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Re: EAPA Cons. Case Number 7205; Lyke Industrial Tool, LLC and Power Tek Tool, Inc.; 19 U.S.C. § 1517

Dear Ms. Liang:

This decision is made in response to a timely request for administrative review of a July 20, 2018 Notice issued by U.S. Customs and Border Protection ("CBP") of a determination as to evasion, which request was dated September 21, 2018 ("Request for Administrative Review"), and was submitted by Shanshan Liang of Pennington, P.A. on behalf of Lyke Industrial Tool, LLC ("Lyke") and Power Tek Tool, Inc. ("Power Tek") (hereinafter "Lyke/Power Tek"), pursuant to 19 U.S.C. § 1517(f) and 19 CFR § 165.41.¹ Lyke/Power Tek request administrative review of an initial determination as to evasion in Enforce and Protect Act ("EAPA") Consolidated Investigation Case Number 7205 dated July 20, 2018 ("July 20 determination" or "July 20 Notice"). The Request for Administrative Review was submitted to CBP within 30 business days after the issuance of the initial determination,² consistent with 19 CFR § 165.41(d). Upon receipt of the last properly filed Request for Administrative Review, the Office of Trade, Regulations and Rulings, Penalties Branch assigned Headquarters case number H301211 to the Request for Administrative Review. This Headquarters case number was transmitted electronically to all parties to the investigation on October 9, 2018. Accordingly, the 60-business-day review period for

¹ On August 31, 2018, Lyke/Power Tek each submitted separate requests for administrative review to CBP. On September 6, 2018, the Office of Trade, Regulations and Rulings, Penalties Branch notified counsel for Lyke/Power Tek by letter that the requests for administrative review must be consolidated into one request to comply with 19 CFR § 165.41(f).

² Lyke/Power Tek were given an extension until September 21, 2018 to submit an amended request for administrative review inasmuch as their first submission did not comply with the requirements in 19 CFR § 165.41.

commencement of the administrative review of the initial determination as to evasion commenced on October 9, 2018.³

In EAPA Consolidated Case Number 7205, CBP determined that there was substantial evidence that Lyke/Power Tek entered merchandise covered by antidumping (“AD”) duty Order A-570-900⁴ into the customs territory of the United States through evasion. Specifically, CBP found substantial evidence to demonstrate that Lyke/Power Tek imported diamond sawblades from the People’s Republic of China (“China” or “PRC”), but did not declare the goods as subject to the AD Order upon entry; and, as a result, no cash deposits for AD duties were made with respect to the merchandise.

FACTS:

Inasmuch as the facts in this case were fully set forth in the July 20 Notice in EAPA Cons. Case Number 7205, we will not repeat the entire factual history in this decision. In brief, according to the record, on July 18, 2017, CBP initiated two investigations pursuant to Title IV, section 421 of the Trade Facilitation and Trade Enforcement Act of 2015. The allegations, submitted by Diamond Sawblades Manufacturers Coalition (“DSMC”) and received by CBP on June 22 and June 26, 2018, alleged that Lyke/Power Tek evaded the payment of cash deposits on imports of certain shipments of diamond sawblades covered by AD Order A-570-900 applicable to diamond sawblades from China. Specifically, DSMC alleged that Lyke/Power Tek evaded the AD Order by misclassifying diamond sawblades as millstone products and segments, which are not covered by AD Order A-570-900.⁵ On September 22, 2017, in accordance with 19 CFR § 165.24, CBP issued a notice of initiation of investigation to all interested parties, and notified the parties of CBP’s decision to take interim measures based upon reasonable suspicion that Lyke/Power Tek, as the importers of record, entered covered merchandise into the

³ On December 26, 2018, an email was sent to the parties from the Office of Trade, Regulations and Rulings, Penalties Branch notifying them that a decision would be delayed due to the federal government furlough. Due to the partial government shutdown, the 60-business-day review period ends on February 11, 2019.

⁴ On May 22, 2006, the Department of Commerce (“DOC” or “Commerce”) determined that imports of diamond sawblades from China and Korea were being sold in the United States at less than fair value. 71 Fed. Reg. 29303 (May 22, 2006) (China); 71 Fed. Reg. 29310 (May 22, 2006) (Korea). In July 2006, the U.S. International Trade Commission (“Commission” or “ITC”) determined that a U.S. industry was not materially injured or threatened with material injury by reason of imports of diamond sawblades from China and Korea. *Diamond Sawblades and Parts Thereof From China and Korea*, Inv. Nos. 731-TA-1092-1093 (Final), USITC Pub. 3862 (July 2006). Following judicial review of the negative determinations and on remand from the U.S. Court of International Trade (“CIT”), the Commission determined that a U.S. industry was threatened with material injury by reason of subject imports of diamond sawblades from China and Korea. *Diamond Sawblades and Parts Thereof From China and Korea*, Inv. Nos. 731-TA-1092-1093 (Final) (Remand), USITC Pub. 4007 (May 2008). On January 13, 2009, the CIT affirmed the Commission’s affirmative determinations on remand. *Diamond Sawblades Mfrs. Coalition v. United States*, Slip Op. 09-05 (Ct. Int’l Trade Jan. 13, 2009). On January 22, 2009, the Commission notified Commerce of the Court’s decision, stating that it was a decision not in harmony with the Commission’s original negative determinations. On November 4, 2009, Commerce published orders that antidumping duties be imposed on imports of diamond sawblades from China and Korea, effective January 23, 2009. *Diamond Sawblades and Parts Thereof from the People’s Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Nov. 4, 2009) (“AD Orders”).

⁵ See EAPA Allegation as to Evasion for Power Tek, at 1 (June 26, 2017); and EAPA Allegation as to Evasion for Lyke, at 1 (June 26, 2017).

customs territory of the United States through evasion.⁶ The reasonable suspicion arose not only from the information provided in the allegations filed by DSMC, but also from additional information provided by Lyke (prior to receipt of the allegations), as well as a cargo exam performed by CBP on an importation by Power Tek (after receipt of the allegations). A summary of the additional information provided by Lyke to CBP and the results of the cargo exam were previously set forth in the July 20 determination and will not be repeated here.

Based on the information provided and cargo examinations, CBP determined that Lyke/Power Tek should have entered certain shipments found to contain diamond sawblades as entry type "03" entries⁷ and should have paid the applicable cash deposits under AD Order A-570-900 covering diamond sawblades and parts thereof, which Order states as follows:

The products covered by the order are all finished circular sawblades, whether slotted or not, with a working part that is comprised of a diamond segment or segments, and parts thereof, regardless of specification or size, except as specifically excluded below. Within the scope of the order are semifinished diamond sawblades, including diamond sawblade cores and diamond sawblade segments. Diamond sawblade cores are circular steel plates, whether or not attached to non-steel plates, with slots. Diamond sawblade cores are manufactured principally, but not exclusively, from alloy steel. A diamond sawblade segment consists of a mixture of diamonds (whether natural or synthetic, and regardless of the quantity of diamonds) and metal powders (including, but not limited to, iron, cobalt, nickel, tungsten carbide) that are formed together into a solid shape (from generally, but not limited to, a heating and pressing process).

Sawblades with diamonds directly attached to the core with a resin or electroplated bond, which thereby do not contain a diamond segment, are not included within the scope of the order. Diamond sawblades and/or sawblade cores with a thickness of less than 0.025 inches, or with a thickness greater than 1.1 inches, are excluded from the scope of the order. Circular steel plates that have a cutting edge of non-diamond material, such as external teeth that protrude from the outer diameter of the plate, whether or not finished are excluded from the scope of the order. Diamond sawblade cores with a Rockwell C hardness of less than 25 are excluded from the scope of the order. Diamond sawblades and/or diamond segment(s) with diamonds that predominantly have a mesh size number

⁶ See Notice of initiation of an investigation and interim measures taken as to Power Tek Tool, Inc. and Lyke Industrial Tool, LLC concerning evasion of the antidumping duty order on Diamond Sawblades from the People's Republic of China, (Sept. 22, 2017) ("Notice of Initiation and Interim Measures"). Available at: <https://www.cbp.gov/document/report/eapa-cons-investigation-number-7205-power-tek-tool-inc-and-lyke-industrial-tool-llc>. CBP consolidated the two separate allegations filed against Lyke and Power Tek into EAPA consolidated Case 7205 and aligned the periods of investigation. See 19 CFR 165.13(b).

⁷ Entry type "03" is the code that CBP requires importers to use to designate an entry as subject to antidumping duties; the instructions for CBP Form 7501 (Entry Summary) clearly state that code 03 shall be used for entries subject to antidumping duties.

greater than 240 (such as 250 or 260) are excluded from the scope of the order. Merchandise subject to the order is typically imported under heading 8202.39.00.00 of the Harmonized Tariff Schedule of the United States (HTSUS). When packaged together as a set for retail sale with an item that is separately classified under headings 8202 to 8205 of the HTSUS, diamond sawblades or parts thereof may be imported under heading 8206.00.00.00 of the HTSUS. On October 11, 2011, the Department included the 6804.21.00.00 HTSUS classification number to the customs case reference file, pursuant to a request by CBP. *See* Diamond Sawblades and Parts Thereof From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 76128 (December 6, 2011). The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

On July 20, 2018, the CBP Director of Enforcement Operations, Trade Remedy & Law Enforcement Directorate, Office of Trade, issued a Notice of CBP's determination as to evasion in EAPA Consolidated Case Number 7205. CBP found substantial evidence⁸ to demonstrate that Lyke/Power Tek imported diamond sawblades from China and entered the merchandise into the customs territory of the United States through material false statements, specifically the declaration of the entry type as 01 (not subject to AD duties) when the imported merchandise was covered by the AD Order on diamond sawblades from China. The material false statements resulted in the evasion of payment of cash deposits for merchandise that was subject to AD Order A-570-900. The entries covered during the period of the investigation included ten entries filed by Lyke and ten entries filed by Power Tek, made between June 26, 2016 and August 10, 2017, which consisted of diamond sawblades manufactured or produced by Danyang NYCL Tools Manufacturing ("NYCL") in China.

LAW:

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

(1) Determination of Evasion

(A) In general

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.

⁸ Substantial evidence is not defined in the statute. 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)).

The term evasion is defined in 19 U.S.C. § 1517(a)(5), 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, the 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 of the merchandise’s physical characteristics. *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations*, 81 Fed. Reg. 56477, 56478 (August 22, 2016).

Covered merchandise is defined as “merchandise that is subject to a countervailing duty order (“CVD”) 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).” 19 CFR § 165.1.

Therefore, CBP must determine whether a party has entered merchandise that is subject to an AD or CVD 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 CVD cash deposits or duties being collected on such merchandise.

Pursuant to 19 U.S.C. § 1517(c)(3), an adverse inference is defined, in part, as follows:

(A) In general

If the Commissioner finds that a party or person described in clause (i), (ii), or (iii) of paragraph (2)(A) has failed to cooperate by not acting to the best of the party or person’s ability to comply with a request for information, the Commissioner may, in making a determination under paragraph (1), use an inference that is adverse to the interests of that party or person in selecting from among the facts otherwise available to make the determination.

(B) Application

An inference described in subparagraph (A) may be used under that subparagraph with respect to a person described in clause (ii) or (iii) of paragraph (2)(A) without regard to whether another person involved in the same transaction or transactions under examination has provided the information sought by the Commissioner, such as import or export documentation.

ARGUMENTS MADE BY LYKE/POWER TEK IN REQUEST FOR ADMINISTRATIVE REVIEW:

Lyke/Power Tek make the following arguments in their request for administrative review of the July 20 Notice as to evasion in the instant case:

- 1) Substantial evidence in the record supports the finding that Lyke/Power Tek did not make or provide any material false statement, or documentation or make any material omission, in entering the diamond sawblades from China into the United States.
- 2) Power Tek correctly classified the goods. Lyke's mistake in classification under subheading 6804.21.0010, HTSUS, is "ministerial" because it is only mistaken in the last two digits – the correct classification should be subheading 6804.21.0080, as "millstone: other than segments." This mistake is innocent because the diamond sawblades AD Order ("DSB Order") specifically includes segments and subheading 6804.21.00, and the misclassification did not result in the reduction or nonpayment of antidumping duties or cash deposits.
- 3) The type 01 entry declarations were not "false." The meaning of false statement under the EAPA statute requires greater culpability than that of 19 U.S.C. § 1592. Lyke/Power Tek entered their merchandise based on a reasonable interpretation of the DSB Order. Therefore, neither Lyke nor Power Tek acted negligently and did not have the culpability required by the EAPA statute.
- 4) There is not substantial evidence in the record supporting the application of an adverse inference which would subject Lyke/Power Tek's diamond sawblades to China-wide AD rates. CBP cannot use LIKE's⁹ failure to cooperate adversely against Lyke and Power Tek. Therefore, CBP's application of an adverse inference is not in accordance with the law.

For the reasons set forth below, we are not persuaded by Lyke/Power Tek's arguments.

⁹ Lyke identified its parent company (which also acts as Power Tek's agent) as Danyang Like Tools Manufacturing ("LIKE"). Lyke/Power Tek stated that Lyke provides a purchase order to NYCL through LIKE. Lyke/Power Tek stated that LIKE communicates with NYCL via hard copies of purchase orders. Once a shipment is ready, Lyke/Power Tek stated that LIKE is the conduit through which NYCL files its ISF and invoice to the customs broker. See Lyke Initial RFI Response at 3-4 and Power Tek Initial RFI Response at 3-4.

ANALYSIS:

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 CFR § 165.45, the Office of Trade, Regulations and Rulings has performed a *de novo* review based solely upon the facts and circumstances on the administrative record in the proceeding. In making our determination, we reviewed: (1) the entire administrative record upon which the July 20 determination was made; and (2) the timely and properly filed requests for review and responses.¹⁰ CBP did not receive any additional information as set forth in 19 CFR § 165.44. Pursuant to 19 CFR § 165.45, the administrative review of this case by the Office of Trade, Regulations and Rulings has been completed in a timely manner within 60 business days of the commencement of the review period.¹¹

Lyke/Power Tek argue that they (1) did not enter “covered merchandise”, through (2) evasion, under 19 U.S.C. § 1517(c)(1). Lyke/Power Tek also contest the application of an adverse inference under 19 U.S.C. § 1517(c)(3).

I. “Covered merchandise” under 19 U.S.C. § 1517(c)(1)

A. Lyke/Power Tek argue that the merchandise is specifically excluded from the scope of the AD Order under the Rockwell C hardness exclusion.

Lyke/Power Tek imported finished diamond sawblades. The AD Order scope language covers imported finished diamond sawblades, as well as certain “parts thereof” when separately imported: segments and cores. The scope language of the Order also contains several exclusions. The language of these exclusions is explicit regarding whether each exclusion applies to imported “parts thereof,” i.e., cores/segments, or to both the parts and to diamond sawblades.

Lyke/Power Tek argue that the diamond sawblades from China were not “covered merchandise” because Lyke/Power Tek “sincerely and reasonably believed that the diamond sawblades were excluded from the scope of the DSB Order under the Rockwell C hardness exclusion.” *See* Request for Administrative Review at Page 8. The Rockwell C hardness exclusion reads as follows:

Diamond sawblade cores with a Rockwell C hardness of less than 25 are excluded from the scope of the order.

The exemption relating to Rockwell C hardness applies only to merchandise described as diamond sawblade cores, not to finished diamond sawblades. Even if Lyke/Power Tek had provided undeniable evidence that the cores incorporated into their finished diamond sawblades had a tested Rockwell C hardness of less than 25 (which was never actually

¹⁰ CBP received a Response of the Diamond Sawblades Manufacturers' Coalition to requests for review of EAPA Consol. Case Number 7205, dated October 23, 2018.

¹¹ The commencement of the review period was October 9, 2018, which is the date that CBP accepted the last properly filed request for administrative review and transmitted electronically the assigned Headquarters case number to all the parties to the investigation. As noted above, the time period for review was tolled for 37 days due to the partial government shutdown which affected CBP.

established), it would not matter. The scope language of the antidumping duty order unambiguously excludes only diamond sawblade cores. Moreover, the DOC's final determination upon which the AD Order is based also indicates that "the hardness threshold applies to cores, not diamond sawblades."¹²

Furthermore, the DOC has confirmed that there is no Rockwell C hardness exclusion for **finished** diamond sawblades. This is significant because the DOC is the agency responsible for the issuance and administration of AD orders. *See* 19 U.S.C. § 1673 *et seq.*¹³ The DOC issued a scope ruling that the subject merchandise imported by Lyke/Power Tek was and is covered by the scope of the AD Order. The record shows that on February 23, 2018, Lyke submitted a scope ruling request to Commerce seeking confirmation that (1) diamond sawblades with cores where the Rockwell C hardness was less than 25 prior to the incorporation of diamond segments, and (2) diamond cup wheels, were outside the scope of the AD Order.¹⁴ On May 17, 2018, in response to Lyke's request, Commerce issued its scope ruling stating that finished diamond sawblades with: "(1) diamond segments permanently bonded by sintering and/or laser welding to the outer diameter of the core; and (2) cores that are made of stainless steel and have a Rockwell C hardness of less than 25 (22 +2) prior to the incorporation of diamond segments, with diameters from 4 inches to 306 inches and thickness from 1.2 mm to 4.5 mm, which Lyke Industrial Tool, LLC imports are within the scope of the antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China (A-570-900)."

In response to the Commerce scope determination, CBP issued Message Number 8142304 dated May 22, 2018, which stated that "Because the imported products are finished diamond sawblades within the scope of the order regardless of whether the Rockwell C hardness is above or below 25, Commerce found this product to be within the scope of the order." Consequently, the DOC has confirmed that the merchandise imported by Lyke/Power Tek is within the scope of the AD Order. The scope ruling was never challenged by Lyke/Power Tek. Moreover, Lyke/Power Tek conceded in their Request for Administrative Review that "for the purpose of this EAPA investigation, both Lyke and PTEK admitted that covered products were entered during the investigation period." *See* Request for Administrative Review at Page 8.

We thus find substantial evidence in the record to conclude that Lyke/Power Tek imported "covered merchandise", that is, merchandise which is subject to an AD Order issued under 19 U.S.C. § 1673e.

¹² *See* Final Determinations and Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination", dated May 15, 2006 at 16.

¹³ The Trade Agreements Act of 1979 transferred administration of the antidumping laws from the Department of the Treasury to the Department of Commerce. Pub. L. No. 96-39, § 101, 93 Stat. 144, 169-70 (1979). Under the present antidumping law, Commerce calculates and determines antidumping rates. 19 U.S.C. § 1675 (1988 & Supp. V 1993). Commerce conducts the antidumping duty investigation, calculates the antidumping margin, and issues the antidumping duty order. Commerce then directs CBP to collect the estimated duties. *See* 19 U.S.C. § 1673e(a)(1) (1990).

¹⁴ Power Tek did not request a separate ruling because it believed that the DOC ruling on Lyke's request would be applicable to its products as well. *See* Request for Administrative Review at Page 7.

II. Evasion

- A. Lyke/Power Tek argue that they properly classified the merchandise in heading 6804, HTSUS, and that any misclassification at the subheading level beyond the eight digit subheading (6804.21.00, HTSUS) is not material and false, and does not constitute evasion within the meaning of the EAPA statute.

CBP issued a Request for Information ("RFI") ("CBP Form 28") to Lyke on January 27, 2017, for the entry identified on page 2 of the July 20 Notice requesting invoices, bills of lading, packing list, sales literature, pictures, item/sku number, stating that the merchandise may be subject to the AD Order A-570-900 on diamond sawblades. The merchandise was entered by Lyke under subheading 6804.21.0010, HTSUS, "Millstones, grindstones, grinding wheels and the like, without frameworks, for grinding, sharpening, polishing, trueing or cutting, hand sharpening or polishing stones, and parts thereof, of natural stone, of agglomerated natural or artificial abrasives, or of ceramics, with or without parts of other materials: Other millstones, grindstones, or grinding wheels and the like: Of agglomerated synthetic or natural diamond; Segments for circular sawblades, consisting of diamond agglomerated with metal." The exporter of the merchandise was listed as Danyang NYCL Tools Manufacturing Co. Ltd. ("NYCL"). Upon review of the information submitted by Lyke, CBP determined that the merchandise should have been properly classified in heading 8202, HTSUS, and subheading 8202.39.0040, HTSUS, which provides for: "Handsaws, and metal parts thereof; blades for saws of all kinds (including slitting, slotting or toothless saw blades), and base metal parts thereof: Circular saw blades (including slitting or slotting saw blades), and parts thereof: Other, including parts; Diamond sawblade cores". CBP issued a Notice of Action ("CBP Form 29") on March 22, 2017, changing the entry type from type 01 to type 03, including AD Order A-570-900 on the entry summary documents, reclassifying the merchandise, and rate advancing the entry to require the payment of the corresponding AD cash deposit rate of 29.76 percent.

In addition, on August 11, 2017, CBP performed a cargo examination of an entry (identified on page 3 of the July 20 Notice), imported by Power Tek for a shipment described as "millstone diamond cup wheel" which was entered as an entry type 01 and classified in heading 6804, HTSUS, under subheading 6804.21.0080, HTSUS, which provides for: "Millstones, grindstones, grinding wheels and the like, without frameworks, for grinding, sharpening, polishing, trueing or cutting, hand sharpening or polishing stones, and parts thereof, of natural stone, of agglomerated natural or artificial abrasives, or of ceramics, with or without parts of other materials: Other millstones, grindstones, or grinding wheels and the like: Of agglomerated synthetic or natural diamond: Other". Based on the samples taken, CBP determined that the imported merchandise consisted of finished diamond sawblades and that each type of sawblade in the shipment was properly classified as sawblades in heading 8202, HTSUS, and subheading 8202.39.0010, HTSUS, which provides for: "Handsaws, and metal parts thereof; blades for saws of all kinds (including slitting, slotting or toothless saw blades), and base metal parts thereof: Circular saw blades (including slitting or slotting saw blades), and parts thereof: Other, including parts, With diamond working parts".

Despite CBP's action to reclassify Lyke/Power Tek's merchandise in heading 8202, HTSUS, the record shows that Lyke/Power Tek did not file a protest pursuant to 19 U.S.C. § 1514 to challenge CBP's classification of the diamond sawblades under subheading 8202.39.0040, or 8202.39.0010, HTSUS. In *United States v. Sterling Footwear, Inc.*, 279 F. Supp. 3d 1113 (Ct. Int'l. Trade Oct. 12, 2017), the U.S. Court of International Trade ("CIT") stated that CBP's classification decisions with respect to liquidations and reliquidations are final and conclusive unless protested under 19 U.S.C. § 1514. See accord, *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008). In *Sterling Footwear*, the CIT stated that Sterling could not bypass the protest mechanism and attempt to collaterally challenge the liquidation in the ensuing enforcement action. In keeping with that holding, we find that CBP's classification decisions with respect to the liquidation of Lyke/Power Tek's entries are final and conclusive. Lyke/Power Tek's failure to timely protest CBP's classification decisions, renders the classification under subheadings 6804.21.0080, and 6804.21.0010, HTSUS, false.¹⁵ The classifications claimed by Lyke/Power Tek were incorrect and inconsistent with the facts.

As to whether the incorrect classification was material, we do not believe it necessary to address that issue here. Even assuming that Lyke/Power Tek's classification was correct under either subheading 6804.21.0080, HTSUS, or 6804.21.0010, HTSUS, which it is not, Lyke/Power Tek's classification arguments nonetheless fail because: (1) the merchandise is "covered merchandise" under the statute;¹⁶ and (2) CBP's finding of evasion was not based on the false classification by Lyke/Power Tek, but on the failure of Lyke/Power Tek to declare the subject diamond sawblades as subject to the AD Order, which resulted in the non-payment of, i.e., evasion of, applicable antidumping duty deposits.

- B. Lyke/Power Tek argue that substantial evidence does not exist in the record to support a finding that there was a material false statement, document, act or omission in connection with their importation of diamond sawblades into the United States.

Lyke/Power Tek claim that the declaration of entry type 01 on the entry documents does not constitute a material false statement. Lyke/Power Tek claim that because the EAPA statute does not define the terms "material" and "false," CBP should look to other customs statutes for guidance. In particular, Lyke/Power Tek point to 19 U.S.C. § 1592 because they claim that it closely parallels EAPA. They argue that the term "false" under the EAPA statute and regulations must require the knowledge of the falsity of the statement. In support of this position, Lyke/Power Tek claim that "19 U.S.C. § 1592 does not require the person committing a Section 1592 violation to have the knowledge of falsity because a violation could be committed by 'fraud,' 'gross negligence,' or 'negligence.'" See Request for Administrative Review at Page 15. As a result, Lyke/Power Tek argue that the declaration of entry type 01 on the entry documents did not constitute evasion because there was no

¹⁵ False, as defined by the Merriam-Webster Online Dictionary, includes "not true" and "inconsistent with facts," as well as "intentionally untrue." Merriam-Webster Online Dictionary. 2019. <https://www.merriam-webster.com> (February 5, 2019)

¹⁶ As Lyke/Power Tek acknowledge, the scope of the AD Order is determined by the description contained in the Order, not by HTSUS classification. That said, DOC recognized that merchandise subject to the AD Order is typically imported under the 8202.39.00.00, HTSUS, category.

“knowledge of the falsity of the statement at the time the entries were made.” *See* Request for Administrative Review at Page 16.

Lyke/Power Tek’s arguments are based on the incorrect and unfounded assumption that the legal definition of evasion under the EAPA statute requires knowledge of the material false statement, document, act or omission. In making this argument, Lyke/Power Tek compare 19 U.S.C. § 1592 to the EAPA statute and conclude that the EAPA statute requires a knowing violation. The problem with this argument is that under 19 U.S.C. § 1592, a material false statement can be made by either negligence, gross negligence or fraud. The fact that 19 U.S.C. § 1592 includes different levels of culpability does not indicate in any way that the EAPA statute’s definition of evasion requires a party to have knowledge of a material false statement. Indeed, 19 CFR § 165.0 makes clear that proceedings under 19 U.S.C. § 1592 are separate and distinct from EAPA investigations; *see also* 19 CFR § 165.47.

Evasion is defined as “the entry of 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 of any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.” *See* 19 CFR § 165.1; *see also* 19 U.S.C. § 1517(a)(5). There is nothing in this definition that requires an intentional or purposeful attempt to avoid duties, nor does it require a failure to exercise reasonable care. Rather, it is sufficient if an importer enters covered merchandise into the United States by means of any material false document, statement, act or omission that results in the reduction or non-payment of antidumping or countervailing duties or deposits thereof.

Furthermore, we find it disingenuous for Lyke/Power Tek to claim that they did not have knowledge of the falsity of the classification and that finished diamond sawblades with a Rockwell C hardness of less than 25 were outside the scope of the order. Both Lyke/Power Tek admitted in separate prior disclosures¹⁷ to having entered diamond sawblades from China without declaring the goods as subject to antidumping duties or making appropriate duty payments. As previously stated, even prior to the filing of the EAPA allegation by DSMC in this case, CBP had issued a CBP Form 29 to Lyke rate advancing its entry and changing the classification to subheading 8202.39.0040, HTSUS, and the entry type from 01 to 03. There is also no evidence in the record to support Lyke/Power Tek’s claim that they reasonably believed their goods to be out of scope due to the Rockwell C hardness. In fact, the CBP cargo examination indicated that Lyke/Power Tek were importing merchandise consisting of diamond sawblades of a variety of Rockwell C hardness which were not declared as in-scope. In addition, the DOC scope language in the AD Order itself unambiguously indicates that there is no Rockwell C hardness exclusion for finished diamond sawblades.

If this were not enough, DOC also issued a scope ruling in 2006 with regard to the Antidumping Investigation of Diamond Sawblades and Parts Thereof from the Republic of Korea, explicitly confirming that “all finished circular sawblades, whether slotted or not, with

¹⁷ *See* Letter from Power Tek, Re: Power Tek Tools, Inc. Prior Disclosure dated November 15, 2017 and Letter from Lyke, Re: Lyke Industrial Tools, LLC, dated November 16, 2017.

a working part that is comprised of a diamond segment or segments, and parts thereof, regardless of specification or size," are subject to the order, regardless of the hardness of the cores incorporated into those blades.¹⁸ In addition, to further clarify the scope, the DOC also stated in the 2006 scope ruling that it determined that "cores imported as a part thereof could be excluded from the scope of investigation based on the Rockwell hardness test, while cores imported as a part of a finished diamond sawblade could not be excluded on this basis."¹⁹ Accordingly, with regard to the false declaration of the entries as entry type 01 on the entry documents and not subject to the AD Order, counsel's argument that Lyke/Power Tek did not have "knowledge of the falsity of the statement at the time the entries were made" is without merit.

Lyke/Power Tek further argue that there was no evasion inasmuch as there was no material omission. They claim that every document has been truthfully and duly provided to CBP in the entry process and verification processes and that nothing was omitted. We are of the opinion that the failure to include the applicable AD Order number A-570-900 on the entry summary constitutes a material omission, inasmuch as an importer is required to include the unique identifying number assigned by the Department of Commerce, International Trade Administration, on an entry summary filed for merchandise subject to an AD or CVD order. *See* 19 CFR § 141.61(c). Because the entries at issue were falsely declared as entry type 01 instead of entry type 03, and omitted the AD Order number, no cash deposits were made, and therefore, substantial evidence exists in the record that the covered merchandise was entered into the United States by means of evasion, as defined in 19 U.S.C. § 1517(a)(5)(A).

Lyke/Power Tek also claim that there is no evasion inasmuch as they did not submit any false document. They argue that "no document has been found to be falsified." *See* Request for Administrative Review at Page 19. The definition of evasion does not require a material false document; it is enough that a material false statement or omission was made. In this case, we have found that Lyke/Power Tek made material false statements and material omissions in that they falsely stated that their merchandise was not subject to the AD Order upon entry and failed to include the applicable AD case number on the entries, which resulted in the failure to pay antidumping duty deposits applicable to the merchandise.

Accordingly, there is substantial evidence in the record that Lyke/Power Tek imported diamond sawblades from China into the commerce of the United States through material false statements, specifically the declaration of the entry type as 01 (not subject to AD duties), when the imported merchandise was covered by the AD Order on diamond sawblades from China.

Lyke/Power Tek also claim that the proper AD rate to be applied is the separate AD rate applicable to NYCL. As previously stated, the definition of evasion refers to entering merchandise into the customs territory of the United States by means of any false document,

¹⁸ *See* Memorandum from Maisha Cryor, Sr. Int'l Trade Compliance Analyst, Office of AD/CVD Operations, Office 4, through Mark Manning, Acting Program Manager, Office of AD/CVD, Office 4, to Thomas F. Futtner, Acting Office Director, Office of AD/CVD Operations, Office 4, re: Consideration of Scope Exclusion Request regarding Antidumping Investigation of Diamond Sawblades and Parts Thereof from the Republic of Korea in A-580-855 (April 7, 2006).

¹⁹ *Id.* at 6.

statement or act or 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.”** 19 U.S.C. § 1517(a)(5)(A) (emphasis added). We have found that the false statements made by Lyke/Power Tek in this case resulted in “any cash deposit ... of applicable antidumping ... duties ... not being applied with respect to the {subject} merchandise.” Accordingly, we find that the definition of evasion under the regulations and statute has been met based upon substantial evidence in the record, regardless of which AD rate may be applicable.

III. Adverse Inferences

Lyke/Power Tek argue that CBP’s use of an adverse inference to justify use of the PRC-wide rate for the subject merchandise is not supported by substantial evidence in the record. Lyke/Power Tek claim that the record establishes that NYCL was the exporter of the goods and that LIKE acted as the buying agent. Lyke/Power Tek argue that CBP cannot use LIKE’s failure to cooperate in the investigation adversely against Lyke/Power Tek. However, the EAPA statute authorizes CBP to employ adverse inferences against any party to the investigation that fails to cooperate or does not act to the best of its ability to comply with information requests. 19 U.S.C. § 1517(c)(3). 19 CFR § 165.6(a) also states that adverse inferences may be applied to any importer or foreign producer/exporter that fails to “cooperate and comply to the best of its ability with a request for information made by CBP.” Pursuant to 19 CFR § 165.5(b)(3), “(a)ny interested party that provides a material false statement or makes a material omission or otherwise attempts to conceal material facts at this point in the proceedings may be subject to adverse inferences. . . and prosecution pursuant to 18 U.S.C. 1001.” Moreover, an adverse inference may be used with respect to the U.S. importer, foreign producers, and manufacturers “without regard to whether another person involved in the same transactions under examination has provided the information sought. . .” 19 U.S.C. § 1517(c)(3)(B). In this case, adverse inferences are warranted inasmuch as Lyke/Power Tek failed to provide sufficient evidence to demonstrate that the AD rate applicable to NYCL applies to their entries.

In AD cases involving imports from China, separate rates are specific to an exporter. *See generally Michaels Stores Inc. v. United States*, No. 2014-1051 (Fed. Cir. Sept. 10, 2014) (discussing China-wide rate versus exporter rates and default to China-wide rate). NYCL has a separate AD rate. For Lyke/Power Tek to be able to use that rate as to their imports, they must prove that NYCL is the exporter for those imports. The burden rests with them to provide such proof; otherwise the China-wide rate applies. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002). Lyke/Power Tek argue that, to qualify as an exporter for antidumping duty purposes, a company must have title to the goods and sell them to an overseas buyer, passing title and risk. Lyke/Power Tek claim that Lyke/Power Tek were the buyers and pursuant to the commercial invoices, the title and risk passed to Lyke or to Power Tek from NYCL when the goods were delivered on board the ship in China. Accordingly, they argue that NYCL was the seller and Lyke/Power Tek were the buyers, and that LIKE acted merely as a buying agent. In support of their position of what constitutes an exporter, Lyke/Power Tek rely on the CBP informed compliance publication document entitled, “What Every Member of the Trade Community Should Know About: Bona Fide Sales & Sales for Exportation to the United States” (August 2005). Lyke/Power Tek’s reliance on this document is misplaced. CBP guidance as to whether an importer has

established what is the relevant “sale for exportation” for valuation purposes is separate and distinct from what is required to establish the exporter status of a company for purposes of determining the antidumping duty rate that should apply. Moreover, in response to a request for information, Lyke/Power Tek submitted entries where at least some of the invoices were issued by LIKE, and not NYCL.²⁰ Therefore, even if we accepted Lyke/Power Tek’s argument that exporter status for purposes of determining the applicable antidumping duty rate is somehow defined by which party issued the commercial invoices, the record in this case shows that not all of the invoices were even issued by NYCL.

In addition, as previously set forth in the July 20 Notice, the record shows that CBP issued supplemental RFIs to Lyke, Power Tek, NYCL, and LIKE, asking specific questions regarding the roles of NYCL and LIKE in the production and sales process of covered merchandise entered during the period of investigation in order to ascertain which entity was the exporter. Both Lyke and Power Tek refused to answer questions regarding NYCL/LIKE, instead referring CBP to those companies. *See* Lyke 3/22 Supplemental RFI Response and Power Tek 3/22 Supplemental RFI Response. LIKE refused to respond to CBP’s March 20, 2018 questionnaire requesting, among other things, information on the relationship between LIKE and NYCL and between LIKE and Lyke/Power Tek. *See* Email from LIKE to CBP, dated April 2, 2018. For its part, NYCL provided only deficient data to CBP that did not support a finding that NYCL was the exporter in this case. Accordingly, during the investigation, Lyke/Power Tek failed to provide information as to which they bear the burden of proof in order to benefit from an exporter’s separate rate. Furthermore, they did not provide any additional information in their Request for Administrative Review to rebut CBP’s finding of an adverse inference in this case. Thus, the record does not contain information sufficient to support Lyke/Power Tek’s assertion that they should be able to use NYCL’s exporter-specific rate.

The EAPA statute provides that in cases where CBP is unable to determine the producer or exporter of the merchandise, CBP may use the cash deposit rate or antidumping or countervailing duty assessment rate in the highest amount applicable to any producer or exporter, including the “all-others” rate for the merchandise. 19 U.S.C. § 1517(d)(2)(B). Therefore, since Lyke/Power Tek are unable to substantiate the identity of the exporter in this case, the PRC-wide rate for A-570-900 is applicable to the merchandise at issue.

CONCLUSION:

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, we affirm the determination made by the Director of Enforcement Operations, Trade Remedy & Law Enforcement Directorate, Office of Trade, that pursuant to 19 U.S.C. § 1517 and 19 CFR § 165, substantial evidence exists to support a finding that Lyke/Power Tek imported

²⁰ *See* Lyke Second Supplemental RFI Response dated March 22, 2017, Exhibit 1.

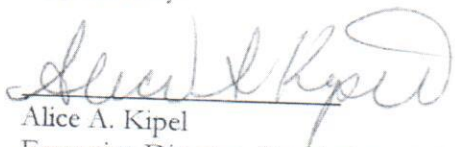
diamond sawblades from the People's Republic of China into the United States through evasion. This decision does not preclude CBP or other agencies from pursuing additional enforcement actions or penalties. Pursuant to 19 CFR § 165.46(a), this final administrative determination is subject to judicial review pursuant to section 421 of the EAPA.

Sincerely,



George Frederick McCray
Supervisory Attorney-Advisor/Chief Penalties Branch
Office of Trade-Regulations & Rulings
U.S. Customs & Border Protection

Approved by:



Alice A. Kipel
Executive Director, Regulations & Rulings
Office of Trade
U.S. Customs & Border Protection

Dated: February 8, 2019