



U.S. Customs and Border Protection

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PUBLIC VERSION

EAPA Case Number: 7238

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Antonia Tzinova
Ronald A. Oleynik
On behalf of Royal Brush Manufacturing Inc. a/k/a Royal and Langnickel
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Re: Notice of Final Determination as to Evasion

Dear Ms. Farfan, Ms. Tzinova, and Mr. Oleynik:

Pursuant to an examination of the record in Enforce and Protect Act (EAPA) Investigation Number 7238, U.S. Customs and Border Protection (CBP) has determined that there is substantial evidence that Royal Brush Manufacturing Inc. (“Royal Brush”), entered into the customs territory of the United States through evasion merchandise covered by antidumping duty (AD) order on Certain Cased Pencils from the People’s Republic of China A-570-827. Substantial evidence demonstrates that Royal Brush imported cased pencils made in China by transshipping the pencils through the Subic Bay, Philippines and falsely declaring the country of origin. As a result, no cash deposits were applied to the merchandise.

Background

On March 27, 2018, CBP initiated an investigation pursuant to Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015, commonly referred to as the “Enforce and Protect Act” or “EAPA.” On March 6, 2018 CBP confirmed receipt of an allegation filed by Dixon Ticonderoga Company (“Dixon” or “Alleger”), a domestic producer of pencils. The allegation, which was filed on February 27, 2018, reasonably suggested that Royal Brush evaded the payment of cash deposits on imports of cased pencils from China. In its allegation, Dixon

claimed that Royal Brush was transshipping Chinese-origin pencils through the Philippines in order to avoid the payment of antidumping duties. This investigation covers entries from March 6, 2017, one year before the receipt of allegation, through the pendency of this investigation that were entered for consumption, or withdrawn from a warehouse for consumption.

The antidumping duty order covers certain cased pencils of any shape or dimension that are manufactured in China and feature cores of graphite or other materials that are encased in wood and/or man-made materials.¹ Pencils subject to the AD Order are classifiable under subheading 9609.10.00, HTSUS. This classification is not dispositive as to the scope of the Order.

On June 26, 2018, CBP issued a notice of initiation (NOI) of investigation and notified the parties of CBP's decision to impose interim measures in accordance with 19 C.F.R. § 165.24 based on reasonable suspicion that Royal Brush entered covered merchandise into the customs territory of the United States through evasion. In reaching its decision to impose interim measures, CBP relied not only on the information provided by Dixon in the allegation and supplemental filings, but also on additional information CBP obtained from Royal Brush and its supplier [redacted], "Philippines Shipper").

In its allegation, Dixon claimed that multiple shipments of cased pencils subject to A-570-827 imported by Royal Brush were made in China by [redacted] (hereinafter, the "alleged Chinese Manufacturer"), but marked as "Made in Philippines." According to Dixon, the alleged Chinese Manufacturer had entered into a purchase contract with [redacted] (hereinafter "Trading Company"), where the Trading Company required the Chinese Manufacturer to mark the country of origin of the merchandise as Philippines.² The contract applied to item numbers RTN-157, RTN-158, and WPEN-12, which corresponded to item numbers used by Royal Brush its online catalog for colored pencils.³

Additionally Dixon alleged that the contract required the products to be certified to U.S. standards for levels of heavy metals and phthalates, and to bear Royal Brush's trademark "Royal & Langnickel."⁴ The Trading Company provided specific instructions to the Chinese Manufacturer on how to mark pencil boxes as "Made in Philippines" for shipment.⁵

¹ *Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 FR 66909 (December 28, 1994) (Order); *see also Continuation of Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 82 FR 41608 (September 1, 2017).

² *See* Allegation, at Exh. 1 (demonstrating a "Purchase Contract" identified by number RT02902, between the Chinese Manufacturer and the Trading Company).

³ *See* Notice of Initiation of Investigation and Interim Measures at 2 (fn 4) referencing http://www.royalbrushstore.com/c/cool-art_pencils (last viewed June 22, 2018).

⁴ *See* Allegation, at Exh. 3 (demonstrating a production order for 278 cartons of RTN 157; 322 cartons of RTN 158; and 139 cartons of WPEN-12, with product specifications and the trademarks indicated therein).

⁵ *See* Allegation, at Exh. 2 (containing marking instructions for boxes in which the items in the contract would be shipped to Subic Bay).

Finally, Dixon provided publicly available shipping data showing that the pencils with matching description and amounts had been imported into the United States from the Philippines by the Philippines Shipper.⁶ On March 13, 2018, Dixon supplemented the Allegation with additional evidence (“Supplement”) demonstrating that the Trading Company was the Chinese Manufacturer’s frequent customer.⁷

The Allegation and supporting documents, reasonably suggested that cased pencils covered by the Order had been entered for consumption into the customs territory of the United States through evasion. Consequently, CBP initiated EAPA investigation 7238 under 19 C.F.R. § 165.15(b).

On April 25, 2018, CBP issued a Form 28, Request for Information (“CF28”) to Royal Brush requesting production records for Entry No. []7828, a shipment of art pencils. CBP reviewed the documents and found that the shipment contained cased pencils stamped with Royal Brush’s trademark of “Royal & Langnickel.” The documents identified pencils as “Sketching Pencils,” item number SPEN-12, and indicated that [], a shipper in the Philippines was the manufacturer.⁸

On May 25, 2018, Royal Brush responded to the CF28 for Entry No. []7828 (“Response”). In its Response, Royal Brush claimed that the pencil supplier and the Philippines Shipper manufactures pencils in its Subic Bay facility using wood slats and pencil cores from China, and paint and packaging from the Philippines.⁹

In addition, Royal Brush provided purchasing, invoicing, export, shipping, and entry documents for a transaction identified by contract number []. These documents show that Royal Brush’s pencil supplier, the Shipper in the Philippines [], operates in the Subic Bay facility at the following address: []. The documents included invoices and bills of lading from the Trading Company [] that Dixon described is involved in the transaction.

Royal Brush’s Response contained internal contradictions that call into question whether the pencil shipments were actually manufactured in the Philippines. Specifically, the invoices and bills of lading from the Trading Company [] in China to the Philippines Shipper at the Subic Bay facility for raw materials, such as pencil slats and colored lead, indicate that the quantities purchased did not match the production requirements and

⁶ See Allegation, at Exh. 7

⁷ See Supplement, at Exh. 3.

⁸ See Notice of Initiation of Investigation and Interim Measures at 4 (fn 5) referencing http://www.royalbrushstore.com/products/productdetail/SPEN-12+-+12+PC+SKETCHING+PENCILS/part_number=SPEN-12/201.0.1.1.67808.1006207.0.0.0 (last viewed June 22, 2018).

⁹ See Response at 3.

processes at the Subic Bay facility.¹⁰ Further, Royal Brush provided two certifications from a third party certification service indicating that the imported pencils complied with U.S. safety standards.¹¹ The certification service [] that provided the documentation is located in China and appeared to have reviewed the pencils with an understanding that they were of Chinese origin.¹² Finally, the date of the certification not only post-dated the date of importation into the United States, but it was also issued after CBP sent CF 28s to Royal Brush.

On June 6, 2018, CBP Attaché (“Attaché”) performed an unannounced site visit to the pencil supplier and the Philippines Shipper at the Subic Bay facility. During the visit, the Attaché observed the staff making minor alterations (*e.g.*, sharpening) to what appeared fully manufactured pencils. The Attaché did not observe any manufacturing of pencils or any presence of raw materials sufficient to manufacture pencils in the amount Royal Brush had described in its Response. The manufacturing equipment that Royal Brush had represented as being in use at the Subic Bay facility, both in the Response and on the website for the Philippines Shipper, appeared to have been covered in dust and cobwebs indicating that they had not been used for some time.

In addition to the absence of any apparent manufacturing operations, the Attaché also observed evidence of what appeared to be repacking operations for finished pencils from China. The Attaché found numerous boxes onsite, indicating the origin as China and filled with fully manufactured pencils. Moreover, the Attaché witnessed staff repacking what appeared to be Chinese origin products into boxes labeled, “Made in Philippines” for export to other U.S. companies.

Based on the evidence above, CBP found that it had reasonable suspicion that Royal Brush was evading the antidumping duty order on cased pencils by importing pencils manufactured in China and falsely marked as being of Philippines origin and imposed interim measures.¹³

After interim measures, CBP sent multiple Requests for Information (RFI) to The Philippines Shipper and Royal Brush. Both submitted RFI responses during October 2018. Between November 14 and November 17, 2018, CBP conducted an onsite verification at the Subic Bay facility to determine whether the Philippines Shipper could produce the amount of pencils that Royal Brush had imported into the United States and identify the country of origin for pencils exported by the Philippines Shipper. During the verification, CBP toured the Subic Bay facility

¹⁰ Generally, and in the images provided by the Philippines Shipper, two pencil slats come together to form a “pencil sandwich” that ultimately yields at least 6 pencils. This process implies that a typical slat-to-core ratio should be, at a minimum, 2 slats for every 6 cores. *See* Response, at Exh. 3, Annex 12a. The invoice from the Philippines Shipper, and the “Bill of Materials” provided by Royal Brush indicate a ratio of approximately [] slats to [] core. *See* Response, at Exh. 3, Annexes 9 and 9a.

¹¹ *See* Response, at Exh. 3, Annex 13.

¹² *Id.*

¹³ *See* 19 U.S.C. § 1517(e); 19 C.F.R. §165.24(a).

and reviewed production records and seven (7) invoices associated with imports by [].

Given the complexities surrounding the federal government’s lapse in funding and resulting shut down, CBP extended the deadline on February 25, 2019, for this final determination by sixty days, pursuant to 19 C.F.R §165.22(c)(1)(iii).¹⁴ In reaching its determination, CBP considered the written arguments provided by Royal Brush and Dixon.¹⁵

Final Determination as to Evasion

19 CFR §165.27(a) requires CBP to “make a determination based on substantial evidence as to whether covered merchandise was entered into the United States through evasion.” “Covered merchandise” is defined by 19 CFR §165.1 as “merchandise that is subject to a CVD order...and/or an AD order.” As discussed below, the record of this investigation indicates that covered merchandise entered the United States through evasion, and that there is a basis for concluding that substantial evidence, in conjunction with an assumption of adverse inferences related to information requested but not provided, indicates Royal Brush’s imports were merchandise entered through evasion.

Based on entry information and CBP’s calculations of Philippines Shipper’s production capacity using data supplied by Philippines Shipper and information obtained at verification, CBP determined that total U.S. imports of pencils by all importers during 2018 that were identified with Philippines Shipper as manufacturer exceeded the company’s annual production capacity by [] percent.¹⁶ Based on CBP’s aforementioned calculations, Philippines Shipper must have

¹⁴ See February 26, 2019, “Notice of Extension of Final Determination,” which refers to the novelty of issues presented in the investigation, following the extension of the original deadline for written arguments to allow interested parties to address issues addressed in the on-site verification report that was issued several weeks after the end of the government shutdown. See also 19 C.F.R §165.22(c)(1)(iii).

¹⁵ See Royal Brush’s “Submission of Written Arguments to be Placed on the Administrative Record,” dated March 25, 2019 (“Royal Brush Written Arguments”) and Dixon’s Response to Royal Brush’s Written Arguments, dated April 9, 2019 (“Dixon Response”). Earlier, Royal Brush had filed a rebuttal containing new information in response to CBP’s verification report, followed by an initial version of its written arguments. CBP clarified that the verification report (and verification exhibits), which are covered by §165.25 of the EAPA regulations, do not constitute “new factual information” as that expression is used earlier in the regulations under §165.23(c)(1), which allows rebuttal information to be submitted in response to “new factual information” placed on the record by CBP. Consequently, rejected Royal Brush’s rebuttal submission. Furthermore, CBP also rejected the initial version of Royal Brush’s written arguments, which referenced untimely new information in the rejected Royal Brush rebuttal submission, as §165.26(a)(1) of the EAPA regulations require that written arguments be based solely upon facts on the record. However, Royal Brush was provided additional time to submit its March 25, 2019 Written Arguments. See TRLED’s email with subject line “EAPA Case # 7238: Submission of Written Arguments – Business Confidential Version,” dated March 21, 2019.

¹⁶ See February 11, 2019 on-site verification report (“Verification Report”) at 8-9. Note also the record does not indicate, and neither Philippines Shipper nor Royal Brush have claimed, that Philippines Shipper had massive inventories at the outset of 2018, which, had they existed, might help explain the large difference between estimated Philippines Shipper production capacity and total U.S. imports of pencils for which the identified manufacturer was Philippines Shipper.

been shipping large volumes of pencils to the United States from sources other than its own production facilities because, while Philippines Shipper “has the capability to produce pencils,”¹⁷ it does not have the capacity to produce pencils in “sufficient quantities as to account for the 2018 total imported pencils.”¹⁸

Information on the record supports the conclusion that pencils imported into the United States by Royal Brush had been manufactured in China and transshipped through the Philippines. As noted in the Notice of Initiation and Interim Measures, Royal Brush’s response to the CF28 included certifications supporting an origin of China for the pencils in question.¹⁹ The CBP Attaché observed, during his site visit to Philippines Shipper at the Subic Bay Facility, that Philippines Shipper’s “{s}taff appeared to be repacking China origin product into boxes labeled, ‘Made in Philippines’ for export....”²⁰ In his report, the CBP Attaché included photographs he identified as showing Chinese pencils repacked as “made in the Philippines.”²¹ Later, during the onsite verification, a Philippines Shipper official stated that Chinese origin pencils present in the facility had been intended for shipment to the United States.²² In addition, during the verification CBP found inventory receipt records from a Chinese supplier that ostensibly covered raw materials, but which also included references to pencils.²³

CBP’s ability to determine the extent to which Philippines Shipper transshipped pencils from China was hindered by Philippines Shipper’s failure to cooperate and comply to the best of its ability, a conclusion that can warrant the application of an inference adverse, as indicated in 19 CFR §165.6(a).²⁴ For example, Philippines Shipper failed to provide substantial amounts of information requested by CBP at verification, such as inventory bank records, payroll records, receipts records, export declarations, and invoices between Philippines Shipper and suppliers.²⁵ Regarding Philippines Shipper’s sourcing of pencils from other suppliers, while Philippines Shipper provided various purchase orders and invoices referring to raw materials and pencils from suppliers, including Trading Company, Philippines Shipper did not provide documentation

¹⁷ See Verification Report at 8.

¹⁸ *Id.* at 8. Royal Brush appears to believe that CBP is comparing total imports by Royal Brush to [] production capacity, given its claim in this context that only “the 2018 total imported pencils by Royal Brush” are in the scope of this investigation. See Royal Brush Written Arguments at 11. However, CBP asked for information related to the Philippine Supplier’s other customers and total U.S. exports in order to determine whether the supplier had capacity sufficient to produce pencils for all of its U.S. exports. That determination is relevant to whether the supplier had produced the pencils it exported to Royal Brush.

¹⁹ See Notice of Initiation and Interim Measures at 5 (citing Royal Brush’s May 25, 2018, CF28 Response at Exh. 3, Annex 13), which alludes to a certification indicating China as country of origin.

²⁰ See Site Visit Report at 2.

²¹ *Id.* at attached photographs (including descriptive captions that are available in the public version as well as the business confidential version).

²² See Verification Report at 4-5.

²³ *Id.* at 5.

²⁴ As noted under section 412(b)(1) of the Trade Facilitation and Trade Enforcement Act of 2015, such an adverse inference can be based on the failure to cooperate of the producer or exporter.

²⁵ See Verification Report at 6. Furthermore, one of the suppliers for which invoices were not provided was Trading Company, in China. *Id.*

showing where the pencils were recorded into inventory.²⁶ In addition, Philippines Shipper provided a purchase order and invoice for raw materials and pencils from Trading Company, but Philippines Shipper did not provide the requested inventory receipt records for the pencils, and CBP noted that documents reviewed included a handwritten reference to pencils that had been included in the inventory receipt count for one of the raw materials rather than pencils.²⁷ Furthermore, Philippines Shipper provided a purchase order and invoice for raw materials from Trading Company, but did not provide purchase orders or invoices for pencils, even though the inventory receipt records provided for the shipment included a reference to pencils supplied by a different supplier.²⁸ CBP concluded, based on its on-site verification, that Philippines Shipper “could not demonstrate inventory receipt records for purchased pencils from overseas.”²⁹ In short, based on the absence or unreliability of such inventory records, there is no basis for relying on subsequent country of origin classifications for specific pencils that Philippines Shipper subsequently shipped to customers, including Royal Brush.

With regard to Philippines Shipper’s production of pencils, in many instances at verification Philippines Shipper either did not provide requested documents, or provided records in a manner that was unusable to CBP because they had been redacted or otherwise altered. For the eight sample purchase orders and invoices between Philippines Shipper and Royal Brush reviewed at verification, the daily production reports provided by Philippine Shipper was missing information that had been redacted or whited-out by Philippines Shipper. For many of the sample transactions, Philippine Shipper did not provide inventory receipts for the raw materials, and inspection reports for raw materials were incomplete.³⁰ Given Philippines Shipper’s failure to provide such requested production documentation, CBP could not verify that the pencils shipped to Royal Brush were actually produced by Philippines Shipper.

Further, the verification team found that the payroll records Philippines Shipper had submitted to CBP in its RFI responses were unsupported.³¹ During verification, Philippines Shipper did not provide payroll records requested by CBP for significant periods of time.³² Philippines Shipper also “could not provide any accounting records or financial documentation to support that employees were paid for any of the periods selected for review.”³³ Philippines Shipper did not provide during verification the payroll records to support the production related to a sample invoice between Philippines Shipper and Royal Brush.³⁴ Furthermore, Philippine Shipper’s employee hours/days worked log book covering approximately five months included whited-out

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 4.

³⁰ *Id.* at 6-8.

³¹ *Id.* at 9.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 10.

names and were missing other information.³⁵ CBP concluded that for time periods it was unable to verify that employees were paid or that production was occurring.³⁶

In short, Philippines Shipper failed to cooperate and comply to the best of its ability, given its refusal to provide substantial amounts of information that were requested by CBP, including those relating to the purchasing, inventorying, and production of pencils, and an adverse inference is warranted. Consequently, CBP infers a) that Philippines Shipper's production records did not support its contention that the pencils that it shipped to Royal Brush were manufactured by Philippines Shipper; and b) that such pencils were manufactured in China, given Philippines Shipper's involvement with Chinese suppliers, including even the purchasing and repacking of pencils identified as manufactured in China.

In its written arguments, Royal Brush refers to information in daily production reports and sales documentation provided by Philippines Shipper, and concludes from that information that "the Record provides ample evidence that" Philippine Shipper "has more than sufficient capacity and actual production to manufacture pencils in the Philippines to meet Royal Brush's purchase orders."³⁷ However, Philippine Shipper had already been unable or unwilling to provide the necessary information, including original and complete production and sale documentation, to allow CBP to verify the extent to which Philippine shipper delivered pencils it had produced or that it had transshipped, which as noted above provides the basis for concluding Philippines Shipper failed to cooperate and comply to the best of its ability. Royal Brush claims that Philippines Shipper withheld information that CBP had requested because Philippines Shipper and Royal Brush believe such information is outside the scope of the investigation.³⁸ However, there is no way for CBP to conclude either that the information that was withheld or otherwise concealed (*e.g.*, by redacting) did not relate to Royal Brush, or that the information that was provided to CBP was reliable, given the failure of Philippines Shipper to provide complete original documentation at verification.

In conclusion, the record evidence, and the absence of information due to Philippines Shipper's failure to cooperate and comply to the best of its ability, support a conclusion that pencils shipped by Philippines Shipper to the United States and imported by Royal Brush, were manufactured in China rather than in the Philippines. Therefore, pursuant to 19 CFR §165.27(a), CBP finds that there is substantial evidence that Royal Brush entered covered merchandise in the U.S. through evasion, and that such imports are covered by A-570-827.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Royal Brush Written Arguments at 10-14.

³⁸ *Id.* at 20-21.

Actions Taken Pursuant to the Affirmative Determination of Evasion

In light of CBP's determination that Royal Brush entered merchandise into the customs territory of the United States through evasion, and pursuant to 19 U.S.C. §1517(d) and 19 C.F.R. §165.28, CBP will continue to suspend the liquidation for any entry imported by Royal Brush and assembled, shipped or otherwise processed by [], that has entered on or after March 27, 2018, the date of initiation of this investigation. CBP will continue to extend the period for liquidation for all unliquidated entries that entered before that date until instructed to liquidate these entries. For future entries, CBP will continue to require live entry, which requires that the importers post the applicable cash deposits prior to the release. Finally, CBP will evaluate the continuous bond of the importer in accordance with CBP's policies, and may require single transaction bonds as appropriate. None of the above actions precludes CBP or other agencies from pursuing additional enforcement actions or penalties.

Sincerely,

Africa R. Bell

Africa R. Bell
Acting Director, Enforcement Operations Division
Trade Remedy & Law Enforcement Directorate
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