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Wiley Rein LLP
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RE: Enforce and Protect Act ("EAPA") Case Number 7257; H & H Machine Co.; 19 U.S.C. § 1517

Dear Ms. Connelly and Mr. Pickard:

This is in response to a timely 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 ("CFR") Section 165.41, dated November 19, 2019\(^1\), filed by Sandler, Travis & Rosenberg, P.A., on behalf of H & H Machine Company (hereinafter referred to as "H & H"). H & H requests the review of a determination of evasion made on October 9, 2019 by U.S. Customs and Border Protection ("CBP") Enforcement Operations Division, Trade Remedy & Law Enforcement Directorate ("TRLED"), CBP Office of Trade ("OT"), in a Notice of Final Determination as to Evasion (hereinafter referred to as the "October 9th Determination").

In the October 9th Determination, TRLED determined that there was substantial evidence in the administrative record to establish that Prime Stainless Products, LLC ("Prime Stainless")\(^2\) and H & H imported stainless steel flanges forged in the People’s Republic of China ("PRC" or "China”) into the customs territory of the United States through evasion. Specifically, TRLED determined that Prime Stainless and H & H imported stainless steel flanges made in China into the customs territory of the United States that are covered by both antidumping duty ("AD") order A-570-064\(^3\) and the countervailing duty ("CVD") order C-570-065\(^4\)

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\(^1\) Additional documents were submitted by counsel for H & H via email on November 21, 2019. The last email correspondence from counsel for H & H took place on November 26, 2019.

\(^2\) Prime Stainless did not submit a request for administrative review to this office pursuant to 19 U.S.C. § 1517(f) and 19 CFR § 165.41.

(collectively the “Orders”) by transshipping the merchandise through the Philippines and falsely declaring that the merchandise was of Philippine-origin. TRLED found that, as a result of the false statement as to the country of origin of the stainless steel flanges, H & H failed to post cash deposits with CBP for the merchandise in question.

In its Request for Administrative Review, H & H requests that the October 9th Determination be reversed because CBP did not prove by substantial evidence, as required under 19 CFR § 165.27, that all stainless-steel flanges imported by H & H were entered into the United States by evasion. In addition, H & H maintains that certain actions by TRLED during the investigation were arbitrary and capricious and not supported by the laws and regulations applicable to CBP’s actions. Based on these reasons, H & H requests that, pursuant to 19 CFR § 165.46, all interim measures taken under the authority of 19 CFR § 165.24 be discontinued and that CBP return the cash deposits and the affected entries be allowed to liquidate in the normal course.

The findings made in the October 9th Determination resulted from a CBP investigation of Prime Stainless and H & H that was initiated on August 30, 2018 and September 13, 2018, respectively, 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.” TRLED assigned case number 7257 (“EAPA Case No. 7257?”) to CBP’s investigation of Prime Stainless and H & H imports during the period under investigation. The investigation was commenced by CBP in response to allegations submitted by domestic producer, Core Pipe Products, Inc. (“Core Pipe” or the “alleger”), on August 30, 2018, with respect to Prime Stainless, and on September 13, 2018, with respect to H & H, claiming that Prime Stainless and H & H were importing Chinese-origin steel flanges into the United States as products of the Philippines without paying the appropriate antidumping and countervailing duties. Core Pipe alleged that Prime Stainless and H & H evaded antidumping and countervailing duties by transshipping stainless steel flanges from China through an intermediary supplier in the Philippines, EN Corporation (hereinafter “ENC”).

On December 6, 2018, TRLED issued its Notice of initiation and interim measures taken concerning the evasion of antidumping and countervailing duty orders on stainless steel flanges from the PRC (“NOI”) to Prime Stainless and H & H, notifying the parties that CBP had commenced a formal investigation under the EAPA. Specifically, CBP stated that it was investigating whether Prime Stainless and H & H had evaded the antidumping duty order and countervailing duty order on stainless steel flanges from the PRC entered into the United States. CBP also stated that because evidence established a reasonable suspicion that Prime Stainless and H & H had entered merchandise into the United States through evasion, CBP had imposed interim measures. CBP stated that the period of investigation covered

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5 The separate EAPA allegations were originally assigned case numbers 7257 for Prime Stainless and 7264 for H & H, but were later consolidated at the time of imposition of interim measures as Case No. 7257.
6 ENC is a Philippine-registered manufacturer of stainless steel fittings and flanges and exports a majority of its flanges to the United States. See Interoffice Memorandum from Kristina Horgan, International Trade Specialist (ITS), Enforcement Operations Division, Trade Remedy Law Enforcement Division (TRLED), Office of Trade, Edward Bayron, CBP Attaché-Korea, Through Victoria Cho, Chief, EAPA Investigations Branch, TRLED, to Carrie L. Owens, Director, Enforcement Operations Division, TRLED, dated November 20, 2018.
those entries entered for consumption, or withdrawn from warehouse for consumption, from August 9, 2017, through the pendency of the investigation. See 19 CFR § 165.2.

Upon concluding its investigation and based on the administrative record, TRLED issued its October 9th Determination, finding that substantial evidence on the record demonstrated that Prime Stainless and H & H had imported stainless steel flanges into the customs territory of the United States through evasion by “transshipping” stainless steel flanges made in the PRC as a product of the Philippines when, in fact, the country of origin was China. As a product of China, the steel flanges were subject to the AD and CVD Orders applicable to the merchandise. TRLED determined that by falsely claiming that the merchandise was a product of the Philippines, Prime Stainless and H & H failed to identify the entries as subject to the AD and CVD Orders and, as a result, Prime Stainless and H & H evaded the payment of antidumping and countervailing duties.

On November 19, 2019, counsel filed, on behalf of H & H, a Request for Administrative Review pursuant to 19 U.S.C. § 1517(f) and 19 CFR § 165.41. H & H requested that CBP’s determination as to evasion be reversed.

Consistent with 19 CFR § 165.41(d), H & H’s Request for Administrative Review was timely submitted within 30 business days after the October 9th Determination. Upon receipt of the Request for Administrative Review, OT/Regulations and Rulings/Penalties Branch assigned Headquarters Case Number H307050 to review the matter. This Headquarters case number was electronically transmitted to all of the interested parties to the investigation on November 27, 2019. On December 12, 2019, Core Pipe (“alleged”) provided its Response to the Request for Administrative Review. Under the aforementioned submission, Core Pipe opined that there was substantial evidence of evasion by H & H. With all of the submissions made in a timely fashion, our administrative review decision follows.

FACTS:

Inasmuch as the facts in this case are fully set forth in the October 9th Determination/EAPA Case Number 7257, we will not repeat the entire factual history in this decision. However, briefly stated, on August 30, 2018 and September 13, 2018, CBP initiated an EAPA investigation into Prime Stainless and H & H’s import activities in response to an allegation made by Core Pipe, a domestic producer of stainless steel flanges. Core Pipe alleged that Prime Stainless and H & H were transshipping Chinese-origin flanges through the Philippines, and entering the steel flanges as a product of the Philippines in order to avoid the payment of antidumping and countervailing duties under the Orders. CBP’s investigation of H & H covered entries from August 9, 2017, one year before the receipt of Core Pipe’s allegations, through the pendency of the investigation, for merchandise entered or withdrawn for consumption or withdrawn from a warehouse for consumption. 19 CFR § 165.2. AD Case Number A-570-064 and CVD Case Number C-570-065 cover certain stainless steel flanges, whether unfinished, semi-finished, or finished (certain forged stainless steel flanges) that are forged in China. Merchandise subject to the Orders is classifiable.

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7 See October 9th Determination.
8 See Core Pipe’s Allegations ("Allegations") dated August 1, 2018.
under subheadings 7307.21.1000 and 7307.21.5000, Harmonized Tariff Schedule of the United States.

On November 28, 2018, in accordance with 19 CFR § 165.24(c), CBP issued a NOI and notified Prime Stainless and H & H of CBP’s decision that it would impose interim measures, in accordance with 19 CFR § 165.24, based on reasonable suspicion that Prime Stainless and H & H, as importers of record, had entered stainless steel flanges into the customs territory of the United States through evasion. TRLED found that the following factors supported a reasonable suspicion that covered merchandise entered into the United States through evasion by means of transshipment through the Philippines:

1) The presence of boxed Chinese-origin flanges\(^9\) at ENC facilities in the Philippines with no visible country of origin markings is consistent with the transshipment scheme alleged by Core Pipe, especially given that the U.S. market accounts for an overwhelming percentage of ENC’s shipments of stainless steel flanges;

2) ENC’s prior disclosure conceding shipment of Chinese flanges to the United States on which cash deposits were owed but not made. Also, in its prior disclosure, as a U.S. importer, regarding the importation of such Chinese-origin flanges, ENC provided evidence of the type of transshipment scheme outlined by Core Pipe in its allegations; and

3) The absence of CBP Form 28\(^10\) response information\(^11\) relating to ENC production facilities (e.g., production capacity) prevented CBP from confirming that the flanges in question were produced in the Philippines.\(^12\)

Between the period from December 21, 2018 and April 1, 2019, CBP issued and received responses on multiple Requests for Information (“RFI”) to Prime Stainless and H & H and ENC. Prime Stainless and H & H each submitted RFI responses to CBP in January 2019 and April 2019, and ENC submitted RFI responses in February 2019 and April 2019.

On February 14, 2019, Core Pipe placed a public document on the record of this case from a parallel scope/anti-circumvention proceeding at the Department of Commerce.\(^13\) Specifically, Core Pipe submitted a letter by ENC that acknowledged that ENC had failed to declare Chinese-origin flanges as subject to AD/CVD duties, that Prime Stainless and H &

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\(^9\) See ENC Site Visit Memo at 4.

\(^10\) The CBP Form 28 is the form used by CBP to request information from private parties.

\(^11\) See memo from Santh Kimchrea, Import Specialist, Base Metals Center of Excellence and Expertise (CEE), Enforcement Branch, Team 085, Office of Field Operations, to Kareen Campbell, International Trade Specialist, EAPA Investigations Branch, Enforcement Operations Division, Office of Trade, dated August 20, 2019, stating that a response to the CBP Form 28 issued on October 12, 2018 to H & H was due within 30 days of the date of the request. The CEE did not receive a response to its CBP Form 28. In January 2019, the CEE received correspondence from the EAPA Investigations Branch indicating that H & H Machine alleges having submitted its response on November 17, 2018. The CEE did not receive this alleged response and there is no electronic record of receipt. Notwithstanding the alleged response submission, the CEE has no record of a response prior to this correspondence with the EAPA Investigations Branch. The CEE notes the date of the alleged response, however, and November 17, 2018 would have been beyond the due date.

\(^12\) See ENC Site Visit Memo at 7.

\(^13\) See e-mail from Daniel B. Pickard, re: EAPA Cons. Case 7257 (Feb. 14, 2019) (attaching Letter from Squire Patton Boggs (US) LLP to Sec’y Commerce, re: Stainless Steel Flange from China and India (Feb. 12, 2019) (PUBLIC VERSION)).
H were importers of ENC’s Chinese flanges and that the Chinese flanges were improperly declared to have been “Philippine-origin” flanges.\textsuperscript{14} The letter also provided entry dates, destination ports, “Chinese” country of origin indications, and product descriptions.\textsuperscript{15}

Between May 22 and May 24, 2019, CBP conducted an onsite verification at the ENC facility located in Cavite Economic Processing Zone, Rosario, Cavite, the Philippines, in order to “determine whether the foreign manufacturer produced/manufactured sufficient quantities of stainless steel flanges to export to the United States” and to review factual information associated with “the scope of the EAPA investigation” which “included H & H and Prime Stainless entries with entry dates from August 9, 2017, through the pendency of the EAPA investigation.”\textsuperscript{16}

CBP’s investigation included an announced site visit made on November 13, 2018 and an announced visit made between May 22 and May 24, 2019, to the ENC facility located in the Philippines. During the site visits, CBP interviewed company officials concerning their operations and recordkeeping practices, toured the facilities and reviewed copies of certain records to verify the on-the-record responses. The scope of the verification of factual information included four invoices associated with imports of stainless steel flanges by H & H and Prime Stainless from ENC. Upon concluding the 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 H & H. ENC failed to provide CBP with production travel sheets, which are documents that accompany the stainless steel flanges through the production cycle, and which, according to CBP, would have helped substantiate the actual production of stainless steel flanges during the period of investigation.\textsuperscript{17} CBP was able to identify instances where imported quantities of Chinese stainless steel flanges were repackaged and exported to the United States as goods produced in the Philippines. Moreover, the verification team was able to identify significant time gaps in ENC’s production process of the stainless steel flanges.

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.

\textsuperscript{14} See id.
\textsuperscript{15} Id.
\textsuperscript{16} See U.S. Customs and Border Protection Office of Trade Verification Report, Enforce and Protect Act Consolidated Case Number 7257 (“ENC Verification Report”) (July 11, 2019).
\textsuperscript{17} See ENC Verification Report at 6-8, 10, 20.
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 FR 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. § 1675e).” 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 H & H IN ITS REQUEST FOR ADMINISTRATIVE REVIEW:

H & H states at the outset that its request for administrative review addresses several "significant procedural issues" that it believes warrant a reversal of the October 9th Determination. H & H opines that these procedural issues did not allow it due process in this investigation and that the findings of evasion were based on actions and determinations that are not in accordance with Customs laws and regulations.

A. The submission of a prior disclosure by ENC prevents TRLED from investigating an EAPA case on the matter.

H & H argues that Regulations and Rulings must address whether the submission of a prior disclosure made by an interested party to the investigation should prevent TRLED from moving forward with an EAPA case. Regulations and Rulings should not accept TRLED's contention that the information provided in ENC's prior disclosure submission be used as evidence of evasion. H & H does not believe that the fact that ENC did not "perfect" its disclosure is relevant in this case.

ENC filed its prior disclosure in October 2018. At that time, CBP was conducting its initial investigation pursuant to 19 CFR § 165, however, the parties to the investigation claim to have had no knowledge of such investigation.

H & H highlights that ENC submitted its prior disclosure stating that certain steel flanges produced at its Philippine manufacturing facility and shipped to the United States, which were originally forged in China, were mixed with other U.S. shipments containing stainless steel flanges fully made in the Philippines, and thus were subject to antidumping and countervailing duties under the corresponding AD/CVD case. As part of its prior disclosure submission, ENC included a list of entries filed by Prime Stainless and H & H, as the importers of record. H & H contends that once this disclosure was filed with CBP and ENC reported that certain flanges were of Chinese-origin, one of the elements of an EAPA case no longer existed as the material false statement made at the time of entry, i.e., the goods were not entered as subject to antidumping and countervailing duties, had been corrected by the prior disclosure submission pursuant to 19 U.S.C. § 1592. Thus, when the prior disclosure submission was filed allegedly correcting the country of origin of the products in question, CBP should not have moved forward with the case. At that time, H & H contends that there were clearly legal and procedural questions regarding whether the
EAPA investigation should have continued. H & H states that 19 U.S.C. § 1592(d)\(^{18}\) was enacted to allow an importer to advise CBP of a violation of import-related laws and regulations with protection from penalty.

However, H & H argues that TRLED has made its own interpretation of a prior disclosure by using the admission that the goods were entered improperly as evidence of evasion. H & H strongly disagrees with such an interpretation and believes that such practice and use contradict CBP’s longstanding policy of encouraging importers to submit prior disclosures pursuant to 19 U.S.C. § 1592(d)\(^{19}\) and 19 CFR § 162.74.

H & H requests that we reverse TRLED’s conclusions in its October 9\(^{th}\) Determination as a result of the prior disclosure submission filed by ENC prior to notification to H & H of the EAPA investigation. According to H & H, the EAPA investigation should have ended once the material false statement regarding the origin of the flanges was corrected by the disclosure. In addition, H & H believes that TRLED’s use of ENC’s prior disclosure as evidence of evasion is also unsupported by Customs laws and regulations, namely 19 U.S.C. § 1592(d)\(^{20}\) and 19 CFR § 162.74. H & H states that TRLED’s use of a prior disclosure submission to support a finding of evasion is in direct contradiction of the intent behind 19 U.S.C. § 1592 and 19 CFR § 162.74. H & H believes that allowing such use will have a chilling effect on the trade community and instead of encouraging companies to disclose potential violations of import laws, this will prevent companies from doing so for fear that such an admission could be used against them in a similar proceeding.

In this case, H & H states that ENC filed a prior disclosure addressing a violation of 19 U.S.C. § 1592. H & H explains that at no point was ENC notified by CBP that its prior disclosure submission was denied. Within this submission, ENC identified the entries filed by H & H and reported the parts numbers which were of Chinese origin. However, H & H states that instead of providing ENC with the benefit of the prior disclosure, TRLED used this admission to support a finding of evasion by two of ENC’s customers in the United States. In addition, H & H maintains that TRLED is mistakenly interpreting the fact that the disclosure was not “perfected” as grounds for using it to support the claim of evasion.

H & H states that although it did not file its own prior disclosure, it believes that the disclosure submission filed by ENC should have ended this investigation of H & H. H & H believes that the material statement, a required element for finding evasion, was eliminated once the prior disclosure submission was filed and the antidumping and countervailing duty declaration was made.

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\(^{18}\) This is an incorrect citation. The correct citation is 19 U.S.C. § 1592(c)(4).

\(^{19}\) Id.

\(^{20}\) Id.
B. TRLED’s refusal to accept certain documents was an arbitrary and capricious decision.

H & H states that during the investigation, as permitted under 19 CFR § 165.23, parties to the investigation were allowed to provide information and documents to TRLED related to the production and entry of the stainless steel flanges per 19 CFR § 165. H & H states that it provided documents to TRLED in response to two questionnaires issued by the office. However, H & H claims that TRLED refused to accept certain documents filed by H & H through counsel in the final submission of Written Arguments dated August 6, 2019. H & H believes that this refusal was an arbitrary and capricious decision and prevented it from the opportunity to fully defend itself in this case.

Regarding the request for documents in response to the two questionnaires, H & H states that it attempted to provide copies of ENC’s “travel sheets” which were addressed by TRLED in the ENC Verification Report. However, counsel for H & H was advised by TRLED that these documents were new factual information and could not be included. For this reason, H & H states that it resubmitted the response without copies of such documents due to concerns that the submission would be rejected in its entirety pursuant to 19 CFR § 165.23. H & H states that in the final version of the Written Arguments dated August 9, 2019 and provided to TRLED, these sections were redacted.

H & H claims that after receiving a copy of the ENC Verification Report, it was determined that H & H had copies of the missing travel sheets. Since these documents were specifically identified and referenced by TRLED in the ENC Verification Report, H & H believes that these documents are not considered new factual information. Therefore, H & H believes that it should not have been prevented from providing copies of the travel sheets referenced in the ENC Verification Report.

H & H notes that in the final determination by TRLED, TRLED states that travel sheets for flanges on certain invoices were not available during the verification visit on May 22-24, 2019. H & H further notes that TRLED stated in its October 9th Determination that “the travel sheets might have substantiated production of stainless steel flanges during the period of investigation.” H & H claims that TRLED’s refusal to accept copies of the missing travel sheets should be part of the de novo review of this case. H & H states that the travel sheets were specifically identified and referenced by TRLED in the report and were thus “part of the administrative record. As such, copies should have been allowed to be provided, despite counsel for Petitioner’s claim that they are ‘new information.’”

H & H believes that the decision issued by TRLED was arbitrary, capricious and not supported by 19 CFR § 165 and that the missing travel sheets were not “new factual information.” H & H opines that inasmuch as the travel sheets were specifically

21 H & H’s Request for Administrative Review at 17.
addressed in the ENC Verification Report issued by TRLED, they were thus part of the administrative record. H & H believes that TRLED’s refusal to accept these travel sheets was driven by the office’s need to substantiate the evasion investigation. H & H states that the travel sheets were clearly available but for TRLED’s refusal to accept them. According to H & H, had the travel sheets been accepted and reviewed by TRLED, a different determination would have resulted.

H & H argues that the travel records are not new factual information inasmuch as TRLED stated in its decision that the travel sheets could not be located. Thus, according to H & H the travel sheets themselves are clearly part of the administrative record. Therefore, H & H asserts that TRLED’s refusal to accept documents addressed in the verification report is a lack of due process because it does not afford H & H an adequate chance to defend itself.

Finally, H & H claims that ENC’s comments regarding TRLED’s findings should have been allowed to be part of the administrative record. H & H argues that it was put at a great disadvantage since TRLED’s findings were heavily redacted and it was impossible to address the findings. In addition, H & H claims that ENC was not allowed an opportunity to address or explain any of the deficiencies in the TRLED report. Therefore, TRLED’s refusal to accept ENC’s comments in connection with the ENC Verification Report and providing a heavily redacted verification report to H & H is a violation of H & H’s due process rights.

ARGUMENTS MADE BY CORE PIPE PRODUCTS, INC. IN ITS RESPONSE TO THE REQUEST FOR ADMINISTRATIVE REVIEW:

In its submission dated December 12, 2019, Core Pipe argues that CBP should affirm the October 9th Determination because it properly determined that H & H Machine (1) entered covered merchandise into the United States (2) through materially false statements and omissions, and (3) avoided the application of the requisite antidumping and countervailing duties. Core Pipe states that in its request for administrative review, H & H essentially abandons the vast majority of its arguments presented to TRLED, including its argument that H & H’s entries did not satisfy the three requisite elements for a finding of evasion.

Core Pipe states that, instead of presenting arguments asserting that H & H did not evade the order, H & H argues that CBP should reverse TRLED’s final determination due to “several significant procedural issues.” Core Pipe claims that these arguments are without merit. First, Core Pipe states that CBP should reject H & H’s claim that ENC’s prior disclosure absolves H & H from liability for importing transshipped Chinese stainless steel flanges without payment of duties. Second, Core Pipe maintains that CBP should find that TRLED properly rejected H & H’s untimely submitted travel sheets during the underlying investigation since they were submitted months after the factual information deadline had expired. Finally, Core Pipe claims that TRLED properly rejected ENC’s comments on the verification report, since they were untimely.
ANALYSIS:

A. Administrative Review and Standard of Review

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 CFR § 165.45, the Office of Trade, Regulations and Rulings, will apply a de novo standard of review under the law based solely upon the facts and circumstances on the administrative record in the proceeding. In making our determination, we reviewed: (1) the entire administrative record upon which the October 9th Determination was made by TRLED; (2) the timely and properly filed requests for review and responses; and (3) any additional information that was received pursuant to 19 CFR § 165.44. The Office of Trade, Regulations and Rulings, did not request additional written information from the parties to the investigation pursuant to 19 CFR § 165.44.

Pursuant to 19 U.S.C. § 1517(f)(1), H & H’s November 19, 2019 request for administrative review is timely.

Pursuant to 19 CFR § 165.42, Core Pipe submitted a written response, dated December 12, 2019, to H & H’s request for administrative review. The response both complies with the requirements of 19 CFR § 165.42, and is timely.

Pursuant to 19 CFR § 165.45, our administrative review of this case has been completed in a timely manner within 60 business days of the commencement of the review period.

B. Covered Merchandise under 19 U.S.C. § 1517(c)(1)

1. The Order

The U.S. Department of Commerce ("Commerce") issued antidumping and countervailing duty orders on imports of stainless steel flanges from the People’s Republic of China. See Stainless Steel Flanges from the People’s Republic of China: Antidumping Duty Order, 83 FR 37468 (August 1, 2018) and Stainless Steel Flanges from the People’s Republic of China: Countervailing Duty Order, 83 FR 26006 (June 5, 2018). Imports of Chinese stainless steel flanges subject to the AD and CVD Orders are subject to 174.73 percent countervailing duties and 257.11 percent antidumping duties.

2. The Scope

Commerce defined the scope of the Orders as follows:

The products covered by this order are certain forged stainless steel flanges, whether unfinished, semi-finished, or finished (certain forged stainless steel flanges). Certain forged stainless steel flanges are generally manufactured to, but not limited to, the material specifications of ASTM/ASME A/SA182 or comparable domestic or foreign specifications. . . .

The country of origin for certain forged stainless steel flanges, whether unfinished, semi-finished, or finished is the country where the flange was forged. Subject merchandise includes stainless steel flanges as defined above.
that have been further processed in a third country. The processing includes, but is not limited to, boring, facing, spot facing, drilling, tapering, threading, beveling, heating, or compressing, and/or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the stainless steel flanges.

Merchandise subject to the order is typically imported under headings 7307.21.1000 and 7307.21.5000 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings and ASTM specifications are provided for convenience and customs purposes, the written description of the scope is dispositive.

As stated above, the Orders cover forged stainless steel flanges, whether unfinished, semi-finished, or finished. The Orders state that the country of origin for certain forged stainless steel flanges, whether unfinished, semi-finished, or finished is the country where the flanges were forged. This includes stainless steel flanges that have been further processed in a third country, which includes, but is not limited to, boring, facing, spot facing, drilling, tapering, threading, beveling, heating, or compressing, and/or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the stainless steel flanges.

Furthermore, on January 31, 2019, pursuant to 19 CFR § 351.225, the Coalition of American Flange Producers requested a ruling by Commerce to determine whether ENC's flanges forged in either China or India and finished in the Philippines are included within the scope of the stainless steel flanges Orders. On April 1, 2019, Commerce issued its determination finding that ENC stainless steel flanges forged in China and India but finished in the Philippines are within the scope of the Orders based on a plain reading of the scope language.23

Substantial evidence on the record establishes that H & H imported stainless steel flanges described and covered by the Orders. The scope of the Orders covers flanges forged in China, regardless of various finishing operations that might be performed on such flanges in a third country before export to the United States. While the stainless steel flange may undergo further processing in a third country such as boring, facing, spot facing, drilling, tapering, threading, beveling, heating, or compressing, Commerce has determined that such further processing does not remove the merchandise from the scope of the Orders. In other words, stainless steel flanges forged in China are subject merchandise although the product may have been further processed in other countries, such as the Philippines. In this case, the

22 See Memorandum from James C. Doyle, Director, AD/CVD Operations, Office V, to James Maeder, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, dated April 1, 2019, finding that ENC's stainless steel flanges forged in China and India but finished in the Philippines are within the scope of the Orders based on the plain reading of the scope language.
23 See Stainless Steel Flanges from the People's Republic of China: Antidumping Duty Order, 83 FR 37468 (August 1, 2018); see also Stainless Steel Flange from the People's Republic of China: Countervailing Duty Order, 83 FR 26006 (June 6, 2018); see also Stainless Steel Flanges from India: Antidumping Duty Order, 83 FR 50639 (October 9, 2018); see also Stainless Steel Flanges from India: Countervailing Duty Order, 83 FR 5036 (October 5, 2018).
record establishes that H & H falsely entered Chinese forged stainless steel flanges into the United States as a product of the Philippines through ENC, its foreign supplier.

In its request for administrative review of the TRLED decision, H & H does not contest the fact that the subject merchandise falls within the scope of the Orders.

C. Evasion

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 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 CFR § 165.1; See also 19 U.S.C. § 1517(a)(5).

CBP visited the ENC manufacturing facility in the Philippines during the period from May 22-24, 2019. The Office of Trade/Regulatory Audit and Agency Advisory Services ("RAAAS") provided a non-audit service to assist in the fact finding and analysis to assist TRLED in determining whether there was reasonable suspicion or substantial evidence of AD/CVD evasion related to this case.24 RAAAS traced selected invoices to the extent that documents were available from the initial sales quote between ENC and either H & H or Prime Stainless through the records provided which included purchase orders, ENC quotations, ENC sales contracts, ENC production orders, invoices, accompanying packing lists, bills of lading, proof of payment, “Sales Slip with lot no.”, packing shipment schedules, product ship status reports, sourced material invoices and accompanying packing lists, limited Philippine import entry documentation, and handwritten daily production summary sheets. The following documents were requested, but not provided to CBP:

a. Original ENC records and other source documentation used to prepare any part of the responses;
b. Production travel sheets and perpetual inventory sheets;
c. Production records, handwritten daily summary production sheets, or production travel sheets to substantiate the production of the various heat numbers and related shipping quantities for Invoice N-1809016.

During the site visit, ENC informed the CBP Verification team that it does not have an Enterprise Resource Planning ("ERP") system to manage its production data or an accounting system that is integrated with sales or production data. Rather, all production records are tracked by hand-written documents, including production "Travel Sheets."

During an interview between ENC’s marketing manager and representatives from the CBP Verification team, the ENC manager explained that ENC had been using Chinese flanges in its manufacturing process/finishing/cleaning/drilling/etc. since 2008 when ENC was incorporated and the last stainless steel flanges were imported from China in February 2018, which includes the period under investigation.25 The marketing manager further confirmed

25 See id. at 5.
that ENC sourced stainless steel flanges from China when ENC was not able to produce the
specific flanges required to fill an order (i.e., small quantity and odd flange sizes that ENC
did not produce). Further, as noted in the ENC Verification Report, ENC failed to
provide CBP officials with the production travel sheets, which are used to help substantiate
the actual production of stainless steel flanges during the period of investigation. Likewise,
CBP officials also requested production records and handwritten daily summary production
sheets, but ENC also failed to produce these records at verification.

The ENC Verification Report also confirmed the existence of Chinese flanges in ENC’s
inventory and found that ENC had imported stainless steel flanges from China to fulfill
quantities on one of the invoices connected to H & H that the team reviewed. ENC noted
that it produced some of the flanges at its facility; however, based on interviews with ENC
company officials, CBP confirmed that ENC did not produce the same stainless steel flanges
that were being produced by a Chinese manufacturer. During an interview with the ENC
President, he stated to the ENC Verification team that a Taiwan affiliate of ENC purchased
stainless steel flanges from a Chinese manufacturer on behalf of ENC and sold them to
ENC. The verification report also indicated that Chinese-sourced flanges were significantly
congregated with other flanges on the same invoice, and were in fact commingled in
invoices pertaining to imports into the United States by H & H.

In addition, CBP identified significant time gaps in the production process for stainless steel
flanges associated with an invoice issued to H & H. For instance, ENC had received raw
materials in June 2017, started and completed production of the stainless steel flanges several
months later in November 2017, but did not fulfill the invoiced quantity to H & H until
March 2018. Based on this information, CBP identified an inconsistency in ENC’s
production process, where it had started the forging process using a different item
description and sizing than what was invoiced by its customer, but later picked up the
proofing, machining, and drilling of this same product under a corrected item description
and sizing to match the customer’s invoiced merchandise. Moreover, CBP identified
instances where ENC did not produce enough quantity of certain goods in the Philippines to
fulfill the quantity of stainless steel flanges it exported to the United States. CBP identified
raw materials that were not accompanied with mill certificates or raw material packing lists
that would have substantiated the supplier heat number and description of materials. In
certain instances, CBP found production records that identified the production process had
started prior to receipt of the raw materials.

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. CBP simply has to
establish that entries were made, of goods subject to an antidumping or countervailing duty

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26 See id. at 5.
27 See id. at 6.
28 See id. at 20.
29 See id at 21.
30 See id at 10-16.
31 See id at 15.
32 See id. at 13-16.
33 See id. at 15-16.
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 it material and that results in any cash deposit or another security or any amount of applicable antidumping duties or countervailing 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 or countervailing duty orders are entered into the United States without reference to the applicable AD/CVD order in the entry documents, since that constitutes a material omission.

We find that the definition of evasion under the regulations and statute has been met based upon substantial evidence in the record. The record establishes clear instances in which H & H entered the stainless steel flanges from China as a product of the Philippines on entry Type 01 consumption entries, instead of entry Type 03 AD/CVD so that the entries would not be subject to the AD/CVD duties. Such entries thus contained material false information. H & H omitted Case Nos. A-570-064 and C-570-065 from the entry summary documentation, which would have identified the imported merchandise as subject to the Orders and required the payment of the applicable AD/CVD duties. These false statements and omissions were material because they resulted in the non-payment, i.e., evasion, of applicable AD and CVD cash deposits. Therefore, we conclude that there is substantial record evidence that covered merchandise, that is stainless steel flanges from China, were entered by H & H into the United States by means of evasion, as defined in 19 U.S.C. § 1517(a)(5)(A). In fact, in its request for administrative review of the TRLED decision, H & H does not present any arguments to contest TRLED’s conclusion that H & H avoided the payment of antidumping and countervailing duties by falsely importing Chinese stainless steel flanges into the United States as a product of the Philippines, through ENC, its intermediate supplier in the Philippines. Therefore, we conclude that TRLED properly found evasion.

1. THE SUBMISSION OF A PRIOR DISCLOSURE BY AN INTERESTED PARTY DOES NOT PREVENT CBP FROM MAKING A FINDING OF EVASION IN AN EAPA CASE

H & H argues that ENC’s submission of a prior disclosure after CBP had already initiated an investigation “should prevent TRLED from moving forward with an EAPA case.” According to H & H, “19 U.S.C. 1592(d)” was enacted to allow an importer to advise CBP of a violation of import related laws and regulations with protection from a penalty. We are of the position that H & H’s arguments are without merit.

A prior disclosure may be submitted by a party pursuant to 19 U.S.C. § 1592(c)(4) and 19 CFR § 162.74, to disclose a violation of 19 U.S.C. § 1592(a).

34 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)).
35 See H & H Request for Administrative Review at 8.
37 See H & H Request for Administrative Review at 8.
19 U.S.C. § 1592(c)(4) states as follows:

(4) Prior disclosure

If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed . . .

(B) If such violation resulted from negligence or gross negligence, the interest . . . on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of disclosure. . .

19 CFR § 162.74 states, in part, as follows:

(a) In general—(1) a prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in paragraph (b) of this section) of 19 U.S.C. 1592 or 19 U.S.C. 1593a, either orally or in writing to a Customs officer before, or without knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties, taxes and fees or actual loss of revenue in accordance with paragraph (c) of this section.

In other words, the prior disclosure provisions contained in 19 U.S.C. § 1592(c)(4) and 19 CFR § 162.74 provide reduced penalty treatment to a person who notifies CBP of the circumstances of a violation of the customs laws and regulations, before CBP or U.S. Immigration and Customs Enforcement ("ICE") discovers the possible violation and/or notifies the party of the discovery of the possible violation. Notably, H & H did not make a prior disclosure; rather, ENC made a prior disclosure. Moreover, the submission of a prior disclosure offers reduced penalty treatment only in circumstances where a violation of 19 U.S.C. § 1592(a) has occurred.

There is no prior disclosure provision in the EAPA statute under 19 U.S.C. § 1517. This is due, in part, to the fact that the EAPA statute does not provide for the imposition of penalties against a party who has entered covered merchandise subject to AD/CVD into the United States by means of evasion. Rather, under the EAPA statute, CBP is able to take steps to protect the revenue and preserve entries for the collection of AD and CVD assessed duties. Therefore, prior disclosure benefits for evasion of antidumping and/or countervailing duties do not exist at all under the EAPA statute. 19 U.S.C. § 1592 and 19 U.S.C. § 1517 are separate and distinct statutes with different requirements. In fact, the EAPA regulations and statute specifically provide that the EAPA statute does not preclude CBP from initiating additional investigations or enforcement actions under any other relevant laws, including 19 U.S.C. § 1592 and 19 U.S.C. § 1593a. Accordingly, the fact that

38 See https://www.cbp.gov/sites/default/files/assets/documents/2017-Oct/Prior%20Disclosure%20FINAL.pdf
30 19 CFR § 165.47.
a prior disclosure was submitted by ENC for a violation of 19 U.S.C. § 1592 has no bearing on whether or not H & H entered covered merchandise into the customs territory of the United States by means of evasion pursuant to 19 U.S.C. § 1517.

H & H opines that once the prior disclosure was filed with CBP and ENC admitted that the stainless steel flanges were not entered as subject to AD or CVD duties, “one of the elements of an EAPA case no longer existed,” namely, that there was no material false statement, since the prior disclosure “corrected” the country of origin of the products in question.40 This interpretation of the prior disclosure statute as it relates to a determination of evasion is misplaced. In order to have a valid prior disclosure pursuant to 19 U.S.C. § 1592(c)(4), the disclosing party must disclose the false statement, act or omission and meet all of the other prior disclosure requirements. Contrary to H & H’s contention, when a party submits a prior disclosure of a violation of 19 U.S.C. § 1592, this does not “correct” the false statement, act or omission. Rather, in a prior disclosure, a party is admitting to the commission of a false statement, act or omission, in violation of 19 U.S.C. § 1592. The reason for submitting a prior disclosure is to try to reduce any penalty liability under 19 U.S.C. § 1592 which may apply to the party making the disclosure. Even assuming that the section 1592 statute were applicable in the context of section 1517 evasion cases, which it is not, the submission of a prior disclosure of a violation of 19 U.S.C. § 1592 does not negate the existence of a material false statement, act or omission in an EAPA case. Therefore, H & H’s claim that there was no basis for the EAPA investigation in this case because the prior disclosure “corrected” the material false statement regarding the applicability of antidumping and countervailing duties and the origin of the flanges, is simply without merit. In sum, the fact that ENC, a totally unrelated company to H & H, made a prior disclosure for a violation of 19 U.S.C. § 1592, does not absolve H & H of a finding of evasion under the EAPA statute.

Furthermore, contrary to H & H’s claim, TLRED did not base its decision of evasion on the prior disclosure submission from ENC. Rather, the decision of evasion was based on the substantial evidence in the record as set forth above. However, the prior disclosure evidence is cumulative to the substantial evidence gathered by TLRED and only serves to buttress the finding of evasion as to H & H. We also note that CBP had already commenced its investigation into H & H in response to allegations received from Core Pipe several months before the submission of the prior disclosure by ENC.

The fact that ENC submitted a prior disclosure for a violation of 19 U.S.C. § 1592 does not prevent TLRED from initiating an investigation into evasion of the antidumping and countervailing duty orders on stainless steel flanges from China as to another party.

2. TLRED’s REFUSAL TO ACCEPT CERTAIN DOCUMENTS AND REJECTION OF ENC’S COMMENTS ON THE VERIFICATION REPORT DOES NOT CHANGE THE FINDING OF EVASION

H & H states that TLRED’s refusal to accept copies of the missing “travel sheets” is an arbitrary and capricious decision which is a violation of H & H’s due process rights in this investigation. H & H argues that these documents should have been accepted as they were

40 See H & H Request for Administrative Review at 8.
part of the administrative record and should have been included when TRLED was
determining whether there was substantial evidence of evasion.

We find that the record in this case supports a conclusion that H & H entered covered
merchandise into the commerce of the United States by means of evasion, inasmuch as H &
H submitted material and false information and documents that resulted in the failure to pay
antidumping and/or countervailing duties applicable to covered merchandise. Assuming, for
the sake of argument that additional information perhaps would have shown that some of
the entries may not have been entered falsely into the commerce of the United States, such
facts would be immaterial to our conclusion. H & H has also raised a number of procedural
complaints that do not alter our conclusion. The fact that some entries may have been
made correctly does not change the fact that some were false, as clearly established at the
verification. No procedural flaw alleged by H & H would alter the substantial evidence
gathered demonstrating false entries.

We also note that the consequence of a finding of evasion is commensurate with the
underlying act. In other words, when we find evasion, we find that AD or CVD duties on
covered merchandise were not paid. The consequence in an EAPA case is that CBP
requires liquidation of entries of relevant merchandise to remain extended/suspended or to
be extended/suspended, and for deposits of AD/CVD duties to be made.

H & H claims that the travel sheets may have supported the fact of production. Our role is
to decide, based on the record, whether evasion has occurred. In light of the admission by
ENC that it had shipped Chinese-origin flanges subject to AD/CVD duties but not declared
the flanges as such, that H & H was an importer of record of those ENC flanges, and that
the Chinese flanges were improperly declared to have been “Philippine-origin” flanges, the
inclusion of the travel sheets would not alter our conclusion that H & H had committed acts
of evasion. The record supports that false entries were made. Even if it were shown that
fewer entries contained material omissions, this does not mean that evasion did not occur.
The fact that additional information may have shown some production and may have
proven that some entries were not false, does not change the fact that there were false
entries, especially given that ENC has admitted as much. Once evasion is found, we
suspend the liquidation of each unliquidated entry of covered merchandise and require the
posting of a cash deposit with respect to those entries, or any additional measures that CBP
deems necessary to protect the revenue. Commerce will sort out the final facts, and if some
entries contained non-subject merchandise, the assessment rates determined by Commerce
will take that into account. Therefore, since the additional travel sheets would not alter our
conclusion, we do not address herein H&H’s claims regarding alleged error by TRLED in
rejecting the travel sheets, or its claims that the travel sheets are properly part of the record.

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 H & H imported stainless steel

Page 18 of 19
flanges 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 CFR § 165.46(a), this final administrative determination is subject to judicial review pursuant to section 421 of the EAPA.

Sincerely,

_Coraly Schreiber for: Brian Barulich_

CORALY SCHREIBER

Brian T. Barulich
Acting Chief, Penalties Branch
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Approved by:

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