



Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences

You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

¹ By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

² As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: Mutti S.p.A.
Address: Via Traversetolo, 28
43022, Montechiarugolo (PR)
Italy
Type of entity (trade union, corporation, government etc.): Corporation

2. Contact person for applicant

Full name: Filippo Corsello
Position: Export Director
Email address: filippo.corsello@muttisp.a.it
Telephone number: +39 0521 652511

3. Set out the basis on which the applicant considers it is an interested party

Mutti S.p.A. ("Mutti") is an Italian exporter of prepared or preserved tomatoes targeted by review No. 354, upon which the Assistant Minister for Industry, Innovation and Science has imposed antidumping measures by virtue of Anti-Dumping Notice No. 2017/47 published under Sections 269ZDB(1) and (2) of the Customs Act 1901 (the "Act").

Considering that Mutti is directly concerned with the importation of the goods subject to the reviewable decision, it is considered as an "interested party" pursuant to Section 269ZX of the Act.

4. Is the applicant represented?

Yes No

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

****It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES**5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:**

- | | |
|--|---|
| <input type="checkbox"/> Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice | <input type="checkbox"/> Subsection 269TL(1) – decision of the Minister not to publish duty notice |
| <input type="checkbox"/> Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice | <input checked="" type="checkbox"/> Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures |
| <input type="checkbox"/> Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice | <input type="checkbox"/> Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry |
| <input type="checkbox"/> Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice | <input type="checkbox"/> Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures |

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods which were the subject of the reviewable decision were defined in section 2.3 of the Final Report No. 354 as follows:

“tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.”

The goods excluded from this definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

7. Provide the tariff classifications/statistical codes of the imported goods

The goods which are concerned by the reviewable decision are classified under subheading 2002.10.00 (statistical code 60) to Schedule 3 of the Customs Tariff Act 1995.

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

The reviewable decision was published under Anti-Dumping Notice No. 2017/47.

9. Provide the date the notice of the reviewable decision was published

The reviewable decision was published on 4 May 2017.

****Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application****

Copy of the Anti-Dumping Notice No. 2017/47 is provided under **Attachment A**.

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so:

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

A. INTRODUCTION

On 25 May 2016, the Anti-Dumping Commission (the "**ADC**") initiated the interim review No. 354 concerning the antidumping measures applicable to certain prepared or preserved tomatoes ("**PPTs**") exported to Australia from the Republic of Italy by all exporters except Feger di Gerardo Ferraioli S.p.A., La Doria S.p.A. and AR Industrie Alimentari S.p.A.

On 5 April 2017, the ADC concluded the investigation by adopting the Final Report Nos. 349 and 354 (the "**Final Report**"), in which the ADC concluded that the normal value, export price and the non-injurious price leading to the imposition of original measures have changed, and consequently recommended the Parliamentary Secretary to modify the ascertained variable factors in relation to all exporters, including Mutti.

On 4 May 2017, on the basis of the recommendations contained in the Final Report, the Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the "**Minister**") published the Anti-Dumping Notice No. 2017/47 amending the antidumping measures in relation to imports of PPTs exported from Italy by all exporters except Feger di Gerardo Ferraioli S.p.A., La Doria S.p.A. and AR Industrie Alimentari S.p.A. (the "**reviewable decision**"), including the PPTs produced by Mutti.

According to the Anti-Dumping Notice No. 2017/47, the form of the measures targeting, *inter alia*, Mutti was determined on the basis of the "*combination of fixed and variable duty method*" set out in the *Customs Tariff (Anti-Dumping) Regulation 2013*. As explained in the *Guidelines on the Application of Forms of Dumping Duty*, the 'combination duty' comprises two elements:

- (a) the fixed duty element, i.e. an *ad valorem* duty of 3.2% which applies to the higher of the ascertained export price ("**AEP**") or the actual export price ("**DXP**") of Mutti's exports; and
- (b) the variable duty element, i.e. the difference between the DXP and the AEP of Mutti's exports, in case the actual export price of the shipment is lower than the ascertained export price.

The above clarified, it is submitted that the determination of Mutti's AEP operated by the ADC in the framework of interim review No. 354 (i.e. [CONFIDENTIAL – AEP] is not correct, being inconsistent with the rules laid down for this purpose by the Australian legislation.

B. THE RULES GOVERNING THE DETERMINATION OF THE AEP

According to Section 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013*, the variable duty element consist in the difference between the actual export price of the shipment and the “*export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice*”.

According to Section 4 of the *Customs Tariff (Anti-Dumping) Regulation 2013*, “*export price has the meaning given by section 269TAB of the Customs Act 1901*”.

According to Section 269TAB(1)(a) of the Act (which was relied upon by the ADC in order to calculate Mutti's AEP) the export price is “*the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation*”.

Moreover, Section 269TAB(1A) clarifies that “[f]or the purposes of paragraph (1)(a), the reference in that paragraph to the price paid or payable for goods is a reference to that price after deducting any amount that is determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of that transaction” (emphasis added).

As explained in the Dumping and Subsidy Manual, “*Section 269TAA(1A) allows transactions affected by reimbursements that are a normal business practice to be treated as being at arms length, after having regard to any agreement or established trading practice. [...] A rebate may be considered part of price provided that the nature and manner of payment remain sufficiently connected with the sales transaction (e.g. volume rebate)*”.

In other words, Section 269TAA(1A) provides that, if it is possible to establish a sufficient connection between, on the one hand, the export sales transactions and, on the other hand, deferred rebates made in accordance with the normal business practice, the consequence is that:

- first, the export transactions should be considered at arm's length despite the existence of compensatory arrangements between the exporter and the importer;
- second, the rebates under discussion should be considered as part of the selling price paid by the importer.

This means, in turn, that such deferred rebates should be deducted from the FOB selling price paid by the importer when working out the export price. In fact, the export price is defined as “*the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation*” (emphasis added).

It follows that the AEP should be worked out by deducting from the weighted average FOB price paid by the relevant importer(s) during the investigation period any amount that is determined to be a reimbursement of the kind referred to in subsection 269TAA(1A).

C. THE CALCULATION OF MUTTI'S AEP IS FLAWED

Bearing the above in mind, it is submitted that the ADC failed to correctly work out Mutti's AEP insofar as the amounts of the deferred rebates that Mutti paid to certain Australian importers have not been deducted from the FOB price paid by such importers.

In this respect it must be noted that, as explained in response to question B-6 to Mutti's Exporter Questionnaire and further detailed throughout the investigation, Mutti grants deferred rebates/discounts to two Australian customers (namely, [CONFIDENTIAL – CLIENT DETAILS]). These discounts/rebates (which were reported in an aggregated form in the "Australian sales" listing under the column "CONTRIBUTES TO CUSTOMERS OUT OF INVOICE OTHERS") take different forms, including:

1. **Target rebates:** these rebates are bestowed at the end of the financial year upon achievement of certain sales volumes and/or turnover. [CONFIDENTIAL – BUSINESS INFORMATION];
2. **Shelf price discounts:** these rebates (sometimes called "promotional discounts") are [CONFIDENTIAL – BUSINESS INFORMATION]. In substance, these are discounts granted to final consumers which are shouldered by Mutti rather than by the relevant importer;
3. **Lump sum rebates:** these rebates are similar to the target rebates discussed under No. 1 above, but are paid in the form of a lump sum. [CONFIDENTIAL – BUSINESS INFORMATION].

The nature and characteristics of the rebates/discounts clearly shows that these rebates are "sufficiently connected" with the sales of the goods under consideration in the Australian market.

Moreover, it must be pointed out that the rebates/discounts under discussion (which, as explained, were reported in Mutti's 'Australian sales' listing) have been verified by the ADC and taken into account for the purpose of calculating Mutti's dumping margin, i.e. they have been deducted from Mutti's export price (*rectius*, added to Mutti's normal value, which is the same) for the purpose of calculating Mutti's dumping margin. This clearly demonstrates that these discounts/rebates are "sufficiently connected with the sales transaction" and therefore must be "considered part of price" as provided by the Dumping and Subsidy Manual, which brings to the obvious conclusion that they should have been deducted from the FOB price paid by Mutti's Australian customers when working out Mutti's AEP.

Therefore it must be concluded that, by failing to deduct the deferred discounts/rebates from the FOB prices paid by Mutti's Australian customers, the ADC has unduly inflated Mutti's AEP. In fact, the ADC has set Mutti's AEP at [CONFIDENTIAL – AEP], whereas the correct AEP (after deduction of the discounts/rebates under discussion) would result to be [CONFIDENTIAL – AEP].

- 11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

Based on the arguments illustrated in response to Question No. 10, Mutti submits that the correct or preferable decision would have been to deduct the discounts/rebates conceded to Mutti's Australian customers from the FOB prices paid by those customers for the purpose of determining Mutti's AEP.

Had the ADC correctly applied the provisions of subsections 269TAB(1)(a) and 269TAB (1A) of the Act, Mutti's AEP would have been set at the level of [CONFIDENTIAL – AEP] rather [CONFIDENTIAL – AEP].

The Anti-Dumping Review Panel is therefore respectfully requested to recommend to the Minister, under sections 269ZZK(1) and (1A) of the Act, that the reviewable decision should be revoked and substituted with a decision to publish a notice under subparagraph 269ZDB(1)(a)(iii) imposing a reduced AEP in relation to PPTs exported from Italy by Mutti.

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

Mutti submits that the difference between the reviewable decision and the proposed decision is material.

In fact, the reviewable decision has determined the variable part of the antidumping duty on the basis of an inflated AEP of [CONFIDENTIAL – AEP], while the correct AEP would be [CONFIDENTIAL – AEP], with the effect of unduly increasing the amount of the variable part of the antidumping duty to be collected on Mutti's exports.

PART D: DECLARATION

The applicant/the applicant's authorised representative [*delete inapplicable*] declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:



Name: **Gabriele Coppo**

Position: **Associate**

Organisation: **Van Bael & Bellis**

Date: **02/06/2017**

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant’s authorised representative

Full name of representative: **Fabrizio Di Gianni**
Gabriele Coppo

Organisation: **Van Bael & Bellis**

Address: **Glaverbel Building**
Chaussée de La Hulpe 166
1170 Brussels
Belgium

Email address: **fdigianni@vbb.com**
gcoppo@vbb.com

Telephone number: **+32(0)2.647.73.50**

Representative’s authority to act

****A separate letter of authority may be attached in lieu of the applicant signing this section****

The person named above is authorised to act as the applicant’s representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....
(Applicant’s authorised officer)

Name:

Position:

Organisation

Date: / /