relevant accounting records detailing the by-product revenues, cost of logs and other CTMS data (which Customs has verified), Customs can utilise the information in those records for purpose of performing the off setting calculations.

Further, even if our client does not set off the by product revenues in its own records there is no legal impediment to the Minister doing so. That this is so is supported by a proper construction of regulation 180 and the highlighted passages of WTO panel case above.

As to the appropriateness of setting off by product revenues, we would draw your attention to the paragraph 7.306 of the WTO Panel judgement where it was made clear that off setting by product revenues from costs of production is standard practice - it was not even contested by the parties.

[1] See also 7.310 of the judgement.

As to the tax law in the Czech Republic, PwC opines that it is *implied* by s.7(6) of the Czech Accounting Act that by-product revenues cannot be offset against the costs of raw materials except in particular circumstances. However, customs law practice is an entirely different field of jurisprudence to tax law. As the above analysis shows and as PwC says, Czech law does not expressly deal with by-product revenue except *impliedly* by excluding set off except for certain things. However, that law has no application and in no way interferes with regulation 180.

Finally, given that the costs to make and sell data does not include by-product revenue, our client has, consistent with regulation 180 and the *United States - Final Dumping Determination on Soft-wood Lumber from Canada* case, undertaken a re-assessment of the dumping margin and relevant variables. A copy of our client's spreadsheets are attached. As you appreciate, since by-product revenue reduces the cost of production then that will ordinarily lower the margin of dumping - which is what is reflected in the spreadsheet.

Yours sincerely

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