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U.S. Customs and Border Protection

November 27, 2023

PUBLIC VERSION

OT:RR:BSTC:PEN H334217 BEK

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Re: Enforce and Protect Act ("EAPA") Consolidated Case Number 7730; *Certain Steel Grating from the People's Republic of China: Antidumping Duty Order*, 75 Fed. Reg. 43,143 (Dep't of Commerce July 23, 2010) and *Certain Steel Grating from the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 43,144 (Dep't of Commerce July 23, 2010); Manufacturing Network, Inc.; 19 U.S.C. § 1517

Dear Counsel:

This is in response to the request for *de novo* administrative review of a determination of evasion dated July 21, 2023, made by the Trade Remedy Law Enforcement Directorate ("TRLED"), Office of Trade ("OT"), U.S. Customs and Border Protection ("CBP"), pursuant to 19 U.S.C. § 1517(c), EAPA Consolidated Case Number 7730 ("July 21 Determination").[1] The request for review, dated August 31, 2023, was submitted to CBP, OT, Regulations and Rulings ("RR"), by Faegre Drinker Biddle & Reath LLP on behalf of Manufacturing Network, Inc. ("MNI" or "Importer"), pursuant to 19 U.S.C. § 1517(f) and 19 C.F.R. § 165.41(a). The other importer involved in this EAPA Case, Double L Group, LLC ("Double L"), did not submit a request for

[1] *See* EAPA Consolidated Investigation 7730: Notice of Determination as to Evasion (Public Version), dated July 21, 2023, *available at* https://www.cbp.gov/document/publications/eapa-con-case-7730-double-l-group-llc-and-manufacturing-network (last accessed Nov. 27, 2023).

review. Hog Slat, Inc. ("Hog Slat" or "Alleger") filed a response to the request for review on September 20, 2023.

I. Background

Based on our review of the administrative record, we agree with the recitation of facts as set forth by the July 21 Determination. As such, we will not repeat the entire factual history herein.

On April 18, 2022, Hog Slat filed EAPA allegations against MNI and Double L (collectively, the "Importers"). CBP acknowledged receipt of the allegations on June 29, 2022. On July 21, 2022, TRLED initiated a formal investigation under Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA"), in response to the allegations of evasion.[2]

Hog Slat alleged that the Importers were importing certain steel grating (specifically, galvanized steel tri-bar flooring) into the United States from the People's Republic of China ("China") through material false statements by declaring the products as non-covered merchandise on entry documentation to evade the payment of antidumping and countervailing duties, as required under Case Nos. A-570-947 and C-570-948.[3]

The allegations of evasion pertained to the antidumping and countervailing duty orders (the "AD/CVD Orders") issued by the U.S. Department of Commerce ("Commerce") on imports of certain steel grating from China.[4] Commerce defined the scope of the relevant AD/CVD Orders as follows:

> The products covered by this order are certain steel grating, consisting of two or more pieces of steel, including load-bearing pieces and cross pieces, joined by any assembly process, regardless of: (1) size or shape; (2) method of manufacture; (3) metallurgy (carbon, alloy, or stainless); (4) the profile of the bars; and (5) whether or not they are galvanized, painted, coated, clad or plated. Steel grating is also commonly referred to as "bar grating," although the components may consist of steel other than bars, such as hot–rolled sheet, plate, or wire rod.
>
> The scope of this order excludes expanded metal grating, which is comprised of a single piece or coil of sheet or thin plate steel that has been slit and expanded and does not involve welding or joining of multiple pieces of steel. The scope of this order also excludes plank type safety grating which is comprised of a single piece or coil of sheet or thin plate steel, typically in thickness of 10 to 18 gauge, that has been pierced and cold formed, and does not involve welding or joining of multiple pieces of steel.

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[2] *See* Notice of Initiation of Investigation and Interim Measures: Consolidated EAPA Case 7730 (Oct. 26, 2022) (Public Version) ("Notice of Initiation"), *available at* https://www.cbp.gov/document/publications/eapa-consolidated-case-7730-double-l-group-llc-and-manufacturing-network-inc (last accessed Nov. 27, 2023).

[3] *See* Notice of Initiation (Public Version).

[4] *See Certain Steel Grating from the People's Republic of China: Antidumping Duty Order*, 75 Fed. Reg. 43,143 (Dep't of Commerce July 23, 2010) ("AD Order"); *Certain Steel Grating from the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 43,144 (Dep't of Commerce July 23, 2010) ("CVD Order").

> Certain steel grating that is the subject of this order is currently classifiable in the Harmonized Tariff Schedule of the United States ("HTSUS") under subheading 7308.90.7000. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

On October 26, 2022, in accordance with 19 C.F.R. § 165.24, CBP issued a Notice of Initiation of the EAPA investigation to all parties to the investigation, stating that the investigation had begun on July 21, 2022, and notifying the parties of CBP's decision to take interim measures based upon reasonable suspicion that the Importers entered covered merchandise into the customs territory of the United States through evasion.[5] The entries subject to the investigation are all entries of covered merchandise entered from June 29, 2021, through the pendency of the investigation (herein, referred to as the "period of investigation" or "POI").[6]

On July 21, 2023, TRLED found there was substantial evidence that the tri-bar flooring imported by the Importers was of Chinese origin and described by the scope of the AD/CVD Orders. The tri-bar flooring was entered into the customs territory of the United States on type "01" consumption entries.[7] As a result, no cash deposits or AD/CVD were applied to the merchandise.[8] TRLED applied adverse inferences to MNI as to specific entries because MNI failed to provide necessary information that TRLED had solicited via multiple Requests for Information ("RFIs"). MNI's failure to cooperate precluded TRLED "from performing the necessary analysis of the requested documents to determine whether the entries in question contain covered merchandise."[9] As a result, the record contained gaps that required TRLED to select from facts otherwise available on the record to determine that these entries contained covered merchandise.[10]

On August 31, 2023, MNI filed a timely Request for Administrative Review. On September 5, 2023, RR sent an email to all parties to the investigation, notifying them of the commencement of the administrative review and the assignment of RR case number H334217. On September 20, 2023, Hog Slat filed a timely Response to the Request for Administrative Review, presenting its counterarguments.

II. Law & Analysis

Section 517 of the Tariff Act of 1930 ("the Tariff Act"), as amended (19 U.S.C. § 1517), provides, "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."[11] The term evasion is defined as:

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[5] *See* Notice of Initiation (Public Version).
[6] *See* 19 C.F.R. § 165.2.
[7] Imports that are covered by AD/CVD orders are required to be entered on type "03" entries; entries declared as type "01" are not subject to payment of AD/CVD. *See* CBP Entry Summary Form 7501 and Instructions and the ACE Entry Summary Business Rules and Procedure Document*, available at* https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501 (last accessed Nov. 27, 2023).
[8] *See* July 21 Determination (Public Version).
[9] *Id.* at 16.
[10] *See id.*
[11] 19 U.S.C. § 1517(c)(1).

> 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.[12]

Examples of evasion include, but are not limited to, misrepresentation of the merchandise's true country of origin (*e.g.*, through false country of origin markings on the product itself or false sales), false or incorrect shipping and entry documentation, or misreporting of the merchandise's physical characteristics.[13]

Additionally, covered merchandise is defined as "merchandise that is subject to a CVD order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. § 1671e), and/or an AD order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. § 1673e)."[14] While "substantial evidence" is not defined by statute, the "substantial evidence" standard has been reviewed by the courts in relation to determinations by other agencies. "Substantial evidence requires more than a mere scintilla but is satisfied by something less than the weight of the evidence."[15]

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. In doing so, CBP may apply adverse inferences where they are warranted.[16] RR's determination as to evasion must be supported by substantial evidence.

A. MNI's Arguments

MNI requests that we reverse the July 21 Determination, arguing that its entries containing tri-bar flooring are not subject to the AD/CVD Orders and that TRLED's application of adverse inferences was not in accordance with law.

MNI argues that it could not have made a false statement with respect to the entries of tri-bar flooring for three reasons. First, MNI avers that CBP knew about MNI's imports of tri-bar flooring but never informed MNI that such merchandise was subject to the AD/CVD Orders.[17] Specifically, MNI refers to a [date] CBP CF-28 request for information involving a particular entry, [entry no.] made on [dates] that pre-dates the POI.[18] In

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[12] 19 U.S.C. § 1517(a)(5); *see also* 19 C.F.R. § 165.1.
[13] *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations*, 81 Fed. Reg. 56,477, 56,478 (Aug. 22, 2016).
[14] 19 C.F.R. § 165.1.
[15] *See Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted).
[16] *See* 19 C.F.R. § 165.6.
[17] MNI's Administrative Review Request (Aug. 31, 2023) (Public Version), at 4–9.
[18] *See id.* at 4. The CF-28 is a form used by CBP to request information from an importer, and is used by CBP in a variety of contexts. *See also* CBP Request for Information CF-28 Form, *available at*

response to this CF-28 request, MNI provided pictures of tri-bar flooring and stated that the flooring did not "fall under the steel grating HTSUS number."[19] MNI argues that this response "put CBP on notice that it believed that its tri-bar flooring does not constitute 'steel grating,'" and thus was not subject to the AD/CVD Orders.[20] Second, MNI argues that because it received no further inquiries from CBP regarding the tri-bar flooring importations at that time, MNI had no indication that future importations of tri-bar flooring would be subject to the AD/CVD Orders.[21] As a result, MNI claims that it lacked the intent to evade the AD/CVD Orders as to its imports entered during the POI on type "01" consumption entries.[22] Third, MNI maintains that it reasonably relied on CBP's lack of follow-up regarding the earlier CF-28 response when declaring the entries made during the POI as not subject to the AD/CVD Orders.[23] Thus, absent the intent to evade the AD/CVD Orders, MNI argues that it could not have made material and false statements when it imported merchandise during the POI on type "01" consumption entries, citing to *Diamond Tools Technology LLC v. United States*, 609 F. Supp. 3d 1378 (Ct. Int'l Trade 2022), in support of this premise.[24]

Additionally, MNI claims that the summary of the record in the July 21 Determination is inaccurate, that it cooperated with TRLED's RFIs, and that the application of adverse inferences is not in accordance with law.[25] To support these assertions, MNI cites to *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003), and argues that the "best of its ability standard" requires CBP to consider MNI's actions and assess the extent of MNI's "abilities, efforts, and cooperation in responding to {. . .} requests for information."[26] MNI focuses on the wording of the RFIs, which MNI describes as imprecise because the RFIs requested entry documents and information for only those entries containing covered merchandise, until the third supplemental RFI, when TRLED adjusted the language.[27] MNI also asserts it had been clear that tri-bar floors are separately indicated on invoices, and that invoices mentioning "pens," "gates," and "stalls" do not include tri-bar flooring.[28]

Furthermore, MNI disagrees with TRLED's application of adverse inferences for five specific entries for which MNI claims to have made a clerical error and inadvertently provided duplicate documentation.[29] MNI claims that TRLED had the information related to those five entries through earlier RFI responses, namely Exhibit 2 of the Supplemental RFI Response and Exhibit 2 of the Second Supplemental RFI Response.[30] In the alternative, MNI argues that it should

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https://www.cbp.gov/sites/default/files/assets/documents/2019-Apr/CBP%20Form%2028.pdf (last accessed Nov. 27, 2023).

[19] *See id.* at 5.

[20] *Id.*

[21] *See id.*

[22] *See id.* at 7, 9.

[23] *See id.* at 7–9.

[24] *See id.*

[25] *See generally id.* at 9–20.

[26] *Id.* at 11 (quoting *Nippon Steel Corp.*, 337 F.3d at 1382) (internal quotation marks omitted)).

[27] *See* MNI's Administrative Review Request (Public Version), at 11–12, 14.

[28] *Id.* at 15–16.

[29] *See id.* at 20–24.

[30] *See id.* at 21–22.

have been afforded an opportunity to correct this clerical error, and states that RR can now fix this issue by requesting the documentation pursuant to 19 C.F.R. § 165.44.[31]

Finally, MNI argues that the broad application of interim measures is unreasonably punitive and that interim measures should only apply to those entries actually containing covered merchandise, not entries to which adverse inferences have been applied to find that they contain covered merchandise.[32]

As such, MNI requests that RR reverse the July 21 Determination's finding of evasion of the AD/CVD Orders.

B. Hog Slat's Arguments

Hog Slat requests that we affirm the July 21 Determination, arguing that there is substantial evidence of evasion of the AD/CVD Orders.

Hog Slat argues that CBP's inaction regarding MNI's prior CF-28 response that pre-dates this EAPA investigation does not constitute notice of CBP's purported position that MNI's imports during the POI would not be considered covered merchandise.[33] Hog Slat also maintains that the EAPA statute does not include an intent requirement to find substantial evidence of evasion, and that this case is distinguishable from *Diamond Tools*.[34]

Hog Slat further claims that the application of adverse inferences against MNI was proper, deferring to CBP as the objective decision-maker that is best positioned to assess MNI's conduct and level of cooperation.[35] Hog Slat also argues that CBP is not required to provide MNI with another opportunity to submit additional information during the *de novo* review, and that doing so would "effectively water down the result of applying an adverse inference during the investigation, and condone MNI's chronic lack of cooperation in the proceeding."[36] Finally, Hog Slat takes the position that the remedies imposed by CBP are not unlawfully punitive or an abuse of discretion because the adverse inferences were lawfully applied to those entries.[37]

As such, Hog Slat requests that RR affirm the July 21 Determination's finding of evasion of the AD/CVD Orders.

III. Administrative Review Analysis

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 C.F.R. § 165.45, upon request for administrative review, RR will apply a *de novo* standard of review, based solely upon the facts and circumstances on the administrative record in the proceeding. In making our determination, we reviewed: (1) the

[31] *See id.* at 22–24.
[32] *See id.* at 24–26.
[33] *See* Hog Slat's Response (Public Document) (Sept. 20, 2023), at 4–5.
[34] *See id.* at 5–8.
[35] *See id.* at 8.
[36] *Id.* at 10–11.
[37] *See id.* at 12–13.

administrative record upon which the July 21 Determination was made, as provided to RR by TRLED; and (2) the timely and properly filed request for review and response.

The record demonstrates that MNI entered tri-bar flooring on type "01" entries and, therefore, no cash deposits or antidumping or countervailing duties were applied to the merchandise.[38] The record also demonstrates that such entry was incorrect and false because the tri-bar flooring entered by MNI was covered by the scope of the Orders and thus, should have been entered on type "03" entries. The bases for our conclusions are discussed below.

In its response to the CF-28 request for information issued during this EAPA case, and dated September 28, 2022, MNI described its imports as "Tristep Creep Flooring," which consists of "steel rods {that} are welded together, then legs and trusses are welded onto the steel rod configuration."[39] MNI explained that the Tristep Creep Flooring contains a truss system and steel decking that are "inextricably linked via welding."[40] MNI also stated that it "imports the Tristep Creep Floors from certain Chinese producers, to be used in conjunction with swine enclosures."[41] As discussed below, these descriptions render the merchandise subject to the AD/CVD Orders; thus, the tri-bar flooring imported by MNI constitutes covered merchandise.

First, MNI's description of this merchandise matches the plain scope language of the AD/CVD Orders, which covers certain steel grating — such as tri-bar flooring — "consisting of two or more pieces of steel, including load-bearing pieces and cross pieces, joined by any assembly process."

Additionally, in a May 11, 2021 scope ruling related to these same Orders, which ruling was issued prior to the start of the POI herein, Commerce determined that tri-bar flooring is covered by the scope of the Orders, finding that:

> {t}he physical characteristics of the steel decking in the tribar truss floor is consistent with the characteristics of subject steel grating because it is composed of parallel galvanized cut-to-length steel wire rods or round bars (tribar) connected by welded crossbars, while subject steel grating is described as "two or more pieces of steel, including load-bearing pieces and cross pieces, joined by any assembly process{.}" Moreover, the tribar truss flooring, including the decking, is "hot-dip galvanized.{"} This is consistent with the description of subject merchandise in the scope (*i.e.*, steel grating is made of pieces of steel "whether or not they are galvanized").[42]

Indeed, MNI has acknowledged that its tri-bar flooring is the same product that CBP investigated in EAPA Case No. 7474. That case involved the same AD/CVD Orders as herein, and the importers in EAPA Case No. 7474 independently sought a scope ruling from Commerce, after CBP

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[38] *See* MNI's RFI Response (Business Confidential Version), Ex. IV-6. *See also* MNI's Supplemental RFI Response (Business Confidential Version), Ex. 1.
[39] *See* MNI's CF-28 Response (Sept. 28, 2022) (Public Version), at 2–3.
[40] *Id.* at 2 n.1.
[41] *Id.* at 3; *see also id.* at 4.
[42] *See Certain Steel Grating from the People's Republic of China: Scope Ruling on Pig Farrowing Crates and Farrowing Flooring Systems* (Dep't of Commerce May 11, 2021), at 9) as cited in Allegation of AD/CVD Evasion under the Enforce and Protect Act of 2015 (Apr. 18, 2022) (Public Version) ("Hog Slat's Allegation"), at Attach. 5.

determined that a covered merchandise referral was unnecessary based upon a review of the plain scope language in reference to the merchandise (*i.e.,* tri-bar flooring) therein at issue.[43]

In that May 11, 2021 scope ruling, Commerce also determined that the inclusion of a support system, or "trusses" of the tri-bar flooring, did not remove it from the scope of the AD/CVD Orders, even when packaged with non-subject merchandise.[44] In this regard, Commerce found that:

> {t}he fact that the tribar truss floor has additional components (the trusses), besides the steel grating, does not mean the steel decking used in the tribar truss floor is now a new product outside the scope of the orders. That is because the essential characteristics of the steel decking are largely unchanged by the additional features.[45]

Therefore, even though Tristep Creep Flooring contained a truss system that was welded to the steel decking, the merchandise is covered by the scope of the AD/CVD Orders. Likewise, the tri-bar flooring imported by MNI remains merchandise covered by the scope of the AD/CVD Orders regardless of whether it is entered with other parts used for farrowing crates, such as the gating.[46]

Additionally, MNI's RFI responses further demonstrate that the physical characteristics of the imported tri-bar flooring are consistent with steel grating covered by the Orders. Specifically, the photographs accompanying the entry documents for the entries of tri-bar flooring — which MNI itself describes as "covered merchandise" in its RFI responses — show parallel galvanized round bars connected by welded crossbars, consistent with certain steel grating covered by the Orders and described as "two or more pieces of steel, including load-bearing pieces and cross pieces, joined by any assembly process," *i.e.*, in-scope merchandise.[47]

Finally, the documentation included in MNI's RFI responses shows that the entered tri-bar flooring was produced in China.[48] MNI's CF-28 response in this case also states that it "imports the Tristep Creep Floors from certain Chinese producers, to be used in conjunction with swine enclosures."[49]

In sum, the record evidence shows that MNI imported Chinese-origin tri-bar flooring, and that such flooring is subject to the AD/CVD Orders. Therefore, we conclude that there is

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[43] *See* July 21 Determination (Public Version), at 7.
[44] *See generally Certain Steel Grating from the People's Republic of China: Scope Ruling on Pig Farrowing Crates and Farrowing Flooring Systems* (Dep't of Commerce May 11, 2021) as cited in Allegation of AD/CVD Evasion under the Enforce and Protect Act of 2015 (Apr. 18, 2022) (Public Version) ("Hog Slat's Allegation"), at Attach. 5.
[45] *Id.* at 10.
[46] *See* MNI's RFI Response (Business Confidential Version), at Ex. IV-6. *See also* MNI's Supplemental RI Response (Business Confidential Version), at Ex. 1 (showing that MNI entered tri-bar flooring on entries that contained other parts for farrowing crates).
[47] *See, e.g.*, MNI's RFI Response (Business Confidential Version), at Ex. IV-6 at 802–804; MNI's Supplemental RFI Response (Business Confidential Version), at Ex. 1 at 162–164. *See also* 75 Fed. Reg. at 43,143 (providing scope language); 75 Fed. Reg. at 43,144 (same).
[48] *See* MNI's RFI Response (Business Confidential Version), at Ex. IV-6; MNI's Supplemental RFI Response (Business Confidential Version), at Ex. 1.
[49] *Id.* at 3; *see also id.* at 4.

substantial evidence that MNI's imports of tri-bar flooring constitute covered merchandise under the AD/CVD Orders.

Furthermore, MNI entered covered merchandise by means of material and false documents or electronically transmitted data or information, written statements, or material omissions that resulted in AD/CVD cash deposits not being applied with respect to the merchandise. The merchandise was incorrectly entered on type "01" consumption entries instead of on type "03" AD/CVD entries. These constitute false statements that are also material because the applicable antidumping and countervailing duties were not paid. MNI also omitted Case Nos. A-570-947 and C-570-948 from the entry summary documentation. The omission of Case Nos. A-570-947 and C-570-948 from the entry summary documentation is material because it interfered with the government's ability to accurately track imports of steel grating, to collect the applicable antidumping and countervailing duties due, and to determine and assess future antidumping and countervailing duties. Consequently, MNI entered the merchandise through evasion of the AD/CVD Orders.

Despite this clear and substantial evidence that MNI imported merchandise that comes within the scope of the Orders, but failed to enter the goods as subject merchandise, without the required deposit or payment of duties, MNI argues that a finding of evasion is unwarranted. MNI's arguments lack merit, as discussed below.

First, MNI argues that, when it declared imports of tri-bar flooring on type "01" consumption entries during the POI, it "reasonably relied on CBP's decision not to challenge" MNI's classification of [merchandise] under subheading [number], HTSUS, on MNI's [date] response to the [date] CF-28 issued by CBP. This entry pre-dates the POI by almost two years, deals with an entry not at issue in this EAPA investigation,[50] and the issue at hand for that entry appeared to be tariff classification (the Orders are nowhere mentioned in the documentation submitted by MNI). Nevertheless, MNI concludes that, pursuant to *Diamond Tools*, entries made during the POI cannot have been made by false statement.[51] MNI's arguments on this point fail for multiple reasons.

As an initial matter, MNI improperly conflates the issue of HTSUS classification with the issue of scope in an AD/CVD context. The two issues are not the same, as has been repeatedly affirmed by the courts,[52] and as Commerce states in virtually every AD/CVD order, including the Orders herein.[53] Whether CBP challenged MNI's tariff classification or not does not matter, since the classification is not determinative for scope purposes. To rely on MNI's belief that the tri-bar flooring did not "fall under the steel grating HTSUS number" to conclude that the flooring was not covered merchandise under the Orders contravenes the dispositive written description of the scope

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[50] MNI's Administrative Review Request (Public Version), at 9.

[51] *See id.*

[52] *See, e.g.*, *Wirth Ltd. v. United States*, 5 F. Supp. 2d 968, 977–78 (Ct. Int'l Trade 1998) ("The inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the antidumping or countervailing duty orders but classified under an HTSUS heading not listed in the petition." (emphases in original)).

[53] *See* Orders, quoted above: "Certain steel grating that is the subject of this order is currently classifiable in the Harmonized Tariff Schedule of the United States ("HTSUS") under subheading 7308.90.7000. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive."

of the Orders. The Orders clearly state that the HTSUS numbers are not controlling for purposes of what is covered by the Orders.[54]

Furthermore, in contrast to the situation in *Diamond Tools*, where the importer relied on a final scope ruling issued by Commerce, here, CBP did not issue a ruling or other decision with respect to MNI's earlier CF-28 response. Per CBP's regulations, a "'ruling' is a written statement issued by the Headquarters Office or the appropriate office of Customs as provided in this part that interprets and applies the provisions of the Customs and related laws to a specific set of facts."[55] A supposed lack of follow-up by CBP to an importer's response to a CF-28 request for information, where no written statement was issued by CBP, does not constitute such a "ruling." Moreover, as MNI or any importer is charged with knowing, CBP could not and cannot issue a ruling on the scope of an AD/CVD order – that is exclusively the province of Commerce. Only Commerce can definitively issue an opinion on whether merchandise is outside the scope of an AD/CVD order.[56] Hence, even if CBP's inaction could somehow be interpreted as a decision, MNI knew or should have known that such a decision by CBP could not be relied upon as to the scope of an AD/CVD order.

Additionally, the earlier CF-28 request pertains only to the one entry identified on the form, which occurred prior to the POI and is not at issue here. Moreover, that entry predates Commerce's May 11, 2021 scope ruling. Thus, to the extent that CBP's alleged inaction had any influence on MNI's entry type reporting, once Commerce ruled, the reliance was even more unjustified. In sum, MNI's reliance on CBP's "inaction" to conclude that entries of tri-bar flooring during the POI were not covered merchandise is entirely misplaced.

Second, MNI erroneously argues that "according to the {U.S. Court of International Trade ("CIT")}, the EAPA statute requires at least some indication of intent to evade,"[57] citing to *Diamond Tools* in support of this assertion.[58] This is an incorrect characterization. The EAPA statute requires only that there be a material false statement, document or omission, which led to the non-payment or underpayment of antidumping and/or countervailing duties. Indeed, evasion:

> {r}efers 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

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[54] *See* Orders, quoted above: "Certain steel grating that is the subject of this order is currently classifiable in the Harmonized Tariff Schedule of the United States ("HTSUS") under subheading 7308.90.7000. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive."

[55] 19 C.F.R. § 177.1(d)(2).

[56] *See, e.g.*, *Ericsson GE Mobile Communs. v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995) ("As the agency charged with administering the antidumping duty program, the Commerce Department is responsible for interpreting the antidumping duty order and determining whether certain products fall within the scope of the order as interpreted."); *Wirth Ltd.*, 5 F. Supp. 2d at 976–77 (holding that Commerce's description of the scope of the covered merchandise is binding and is not limited to the HTSUS headings referenced in the scope language); *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 803 (Fed. Cir. 2020) ("As this court has long noted, only Commerce can interpret and clarify the scope of an antidumping duty order.") (citing *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1300 (Fed. Cir. 2013) ("In issuing scope rulings, Commerce . . . enjoys substantial freedom to interpret and clarify its antidumping orders.'") (internal quotations omitted)).

[57] MNI's Administrative Review Request (Public Version), at 6 (internal quotation marks omitted).

[58] *See id.* at 7.

> or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.[59]

"Culpability" does not appear in this definition. Moreover, contrary to MNI's assertion, the CIT has recently held that "EAPA read as a whole supports CBP's strict liability interpretation of the definition of evasion."[60]

Further, the facts here closely align with those present in *Ikadan*, which involved the same type of merchandise as at issue here: steel grating used as flooring for a farrowing crate.[61] In *Ikadan*, the importers were entering tri-bar flooring for use with a farrowing crate system, both alone and with other parts for farrowing crates, and declaring them as type "01" entries not subject to the AD/CVD Orders. The importers argued that the tri-bar flooring was not covered merchandise under the AD/CVD Orders and unilaterally requested a scope ruling from Commerce, after CBP determined that the tri-bar flooring, on its face, was described by, and therefore subject to, the AD/CVD Orders. Although the scope ruling was not initially considered during the EAPA proceedings before CBP, Commerce's scope ruling ultimately found the tri-bar flooring to be covered merchandise. The CIT upheld CBP's finding of substantial evidence of evasion in *Ikadan,* even though the importers did not have knowledge of the scope ruling at the time of importation.[62] Thus, EAPA does not require "some indication of intent to evade."[63] But even if some indication of intent were needed, here, the May 11, 2021 scope ruling was published and available to MNI when it imported the entries in this case, since the POI did not begin until June 29, 2021.

While the administrative record on its own more than amply supports a finding of evasion (as detailed above), the application of adverse inferences is also warranted here. MNI failed to cooperate to the best of its abilities in two ways: (1) by failing to provide any entry documentation for five individual entries for which such documentation was requested; and (2) by not providing sufficiently detailed information regarding other entries to allow CBP to determine whether those entries included covered merchandise.

Pursuant to 19 C.F.R. § 165.6(a):

> {i}f a party to the investigation that filed an allegation, the importer, or the foreign producer or exporter of the covered merchandise fails to cooperate and comply to the best of its ability with a request for information made by CBP, CBP may apply an inference adverse to the interests of that party in selecting from among the facts otherwise available to make the determination as to evasion pursuant to 165.27 and subpart D of this part.[64]

Additionally, 19 C.F.R. § 165.5(c) provides that CBP may use an adverse inference against an importer, the foreign manufacturer, or an exporter of covered merchandise irrespective of whether another party involved in the same transaction provided the information requested by CBP.[65] In

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[59] 19 U.S.C. § 1517(a)(5)(A).
[60] *Ikadan Sys. United States, Inc. v. United States*, 639 F. Supp. 3d 1339, 1349 (Ct. Int'l Trade 2023).
[61] *See id.* at 1345–46.
[62] *See generally id.*
[63] MNI's Administrative Review Request (Public Version), at 6 (internal quotation marks omitted).
[64] *See also* 19 U.S.C. § 1517(c)(3)(A) (providing CBP authority to apply to certain uncooperative parties or persons).
[65] *See also* 19 U.S.C. § 1517(c)(3)(B) (same).

other words, CBP may apply an adverse inference to a party for its failure to cooperate regardless of whether the sought-after information exists elsewhere on the record.[66]

In order to make a determination in this case, it is necessary to analyze the nature of the merchandise that MNI imported. Indeed, CBP has statutory authority "to collect and verify additional information" to make its evasion determinations.[67] CBP can gather information in various ways, including, but not limited to, "issuing a questionnaire with respect to such covered merchandise" to importers, foreign producers or exporters, and foreign governments, among others.[68]

Here, MNI failed to cooperate and comply to the best of its ability with CBP's multiple requests for information. First, MNI failed to provide the information and documentation that TRLED requested. In the Second Supplemental RFI, TRLED explicitly asked for documentation related to entry lines that MNI claimed did not contain covered merchandise.[69] TRLED explained that it requested such information to obtain more specific descriptions of MNI's entered merchandise because the "generic descriptions" on MNI's invoices "did not allow CBP to determine whether the entry contained covered merchandise."[70]

MNI failed to submit the documentation TRLED requested.[71] Instead, MNI provided only an Excel spreadsheet detailing certain aspects of the entries for which TRLED requested information.[72] This spreadsheet was not responsive to the Second RFI. Thus, TRLED issued a Third Supplemental RFI, again asking for the underlying documents related to the entries for which more information was required.[73] MNI's response to the Third Supplemental RFI did not cure MNI's failure to provide the requested documents.[74] To the contrary, in response to the Third Supplemental RFI, for five of the entries for which TRLED requested documentation, MNI submitted duplicative entry documents that related to other entries. Thus, the entry documents for those five entries were never provided.

MNI argues that its submission of duplicative documents was merely a "clerical error" that should not result in the application of adverse inferences.[75] We disagree. MNI had several opportunities to provide these documents, which TRLED explicitly requested in its Second and Third Supplemental RFIs. Yet, MNI never provided them. *In toto*, and giving MNI the benefit of the doubt, MNI's failure to provide the requested information demonstrates inattentiveness and carelessness, which provides a sufficient basis for the application of adverse inferences. Indeed, as the U.S. Court of Appeals for the Federal Circuit has explained, although the "best of its ability" standard "does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping,"[76] which MNI exhibited here.

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[66] *See also CEK Grp. LLC v. United States*, 633 F. Supp. 3d 1369, 1379 (Ct. Int'l Trade 2023) (finding that "whether a gap exists is not necessarily determinative" to CBP's decision to apply adverse inferences).
[67] 19 U.S.C. § 1517(c)(2).
[68] *Id.* at § 1517(c)(2)(A).
[69] *See* Second Supplemental RFI to MNI (Business Confidential Version).
[70] July 21 Determination (Public Version), at 15.
[71] *See id.* at 11.
[72] *See* MNI Second Supplemental RFI Response (Business Confidential Version), at Ex. 1.
[73] *See* Third Supplemental RFI to MNI (Business Confidential Version).
[74] *See* July 21 Determination (Public Version), at 16.
[75] MNI's Administrative Review Request (Public Version), at 21.
[76] *Nippon Steel Corp.*, 337 F.3d at 1382.

As such, CBP's application of adverse inferences against MNI for its failure to provide requested documentation is warranted.

Second, MNI failed to provide consistent and adequate responses that would allow CBP to identify the nature of the merchandise or determine whether there were entries in which no covered merchandise was entered, as claimed by MNI. TRLED issued four RFI questionnaires to MNI to understand and clarify the nature of MNI's imports, and granted MNI a cumulative total of sixty (60) days of extensions to provide the requested information.[77] Yet, MNI failed to do so, and instead provided incomplete and generic information — such as limiting the description of the goods imported to [description of merchandise] — which resulted in gaps in the administrative record that required TRLED to select from facts otherwise available on the record in making its evasion determination.[78]

Additionally, MNI's submissions are riddled with inconsistencies that effectively prevent CBP from determining what specific merchandise was contained in all of MNI's entries which were examined as part of the investigation. For example, in its CF-28 response, MNI stated that it classified all imports of covered merchandise under subheading 7308.90.9530.[79] In its Review Request to RR, however, MNI stated that it classified all imports of covered merchandise under subheading 7308.90.9590, HTSUS.[80] As a result, CBP cannot ascertain from the information provided by MNI what merchandise, specifically, was contained in MNI's entries and which of MNI's descriptions/statements are correct.

Similarly, the classification information that MNI provided in its Excel spreadsheet submitted in response to the Second Supplemental RFI does not match the classification information listed in the documentation that underlies that spreadsheet. Specifically, the Excel spreadsheet lists subheading [number], HTSUS,[81] but the majority of the 7501 entry summary forms that underlie the Excel spreadsheet classify those same imports under subheading [number], HTSUS.[82] We cite to these inconsistencies not because the HTSUS classification is dispositive, but rather, to demonstrate the unreliability of even the limited information which MNI provided to CBP during the course of the EAPA investigation.

Finally, MNI erroneously argues that TRLED's application of adverse inferences to find evasion is punitive because it will include entries that do not contain covered merchandise. As the CIT has recently recognized, CBP is not required to conduct an entry-by-entry review under the EAPA statute.[83] Rather, CBP must determine whether there is substantial evidence within the administrative record, as a whole, that evasion has occurred.[84] A review of the record has already established that MNI had multiple entries during the POI that definitively included tri-bar flooring or covered merchandise.[85] Even without the use of adverse inferences, the finding of substantial

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[77] *See* July 21 Determination (Public Version), at 15–16.
[78] *See id.* at 16.
[79] *See* MNI's CF-28 Response (Public Version), at 7.
[80] *See* MNI's Request for Administrative Review (Public Version), at 9 n.39.
[81] *See* MNI Second Supplemental RFI Response at Ex. 1 (Business Confidential Version).
[82] *Compare* MNI's Third Supplemental RFI Response (Business Confidential Version) *with* MNI Second Supplemental RFI Response (Business Confidential Version), at Ex. 1.
[83] *See Ikadan Sys. United States, Inc.*, 639 F. Supp. 3d at 1354.
[84] *See* 19 U.S.C. § 1517(f)(1); 19 C.F.R. § 165.45.
[85] *See* MNI's RFI Response (Business Confidential Version), Ex. IV-6. See also MNI's Supplemental RFI Response (Business Confidential Version), Ex. 1.

evidence of evasion still stands. If, indeed, some entries are ultimately proven not to contain subject merchandise, as the CIT has explained, the proper recourse to challenge CBP's assignment of duties on an entry-by-entry basis would be via a protest under 19 U.S.C. § 1514 after review of the determination of evasion is completed.[86] The issue of entry-by-entry duty assignment is not the proper subject of an EAPA administrative review as to whether substantial evidence of evasion exists, which is the situation here.

IV. Decision

Based upon our *de novo* review of the administrative record in this case, including the request for administrative review and response thereto, the July 21 Determination of evasion under 19 U.S.C. § 1517(c) is **AFFIRMED**.

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

Sincerely,

JACINTO P JUAREZ JR
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[86] *See Ikadan Sys. United States, Inc.*, 639 F. Supp. 3d at 1354.