U.S. Court of International Trade

Slip Op. 16–31

ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Plaintiff, v. UNITED STATES, Defendant AND RHEETECH SALES & SERVICES, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00206

OPINION

[Affirming a final scope ruling of the International Trade Administration, U.S. Department of Commerce, interpreting the scope of antidumping and countervailing duty orders on certain aluminum extrusions from the People's Republic of China]

Dated: March 31, 2016

Robert E. DeFrancesco, III, Wiley Rein LLP, Washington, DC, for plaintiff. With him on the brief was *Alan H. Price*.

Douglas G. Edelschick, Trial Attorney, Civil Division, U.S. Department of Justice, Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *David P. Lyons*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

Peter S. Herrick, Peter S. Herrick, P.A., St. Petersburg, FL, for defendant-intervenor.

Stanceu, Chief Judge:

Plaintiff Aluminum Extrusions Fair Trade Committee ("AEFTC") contests an August 7, 2014 final determination of the International Trade Administration, United States Department of Commerce ("Commerce" or "the Department"), in which Commerce ruled that "aluminum frames for screen printing, with mesh screen attached" ("screen printing frames") are not within the scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China (the "Orders").

Before the court is plaintiff's motion for judgment on the agency record, in which plaintiff argues that Commerce erred in ruling the merchandise to be outside the scope of the Orders. Defendant United States opposes plaintiff's motion and argues that the Final Scope Ruling should be affirmed. The court denies plaintiff's motion.

I. BACKGROUND

A. The Contested Decision and the Administrative Proceeding

The decision contested in this litigation is the *Final Scope Ruling on Rheetech Sales & Services Inc.'s Screen Printing Frames with Mesh Screen Attached*, A-570–967, C-570–968 (Aug. 7, 2014) (Admin.R.Doc. No. 9), *available at* http://enforcement.trade.gov/download/prcae/scope/48-screen-printing-frames-7aug14.pdf (last visited Mar. 28, 2016) ("*Final Scope Ruling*").

Commerce issued the Final Scope Ruling in response to a request ("Scope Ruling Request") filed on March 4, 2014 by Rheetech Sales & Services, Inc. ("Rheetech"), a U.S. importer and the defendant-intervenor in this litigation. *Alum. Extrusions from the People's Republic of China Scope Ruling Request Regarding Rheetech Sales & Services, Inc.* (Mar. 4, 2014) (Admin.R.Doc. No. 1) ("*Scope Ruling Request*"). In comments filed with Commerce on May 16, 2014, plaintiff argued that the screen printing frames are "subject merchandise," i.e., merchandise that is subject to the Orders. Letter from Wily Rein LLP to Sec'y of Com., re: *Comments on Rheetech's Scope Ruling Request and Response to the Department's Questionnaire* 11–12 (May 16, 2014) (Admin.R.Doc. No. 6) ("*AEFTC's Scope Ruling Request Comments*").

B. The Antidumping and Countervailing Duty Orders

Commerce issued the Orders in May 2011. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

C. Proceedings before the Court of International Trade

AEFTC commenced this action by filing a summons on September 4, 2014. Summons, ECF No. 1. Plaintiff followed with a complaint on October 3, 2014. Compl., ECF No. 10. The court granted defendant-intervenor status to Rheetech, which has not since filed a brief in this litigation. Order (Oct. 15, 2014), ECF No. 15. Plaintiff submitted its motion for judgment on the agency record, pursuant to USCIT Rule 56.2, on March 30, 2015. Pl.'s R. 56.2 Mot. for J. on the Agency R., ECF No. 21 ("Pl.'s Br."). Defendant responded on August 6, 2015. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 30. Plaintiff

replied on September 4, 2015. Pl. Aluminum Extrusions Fair Trade Committee's Reply Br., ECF No. 31.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act").[1] 19 U.S.C. § 1516a(a)(2)(B)(vi). Section 516A provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id*. In reviewing the contested scope ruling, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B)(i).

B. Description of the Merchandise in Rheetech's Scope Ruling Request

The Final Scope Ruling described the merchandise as "aluminum frames with a mesh screen attached for screen printing designs onto fabric" and as "welded 6063-T5 aluminum rectangular frames with polyester woven mesh glued to one side of the frame." *Final Scope Ruling* 5 (footnote omitted). It also stated that "[t]he frames are imported completely assembled, with no finishing required before being sold." *Id.* (footnote omitted). Commerce further stated in the Final Scope Ruling that "[a]s decribed by Rheetech, the screen printing frames are placed in screen printing machines and are inherently part of a larger whole," *id.* at 12 (footnote omitted), and that "[t]he screen printing frames are fully and permanently assembled and completed, and are ready for installation into the screen printing machines, at the time of entry," *id.* (footnote omitted).

C. The Scope Language of the Orders

The scope language of the antidumping duty order and the scope language of the countervailing duty order are essentially the same. The Orders apply to "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designa-

[1] All statutory citations herein are to the 2012 edition of the United States Code and all regulatory citations herein are to the 2014 edition of the Code of Federal Regulations.

tions published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653.

The scope of the Orders includes goods made of the specified aluminum alloys that resulted from an extrusion process but also were subjected to certain specified types of industrial processes after extrusion. These post-extrusion processes are drawing, fabricating, and finishing; the scope language provides non-exhaustive lists of types of fabricating and finishing operations. As to finishing, for example, the good may be "brushed, buffed, polished, anodized (including bright-dip anodized), liquid painted, or powder coated." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654. For fabricating, the Orders include a good that is, for example, "cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun." *Id*. The scope includes these aluminum extrusions even if they are "described at the time of importation as parts for final finished products that are assembled after importation" or "identified with reference to their end use." *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. Subject to a specific exclusion (the "finished goods kit exclusion"), "the scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise . . . ." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

The scope language of the Orders provides an exclusion from the scope for certain "finished merchandise," which reads as follows:

> The scope . . . excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

D. Commerce Was Correct in Ruling that the Screen Printing Frames Are Not Within the Scope of the Orders

As the Court of Appeals for the Federal Circuit has held in a leading case, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) ("*Duferco*").

Applied to the facts of this case, the *Duferco* principle presents the question of whether the "general scope language," i.e., the scope language considered apart from any specific exclusion from the scope, reasonably may be interpreted to include the screen printing frames. If so, then a second question is whether the screen printing frames satisfy the requirements of a specific exclusion set forth in the scope language and therefore must be determined to be outside the scope of the Orders.

For the reasons discussed below, the court concludes that the general scope language may not reasonably be interpreted to include the screen printing frames. It is unnecessary, therefore, to consider the question of a specific exclusion. However, even if, *arguendo*, the general scope language were presumed to include the screen printing frames, this merchandise necessarily would be excluded from the scope of the Orders by operation of the "finished merchandise exclusion" referenced above.

The general scope language provides that the Orders apply to "aluminum extrusions which are shapes and forms, produced by an extrusion process . . . ." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. The intended meaning of the term "shapes and forms" is clarified by the following general scope language: "Aluminum extrusions are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars and rods." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654. The examples presented to clarify the term "shapes and forms" are of single extruded articles. These examples are an indication that the scope of the Orders was not intended to include, as a general matter, any assembled good that contains an aluminum extrusion as a part.

The screen printing frames are not themselves "extrusions" but rather are assemblies, each of which consists of a frame, which is a welded assembly of extrusions, and a polyester mesh screen that is attached to the frame. There is no dispute in this case that the frame is assembled by welding together extrusions that are of an aluminum alloy specified in the Orders.

Under the general scope language, a good resulting from an extrusion process performed upon a covered aluminum alloy remains in the scope even if, after being extruded, it has been subjected to one of three specified types of processes: drawing, fabricating, and finishing. *Id.* Absent from the list of post-extrusion processes identified in the general scope language is an assembly process. To the contrary, the reference in the general scope language to fabrication includes an

indication that assembly is *not* one of the contemplated post-extrusion processes: "Aluminum extrusions may also be fabricated, *i.e.*, *prepared for* assembly." *Id.* (emphasis added).

The court concludes that it is not reasonable to interpret the general scope language to place within the scope of the Orders, as a general matter, *any* assembled good containing as a component an "aluminum extrusion," even as the term "extrusion" is broadly defined therein. In other words, the Orders apply to "extrusions," a term that is defined expansively by the Orders to include goods that have been processed in various ways following an extrusion process. The term "extrusions," however, is not defined in the general scope language so broadly as to include all goods consisting of assemblies of which extrusions are parts.

The only reference in the general scope language that describes assemblies of any kind as being within the scope of the Orders is the reference to certain "subassemblies," which in context reads as follows:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below.[2]

AD Order, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654.

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[2] The reference in the text to "the finished goods 'kit'" is a reference to a specific exclusion from the scope of the Orders that reads as follows:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc*. in the packaging with an aluminum extrusion product.

Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,651 (Int'l Trade Admin. May 26, 2011); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,654 (Int'l Trade Admin. May 26, 2011).

With respect to the first two sentences of the above-quoted language, the screen printing frames are not plausibly described as "parts for final finished products that are assembled after importation" that "otherwise meet the definition of aluminum extrusions." *Id*. Even were it presumed that the screen printing frames are "parts for final finished products," they would not answer to the description-"parts that otherwise meet the definition of aluminum extrusions." As discussed above, the definition of "aluminum extrusions" is "shapes and forms produced by an extrusion process . . . ," *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653, which after extrusion may be subjected to "drawing, fabricating, and finishing." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654.

The third sentence in the language quoted above, i.e., the sentence referring to "subassemblies," is inapplicable to the goods under consideration when read according to plain meaning. Citing the Scope Ruling Request, Commerce described the screen printing frames as "imported completely assembled, with no finishing required before being sold." *Final Scope Ruling* 5 (footnote omitted). Because the "subassemblies" reference is an exception to the definition of "extrusions" put forth in the remainder of the general scope language and therefore should be read narrowly, it would be a mistake to construe the subassemblies reference to apply more broadly than its plain meaning would indicate.

Because screen printing frames are not "shapes and forms produced by an extrusion process," because they are, instead, assemblies, and because they are not described by the term "subassemblies, *i.e.*, partially assembled merchandise" as that term is used in the general scope language, the general scope language is not reasonably interpreted to include these imported products. The court concludes, therefore, that Commerce was correct in deciding that the screen printing frames described in the Scope Ruling Request are not within the scope of the Orders.

In the Final Scope Ruling, Commerce did not expressly conclude that the screen printing frames fall within the general scope language. Instead, Commerce concluded that the screen printing frames satisfy the terms of the finished merchandise exclusion. *Final Scope Ruling* 11 (". . . we find that Rheetech's Screen Printing Frames at issue meet the exclusion criteria for finished goods."). In so ruling, Commerce relied upon its regulation, 19 C.F.R. § 351.225(k)(1), and two of its previous scope rulings.[3]

[3] In the cited regulation, Commerce provided, in pertinent part, that "in considering whether a particular product is included within the scope of an order..., the Secretary will take into account the following:...The descriptions of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 352.225(k)(1).

Commerce did state that, based on its examination of the language of the scope and the determination in one of its previous rulings, it found that "the product in question is a 'subassembly' that meets the criteria for a finished good and is therefore excluded from the scope of the *Orders*." *Final Scope Ruling* 13 (citing *Final Scope Ruling on Side Mount Valve Controls*, A-570–967, C-570–968 (Oct. 26, 2012) *available at* http://enforcement.trade.gov/download/prc-ae/scope/27-Innovative%20Controls-Side-MountValve-Controls-20121026.pdf (last visited Mar. 28, 2016)). The statement at issue could be read to mean that Commerce determined the merchandise to be within the scope of the Orders under the aforementioned subassemblies provision but ultimately determined it should be excluded from the scope of the Orders because it met the requirements of the "finished merchandise exclusion." This interpretation of the Final Scope Ruling, however, leads to two problems of construction. First, the "subassemblies" provision applies to "partially assembled merchandise" while the finished merchandise exclusion is confined to "merchandise" that is "fully and completely assembled." The language Commerce chose when drafting the two provisions would seem to be mutually exclusive. Second, once a finding is reached that a good is within the meaning of the scope term "subassemblies, *i.e.*, partially assembled merchandise," the good is, at least arguably, included within the scope "unless imported as part of the finished goods 'kit' defined further below." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. In setting forth the subassemblies provision, the scope language mentions the finished goods kit exclusion without making a parallel reference to the finished merchandise exclusion, which suggests that the subassemblies provision and the finished merchandise exclusion were intended to be mutually exclusive. Given these two problems of construction, a better interpretation of the Final Scope Ruling may be that Commerce reached a decision that the screen printing frames are not within the scope of the Orders by analyzing the applicability of the finished merchandise exclusion without first deciding conclusively whether the general scope language described these goods.[4] But regardless of whether Commerce considered the

[4] While not expressly concluding that the screen printing frames fall within the general scope language, Commerce opined that the aluminum frame portion of the article, if considered separately, would fall within the general scope language, stating as follows:

> The scope of the *Orders* describes aluminum extrusions as "shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents.)" Taken by itself, the aluminum frame of the screen printing frames would fall within this description.

screen printing frames to fall within the "subassemblies" provision, or simply did not decide that question and instead proceeded directly to the question of whether the goods are described by the finished merchandise exclusion, Commerce unquestionably reached the correct result in placing these goods outside the scope of the Orders.

The finished merchandise exclusion applies to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Were the screen printing frames presumed, *arguendo*, to be described by the general scope language, they would be excluded from the scope because they would satisfy the requirements of this exclusion. As Commerce found, and as is shown by substantial evidence on the record, these goods "are imported completely assembled, with no finishing required before being sold." *Final Scope Ruling* 5 (footnote omitted).

In summary, the court's analysis of the scope language of the Orders differs somewhat from that applied by Commerce in the Final Scope Ruling. Nevertheless, the question before the court is whether the court should grant or deny plaintiff's motion for judgment on the agency record, not whether the court agrees entirely with the Department's analysis. Because the screen printing frames would not fall within the scope of the Orders under either analysis, plaintiff's motion must be denied and judgment entered for defendant. *See* USCIT R. 56.2(b).

In contesting the Final Scope Ruling, plaintiff raises a number of arguments that fail to persuade the court that Commerce erred in placing the screen printing frames outside the scope of the Orders.

Plaintiff argues that the screen printing frames are, as Commerce found, "subassemblies," Pl.'s Br. 8 (citing *Final Scope Ruling* 13), and maintains that "[s]ubassemblies, by definition, are *not* final finished products[] and thus *cannot* meet the 'finished merchandise' exclusion in the scope of the AD/CVD orders," *id.* at 9. Plaintiff submits that "[t]here was no substantial evidence on the record to support the agency's conclusion that Rheetech's products fit within this narrow

Final Scope Ruling on Rheetech Sales & Services Inc.'s Screen Printing Frames with Mesh Screen Attached, A-570–967, C-570–968 (Aug. 7, 2014) (Admin.R.Doc. No. 9), *available at* http://enforcement.trade.gov/download/prc-ae/scope/48-screen-printing-frames-7aug14.pdf (last visited Mar. 28, 2016). Reaching this conclusion was not necessary to the Department's decision, and the court is unable to agree with the conclusion if the conclusion was intended as a construction of the general definition of "extrusions" absent consideration of the "subassemblies" provision discussed elsewhere in this Opinion. Additionally, in response to AEFTC's comment that Commerce should find that frames imported without the mesh screens would be within the scope, Commerce declined to decide that issue as it was not presented in the Scope Ruling Request. *Id.* at 13.

exclusion to the scope." *Id.* at 8. Plaintiff asserts, correctly, that Commerce found the goods at issue are "'placed in screen printing machines and are inherently part of a larger whole,'" *id.* at 8 (quoting *Final Scope Ruling* 12), but based on the Department's own finding that the screen printing frames are imported in fully assembled form and the supporting record evidence, the court must reject plaintiff's argument. The screen printing frames are not correctly described as "partially assembled merchandise" that must be placed within the scope of the Orders by operation of the subassemblies provision. Commerce expressly found that these goods "are imported *completely assembled*, with no finishing required before being sold." *Final Scope Ruling* 5 (emphasis added) (footnote omitted). Similarly, it found that "[t]he screen printing frames are fully and permanently assembled and completed, and are ready for installation into the screen printing machines, at the time of entry," *id.* at 12 (footnote omitted).

In making its "subassemblies" argument, AEFTC relies on *Shenyang Yuanda Alum. Indus. Eng'g Co. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015). That decision is inapposite because it involved goods found to be parts of curtain walls, not goods identical or similar to those under consideration here.

Plaintiff contends, further, that "[s]creen printing frames are simply component parts for a larger finished machine[] and are thus *not* independent finished goods." Pl.'s Br. 10. This argument presumes that to fall outside the scope of the Orders an assembled good such as the screen printing frame must be "independent," i.e., not used as a component or accessory with any other good. The scope language does not so provide. Instead, while stating that "[s]ubject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation . . . ," the scope language qualifies this statement by providing that "[s]uch parts that *otherwise meet the definition of aluminum extrusions* are included in the scope." *AD Order*, 76 Fed. Reg. at 30,650–51 (emphasis added); *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added). As the court discussed previously, the assembled good at issue in this case does not meet that definition.

AEFTC argues that the screen printing frames do not satisfy the requirements of the finished merchandise exclusion, asserting that the mesh screen is not fully and permanently assembled to the frame at the time of entry. Pl.'s Br. 11. According to this argument, because only one of the four sides of the mesh screen is glued to the frame, "the mesh must therefore be either removed or fully glued down by the purchaser prior to use." *Id.* (citing *AEFTC's Scope Ruling Request Comments* at 13–14). Plaintiff's argument must be rejected. First,

under the court's analysis of the scope the screen printing frames are not described by the general scope language, regardless of the exclusions. Second, plaintiff's assertion that the mesh must be removed or glued down prior to use is not supported by the record evidence and is at odds with the Department's findings. Consistent with the record evidence, Commerce found that the screen printing frames are "fully and permanently assembled," *Final Scope Ruling* 12, and that upon importation the mesh screen is affixed in place with glue and only replaced after approximately 50,000 imprints, use for four or five different designs, or upon being torn or loosened, *id.* at 5 (citing Letter from Peter S. Herrick, P.A., to Sec'y of Com. re: *Rheetech Sales & Services, Inc. ("Rheetech") – Screen Printing Frames Response to Request for Information Dated April 3, 2014* (Apr. 15, 2014) 2,4 (Admin.R.Doc. No. 5)).

Finally, citing various past determinations interpreting the scope of the Orders, plaintiff argues that in the Final Scope Ruling "Commerce unlawfully departed from its past practice in interpeting the 'finished merchandise' exclusion, with insufficient explanation and rationale." This argument fails because the scope language of the Orders is not reasonably interpreted to include the screen printing frames. In circumstances such as those presented here, "Congress intended the language of the orders to govern." *Duferco*, 296 F.3d at 1098.

III. CONCLUSION

For the reasons discussed in the foregoing, the court must deny plaintiffs' motion for judgment on the agency record. The court will enter judgment for defendant.

Dated: March 31, 2016
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU CHIEF JUDGE

Slip Op. 16–32

SHANDONG RONGXIN IMPORT & EXPORT CO., LTD., Plaintiff, v. UNITED STATES, Defendant, AND DIXON TICONDEROGA COMPANY, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No. 15–00151

OPINION AND ORDER

[Commerce's final results in antidumping administrative review are remanded.]

Dated: April 5, 2016

John J. Kenkel, *Gregory S. Menegaz*, *J. Kevin Horgan*, and *Judith Holdsworth*, deKieffer & Horgan, PLLC, of Washington DC, for plaintiff.

Robert M. Norway, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Erica A. Hixon*, Trial Counsel. Of counsel on the brief was *Amanda T. Lee*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

Felicia Leborgne Nowels and *Sheryl D. Rosen*, Akerman LLP, of Tallahassee, FL, for defendant-intervenor.

Tsoucalas, Senior Judge:

Plaintiff, Shandong Rongxin Import & Export Co., Ltd., ("Shandong") contests Commerce's Final Results of the Antidumping Duty Administrative Review on Certain Cased pencils from the People's Republic of China ("PRC"), *Certain Cased Pencils From the PRC*, 80 Fed. Reg. 26,897 (Dep't Commerce May 11, 2015) (Final Results of the Antidumping Duty Administrative Review) ("*Final Results*"); Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Certain Cased Pencils from the PRC; 2012–2013, A-570–827, (Apr. 30, 2015) ("*I&D Memo*"); Pl.'s Rule 56.2 Mot. for J. Upon the Agency R., Aug. 28, 2015, ECF No. 24 ("Pl's Br."). Defendant, United States Department of Commerce ("Commerce"), and Defendant-Intervenor, Dixon Ticonderoga Company ("Dixon"), oppose Shandong's Motion. Def.'s Opp'n, Dec. 18, 2015, ECF No. 30; Def-Inter. Opp'n, Dec. 18, 2015, ECF No. 34. For the following reasons, Commerce's *Final Results* are remanded.

BACKGROUND

Shandong is an exporter of pencils from the PRC whose pencils are subject to an Antidumping Duty Order. *Final Results*, 80 Fed. Reg. at 26,897. On December 20, 2013, Dixon filed a request for administrative review of Shandong. Req. for Administrative Review, PR 1 (Dec. 20, 2013) ECF No. 27 (Sept. 4, 2015) ("*Req*."). Dixon's request stated that "[a]s a United States importer and manufacturer of subject merchandise, Petitioner is an interested party under 19 U.S.C. § 1677(9) who may make this request for administrative review pursuant to 19 C.F.R. § 351.213(b)." *Id*. at 1. The request was accompanied by a company certification, signed by Dixon's Chief Executive Officer ("CEO"), Timothy Gomez, which stated that the information contained in the submission is accurate. *Id*. at 3. On February 3, 2014, Commerce initiated an administrative review of Shandong. *I&D Memo* at 2. During the review, Shandong argued that, first, Com-

merce's initiation of the review of Shandong was void ab initio, because Dixon failed to claim that it was a domestic interested party, that is, a U.S. manufacturer of pencils during the period of review, and second, Shandong deserves a separate rate, because it can demonstrate the absence of government control, both in law (de jure) and in fact (de facto). Pl. Br. at 3, 20–37.

In the *Final Results*, Commerce found that there is no evidence "on the record that undermines or calls into question Dixon's certification [that it is an interested party]." *I&D Memo* comment 2 at 9.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), and Section 516A(a)(2)(A)(i) of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2012).[1]

The Court will hold unlawful Commerce's determinations that are unsupported by substantial evidence on the record, or not otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). To determine whether Commerce's interpretation and application of the statute is "in accordance with law," the courts review the statute to determine whether "Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984). "To ascertain whether Congress had an intention on the precise question at issue, we employ the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). The tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id*. If the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question then becomes what level of deference is owed Commerce's interpretation, the traditional second prong of the Chevron analysis. *Chevron*, 467 U.S. at 842–43. *See United States v. Mead Corp*., 533 U.S. 218, 228 (2001). "Chevron deference is afforded to Commerce's statutory interpretations as to the appropriate methodology . . . ." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001). Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. A "permissible" construction under *Chevron* is understood in terms of reasonableness;

[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, and all applicable amendments thereto.

only reasonable interpretations will be upheld by the Court. *See Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) ("*Chevron* requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable."). To determine reasonableness, the Court looks to the express terms of the statute, the objectives of the statute, and the objectives of the statutory scheme as a whole. *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007).

The Court will uphold Commerce's determination unless it is unsupported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(1)(B)(i). "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of NY v. NLRB*, 305 U.S. 197, 229 (1938). Moreover, "substantial evidence" must be measured by the record as a whole, "including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Commerce's determination cannot be based on "isolated tidbits of data which suggest a result contrary to the clear weight of the evidence." *USX Corp. v. United States*, 11 CIT 82, 84, 655 F. Supp. 487, 489 (1987). "[T]he substantial evidence standard requires more than mere assertion of 'evidence which in and of itself justified [the . . . determination], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'" *Gerald Metals Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

DISCUSSION

The issue the court must first address is whether Commerce's determination — that Dixon was a domestic interested party with standing to request an administrative review — is supported by substantial evidence and in accordance with law. If Commerce's determination was not supported by substantial evidence and in accordance with law, there is no reason to reach the second issue of whether Shandong deserves a separate rate.

Each year during the anniversary month of the publication of an antidumping duty order, a domestic "interested party" may request in writing that the Secretary conduct an administrative review "if the requesting person states why the person desires the Secretary to review those particular exporters or producers." 19 C.F.R. § 351.213(b)(1) (2013). An interested party means "a manufacturer, producer, or wholesaler in the United States of a domestic like product." 19 U.S.C. § 1677(9)(C)(2012).

Commerce may presume standing, absent evidence to the contrary. *See Zenith Electr. Corp. v. United States*, 18 CIT 1145, 1149, 872 F.Supp. 992, 996 (1994) (citing *Minebea Co. v. United States*, 984 F.2d 1178, 1181 (Fed. Cir. 1993)). "[T]he burden of production of evidence to rebut standing has been allocated by the Federal Circuit to the party challenging standing." *Id*. at 1150 (citing *Minebea*, 984 F.2d at 1181).

"[T]he legislative history states that the 'standing requirements [should] be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.'" *Brother Indus. (USA), Inc. v. United States*, 16 CIT 789, 793–94, 801 F. Supp. 751, 757 (1992) (citing S.Rep. No. 96–249, 96th Cong., 1st Sess. 63 (1979), U.S.Code Cong. & Admin. News 1979, pp. 381, 449).

Shandong argues that Dixon failed to make a claim that it was a domestic producer during the period of review, and therefore Dixon does not have standing to request an administrative review. Pl.'s Br. at 10–11. Shandong further argues that Dixon implicitly claimed that Dixon manufactured pencils in China and exported them to the U.S., pointing to Dixon's claim that it was a manufacturer of "subject merchandise" in the request for review. *Id*. at 13; *see also* 19 U.S.C. § 1677(25) (subject merchandise means "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921.") An interested party means "a manufacturer, producer, or wholesaler in the United States of a domestic like product" under Section 1677(9)(C), not a manufacturer of subject merchandise, as stated in Dixon's request. 19 U.S.C. §1677(9)(C); *Req*. at 1. Nevertheless, Shandong failed to present this argument in its case brief at the administrative level and therefore the court deems the argument waived. Pl.'s Admin. Case Br. at 15–16, PR 48 (Jan. 30, 2015), ECF No. 27 (Sept. 4, 2015) ("Pl.'s Admin. Case Br."); *See Husteel Co. Ltd. v. United States*, 39 CIT ___, ___, 77 F.Supp.3d 1286, 1294 (2015).

Commerce contends that Shandong "fails to cite any evidence that would undermine Dixon's claim that it was a domestic interested party." Def.'s Opp'n at 8; *I&D Memo* at 9 ("there is no evidence on the record that undermines or calls into question Dixon's certification."). The court disagrees. During the review, Shandong provided evidence that Dixon's affiliated Chinese exporter, Beijing Fila Dixon Stationary Company, Ltd., produces Dixon's pencils in China. *Certain Cased Pencils From the PRC*, 78 Fed. Reg. 42,932 (Dep't Commerce July 18, 2013) (Final Results of Antidumping Duty Administrative Review

and Determination to Revoke Order in Part; 2010–2011); Pl.'s Admin. Case Br. at 15. Therefore, in light of the evidence Shandong provided, Commerce may not presume standing. *See Zenith*, 18 CIT at 1149.[2] Commerce failed to adequately address Shandong's argument in the *I&D Memo*. *I&D Memo* at 9.

Commerce argues that its determination is supported by substantial evidence, because Dixon's CEO, Timothy Gomez, certified in writing that Dixon is a U.S. producer of pencils. Def.'s Opp'n at 8; *Req*. at 3. Nevertheless, Commerce failed to explain how and why this certification trumps Shandong's argument to the contrary. *See Motor Vehicle Mfr. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("[t]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962).

Dixon asserts that Commerce's standing determination was supported by substantial evidence, because the antidumping duty order on certain cased pencils from the PRC originates from a petition filed in November 1992 by Dixon in which it was held to be a U.S. producer; it has appeared in Sunset and Administrative Reviews; and it receives Continued Dumping and Subsidy Offset Act Disbursements. Def-Inter. Opp'n at 6–11. Nevertheless, Dixon fails to appreciate that "an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc*., 371 U.S. at 169. Commerce articulated a different basis for its decision on standing; therefore, the court cannot uphold Commerce's decision for the reasons proffered by Dixon. *See id*.; *I&D Memo* at 9.[3]

The court does not reach the issue of whether Shandong deserves a separate rate until the threshold issue of standing is resolved.

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[2] In *Zenith*, the Court found that Commerce did not abuse its discretion by not conducting a wide-ranging investigation of Zenith's standing where Respondent produced a *prior statement of intent to move* assembly to Mexico (emphasis added). *Zenith*, 18 CIT at 1149–50. Unlike in *Zenith*, here, Shandong provided actual evidence that Dixon's affiliate produces pencils in China. *Cf. id*.

[3] "Department's Position: Dixon has certified that it is a domestic producer of pencils. Rongxin's [Shandong's] assertion is unsupported by factual information. Therefore, there is no evidence on the record that undermines or calls into question Dixon's certification. As a result, the Department finds no reason to revisit Dixon's interested party status and determines that Dixon is a domestic producer of pencils with standing to request an administrative review."

ORDER

For the reasons stated above it is hereby,

ORDERED that this case is remanded to the Department of Commerce, International Trade Administration, for further explanation or reconsideration as may be appropriate. Commerce shall have until May 5, 2016, to file its remand results. The parties shall have until June 6, 2016, to file objections, and the government shall have until July 6, 2016, to file its response.

SO ORDERED.

Dated: April 5, 2016
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE