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Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal Branch

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By EMAIL: john.cosgrave@minterellison.com

Mr John Cosgrave
MinterEllison
Constitution Place,
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Dear Mr Cosgrave,

ADRP Review No. 144 – Consumer Pineapples exported from the Republic of the Philippines and the Kingdom of Thailand

I refer to your letter dated 15 December 2021 to the Anti-Dumping Review Panel (the Panel).

In your letter you make a number of submissions on behalf of your client, being associated entities of Dole Asia Holdings, Dole Thailand Limited and Dole Philippines Inc. I understand that the submissions are made in the context of the current review I am conducting and are made on behalf of your clients pursuant to s.269ZZJ of the *Customs Act 1901* (the Act).

One of the issues you raise concerns the validity of the application for review made by Golden Circle Limited (Golden Circle) which is the basis for this review. For the reasons provided in your letter, you request that the Panel revoke its decision to accept Golden Circle's application. It appears to me that if I was to accept the reasons put to me in your letter and treat the application by Golden Circle as not a valid application, then I should stop the current review rather than continue with it and deal with the issue of the validity of the application at the time of my report to the Minister.

For this reason, I have considered the issue you have raised and have decided that I should continue with the review on the basis that the application for review by Golden Circle was a valid application. I am providing notice of this decision and the reasons for it so that your clients can consider any action they may wish to take in light of this decision.

Your letter raises two separate grounds as to the validity of the application for review. These are that:

- The application did not comply with the requirements of subdivision B of Division 9 of Part XVB of the Act and, in particular, did not satisfy the requirement of s.269ZZE(b); and

- The application did not engage with the "statutory test" relevant to the Panel's assessment of the reviewable decisions.

I will deal with each of the grounds below.

Separate Applications

Your submission is to the effect that there were two reviewable decisions made by the Minister when the declaration was made under s.269ZHG(1) with respect to the anti-dumping measures in place with respect to exports of consumer pineapple from the Republic of the Philippines (the Philippines) and the Kingdom of Thailand (Thailand). The basis for this submission is that there were two different anti-dumping measures in place, namely those with respect to exports from Thailand and those with respect to the exports from the Philippines.

The consequence of there being two reviewable decisions is, you submit, that Golden Circle was required to make two separate applications. The basis for this submission is that there is nothing in s.269ZZA to authorise the making of a single application to the Panel in respect of more than one reviewable decision and that the approved form specifies that a separate application must be completed for each reviewable decision. Consequently, the application does not comply with s.269ZZE(b) which requires that the application be in accordance with a form approved under section 269ZY of the Act.

It is possible that the terms of Division 6A of Part XVB of the Act require that, in the circumstances of the measures in place with respect to exports of consumer pineapple from Thailand and the Philippines, there should have been two separate decisions made by the Minister and separate declarations made under s.269ZHG(1) of the Act. I do not propose to consider whether or not this is the case as it goes to the validity of the approach of the Anti-Dumping Commissioner in making the recommendation under s.269ZHF(1) of the Act as well as the Minister's decision under s.269ZHG(1). The Panel is not in a position to review the validity of those decisions on that basis.

In my view, whether or not it was the correct approach, there was one relevant recommendation from the Commissioner and, on the basis of this recommendation, a decision by the Minister was made which is the reviewable decision in this case. Apart from the legislative analysis, your letter refers to a number of aspects of the Anti-Dumping Commission's report which support the submission that there were two decisions. These are:

- That there were two reports, namely 571 and 572.

- The acknowledgment that there were different expiry days applying to the measures; and

- A reference in a footnote to the existence of two dumping duty notices.

With respect to the first point, I note that while the report by the Commission was numbered 571 and 572, there was in fact just one report. The Commission combined its inquiries into the continuation of the measures against the exports from Thailand and the Philippines and, in

particular, did not separate the two inquiries when it examined the likelihood of whether material injury from dumping would continue or recur upon the expiration of the measures. In the conclusion of the report, there is no distinction made with respect to the exports of consumer pineapple from Thailand and the Philippines.[1]

Importantly, the report to the Minister stated that the Commissioner found for the purpose of s.269ZHF(2) that the Commissioner was not satisfied "that the expiration of the anti-dumping measures applying to consumer pineapple exported from the Philippines and Thailand would lead, or would be likely to lead, to a continuation or recurrence of, the dumping and the material injury the anti-dumping measures are intended to prevent".[2] There is no distinction made by the Commissioner in coming to this finding between the different exports.

Further, the recommendation to the Minister was relevantly that the Minister declare "in accordance with subsection 269ZHG(1)(a), that he has decided not to secure the continuation of the anti-dumping measures concerned". The recommendation then goes on to state that:

> "The dumping duty notice as it relates to exporters from Thailand will therefore expire on 17 October 2021 and the notice as it relates to exporters from the Philippines will therefore expire on 10 October 2021."[3]

The public notice of the decision of the Minister noted that the Minister had accepted "the recommendation and reason for the recommendation" of the Commissioner and then stated:

> "Pursuant to subsection 269ZHG(1)(a) …I declare that I have decided not to secure the continuation of the anti-dumping measures currently applying to consumer pineapple exported to Australia from Thailand and the Philippines . These measures will expire on 10 October 2021 and 17 October 2021 respectively."[4]

The language of the Commissioner's report and recommendation and the Minister's declaration support a conclusion that there was one reviewable decision of the Minister which is the decision the subject of this review. It is not just the language but also the substance of the approach by the Commission. The same analysis and evidence underpin the finding by the Commissioner under s.269ZHF(2), the recommendation under s.269ZHF(1) and the Minister's subsequent decision.

Even if I am wrong in the above conclusion, I note that s.269ZZE does not itself require that there be different application for review forms completed for different reviewable decisions. Paragraph 269ZZE(1)(b) requires that the application for review be made in accordance with the form approved under s.269ZY of the Act. Hence, I would still need to consider whether the application for review by Golden Circle was invalid because it did not comply with the approved form.

I note that your letter refers to there being nothing in the terms of s.269ZZA to authorise the making of a single application to the Panel in respect of more than one reviewable decision. However, s.269ZZE prescribes how an application for review is to be made and the form for such applications is left to the Senior Member to approve.

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[1] REP 571 & 572, section 7.8 on pages 59 and 60.
[2] As above, section 8 on page 61.
[3] As above.
[4] Anti-Dumping Notice No. 2021/117.

Your submission that the application form completed by Golden Circle does not comply with the form approved pursuant to s.269ZY for the making of an application for review of a decision by a Minister relies on a statement at paragraph 5 that "a separate application must be completed". This, it is submitted, is a requirement that a separate application for review must be completed for each reviewable decision.

The requirement in paragraph 5 is not in such terms. It reads:

> "Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed.**"

It is possible to read this requirement as applying only if more than one box needs to be selected. At the very least it is ambiguous. I consider that Golden Circle should be given the benefit of any ambiguity. It was not unreasonable to take the approach it did given that there was only one box required to be ticked and in light of the form of the decision by the Minister in making only one declaration under s.269ZHG(1)(a).

Statutory Test

A second ground put forward for rejecting the application is that it did not engage with the statutory test set out in s.269ZHF(2) of the Act. It is submitted that the test does not authorise the aggregation of the effects of exports from the two countries that were the subject of separate anti-dumping measures. Two separate tests are required.

It may or may not be the case that this submission is correct in its construction of s.269ZHF(2). However, if it is correct then it would mean that the approach taken by the Commission is questionable and, similarly, the decision of the Minister which relied on the findings of the Commissioner. The correct construction of s.269ZHF(2) and whether or not it allows for the aggregation of exports from the Philippines and Thailand is not an issue which is before the Panel and given the terms of s.269ZZG(5)(c) of the Act, the Panel is unable to consider the issue as part of the review.

Given the approach taken by the Commission to the test in s.269ZHF(2), it is not surprising that Golden Circle did not take a different approach in its application. In any event, I do not consider that the argument you have made means that the application by Golden Circle is not a valid application for review within s.269ZZE of the Act.

For the above reasons, I will continue with the review. A copy of this letter will be placed on the website for this review.

Yours Faithfully

Joan Fitzhenry
Senior Member
Anti-Dumping Review Panel
21 December 2021