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Re: Enforce and Protect Act Case Number 7412; *Certain Magnesia Carbon Bricks from Mexico and the People's Republic of China: Antidumping Duty Order*, 75 Fed. Reg. 57257 (Sept. 20, 2010) and *Certain Magnesia Carbon Bricks from the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 57442 (Sept. 20, 2010); Fedmet Resources Corporation.; 19 U.S.C. § 1517

Dear Messrs. Planert and Schneiderman:

This is in response to a request for *de novo* administrative review of a determination of evasion dated December 3, 2020, made by the Trade Remedy & Law Enforcement Directorate (“TRLED”), Office of Trade (“OT”), U.S. Customs and Border Protection (“CBP”), pursuant to 19 U.S.C. § 1517(c), in Enforce and Protect Act (“EAPA”) Case Number 7412 (hereinafter referred to as the “December 3 Determination”).¹ The request for review, dated January 19, 2021, was submitted to CBP OT Regulations and Rulings (“RR”) by Morris, Manning & Martin LLP, on behalf of Fedmet Resources Corporation (“Fedmet”) pursuant to 19 U.S.C. § 1517(f) and 19 CFR § 165.41(a). Fedmet’s request for administrative review was submitted to RR within 30 business days after the issuance of the initial determination of evasion, consistent with 19 CFR § 165.41(d).

I. Background

Inasmuch as the facts in this case were fully set forth in the December 3 Determination, we will not repeat the entire factual history herein.

¹ See Notice of Final Determination as to Evasion, dated December 3, 2020.

In brief, according to the record evidence, on January 30, 2020, TRLED initiated a formal investigation under Title IV, section 421 of the Trade Facilitation and Trade Enforcement Act (“TFTEA”) of 2015, in response to an allegation of evasion made by the Magnesia Carbon Bricks Fair Trade Committee (“MCBFTC”).

MCBFTC submitted its allegation of evasion to TRLED on November 27, 2019 and filed a supplement to the allegation on December 19, 2019. TRLED acknowledged receipt of the allegation on January 8, 2020. MCBFTC alleged that Fedmet was misidentifying magnesia carbon bricks (“MCBs”) from the People’s Republic of China (“China”) on its entries as its “Bastion” brand magnesia alumina carbon bricks (“MACBs”) in order to avoid payment of antidumping (“AD”) and countervailing (“CV”) duties on MCBs from China, Case Nos. A-570-954 and C-570-955.²

The allegation of evasion pertained to the AD and CV duty orders issued by the U.S. Department of Commerce (“Commerce”) on imports of certain MCBs from China.³

Commerce defined the scope of the relevant AD/CV duty orders as follows:

The scope of these orders includes certain chemically-bonded (resin or pitch), magnesia carbon bricks with a magnesia component of at least 70 percent magnesia (“MgO”) by weight, regardless of the source of raw materials for the MgO, with carbon levels ranging from trace amounts to 30 percent by weight, regardless of enhancements (for example, magnesia carbon bricks can be enhanced with coating, grinding, tar impregnation or coking, high temperature heat treatments, anti-slip treatments or metal casing) and regardless of whether or not antioxidants are present (for example, antioxidants can be added to the mix from trace amounts to 15 percent by weight as various metals, metal alloys, and metal carbides). Certain magnesia carbon bricks that are the subject of these orders are currently classifiable under subheadings 6902.10.1000, 6902.10.5000, 6815.91.0000, 6815.99.2000 and 6815.99.4000 of the Harmonized Tariff Schedule of the United States (“HTSUS”). While HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive.

As the result of a Scope Request made by Fedmet to Commerce following the issuance of the AD/CV duty orders and a subsequent ruling by the Court of Appeals for the Federal Circuit, Fedmet’s Bastion brand MACBs from China were found to be outside the scope of the AD/CV duty orders.⁴

On May 6, 2020, in accordance with 19 CFR § 165.24, CBP issued the Notice of Initiation of Investigation and Interim Measures (“Notice of Initiation”) to all parties to the investigation,

² See Notice of Initiation of Investigation and Interim Measures, dated May 6, 2020.

³ See *Certain Magnesia Carbon Bricks from Mexico and the People’s Republic of China: Antidumping Duty Order*, 75 Fed. Reg. 57257 (Sept. 20, 2010). See also *Certain Magnesia Carbon Bricks from the People’s Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 57442 (Sept. 20, 2010).

⁴ See *Certain Magnesia Carbon Bricks From the People’s Republic of China and Mexico: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision*, 80 Fed. Reg. 34899 (June 18, 2015). See also Final Results of Redetermination Pursuant to Court Remand Magnesia Carbon Bricks from the People’s Republic of China and Mexico, *Fedmet Resources Corporation v. United States*, Court No. 12-00215 (Feb. 23, 2015) (“Amended Final Scope Ruling”).

notifying the parties of CBP's decision to implement interim measures based upon reasonable suspicion that Fedmet entered covered merchandise into the customs territory of the United States through evasion.⁵ The entries subject to the investigation were those entered for consumption, or withdrawn from warehouse for consumption, from January 8, 2019 through the pendency of the investigation.⁶ TRLED concluded that, based on the record evidence, there was reasonable suspicion that Fedmet had entered covered merchandise into the customs territory of the United States through evasion, and imposed interim measures on Fedmet.⁷

On December 3, 2020, TRLED issued the December 3 Determination. TRLED found substantial evidence⁸ to demonstrate that Fedmet evaded AD/CV duties owed on Chinese-origin MCBs entered into the customs territory of the United States by entering the goods as Bastion brand MACBs which are not subject to the AD/CV duty orders on MCBs from China. No AD/CV duty cash deposits had been made as entries of the merchandise were declared as entry type 01 (consumption) instead of entry type 03 (consumption - antidumping/countervailing Duty).⁹

II. Discussion

A. Administrative Review and Standard of Review

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 CFR § 165.45, upon a request for administrative review, CBP will apply a *de novo* standard of review and will render a determination appropriate under the law according to the specific facts and circumstances on the record. For that purpose, CBP will review the entire administrative record upon which the initial determination was made, the timely and properly filed request(s) for review and responses, and any additional information that was received pursuant to 19 CFR § 165.44. The administrative review will be completed within 60 business days of the commencement of the review.

B. Law

Title 19 U.S.C. § 1517(c)(1) provides, in relevant part, as follows:

(1) Determination of Evasion

(A) In general

⁵ See Notice of Initiation. Available at: <https://www.cbp.gov/sites/default/files/assets/documents/2020-May/TRLED%20-%20Notice%20of%20Investigation%20and%20Interim%20Measures%20-%28508%20COMPLIANT%29%20-%287412%29%20-%20PV.pdf>

⁶ See 19 CFR § 165.2. While the regulations set forth which entries CBP will specifically investigate, interim measures can be applied to all unliquidated entries.

⁷ The record evidence supporting the finding of reasonable suspicion is discussed in the Notice of Initiation.

⁸ Substantial evidence is not defined in the statute. The U.S. Court of Appeals for the Federal Circuit has stated that “substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781-82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁹ See December 3 Determination, available at: <https://www.cbp.gov/sites/default/files/assets/documents/2020-Dec/12-03-2020%20-%20TRLED%20-%20Determination%20as%20to%20Evasion%20-%28508%20compliant%29%20-%20-%287412%29%20-%20PV.pdf>

Except as provided in subparagraph (B), not later than 300 calendar days after the date on which the Commissioner initiates an investigation under subsection (b) with respect to covered merchandise, the Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.

The term evasion is defined in 19 U.S.C. § 1517(a)(5)(A), as follows:

(5) Evasion

(A) In general

Except as provided in subparagraph (B), the term “evasion” refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

See also 19 CFR § 165.1.

Examples of evasion could include, but are not limited to, misrepresentation of the merchandise’s true country of origin (e.g., through false country of origin markings on the product itself or false sales), false or incorrect shipping and entry documentation, or misreporting the merchandise’s physical characteristics.¹⁰

Covered merchandise is defined as “merchandise that is subject to a CVD order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. 1671e), and/or an AD duty order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. 1673e).”¹¹

Therefore, CBP must determine whether a party has entered merchandise that is subject to an AD duty order or CV duty order into the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act, that is material and false, or any omission that is material, that resulted in the reduction or avoidance of applicable AD or CV duty cash deposits or duties being collected on such merchandise.

C. Fedmet’s Arguments

Fedmet requests that we reverse the December 3 Determination, arguing that Fedmet did not enter covered merchandise in the United States through evasion as the imported goods are MACBs specifically outside of the scope of the AD/CV duty orders and are not covered merchandise.

¹⁰ *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations*, 81 FR 56477, 56478 (August 22, 2016).

¹¹ *See* 19 CFR § 165.1.

Fedmet preliminarily argues that its procedural due process rights were violated as CBP did not provide the lab results or public summaries of the lab results from testing the chemical composition of bricks from different entries as required pursuant to 19 CFR § 165.4(e). Further, Fedmet states that CBP failed to disclose that additional lab tests were conducted until citing them in the December 3 Determination. As these lab reports were not provided, Fedmet does not know either the chemical composition results from those lab reports or the testing methodology used by CBP to determine the chemical composition of those bricks. Although Fedmet did know of the one lab test done prior to receipt of the December 3 Determination, the results and testing method were redacted from the public version. As a result, Fedmet was deprived of a meaningful opportunity to respond to this information. Given these procedural issues, Fedmet claims that the December 3 Determination cannot lawfully rely on the lab results to find substantial evidence of evasion. Fedmet also notes that it never received the responses to Requests for Information (“RFIs”) submitted by some of Fedmet’s customers as part of the investigation, also information which CBP used to find substantial evidence of evasion.

Fedmet then claims that CBP misinterpreted the scope of the AD/CV duty orders by relying on brand names and product labeling to find evasion. Specifically, the scope of these orders pertains to the chemical composition of the bricks in question, not the way in which the bricks are marketed. The MACBs are defined by a chemical composition of “approximately 8 to 15 percent aluminum oxide (chemical formula Al_2O_3), more commonly known as alumina, 3 to 15 percent carbon, 75 to 90 percent magnesia.”¹² So long as the chemical composition of the MACBs meets these criteria, they are outside of the scope of the order regardless of how they are marketed to U.S. customers. Fedmet argues that CBP is inappropriately conflating selling MACBs under a different brand name to U.S. customers with importing in-scope MCBs. Given this stance by CBP, Fedmet states that a scope referral should have been made to Commerce to determine whether the brand name usage by Fedmet would cause the MACBs to fall within the scope of the orders as CBP does not have the authority to determine the scope of the orders.

Finally, Fedmet argues that the record evidence shows the MACBs entered meet the chemical composition requirements to exclude them from the scope of the orders. Fedmet provides the specifications to its manufacturers for producing the MACBs, has samples routinely tested to ensure compliance, and has all shipments inspected. Fedmet claims that samples from the same brick can vary and, as such, one sample from one brick testing outside of the parameters set forth in the scope ruling is not sufficient to conclude that the entire shipment of bricks has the chemical composition that would make them subject to the AD/CV duty orders. Fedmet’s production reports that give the chemical composition results closely mirror the third-party independent test results for several MACBs that Fedmet tested during the EAPA investigation. These slight variations would be expected due to the nature of refractory bricks. However, the December 3 Determination does not address these lab results from Fedmet and only looks at those results which were relied upon in the Notice of Initiation to find “reasonable suspicion” of evasion for purposes of imposing interim measures. As Fedmet has not seen CBP’s lab reports, there is limited ability to comment; however, Fedmet states that, depending upon the testing method used by CBP, variations in the chemical composition findings could be explained due to the use of different testing methods or possible sampling errors. Commerce did not mandate a specific testing method for determining the amount of alumina in Fedmet’s Bastion MACBs in the Amended Final Scope Ruling. Fedmet compares a

¹² See *Fedmet Resources Corp. v. United States*, 755 F.3d 912, 922-23 (Fed. Cir. 2014). See also Amended Final Scope Ruling, page 7.

subsequent scope ruling by Commerce in 2017 finding that S&S Refractories' MACBs were excluded if they contained at least 5% of *added* alumina based upon the X-ray Diffraction ("XRD") testing method.¹³ Commerce specifically limited that scope ruling to only the identified MACBs in the scope ruling request.¹⁴ Fedmet argues that the testing of the chemical composition of the Bastion brand MACBs is not limited to a specific testing method, and X-ray Fluorescent ("XRF") testing is more precise and the preferred industry testing method. However, it is unknown what method CBP used.¹⁵ Thus, Fedmet is limited in its arguments based on this lack of information.

Given the above, Fedmet believes there is not substantial evidence of evasion and that the December 3 Determination should be reversed.

D. MCBFTC's Arguments

MCBFTC requests that we affirm the December 3 Determination as there is substantial evidence that evasion occurred due to Fedmet entering covered merchandise as entry type 01 and, therefore, made false statements which resulted in the avoidance of AD duties owed on the entries.¹⁶

Preliminarily, MCBFTC argues that, although Fedmet's procedural due process arguments are outside the scope of the administrative review process, the arguments still fail as a public summary of the lab report was provided to the parties and public descriptions of the lab test results were set forth in the Notice of Initiation and the December 3 Determination.

MCBFTC then claims that Fedmet is wrong in their argument that the finding of evasion is based upon CBP's misinterpretation of the scope by relying solely on the brand names used for the bricks in question. Specifically, the December 3 Determination is also predicated upon the independent lab results done by CBP to find that the bricks are in-scope based on their chemical composition. Commerce resolved the testing method issue in its S&S Refractories Final Scope Ruling by requiring those MACBs to have a minimum of 5% *added* alumina based upon XRD testing. Fedmet has not argued that its Bastion branded MACBs would meet the required chemical composition for non-subject MACBs based upon the XRD testing method.

Based on the above, MCBFTC argues that there is substantial evidence of evasion and that the December 3 determination should be affirmed.

E. Administrative Review Analysis

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 CFR § 165.45, the Office of Trade, Regulations and Rulings, will apply a *de novo* standard of review under the law, based solely upon the facts and circumstances on the administrative record in the proceeding. In making our determination, we

¹³ See *Certain Magnesia Carbon Bricks from the People's Republic of China and Mexico: Final Scope Ruling – S&S Refractories* ("S&S Refractories Final Scope Ruling").

¹⁴ See *Id.*, page 4.

¹⁵ See Fedmet's Request for Administrative Review, page 29.

¹⁶ MCBFTC incorporated by reference its Response to Written Arguments, dated October 1, 2020, which primarily expounds upon the arguments made in the Response to Fedmet's Request for Administrative Review. The total page count of both submissions does not exceed the page limit for responses to requests for administrative review pursuant to 19 CFR § 165.42 and, thus, both were considered to the extent that they were responsive to arguments made in Fedmet's Request for Administrative Review.

reviewed: (1) the entire administrative record upon which the December 3 Determination was made by TRLED; and (2) the timely and properly filed request for review and response. We did not request additional written information from the parties to the investigation pursuant to 19 C.F.R. § 165.44. Pursuant to 19 C.F.R. § 165.45, our administrative review of this case has been completed in a timely manner, within 60 business days of the commencement of the review.

The term “evasion” under the EAPA refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable AD duties or CV duties being reduced or not being applied with respect to the merchandise.¹⁷

The term “covered merchandise” means merchandise that is subject to a CVD order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. § 1671e), and/or an AD order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. § 1673e).¹⁸

“Substantial evidence” is not defined by statute. However, the “substantial evidence” standard has been reviewed by the courts in relation to determinations by other agencies. “Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence.”¹⁹ While some evidence may detract from the determination, so long as the finding is reasonable and supported by the record as a whole, the December 3 Determination must be affirmed.²⁰

Preliminarily, the purpose of this *de novo* review is to analyze the December 3 Determination of evasion and whether substantial record evidence supports that determination. Fedmet’s arguments regarding violations of its procedural due process rights is outside of the purview of this *de novo* review.

The crux of this administrative review rests upon analysis of the chemical composition of the Bastion brand MACBs imported by Fedmet to determine whether they fall within the scope of the relevant AD/CV duty orders. The chemical composition required to keep the Bastion brand MACBs outside of the scope of the AD/CV duty orders is “approximately 8 to 15 percent aluminum oxide (chemical formula Al₂O₃), more commonly known as alumina, 3 to 15 percent carbon, 75 to 90 percent magnesia.”²¹ The later S&S Refractories Final Scope Ruling is limited to the MACBs identified in that scope ruling request (*i.e.*, MACBs identified as BP-70A and BP-75A produced by Yingkou Dongming Mineral Products Co., Ltd. in China). As such, the determinant factors in that scope ruling—what lab testing method is used to determine chemical composition and whether the MACBs contain sufficient *added* alumina—are not relevant to whether the Bastion branded MACBs fall within or outside of the scope of the AD/CV duty orders. Rather, Commerce specifically stated that “[t]echnical expertise in administering a scope of an order rests with CBP,

¹⁷ See 19 U.S.C. § 1517(a)(5)(A).

¹⁸ See 19 U.S.C. § 1517(c)(1)(A) and 19 CFR § 165.1.

¹⁹ See *Altix, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted).

²⁰ See *Nucor Corp. v. United States*, 34 C.I.T. 70, 72 (2010) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006)).

²¹ See *Fedmet*, 755 F.3d at 922-23. See also Amended Final Scope Ruling, page 7.

such that it must determine whether particular entries meet the scope as defined by the Department, using whatever testing methodologies they find appropriate.”²²

In this case, CBP conducted four (4) separate lab tests to determine the chemical composition of MACBs entered by Fedmet at different times during the period of investigation. One of those lab tests occurred prior to the issuance of the Notice of Initiation and the other three occurred afterwards.²³ For a majority of these lab results, the percentages for carbon, as well as alumina, fall outside of the required chemical composition of the Bastion brand MACBs in order to find that they are not subject to the AD/CV duty orders. For others, the magnesia levels are also outside of the chemical composition parameters to ensure that the MACBs are not subject to the AD/CV duty orders. The record also indicates that CBP did use the XRF testing method endorsed by Fedmet for at least some of these lab tests.²⁴

Given that the chemical composition of the MACBs tested by CBP places them within the scope of the AD/CV duty orders, the record indicates that Fedmet entered covered merchandise into the customs territory of the United States and, by entering the covered merchandise as entry type 01 instead of entry type 03, made a false statement that resulted in the nonpayment of AD/CV duties. This is substantial evidence of evasion.

III. Decision

Based upon our *de novo* review of the administrative record in this case, including the timely and properly filed request for administrative review and response, the December 3 Determination of evasion under 19 U.S.C. § 1517(c) is AFFIRMED.

This decision does not preclude CBP or other agencies from pursuing additional enforcement actions or penalties. Pursuant to 19 CFR § 165.46(a), this final administrative determination is subject to judicial review pursuant to section 421 of the EAPA.

Sincerely,

Paul Pizzeck
Chief, Penalties Branch, Regulations & Rulings
Office of Trade
U.S. Customs & Border Protection

²² See *Id.*, page 10.

²³ The December 3 Determination erroneously states that the imposition of interim measures was partially based upon all four lab reports. A review of the lab reports shows that the dates of such testing on the latter three occurred after the Notice of Initiation was issued.

²⁴ See Additional Lab Results for LSS Lab Report Re_Fedmet Brick Samples (April 14, 2020). See also Laboratory Report for CEE-IMM- Entry Number XXX-XXXX1996.

Approved by:

Joanne R. Stump
Acting Executive Director, Regulations & Rulings
Office of Trade
U.S. Customs & Border Protection