



15 May 2018

Ms Joan Fitzhenry
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Dear Ms Fitzhenry

Re Dichlorophenoxy-acetic acid exported from the People's Republic of China

PUBLIC FILE

(i) Introduction

Nufarm Limited ("Nufarm") is the sole fully-integrated Australian manufacturer of dichlorophenoxy-acetic acid technical and formulated products ("2,4-D") the subject of the Parliamentary Secretary to the Minister for Jobs and Innovation ("the Assistant Minister") continuation notice. Shandong Weifang Rainbow Chemical Co., Ltd ("Rainbow") is an exporter of 2,4-D from People's Republic of China ("China") to Australia and has made an application to appeal the Assistant Minister's decision to continue the measures applicable on all 2,4-D exported from the People's Republic of China ("China") as published on 5 March 2018.

By its application to the Anti-Dumping Review Panel ("ADRP") Rainbow asserts that the Assistant Minister's decision to continue the measures was not the correct or preferable decision as:

- A VAT based adjustment should not have been made in calculating the normal value for Rainbow's Australian sales;
- In the alternative, even if a VAT adjustment was required, the adjustment had not been calculated correctly;
- The determination of the level of profit by the Anti-Dumping Commission ("the Commission") under Regulation 45(2) of the *Customs (International Obligations) Regulation 2015* by reference to Rainbow's domestic sales sold in the ordinary course of trade was not the correct or preferable decision; and
- In the alternative, Rainbow submits that Regulation 45(2) was not the correct or reasonable basis for determining normal value, as Rainbow's domestic sale of the goods was not in the ordinary course of trade.

Nufarm rejects Rainbow's claims that the Assistant Minister should not have considered a VAT adjustment to Rainbow's normal value for fair comparison purposes. The identification of the applicable VAT applicable to domestic and export sales is a question of fact and cannot be ignored in determining Rainbow's applicable normal value. Similarly, the determination of a level of profit to be applied to Rainbow's normal value as determined under subsection 269TAC(2)(c) is required to be considered in accordance with Regulation 45(2).

The Assistant Minister's determination of normal values for Rainbow is therefore the correct and preferable decision and Rainbow's application for review should be dismissed.

(ii) VAT adjustment

Rainbow asserts two grounds that the Commission incorrectly determined a VAT adjustment to Rainbow's normal value, namely:

- Normal values were determined under subsection 269TAC(2)(c) and that as Rainbow was "*almost fully export-oriented*" the Commission did not evidence that "*the VAT liability difference affected Rainbow's domestic prices differently as compared to Rainbow's export prices to Australia*"; and
- The rate of VAT applicable to domestic sales of 2,4-D relied upon by the Commission was incorrect.

The differential applicable VAT rates for 2,4-D for domestic and export sales is not denied by the applicant. It is asserted by Rainbow that a 13 per cent VAT rate applies on domestic sales, including its comment "*The applicable Rate for 2,4-D products is well documented in the domestic sales documents that were provided to the Commission and verified during the inquiry*¹". Furthermore, Rainbow submitted that export sales of 2,4-D "technical" grade under HS code 2918.99.00 attract a 13 per cent VAT refund, whereas export sales of 2,4-D under 3808.93.19 (i.e. including esters and formulations) attract a 5 per cent VAT rebate.

Rainbow seeks to rule out or minimize the existence of its domestic sale of 2,4-D goods on the Chinese market such that this sale cannot be considered in the context of whether a VAT differential between domestic and export sales is apparent. Rainbow did sell 2,4-D domestically and it attracted the applicable VAT rate (which Rainbow concedes was a sale of 2,4-D technical²). Therefore, on the basis that Rainbow's sales on the Chinese domestic market were of 2,4-D technical, an adjustment for the difference between the VAT applicable on domestic sales and the VAT applicable on export sales is required (as an uplift to Rainbow's normal value(s)).

The Commission had available to it evidence on the applicable VAT rate for Rainbow's domestic sale of 2,4-D technical. Similarly, the applicable VAT rate on export is well understood and therefore the difference between sales on the domestic and export market may be readily identified. The applicable adjustment for VAT differences (on domestic and export markets) cannot be ignored because Rainbow's normal values were determined as not being in the ordinary course of trade and calculated on a constructed basis under subsection 269TAC(2)(c). The basis for normal value determination does not alter the need for adjustment for VAT for fair comparison purposes as it is clear that there is differing VAT rates between domestic and export sales.

The second contention by Rainbow related to the VAT adjustment is the amount of the adjustment made by the Commission. Rainbow argues that the Commission has assumed that the applicable rate of VAT on domestic sales of 2,4-D is 17 per cent. However, Rainbow states that "*The basis of this adjustment was not explained in detail in the verification report or in Report 430*". It is not clear to Nufarm what level of VAT the Commission determined was applicable on domestic sales of 2,4-D hence it is not possible for Nufarm to comment on the accuracy of the adjustment made by the Commission for fair comparison purposes for the export sales of 2,4-D technical and 2,4-D esters and formulations.

Nufarm does consider that the Assistant Minister's decision to make an adjustment for differences in VAT on domestic and export sales was the correct and preferable decision. The Assistant Minister's decision as to the amount of the adjustment may influence the level of dumping margin determined but does not detract from the Assistant Minister's decision to not allow the measures to expire (and to continue the measures).

¹ Refer Rainbow application for review, P.6.

² Ibid, P. 12.

(iii) Level of profit under Regulation 45(2)

Section 7.3.2 of Report 430 states:

"For all models exported to Australia the Commission has constructed normal values in accordance with subsection 269TAC(2)(c). To construct the normal value, the Commission has used:

- The cost of production for Australian export sales, plus*
- Selling, general and administrative (SG&A) costs applicable to the sale of like goods sold on the domestic market; plus*
- An amount of profit.*

The cost of production was calculated under subsection 43(2) of the Regulation, using the exporter's records." SG&A costs were calculated under subsection 44(2) of the Regulation using the exporter's records. The amount of profit was worked out under subsection 45(2) of the Regulation by using data relating to the production and sale of like goods by the exporter of the goods in the OCOT".

Rainbow's ground for appeal concerning the determination of the level of profit to be determined in its normal values under subsection 269TAC(2)(c) by using the methodology required by Regulation 45(2) relies upon its contention that its domestic sales of goods (i.e. 2,4-D technical) were not in the ordinary course of trade and were in low volume (i.e. subsection 269TAC(2)(a)).

Nufarm notes the Commission's recognition of ADRP Report No. 33 following the publication of Report No. 263 concerning the determination of profit to be applied to a constructed normal value under subsection 269TAC(2)(c). The Commission reflected the following:

As part of its review of the findings of REP 263, the ADRP requested the Commission to conduct a reinvestigation of the finding pertaining to the profit margin determined for Pilotdoer. In particular, the ADRP instructed the Commission to take cognizance of subsection 45(2) of the Regulation which, unlike subsection 269TAC(2)(a) of the Act, does not refer to a low volume of sales as a reason for rejecting the exporter's own data."

In determining the level of profit to be applied under Regulation 45(2) the Commission is not required to consider whether the domestic sales by Rainbow (in this instance, a sale of 2,4-D technical) were 'low volume' sales. Rather, the consideration in determining the level of profit to be applied is whether domestic sales exist (irrespective of volume) from which a level of profit may be derived.

The Commission has correctly determined that the exporter Rainbow had domestic sales of like goods (i.e. 2,4-D technical) during the investigation period. The Commission also correctly determined that the level of profit on Rainbow's domestic sales of like goods could be applied to Rainbow's constructed normal value in accordance with Regulation 45(2).

The decision of the Assistant Minister therefore to determine a level of profit for Rainbow under Regulation 45(2) is not required to consider whether the domestic sale from which the profit was derived was in low volume (or otherwise) and was the correct and preferable decision. Further, the Commission's recommendation to determine the level of profit under Regulation 45(2) based upon Rainbow's domestic sale of 2,4-D technical was consistent with the ADRP's instruction as detailed in ADRP Report No. 33.

In light of Nufarm's submission that the Assistant Minister's decision is the correct and preferable decision as it relates to the determination of profit under Regulation 45(2), it is not necessary to address Rainbow's alternative ground of appeal concerning the amount of profit to be applied in the construction of Rainbow's normal value. However, it is noted that the sales of the goods domestically sold in China by Rainbow related to goods that were 'like goods' and that domestic sales of like goods are the preferred basis for determining the applicable level of profit (as the selling prices are market determined).



Nufarm also notes that Rainbows claim that Zhejiang Wynca Chemical Industry Group ("Wynca") is a representative manufacturer of 'all agrichemical products' for demonstrating levels of profit is potentially misleading. Wynca is essentially only involved in glyphosate manufacture; glyphosate is a high-volume, low margin product compared to 2,4-D or the broader group of 'all agrichemical products', so its financial report details are not relevant to the Assistant Minister's determination.

Nufarm contends that the Assistant Minister's decision concerning the determination of profit under Regulation 45(2) is the correct and preferable decision.

IV. Recommendation

Nufarm submits that the Assistant Minister's determination that an adjustment to Rainbow's normal value and the determination of a level of profit under Regulation 45(2) was the correct and preferable decision. Nufarm requests that the ADRP Member affirm the Assistant Minister's decision to continue the measures on 2,4-D exported from China for a further five-year period.

If you have any questions concerning this submission, please do not hesitate to contact me on (03) 9282 1141.

Yours sincerely

A handwritten signature in blue ink, appearing to read "DR", followed by a long horizontal flourish.

David Rumbold
Regional Lead – Regulatory Affairs
Australia and New Zealand