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Ronald A. Oleynik, Esq.
Liliana Farfan, Esq.
Antonia Tzinova, Esq.
On behalf of Royal Brush Manufacturing Inc. a/k/a Royal and Langnickel
Holland and Knight LLP
800 17th Street NW
Suite 1100
Washington, DC 20060

Felicia Leborgne Nowels, Esq.
On behalf of Dixon Ticonderoga Company
Akerman LLP
Suite 1200
106 East College Avenue
Tallahassee, FL 32301

Re: Enforce and Protect Act ("EAPA") Case Number 7238; Royal Brush Manufacturing
Inc. a/k/a Royal and Langnickel; 19 U.S.C. § 1517

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

This decision is made in response to a timely request for administrative review ("Request for Administrative Review") made pursuant to Title 19, United States Code ("U.S.C.") Section 1517(f) and Title 19, Code of Federal Regulations ("C.F.R.") Section 165.41, dated June 18, 2019, filed by Royal Brush Manufacturing Inc., a/k/a Royal and Langnickel (hereinafter referred to as "Royal Brush"). Royal Brush requests the review of a determination of evasion made on May 6, 2019 by U.S. Customs and Border Protection's ("CBP") Enforcement Operations Division, Trade Remedy & Law Enforcement Directorate ("TRLED" or "EAPA Branch"), CBP Office of Trade ("OT"), in a Notice of Final Determination as to Evasion (hereinafter referred to as the "May 6-Determination").

In said document, TRLED determined there was substantial evidence in the administrative record that Royal Brush entered cased pencils (“pencils”) made in the People’s Republic of China (“PRC” or “China”) into the customs territory of the United States through evasion. Specifically, TRLED determined that, contrary to its obligations under law, Royal Brush failed to declare the goods as subject to a U.S. Department of Commerce (“DOC” or “Commerce”) antidumping duty (“AD”) order (*Certain Cased Pencils from the People’s Republic of China* Antidumping Duty Order A-570-827) (the “Order”) and, failed to post cash deposits with CBP for the merchandise in question.¹

In its Request for Administrative Review, Royal Brush requested that the May 6-Determination be reversed because CBP purportedly did not consider the evidence refuting the allegation of evasion by not following the “substantial evidence” standard that is required by 19 C.F.R. § 165.27, and because CBP’s EAPA Branch had purportedly conducted its proceedings in an arbitrary and capricious manner. In addition, Royal Brush requested that, pursuant to 19 C.F.R. § 165.46, all interim measures taken under the authority of 19 C.F.R. § 165.24 be discontinued and the affected entries be allowed to liquidate “in the normal course.”

The findings made in the May 6-Determination resulted from a CBP investigation of Royal Brush imports that was initiated on March 27, 2018 by the EAPA Branch, 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.” CBP assigned case number 7238 (“EAPA Case No. 7238”) to CBP’s investigation of Royal Brush’s imports during the period under investigation, which started on March 6, 2017. The CBP investigation was commenced in view of allegations received from domestic producer, Dixon Ticonderoga Company (“Dixon” or the “allegor”), on March 6, 2018, claiming that Royal Brush was importing Chinese-made pencils into the United States by evasion. On June 26, 2018, upon issuing its notice of initiation (“NOI”), TRLED notified Royal Brush that CBP would take interim measures in accordance with 19 C.F.R. § 165.24, based on a reasonable suspicion of evasion. Upon concluding its investigation, and based on the administrative record, TRLED issued its May 6-Determination, finding that substantial evidence on the record demonstrated that Royal Brush had entered cased pencils of Chinese origin into the customs territory of the United States through evasion. As Chinese-made, the pencils were subject to the *Order*. CBP determined that Royal Brush had failed to identify the entries as subject to the *Order* and failed to post the cash deposits for the antidumping duties by falsely claiming the pencils as “Made in the Philippines.”

On June 18, 2019, Counsel filed, on behalf of Royal Brush, a Request for Administrative Review pursuant to 19 U.S.C. § 1517(f) and 19 C.F.R. § 165.41. Royal Brush requested that CBP’s determination as to evasion be reversed.

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

Consistent with 19 C.F.R. § 165.41(d), Royal Brush's Request for Administrative Review was timely submitted within 30 business days after the May 6-Determination. Upon receipt, OT's Regulations and Rulings ("RR"), Penalties Branch, assigned Headquarters Case Number H304466 ("H304466") to review the matter. This Headquarters case number was electronically transmitted to the interested parties to the investigation on July 1, 2019. Accordingly, CBP's 60-business-day review period for the administrative review of the May 6-Determination commenced on July 1, 2019. On July 12 and on July 15, 2019, Dixon Ticonderoga Company ("Dixon" or the "allegor") provided its Response to the Request for Administrative Review. Under the aforementioned submission, Dixon repeated its claims as the "allegor," and opined that there was substantial evidence of evasion by Royal Brush. Dixon was also of the opinion that Royal Brush had been provided an ample opportunity to present its case to CBP. With the submissions considered timely made, the case is ripe for our administrative review.

FACTS:

Inasmuch as the facts in this case are fully set forth in the May 6-Determination/EAPA Case Number 7238, we will not repeat the entire factual history in this decision. However, briefly stated, on March 27, 2018, CBP initiated an EAPA investigation into Royal Brush's import activities in response to an allegation made by Dixon, a domestic producer of pencils, where the allegor reasonably suggested to CBP that Royal Brush was transshipping Chinese-origin pencils through the Philippines, and claiming the pencils as "Made in the Philippines" to avoid the payment of antidumping duties under the *Order*.² CBP's investigation covered Royal Brush's entries from March 6, 2017, one year before the receipt of Dixon's allegations, through the pendency of the investigation, for merchandise entered for consumption or withdrawn from a warehouse for consumption. 19 C.F.R. § 165.2. The AD Case Number A-570-827 covers 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. Pencils subject to the *Order* are classifiable under subheading 9609.10.00, Harmonized Tariff Schedule of the United States ("HTSUS").³

On June 26, 2018, in accordance with 19 C.F.R. § 165.24(c), CBP issued an NOI and notified Royal Brush of CBP's decision that it would take interim measures based on reasonable suspicion that Royal Brush, as the importer of record, had entered said merchandise into the customs territory of the United States through evasion. CBP considered relevant Dixon's claim that a Chinese manufacturer had allegedly entered into a purchase contract with a trading company that required the Chinese manufacturer to mark the product "Made in Philippines" in order to circumvent the *Order*. The contract was allegedly said to apply to item numbers RTN-157, RTN-158, and WPEN-12, that is, for pencils that corresponded to the item numbers used by Royal Brush in its online catalog for colored pencils.⁴ The contract also allegedly required the products to be

² See Dixon's Allegation ("Allegation") under the Enforce and Protect Act of 2015, dated February 27, 2018.

³ The May 6-Determination correctly made clear that the classification is not dispositive as to the scope of the AD order.

⁴ See Allegation, Exh 1 and 2 referencing contract RT02902 between the Chinese manufacturer and the trading company.

certified to U.S. standards for levels of heavy metals and phthalates and to bear Royal Brush's trademark logo design, "Royal & Langnickel." Dixon provided publicly available shipping data showing that pencils with matching descriptions and amounts were imported into the United States from the Philippines using a Philippine shipper.⁵ Dixon alleged that the trading company was a frequent customer of the Chinese manufacturer. Based on reasonable suspicion, CBP's investigation was initiated on March 27, 2018 and, subsequently, CBP issued requests for information to Royal Brush and, some time thereafter, to the Philippine entity.

CBP's investigation included an unannounced visit made on June 6, 2018 and announced visits made between November 14, 2018 through November 17, 2018, to the Philippine entity's facility in the Philippines. Upon concluding its investigation, CBP determined that the Philippine entity was unable to provide sufficient documentary evidence that it had sufficient manufacturing capabilities to produce the quantities allegedly produced for Royal Brush. Moreover, for the invoices/purchase orders that CBP tried to verify during the November visit, the Philippine entity's proof of manufacture was found inadequate or insufficient. Consequently, in its May 6-Determination, CBP found sufficient evidence that Royal Brush had imported cased pencils made in China that were transshipped through a facility in the Philippines and were imported by Royal Brush as pencils "Made in the Philippines" when, in fact, the cased pencils were of Chinese origin. Because of what CBP witnessed during the unannounced visit to the Philippine entity on June 6, 2018, and the inability of the Philippine entity to provide adequate production records during CBP's November visits to the facility in question, along with the overlapping associations maintained between the Philippine company officers with trading companies in China, CBP determined the totality of the evidence showed that evasion was demonstrated when Royal Brush entered covered merchandise (pencils from China) into the customs territory of the United States by a written or oral statement that was material and false, and an omission that was material and false, inasmuch as Royal Brush failed to identify entries of Chinese-made pencils, failed to identify the applicable AD Case Number (A-570-827), and failed to post the applicable cash deposits for the AD duties on the merchandise.

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.

⁵ See Allegation, Exh 6 referencing shipping documents.

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 C.F.R. § 165.1.

Thus, CBP must determine whether a party has entered merchandise that is subject to an AD [antidumping duty] or CVD [countervailing 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 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 ROYAL BRUSH IN ITS REQUEST FOR ADMINISTRATIVE REVIEW:

Royal Brush requested that the May 6-Determination be reversed because, contrary to the findings made by CBP's EAPA Branch, Royal Brush claimed there is no proof that the pencils imported by Royal Brush into the United States were made in China. Royal Brush stated that the EAPA investigation was triggered by Dixon's unfounded allegations, a filing "by an interested party that alleges an act of evasion by an importer." However, according to Royal Brush, there is no proof of evasion as it claimed that the Philippine entity (the alleged "manufacturer") had the capacity to manufacture the pencils in the quantities that were reflected in Royal Brush's purchase orders and more. Royal Brush claimed that the alleged Philippine manufacturer purchased raw materials and supplies from China. Royal Brush also claimed that the Philippine entity employed sufficient workforce to accomplish the manufacture of its pencils in the Philippines. In its request that the May 6-Determination be reversed, Royal Brush specifically stated that:

- The EAPA Branch did not consider the evidence on record that was provided by Royal Brush to refute the allegations of evasion; the EAPA Branch did not follow the "substantial evidence standard," and consequently, the EAPA Branch conducted its review in an "arbitrary and capricious" manner.
- The EAPA Branch should not have accepted the allegations made for evasion, inasmuch as Dixon did not submit any evidence as proof that the pencils subject to CBP's investigation were manufactured in China, as indicated on the alleged "Contract No. RT02902," a contract ("a copy of which has not been disclosed to Royal Brush") that involved *another* party, *not* Royal Brush, and the authenticity of which has not been established. Royal Brush refers to this contract as the "Unauthenticated Contract," but acknowledged, nonetheless, that it *did* obtain a copy of said contract through the Philippine entity. Royal Brush claimed that "neither Royal Brush nor Royal & Langnickel is a party to, or mentioned in the contract." Royal Brush claimed the Chinese manufacturer and the trading company associated with such contract provided signed declarations stating that Royal Brush was not involved in said Unauthenticated Contract. Royal Brush claimed that pencils in such contract were not destined to the United States but to another [specifically-named] country. Consequently, according to Royal Brush, there is "no link" on the part of Royal Brush to said contract. Furthermore, the EAPA Branch should not have accepted Dixon's claims of evasion based on the "shipping data" supplied by Dixon for pencils that were imported into the United States with matching descriptions and amounts, or on the claims made by Dixon that the trading company was a "frequent customer" of the Chinese manufacturer.
- The EAPA Branch should have accepted the physical evidence as well as business records (which "squarely support") that the pencils imported by Royal Brush were manufactured in the Philippines by the alleged Philippine

manufacturer. Contrary to the findings made, the Philippine manufacturer had the manufacturing capabilities and the ability to acquire sufficient raw materials (wood slats, leads or cores, paints, stamping foils and packaging materials, etc.) to produce the pencil quantities ordered by Royal Brush and more. As for documents that the Philippine manufacturer was unable to provide during CBP's November visits, the reason was because of, among other reasons, alleged confidentiality issues, and because certain documents, such as shipping documents, were actually kept by the trading company. Therefore, there were valid reasons for the Philippine manufacturer not to have provided those documents to CBP.

- Royal Brush claimed to have provided the precise “Gross,”⁶ the precise number of pencils produced, and the correct number of production “shifts” that the alleged Philippine manufacturer achieved for the year 2018. Royal Brush claimed that production quantities *exceed* what Royal Brush imported to the United States. Royal Brush claimed that the EAPA Branch’s calculations of the “ratio of wood slats to cores are incorrect and cannot be used to support an inference of Chinese origin for pencils.” Royal Brush claimed that the EAPA Branch improperly considered that “two pencils slats come together to form a “pencils sandwich” that ultimately yields at least 6 pencils” (2 slats yielding at least 6 pencils). Royal Brush claimed that CBP’s verification team calculations were erroneous and ignored the information provided by Royal Brush in its “RFI Part I, Factual Submission and Written Arguments,” where Royal Brush informed that the Philippine manufacturer purchased the pencil cores and slats in “Gross.”
- Royal Brush claimed that with respect to the “certification service providers” that were based in China and were used by Royal Brush to certify compliance with U.S. Consumer Product Safety Commission (“CPSC”) safety standards for its pencils, any reference to “China” on the forms was due to a clerical error made on the part of Royal Brush upon filing “pre-populated test request forms.” Moreover, Royal Brush claimed that the CPSC does not require that such service providers and laboratories be located in the “respective country of origin” {Philippines} or in the United States. Royal Brush claimed that it submitted two test reports, one dated 2017 and another dated 2018. Royal Brush claimed that CBP did not accept these reports because CBP focused on the “irrelevant fact” of the “timing” of the reports. Royal Brush stated that the 2017 report was prepared “before the relevant pencils had made entry into the United States.”
- Royal Brush claimed that the CBP Attaché report findings cannot be relied upon for the alleged evasion because the CBP Attaché did not consider the fact that the manufacturing process for pencils is “seasonal.” Moreover, the Philippine manufacturer “has documented that it purchased sufficient raw materials to manufacture all of the pencils purchased by Royal Brush.” With regard to the boxes that the CBP Attaché saw being filled with Chinese pencils and depicting

⁶ A “Gross” being a unit equal to 144 items (or 12 dozen).

Chinese characters, Royal Brush claimed that those boxes were being used by the facility workers to move the Philippine-made pencils from “one production stage” to another. Royal Brush claimed that the CBP Attaché could not translate and did not understand the meaning of the Chinese characters written on the boxes.

- Royal Brush claimed that it was not provided with an opportunity to comment or rebut any factual inaccuracies. The EAPA Branch should have considered that Royal Brush was not present during the on-site verification visit (“Site Verification”) conducted between November 14, 2018 and November 17, 2018, and that Royal Brush received only a redacted report (the February 25, 2019 “Verification Report”) upon which CBP based its findings of evasion. The EAPA Branch also purportedly relied on inaccurate statements made by the Philippine company officers to reach the conclusion that the goods were made in China. As an example, the CBP verification team considered that a Philippine company officer had stated that the Chinese-origin pencils viewed by the CBP verifiers at the time of their November visits were intended “for U.S. markets.” However, Royal Brush claimed that the Philippine entity had mentioned during the visit and in a PowerPoint presentation made during such visit, pencils that were Chinese-made but had failed toxicology reports for the region intended (purportedly, *not* for U.S. markets). As for other Chinese-made pencils mentioned in CBP’s Verification Report, Royal Brush claimed those were not intended for the U.S. market but for the Philippine market.
- Royal Brush claimed that, although the EAPA Branch had initially determined that the Verification Report contained “new information” and had purportedly allowed time for Royal Brush to file a rebuttal (“Rebuttal”), the EAPA Branch thereafter changed its position and refused to accept Royal Brush’s Rebuttal. Royal Brush claimed that in said Rebuttal, Royal Brush intended to address the purported inaccuracies that were attributed by CBP to the Philippines’ manufacturer and its employees in CBP’s Verification Report.
- Royal Brush claimed it is being held accountable for actions made by third parties involving transactions as to which Royal Brush neither participated nor had knowledge. Royal Brush claimed that the EAPA Branch erroneously shifted the inquiry away from Royal Brush with respect to its imports and issued its findings based on all imports made into the United States from the Philippine manufacturer, not just on Royal Brush’s imports. Royal Brush claimed that, once the EAPA investigation expanded or shifted, Royal Brush was not provided with an opportunity to respond, contrary to due process.
- The EAPA Branch made conclusions and made adverse inferences that were inappropriate. An adverse inference about the Philippine manufacturer’s cooperation (or lack thereof) should not be used against Royal Brush. Nonetheless, the evidence does not support an adverse inference against the Philippine manufacturer inasmuch as it cooperated with CBP to the “best of its ability.” The inferences of 19 U.S.C. § 1677e(b), an almost identical provision

that is applicable to antidumping investigations, should be applicable with respect to the use of adverse inferences under the EAPA.

**ARGUMENTS MADE BY DIXON TICONDEROGA COMPANY IN
RESPONSE TO THE REQUEST FOR ADMINISTRATIVE REVIEW:**

In submissions dated July 12 and July 15, 2019 (the last submission made to include the required certifications pursuant to 19 C.F.R. § 165.5), Dixon stated that, contrary to Royal Brush's allegations, CBP properly relied on multiple forms of substantial evidence in reaching its determination of evasion, such as (1) the CBP Attaché's visit to the Philippine facility, (2) the responses received by CBP from the Philippine entity, (3) what transpired during CBP's verification visits to the Philippine facility, and (4) the analysis of the Philippine facility's manufacturing capacity compared to U.S. import data. Dixon provided the following specific comments:

- The CBP Attaché witnessed and made findings that, during the unannounced visit, the Philippine facility was not conducting proper manufacturing activities. Moreover, the CBP Attaché noticed a lack of raw materials, the facility's machinery was seen covered in dust and cobwebs, plus, there were boxes with Chinese-made pencils, and repacking activities were observed. As for the November announced visits, CBP considered an admission made by a Philippine entity official stating that Chinese-origin pencils were intended for export to the United States, there were references to inventory receipt records that included references to pencils, and that CBP had analyzed the Philippine facility's manufacturing capacity and had found that the total pencils exported exceeded the Philippine entity's capacity to produce such pencil quantities.
- CBP's investigation was "frustrated" by the Philippine entity's failure to cooperate in order to provide complete and unredacted documentation. There was a lack of production reports, a lack of inventory receipts for raw materials, a lack of inspection reports for raw materials, and a lack of full payroll records. The lack of records prevented CBP from verifying that the pencils exported by the Philippine entity to Royal Brush were indeed manufactured by the Philippine entity.
- CBP's determination was not arbitrary or capricious and it complied with due process by allowing Royal Brush to make submissions pursuant to 19 C.F.R. Part 165. CBP conducted an extensive review of the allegations and the records and responses obtained from Royal Brush and other entities. CBP made a thorough on-site verification and considered arguments from Royal Brush before making its determination of evasion.

ADMINISTRATIVE REVIEW ANALYSIS:

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 C.F.R. § 165.45, the Office of Trade, Regulations and Rulings, has performed its *de novo* review based on the facts and circumstances of the administrative record in this proceeding. In making our determination, we reviewed (1) the administrative record upon which the May 6-Determination was made, and (2) the timely and properly filed requests for review and responses. Pursuant to 19 C.F.R. § 165.45, the administrative review of this case has been completed in a timely manner within sixty (60) business days of the commencement of the review period.

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 or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.” See 19 C.F.R. § 165.1; *see also*, 19 U.S.C. § 1517(a)(5).

We note that the EAPA statute does not require a finding that all of an importer’s entries have been made through evasion. Rather, if CBP finds substantial evidence that evasion has occurred with respect to some entries of covered merchandise, the statute requires CBP to take appropriate action to ensure that entries by that importer do not escape payment of antidumping duties. In this case, having found sufficient evidence of entries of covered merchandise made through evasion, CBP has required live entry, posting of cash deposits, and suspension of liquidation. The DOC’s role is to determine the assessment rates for the calculation of the ultimate antidumping duties, if any, that are owed.

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

A. The Order

The U.S. Department of Commerce issued an antidumping duty order on imports of certain cased pencils from the PRC. See *Antidumping Duty Order: Certain Cased Pencils from the People’s Republic of China*, 59 FR 66909 (December 28, 1994).

On June 1, 2016, Commerce published notice of initiation of the fourth sunset review of the Order, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).⁷ As a result of its review, Commerce determined that revocation of the Order would likely lead to a continuation or recurrence of dumping.⁸ Commerce, therefore, notified the U.S. International Trade Commission (“ITC”) of the magnitude of the margins likely to prevail should the Order be revoked. On August 17, 2017, the ITC determined that revoking the

⁷ See, *Initiation of Five-Year (Sunset) Review*, 81 FR 34974 (June 1, 2016).

⁸ See, *Certain Cased Pencils from the People’s Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 81 FR 69513 (October 6, 2016), and accompanying Issues and Decision Memorandum.

Order on certain cased pencils from the PRC would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁹

B. The Scope

On September 1, 2017, Commerce ordered the continuation of the *Order* on certain cased pencils from the PRC.¹⁰ In that notice, Commerce defined the scope of the *Order* as follows:

... [C]ertain cased pencils of any shape or dimension (except as described below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils... are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded... are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded... are pencils with all of the following physical characteristics: (1) Length: 13.5 or more inches; (2) sheath diameter: Not less than one-and-one quarter inches at any point (before sharpening); and (3) core length: Not more than 15 percent of the length of the pencil. In addition, pencils with all of the following physical characteristics are excluded...: Novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches in circumference, composed of turned wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the merchandise... is dispositive.

As stated above, the *Order* covers 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.

II. Evasion.

The record evidence establishes that Royal Brush imported cased pencils described by the *Order*. Further, the record as a whole does not support a conclusion that the pencils imported by Royal Brush during the period under investigation were manufactured in the Philippines. Moreover, there is also substantial record evidence to support the conclusion that pencils imported by Royal Brush were not made in the Philippines, but were instead made in China. Consequently, there is substantial record evidence that Royal Brush

⁹ See, *Cased Pencils from China*, Inv. No. 731-TA-669 (Fourth Review), 82 FR 40019 (August 23, 2017).

¹⁰ See, *Certain Cased Pencils from the People's Republic of China: Continuation of Antidumping Order*, 82 FR 41608 (September 1, 2017).

imported Chinese-origin pencils into the customs territory of the United States that were covered by the scope of the *Order*.

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 or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.” *See* 19 C.F.R. § 165.1; *see also*, 19 U.S.C. § 1517(a)(5).

Based on the findings made by the CBP Attaché and CBP’s verification team, we are of the position that the record fails to adequately establish that the Philippine entity manufactured the pencils that were associated with the Royal Brush invoices/purchase orders that were reviewed by CBP at the Philippine entity’s facility. Furthermore, there is substantial evidence that the country of manufacture can be said to have been China for entries during the period under investigation.

The EAPA investigation as to Royal Brush was initiated on March 27, 2018. On April 25, 2018, and before Royal Brush was notified that it was the subject of an EAPA investigation, CBP issued a request for information (“RFI”) or “CBP Form 28” to Royal Brush requesting production records for a certain entry that had been filed with CBP for art pencils declared as of Philippine origin.¹¹ Upon review of the documents received from Royal Brush, it was noted that the shipment in question contained cased pencils (“Sketching Pencils,” item number “SPEN-12”) stamped with Royal Brush’s trademark (Royal & Langnickel). In its response to the CBP Form 28, Royal Brush claimed that the Philippine shipper was the supplier as well as the manufacturer of said pencils. Royal Brush made a claim that the Philippine entity manufactured the pencils in its facility using wood slats and pencil cores from China and paint and packaging obtained from the Philippines. Royal Brush provided the purported purchase order, invoice, export document, shipping documents and entry document for said shipment. The documents included invoices and bills of lading from the trading company in China, and which Dixon had identified in its allegations.

CBP found inconsistencies that called into question whether the goods had been manufactured in the Philippines. For example, Royal Brush provided copies of “certification service provider forms” (to certify quality-compliance in the making of the pencils). CBP found that Royal Brush had identified China to be the country of origin for the merchandise being tested. CBP also found that the dates of such certifications post-dated the date of importation and, moreover, appeared to have been issued *after* the issuance of the CBP Form 28. Royal Brush claims that CBP’s focus on the “timing” of these forms is irrelevant, however, the timing *is* relevant because CBP expects that documents provided should temporally correlate to the relevant dates for the importations it reviews. Moreover, what was even more relevant was the fact that Chinese certification forms considered the pencils

¹¹ The EAPA authorizes CBP to collect such information as is necessary to make its determination using methods that CBP may consider appropriate. *See*, 81 FR 56477 (August 22, 2016). To that end, CBP’s regulations allow for a delay in issuance of a notice of investigation.

to be of Chinese-origin, a statement *made by* Royal Brush in the form requests and which Royal Brush later claimed was the result of a “clerical error” *on its part* when it filled “pre-populated test request” forms to its Chinese service providers. Even if CBP considered the “China” statement on the forms not determinative as to “country of origin,” Royal Brush’s claimed “error” elevated, in our opinion, the suspicion of evasion above the claims initially made by the alleged.

The indicators for evasion became even more significant on June 6, 2018, when the CBP Attaché performed an unannounced visit to the entity in the Philippines at its facility; again, this occurred before the NOI was issued. During the visit, the CBP Attaché witnessed that the Philippine entity was *not* conducting manufacturing activities for pencils and, moreover, it appeared *not* to have done so for some time, given the idle state of the machines located at the facility.¹² The CBP Attaché witnessed that the machinery appeared dusty and covered in cobwebs (the machines appeared to have been the ones shown in company pictures). The CBP Attaché witnessed the Philippine entity’s personnel opening cartons containing Chinese-origin pencils and, after conducting minor alterations, such as sharpening, the workers were seen repackaging/repacking the pencils into cartons labeled “Made in Philippines.” The CBP Attaché learned from the escorting staff that the pencils were intended for exportation, including to some major U.S. companies. The CBP Attaché noted that, at least one of two staff managers escorting him, could not describe the pencil manufacturing process, despite self-identifying as the manager on duty and having worked for the company since 2015. During the unannounced visit, the company managers (one manager was available by cellular phone) who directed the tour of the facilities claimed that the raw materials used for manufacture were brought from various specific countries, however, there was virtually no evidence of raw materials at the site at the time of said visit. According to the CBP Attaché, the pictures taken during the visit provided a clear story line of repackaged Chinese pencils bound for the United States in boxes labeled “Made in the Philippines.” When the CBP Attaché specifically asked the escorting company managers about the repackaging activities being witnessed by all during the tour, the company managers bore silenced looks and, with at least one of them, the CBP Attaché felt, a tacit confirmation of what he was witnessing.

The question for further development thus became the capacity of the Philippine entity to manufacture at the level described, given the lack of resources observed during the first on-site visit. Even if CBP considered the possibility that during the unannounced visit, the Philippine entity was not operating at season’s peak, from a CBP standpoint, it would still have expected to see some constancy of production at the facility, particularly in light of production capacity representations made by the Philippine entity at a later date. However, there appeared to be little or no manufacture going on at the time. Therefore, CBP cannot dismiss what the CBP Attaché vividly saw at the time of the visit to the Philippine entity’s facility, regardless of whether the CBP Attaché could understand the Chinese characters on the boxes. The CBP Attaché’s report, complete with observations and photographs,

¹² Notably, this was consistent with U.S. Embassy records reviewed by the CBP Attaché prior to the visit which records showed that there was only one known manufacturer of pencils in the Philippines and it was not the Philippine entity. See, June 5, 2018 CBP Attaché report at page 1.

unequivocally demonstrates repackaging of Chinese pencils into boxes labeled as made in the Philippines and destined for the United States.

We do not agree with Royal Brush's assertions that the CBP Attaché misconstrued what he saw during the initial site visit. He saw retail packaged Chinese-made pencils being unpacked and/or unpacked, and he saw unpacked Chinese finished pencils in large boxes being unpacked and then being repacked/repackaged. He also saw the same green pencils that came from China, in the finishing facility, being used in the repacking process. He saw incoming packing cartons labeled made in China. He saw outgoing packing cartons labeled made in the Philippines. He saw no manufacturing activity and dusty equipment. In June of 2018, he saw materials apparently unused since April of 2017.¹³ The only activity he observed was the packing/package of finished pencils and some pencil sharpening. Had he observed manufacturing or were there evidence of recent manufacturing, it might credibly be argued that some of the packing/package activity was for Philippine-made pencils. However, there was only evidence to the contrary. Moreover, there was no explanation for why retail packaged pencils from China were being unpacked and then repacked for export. We note that the CBP Attaché had no vested interest in this matter, except to report exactly what he had observed. Thus, for the entries prior to June of 2018, the record supports a conclusion that entries of Chinese pencils were being made in the United States with the Philippines being falsely stated to be the country of origin.¹⁴ Notwithstanding, CBP sought to gather additional information, specific to Royal Brush's entries.

After the interim measures went into effect, CBP sent RFIs to both the Philippine entity as well as to Royal Brush. Responses from both parties were filed with CBP in October of 2018. Thereinafter, when CBP performed its announced visit to the Philippine facility between November 14 and 17, 2018, CBP determined that some manufacturing capability appeared to be evident but not to the extent alleged by the affected parties.¹⁵ The purpose for the CBP announced visit ("verification visit") was to determine whether the Philippine supplier could show that it was capable of producing the amount of pencils allegedly manufactured for Royal Brush, as well as to clarify the country of origin for pencils imported by Royal Brush. During its verification visit, CBP reviewed the production records on seven invoices and purchase orders pertinent to Royal Brush. The CBP verification team found numerous inconsistencies and/or discrepancies in the documentation, raising questions regarding the Philippine entity's capabilities to manufacture the pencils at issue. We give credence to CBP's on-site verification team's findings that resulted from the interviews conducted with company officers, a tour of the Philippine facility, and a review of its production records. In particular, we find highly relevant, the facts discussed below.

¹³ Notably, the CBP period of investigation covered entries from March 6, 2017 forward.

¹⁴ The CBP Attaché's visit supports our ultimate determination of evasion. The issue of the contract, which Royal Brush raises in its claims of error on the part of CBP, while supportive of the E.A.P.A Branch's findings, is not the basis for our *de novo* determination of evasion. Nevertheless, it is a fact of record that certainly does not detract from our conclusion.

¹⁵ Members of CBP's verification team included personnel from TRLED and CBP's Regulatory Audit and Agency Advisory Services ("RAAAS").

The Verification Report described how the Philippine entity's officers were closely associated with certain trading companies in China, and the company officers described how the company and partners operated in the Philippines. The CBP verification team also attempted to complete a verification of the information received from the Philippine entity's RFI responses. It became clear that the positions of certain officers at the Philippine facility overlapped with the positions they held within certain Chinese trading companies. For example, a part-owner of the Philippine entity as well as its sales director was also the part-owner of at least two Chinese trading companies that allegedly provided raw materials to the Philippine entity. The sales director acknowledged traveling frequently from China to the Philippines, and more so during the alleged "busy season" but, otherwise, the sales director and part-owner claimed being based ("physically located") in China. The aforementioned sales director was also the officer deciding which selling company to use for the purchase of raw materials on behalf of the Philippine entity. Given the proximity of the Philippine entity with the Chinese trading partners, we would expect that such closely associated companies would make an effort to maintain records properly separated and to maintain built-in functionalities so as to allow the documentation to remain separated while still be able to cross-reference one another if any of the companies were audited.

CBP's verification team requested production records and made specific findings on each of seven Royal Brush invoices/purchase orders that were reviewed during the November 2018 visits. The Philippine entity officers, including the sales director/part-owner associated with the trading companies doing business in the Philippines, were not able to satisfactorily respond to the production questions posed by the CBP verification team. CBP found invoices where the Philippine entity could not provide the inventory receipt records for merchandise described (such as woodless graphite pencils, sharpeners and charcoal pencils) and found that with other invoices, the Philippine facility could not respond to discrepancies that were noted by CBP's verification team, including questions about the receipt of the raw materials essential to the manufacturing process. Some documents were found by the CBP verification team to have been altered by "white-out" marks or were revised with ink marks. The explanations provided at the time for the alterations were not responsive to the issue, or were deemed incomplete, conflictive, unverifiable or unreliable.

The CBP verification team also verified the list of the machinery located at the facility, their functions, their daily production capacity and the production cycles. The information was found short or inadequate. The CBP verification team found that while the Philippine facility did appear to have the capability to produce pencils, it did not appear to be able to produce pencils in the quantities alleged for the company's 2018 production.

In some instances, when the CBP verification team requested that certain production records be provided, the Philippine officers claimed that such documents, if any, were kept at the trading company's "China office," and not at the Philippine office, an odd claim to make because not only were the November 2018 visits *announced* to the Philippine entity, so that the Philippine entity could prepare in advance, but the Philippine entity also thus gave up an opportunity to provide to CBP information that CBP could have found acceptable and sufficient, if existent. It also raised the question as to why a certain entity in one country would keep its production records in *another* country, in this case, China, a country facing an antidumping order from the United States, while the Philippines faced none.

Although Royal Brush claims arbitrary or capricious actions on the part of CBP, opportunities were afforded to Royal Brush, as well as to the Philippine supplier, to prove their claims of production, notwithstanding, both entities fell short to establish the production capabilities of the Philippines entity.¹⁶

The central issue was whether the Philippine manufacturer could sustain sufficient pencil production commensurate to the quantities of Royal Brush's imports to the United States and whether production records could be tied to Royal Brush's imports. The observations and calculations made by CBP's verification team regarding the Philippine entity's production sufficiency, as well as for the "ratio" and "gross" units considered by CBP, were measures that were based on the information provided by the Philippine company officers to CBP's verification team, including the information about the machinery daily capacity (using the "gross" times the number of machines times the number of shifts). The question is not whether CBP erroneously calculated the production (we think not), the question is whether the Philippine entity misinformed the CBP verification team as to the entity's production capacity and why so. If Royal Brush claims that the CBP production calculation numbers are not accurate, how can CBP consider Royal Brush's numbers to be correct, if all numbers came from the same source, purportedly, the Philippine entity? If Royal Brush made an independent review of the Philippine entity's production records, it must have surely encountered what the CBP verification team found: missing documents relating to transportation documents, missing documents for incoming raw materials (including from overseas) used in the production, missing sales invoices between trading partners, altered documents (due, allegedly, to the Philippine entity's incorrect usage of units of measure ("gross" versus "pieces")) or from alleged complications in getting the data on a timely basis, documents relating to receipt of merchandise that were incomplete or absent, documents that appeared to have been redacted and documents that the Philippine entity even refused to provide after the CBP verification team requested the unredacted versions and documents that were said to have been long ago deleted. There is no guarantee to CBP that the information claimed to be the correct information was not redacted, tainted, manipulated, or re-created in or outside the Philippines and/or made to appear to correspond to a legitimate production cycle in the Philippines for the commodity at issue.

As for Royal Brush's claim that production was "seasonal," the claim does nothing to explain the reasons for the discrepancies. Even if CBP had considered some explanations plausible, the weight of the evidence for evasion is still substantial as was revealed upon review of the seven invoices and purchase orders by CBP during the November 2018 announced visits. The production in the Philippines for Royal Brush's imports remains unsubstantiated, as amply demonstrated in the verification report drafted by trained CBP auditors.

¹⁶ In regard to the E.A.P.A Branch's decision not to accept Royal Brush's rebuttal (allegedly said to contain additional explanations as to the production in the Philippines), CBP's denial to accept was made because CBP's verification report and exhibits were deemed covered under 19 C.F.R. § 165.25 and did not constitute "new factual information." Notwithstanding, the E.A.P.A Branch allowed more time for Royal Brush to submit its March 25, 2019 Written Arguments, as stated in footnote number 15 of the May 6-Determination.

In particular, the Verification Report, at pages 9-10, demonstrates how/why the production calculated by the Philippine entity's official was inflated, and how a corrected calculation based on the payroll records provided to CBP resulted in a capacity figure far less than the entity's shipments to the United States. We also note that the entity's calculation was based on a certain number of shifts a day, operating a certain number of days a week, for the entire year. However, the CBP Attaché's visit clearly revealed no production at that time or approximate to the time of the visit, thus further demonstrating that the calculation, which presumed continuous production, was inflated. Continuous operation is also inconsistent with the claims of seasonality made to CBP.

In its arguments, Royal Brush misses the mark by citing its RFI responses when it comes to production information. The point is that this is unverified information, presumably supplied to Royal Brush by the Philippine entity. At verification, CBP auditors could not verify, i.e., did not find evidence to substantiate, the actual production claimed. Instead, CBP found, not only evidentiary gaps, but many indicators pointing away from the accuracy of the claims.

Finally, the fact that CBP's verification team may have inquired about other non-Royal Brush shipments while touring the Philippine facilities does not mean that the investigation was being expanded or that Royal Brush is being held liable for acts attributable to other companies. CBP needed to verify total production as one aspect of determining whether the quantities imported by Royal Brush could have been produced by the Philippine entity.

Furthermore, CBP is not required to establish the existence of a scheme or coordinated intent to enter goods contrary to law, nor is knowledge by the importer required.¹⁷ CBP simply has to establish that entries were made, of goods subject to an antidumping order, and that the importer entered covered merchandise into the United States by means of any document 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 another security or any amount of applicable antidumping duties being reduced or not paid with respect to the covered merchandise. In so doing, CBP must consider the record, as a whole. Evasion is found when goods that are subject to antidumping orders are entered into the United States without reference to the applicable AD/CVD order in the entry documents, since that constitutes material omission. Accordingly, we find that the definition of evasion under the regulations and statute has been met based upon substantial evidence in the record.¹⁸ Therefore, CBP properly found evasion.

¹⁷ We note that an importer is required to exercise reasonable care when making entry to the United States. 19 U.S.C. § 1484. As such, an importer cannot hide behind a claim that it did not know about its supplier's sourcing and production. Contrary to Royal Brush's assertions (*see*, Request for Review at 8), Royal Brush is, within the bounds of reasonable care, responsible for making reasonable inquiries of others in its supply chain to ensure, vis-a-vis products imported into the United States, that those imported products comply with U.S. law.

¹⁸ 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)). Even considering the claims raised by Royal Brush regarding the Philippine facility's alleged production capabilities, the record *as a whole* indicates it was reasonable for the CBP verification team to reach the conclusions it did given the extent of the evidence.

The discussions below and in the May 6-Determination address the adverse references that CBP made because of the insufficiencies in the data that was provided at the time. However, it is our position that, even without adverse inferences, the record as a whole adequately and reasonably supports a conclusion that entries made by Royal Brush were declared as of Philippine origin but actually included covered pencils from China.

III. Adverse Inferences.

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 C.F.R. § 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 C.F.R. § 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). Thus, Congress provided CBP with specific guidance as to CBP’s adverse inference authority in an EAPA case. In this case, adverse inferences were warranted, inasmuch as the importer, as well as the alleged foreign producer and exporter, *failed* to provide sufficient evidence to demonstrate that the pencils imported by Royal Brush were manufactured in the Philippines. CBP reasonably filled those evidentiary gaps with some adverse inferences.

The evidence supports the conclusion that neither Royal Brush nor the Philippine entity could prove or was able to provide CBP’s verification team with sufficient evidence that would reasonably assure CBP’s verification team that the Philippine supplier had sufficient manufacturing capabilities to produce all of the pencils during the period at issue. CBP found some evidence of manufacture in the Philippines but the evidence failed to demonstrate that the pencils in the seven entries that CBP attempted to verify were manufactured in the Philippines, let alone that all pencils declared by Royal Brush as of Philippine origin were made in the Philippines. The November visits did not sufficiently counter what the CBP Attaché had seen, namely, the reboxing of Chinese-origin pencils for exportation to the United States into cartons labeled as made in the Philippines. Thus, the evidence supports the conclusion that goods that were entered into the United States as Philippine-made pencils, were, in fact, Chinese-made pencils. Therefore, Royal Brush failed to comply with its obligation to identify its entries as subject to an antidumping duty order (A-570-827) and failed to post the applicable cash deposits for the commodity and time period 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 responses, 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 C.F.R. § 165, substantial evidence exists to support a finding that Royal Brush Manufacturing Inc. imported pencils from 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 C.F.R. § 165.46(a), this final administrative determination is subject to judicial review pursuant to section 421 of the EAPA.

Sincerely,

CORALY
SCHREIBER

Digitally signed by
CORALY SCHREIBER
Date: 2019.09.24
12:54:41 -04'00'

Coraly Schreiber
Acting 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