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06 May 2020

Mr Paul O'Connor
Panel Member
Anti-Dumping Review Panel
c/- Anti-Dumping Review Panel Secretariat
Industry House
10 Binara Street
Canberra
Australian Capital Territory 2601

By email

Dear Panel Member

ADRP Review No. 124
Interested party submission of Zhuhai Grand Kitchenware Co., Ltd.

As you know, we act for Zhuhai Grand Kitchenware Co., Ltd. ("Zhuhai Grand") in this review.

We would now like to provide further submissions concerning Zhuhai Grand's review grounds, in particular issues concerning:

- the Commission's calculation of normal value adjustments under Section 269TAC(8) of the *Customs Act 1901* ("the Act"); and
- the Commission's determination of domestic sales in ordinary course of trade for normal value purposes under Section 269TAC(1) of the Act.

A Section 269TAC(8) adjustment – calculation errors

We have reviewed the Commission's final calculation, as provided to us on 16 April 2020.

We note that the key changes were with respect to worksheet "(a) TAC(8) Adjustments" (hereinafter "the Worksheet") within the spreadsheet entitled "*REP 517 - Confidential Attachment 27 - Zhuhai Grand Normal Value*".

Specifically, we refer to cells [CONFIDENTIAL TEXT DELETED – confidential spreadsheet details] of the Worksheet. The formula adopted in the calculation for these cells shows that the Commission calculated the differences between the "Export CTM" (being the cost to make the exported models) of the MCC model and the "Export CTM" of the surrogate MCC model to calculate the adjustment relating to differences *between MCCs*.

We provide a screenshot for your reference:

[CONFIDENTIAL IMAGE DELETED – confidential spreadsheet details]

This calculation uses *export* costs alone, instead of the cost of exported goods *and* the cost of domestic goods. This is an example of the concern we expressed in Zhuhai Grand's review application that:

...the focus on only the cost of exported goods for such calculation is incorrect for such purpose. Because the normal value is based on Zhuhai Grand's domestic sales of like goods, and because the adjustment is being made to account for the differences between the product sold in the domestic market due to the use of a surrogate, the adjustments should reflect the differences between the surrogate domestic sales products and the cost of production of the exported goods, and not between the cost of production of two export models.¹

This issue was also discussed during the conference in this review:

12. Moulis argued the approach the ADC ought to have adopted was to simply compare the cost of production of the exported model with the cost of production of the domestic surrogate model for purposes of normal value adjustments. However, what the ADC did was to compare the cost of production of the exported model with the cost of production of an exported surrogate model, instead of the domestic costs of production of the surrogate model.²

A "second step" adjustment calculation is conducted at row 59 to 69 for *all* exported models. This was for the purpose of identifying the differences between Export CTM and Domestic CTM within the same MCC. As noted in our client's application, this step is incorrect insofar as the normal value is based on the domestic prices of surrogate MCC. This is because the cost differences *within the same MCCs* are no longer relevant when the domestic sales of that same MCC are not used for normal value calculation. For these models, a correction should be made at the first step (between MCC), and no further calculation will be required at the second step. As stated in Zhuhai Grand's application:

Further, for the normal value of any MCC which is based on a surrogate MCC, and once the required correction as proposed here is made, there should no longer be any additional adjustment based on the differences between export and domestic cost of the same MCC. This is because the normal value is based on a surrogate model and not on domestic sales of that same MCC.³

Secondly, we notice that in the final worksheet the Commission revised the cost data used to perform the above calculation. In the version the Commission provided to Zhuhai Grand prior to the final report, the cost data used was the CTM *inclusive* of accessories, whereas the Worksheet uses CTM *exclusive* of accessories.

We provide a screenshot for your reference:

[CONFIDENTIAL IMAGE DELETED – confidential spreadsheet details]

In our submission, the full cost to make inclusive of accessory cost should be used to conduct such calculation. The Commission accepts that an adjustment under Section 269TAC(8) is required to

¹ See, Zhuhai Grand ADRP Application Attachment 2 – grounds for review, page 4.

² See, ADRP Conference Summary – 16 April 2020, at para 12.

³ Zhuhai Grand ADRP Application Attachment 2, page 4.

account for the physical differences between the exported goods and the corresponding like goods, based on the cost differences (with a profit mark-up). Accessories form part of the sinks supplied by Zhuhai Grand. The accessories included in the exported goods were different to the accessories included in the goods sold on the domestic market. There is no reason for the accessories and their costs to be left out in such adjustments.

In this regard, we note that the Commission conducted a separate Section 269TAC(8) based adjustment calculation concerning accessory differences. However that calculation was done at a broad weighted average level. It was not based on the specific and actual cost differences between exported goods and domestic sales of like goods at the MCC level and, unlike the adjustment calculated in the Worksheet, did not include a profit component. Once again, we say that accessories formed part of Zhuhai Grand's raw materials for production of the sinks and are part of the cost of production and sale of such sinks. Accordingly, accessory-related physical differences should be treated in the same manner and consistently with other aspects of physical differences, and should form part of the full-CTM based adjustment calculation.

For the Review Panel's convenience, we attach a revised Worksheet with the proposed corrections. The revisions are highlighted. **[CONFIDENTIAL ATTACHMENT]**

B OCOT determination must use cost of production in China

We refer to discussions on this topic between ourselves and the Review Panel during the conference on 16 April 2020.

We recall that an "ordinary course of trade" determination is made in the context of Section 269TAC(1) of the Act, and that Section 269TAC(1) was the legal basis for the Commission's determination of the normal value for the goods exported by Zhuhai Grand. That Section reads as follows:

Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods. [our emphasis]

Report 517 states that, for the purpose of determining if the like goods were sold in the "ordinary course trade":

The Commissioner recommends the Minister be satisfied:

- *in accordance with sections 269TAAD(1) and for the purpose of determining normal value, as set out in Confidential Attachments 6, 11, 16, 21 and 26 and Chapter 7 of this report;*
 - *like goods were sold by ... Zhuhai Grand... in China in sales that were arms length transactions in substantial quantities during an extended period for home consumption in China at a price less than the cost of such goods; and*
 - *that the exporters were unable to recover the cost of such goods within a reasonable period.⁴*

⁴ Report 517, page 108

The price paid for these goods has been taken not to have been paid in the ordinary course of trade for the purpose of determining normal value.

and:

The Commissioner recommends the Minister determine:

...

- *in accordance with section 269TAAD(4), and for the purpose of working out the cost of goods and determining whether the price paid for like goods sold in the country of export in sales that are arms length transactions are taken to have been in the ordinary course of trade, the amounts for the cost of production or manufacture of the goods produced by ... Zhuhai Grand in China and the administrative, selling and general costs associated with the sale of those goods are as set out in Confidential Attachments 5, 10, 15, 20 and 25;⁵*

Evidently, the Minister decided to deem certain of Zhuhai Grand's domestic sales of like goods as not having been made in the ordinary course of trade, based on Section 269TAAD of the Act. We submit that the Minister has failed or erred in the application of Section 269TAAD, because the cost of production adopted for the ordinary course of trade determination cannot be said to be the cost of production in the country of export. The correct and preferable decision requires the Minister to use cost of production as kept in Zhuhai Grand's cost record, as mandated by Article 2.2.1.1 of the WTO Anti-Dumping Agreement. We note that such requirement is not inconsistent with Section 269TAAD(4) and (5), nor with the manner and factors as prescribed under Regulation 43 of the *Customs (International Obligations) Regulation 2015*. This is because Section 269TAC(1) and 269TAAD specifically direct the Minister to carry out the determination:

- in relation to the *"price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export"*;
- where *"like goods are sold in the country of export"*; and
- using *"the cost of production or manufacture of those goods in the country of export"*

Regulation 43(1) confirms that the purpose of that section is to set out the "manner" and "factors" of the Minister's determination of the *"cost of production or manufacture of like goods in a country of export"*. Regulation 43(2) through to (8) then prescribe such manner and such factors. None of these manners and factors require or authorise the Minister to deviate from the task and context set out in the Act or Regulation 43(1), which is to calculate the cost of production of like goods in the country of export.

In the present case, the Minister is in possession of the cost of production in the country of export. The Commission considers that such cost may have been "influenced" by certain governmental factors. However it is not suggested that the cost of production information concerning Zhuhai Grand is unreliable, or that it does not reflect the cost of production of the stainless steel sinks in China. Accordingly we see no legal or factual basis for the Minister to use the price of stainless steel in North America and/or Europe as the cost of production in the country of export, being China. They are not. Zhuhai Grand did not import stainless steel from either Europe or North America such that out of the country of export data might be considered relevant. The prices in Europe and North America have

⁵ Ibid, page 106.

nothing to do with the cost of production in the country of export, and are materially irrelevant considerations for the purposes of the exercise required of the Minister.⁶

The significance of using the cost of production in the country of export is informed both by the text of Section 269TAAD(4) and by the statutory context of Section 269TAC(1). As already noted above, the prescribed determination relates to *“the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export”*. Apart from the case of the negative test under Section 269TAAD, to determine if the domestic sales were in the ordinary course of trade, the Minister is required to consider if the sales were made in the usual course of business. The phrase “ordinary course of trade” should be given its plain meaning, which entails a wide range of transactions done as part of usual business. We refer to the High Court’s considerations of similar phrases in the past.

For example, Dixon CJ in *Taylor v White* said:

...“in the ordinary course of business” refers to “business” as a general conception and is not restricted to the conduct of any particular business such as the business carried in a shop or merchant’s of office or the like, but is referring to the transaction of business as a known and recognised activity pursued by anybody engaged in an attempt to win or earn or “make” money or a living in a systematic or regular way...The time-honoured phrase “in the ordinary course of business” is meant to refer to transactions regularly taking place in a sustained course of activity or some usual process naturally passing without examination.⁷

Similarly, Barwick CJ in *Fairway Estates Pty Ltd v Commissioner of Taxation* said:

*I have come to the conclusion that the decisions involving the expression “in the ordinary course of business” found in bankruptcy legislation have no direct bearing on the construction or application of s 63. Accordingly, I find no need to discuss them. However, the remarks of Rich J in *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (1948) 76 CLR 463 at 477*, are of use in that they emphasise the notion of a common course in the conduct of a business. The requirement that the transaction be in the ordinary course of the business excludes transactions which are made for purposes other than the carrying on of the business or to achieve ends disparate from those of the business activity.⁸*

The question to be asked in the present context therefore is whether Zhuhai Grand’s domestic sales of like goods were made as part of its usual business? Or were they unusual and extraordinary? If such question is to be based on an examination of whether Zhuhai Grand sold the like goods in a usual, commercial, and profit-driven manner, then the decision maker must objectively conduct that examination.

What was or should have been in Zhuhai Grand’s mind when it sold the like goods for home consumption in the country of export? As a kitchen sink producer supplying its products for home consumption in the domestic market, it would have considered the condition of the home market and its own commercial position, including the cost of doing such business and the achievable level of profit. That is what happened, or at least there is no evidence to the contrary. Zhuhai Grand sold the kitchen sinks in the domestic market in a usual way, informed by its market intelligence, its own costs and its

⁶ *McDowell & Partners Pty Ltd v Button* (1983) 50 ALR 647 also available at: [BC8300269](#)

⁷ *Taylor v White* (1964) 110 CLR 129, at 136; [1964] HCA 11

⁸ *Fairway Estates Pty Ltd v Commissioner of Taxation (Cth)*, (1970) 123 CLR 153, [1970] HCA 29

profit motivation, and consummated after its negotiation with customers in the home market. That, essentially, describes Zhuhai Grand's ordinary course of trade.

Accordingly, we submit that the ordinary course of trade determination must only be informed by the actual business conditions of Zhuhai Grand and the conditions of the home market in which it was and is engaged. It is plainly absurd to suggest that in order to sell kitchen sinks in the ordinary course of trade in China, Zhuhai Grand must base such sales on factors relating to the market conditions of North America and Europe. Equally, we submit that it is wrong and unreasonable to find that if Zhuhai Grand sold a kitchen sink in China at a price lower than the cost of producing that sink in North America, then its sales prices can be deemed as not being in the ordinary course of trade in China.

We look forward to your further consideration and remain available to provide further information pursuant to the conference mechanisms available to you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Charles Zhan', with a large, stylized initial 'C'.

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