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BY EMAIL

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Mr Scott Ellis
Panel Member
Anti-Dumping Review Panel
c/o ADRP Secretariat
Legal, Audit & Assurance Branch,
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Dear Mr Ellis

Anti-Circumvention Review - Hollow Structural Sections Containing other alloys exported from the People's Republic of China, Republic of Korea and Malaysia

This submission is made on behalf of Austube Mills Pty Ltd (Administrators Appointed) an 'interested party' in the above Review under s.269ZX(aaa) of the *Customs Act 1901* (**Act**) and is directed at certain claims made in the applications by GP Marketing International Pty Limited (**GPMI**) and the Steelforce Group of companies (**Steelforce**).

Those applications share some similarities. Both allege that the Parliamentary Secretary's decision to declare that certain alterations are taken to have been made to the original dumping duty notice was inconsistent with the terms of the relevant legislation and that, even if that decision was correct, the backdating of the application to the date of acceptance of the application was not the correct or preferable decision. In addition, the Steelforce submission contends that the Commissioner's finding that a circumvention activity had occurred was incorrect.

The primary legislative background to these issues is Section 48 of the *Customs (International Obligations) Regulation* 2015 (**Regulation**). Subsection (2) of the Regulation provides that a circumvention circumstance, commonly known as the "slight modification of goods", exists when all of the following apply:

> (a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;
>
> (b) before that export, the circumvention goods are slightly modified;

(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;

(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;

(e) section 8 or 10 of the Customs Tariff (Anti-Dumping) Act 1975, as the case requires, does not apply to the export of the circumvention goods to Australia.

The Modified Goods

The GPMI application focuses on the requirement of subsection (2)(b) and submits that it does not apply:

> The applicant's position is that the circumvention goods are the goods referred to in subparagraphs (a) and (e) of Regulation 48(2), being alloy HSS, and that alloy HSS was not slightly modified before it was exported.

By contrast the Steelforce submission initially acknowledges, correctly, that ... [*T*]*he key requirement is that goods that are subject to a dumping duty notice be (sic) slightly modified*...but this position is, without explanation, abandoned later in the application with the introduction of the statement that ... *[I]t is the circumvention goods that need to be "slightly modified"*...and the remaining argument and conclusions in the application are contaminated by this change of position.

It is clear that neither GPMI's original contention nor the reversed position adopted in the Steelforce submission can be sustained because both assume that subsection (2)(b) is directed at circumstances in which the circumvention goods themselves (being the goods exported to Australia from a foreign country in respect of which a notice applies and which are not themselves the subject of that notice) are modified prior to export in a manner that excludes them from the notice.

The claim on behalf of GPMI that the alloyed HSS that they imported was not modified before exportation is undoubtedly correct, but irrelevant. To argue otherwise would be to ignore the clear intention in Division 5A of Part XVB of the Act to counter certain circumvention activities by providing the Minister with the power to make alterations to a dumping duty notice. If the interpretation contended for by GPMI and Steelforce was adopted that power would be deprived of any traction because circumvention goods, being goods to which a notice does not apply, would never need to be modified to circumvent a notice. To apply an interpretation of Regulation 48 that would render the provision ineffectual cannot be countenanced [1], especially in circumstances where there is an alternative interpretation that would give the Regulation a field of operation.

The effectual, and therefore preferred, interpretation is that subsection (2)(b) is not directed at the modification of circumvention goods but at the modification of goods falling within the terms

[1] "[A] Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense." per Jordan CJ in *Hall v Jones* (1942) 42 SR (NSW) 203 at 208.

of the dumping duty notice that, before exportation, become circumvention goods as a consequence of modification. This construction is supported explicitly and conclusively by the terms of subsection (3) of the Regulation which introduces a requirement that *...for the purpose of determining whether a circumvention good is slightly modified...* the Commissioner must *...compare the circumvention good and the good the subject of the notice.*

In determining whether goods have been modified for the purpose of subsection (2)(b) it is clear that the overall requirement of the Regulation is to compare the goods subject to the notice and the goods not subject to the notice, taking account of any relevant factors including those set out in subsection (3) of the Regulation.

Consequently "Is the alloyed HSS modified?" is the wrong question. "Is alloyed HSS a modified version of unalloyed HSS?" is the correct question and the Commissioner has answered it in the affirmative after having regard, *inter alia*, to the factors listed in subparagraph (3). Significantly, neither Steelforce nor GPMI have questioned his analysis of these factors, apart from the former's observation that the factors are not determinative of the issue of whether a good is modified. The observation is correct but nevertheless the legislature clearly considered that the factors were major considerations to take into account. The silence of the two applicants on this key issue of substance and the consequential unquestioned integrity of the Commissioner's analysis provides very substantial support for his affirmative finding.

Process of Modification

On other issues relevant to the question of modification, it is not in dispute that the difference between alloyed and unalloyed HSS arises out of the choice of feedstock by a producer of HSS. If a producer of unalloyed HSS that is exported to Australia changes its feedstock to alloyed HRC, whether produced internally or outsourced, and then manufactures and exports alloyed HSS, the output can assuredly be described accurately as a modified version of unalloyed HSS.

While the Regulation does specify the degree of modification required with the introduction of the word 'slightly', it does not specify the form of modification. Product alterations that may be extrinsic to the manufacturing process (eg., painting or galvanising) and product alterations that are intrinsic to that process (eg., changing the main raw material input or adding an alloy during the manufacturing process) are both modifications for the purpose of the Regulation.

The Steelforce application claims, without elaboration, that it is 'questionable' whether the addition of an alloy to the HRC production process can be described as a modification of the HRC. Again we submit that the wrong question is being addressed. The right question is whether HSS made from alloyed HRC is a modified version of unalloyed HSS.

In our view the issue of modification must be determined by reference to the end result of changes in production processes, not the form of those processes. This is illustrated by reference to ADN No. 2015/44 of 31 March 2015. That notice announcing the enactment of a new circumvention activity known as 'slight modification' included an example of how the new provision might operate. The hypothesis was that unscented wax candles were the subject of a dumping duty notice. The new regulation would apply to circumstances in which an exporter slightly modified his product by adding a scent (musk) during the production process resulting in exports of scented wax candles not falling within the terms of the notice. Application of the Steelforce proposition implies that if instead the exporter had changed the modification process by purchasing musk scented wax from an outside supplier, then section 48 would not apply. We submit such an outcome would be incongruous and clearly contrary to both the wording and intended operation of the Regulation.

Degree of Modification

Section 48(2)(b) requires that, before export, the goods are 'slightly' modified. The issue is not addressed in the applications of GPMI and Steelforce, other than an observation by the latter applicant that the 'slightness' of the modification of the HRC is not apparent.

Consideration of at least three of the comparison factors – paragraphs (d), (e) and (f) - listed in subsection (3) of the regulation may influence a judgement by the Commissioner concerning the degree of modification. REP 291 contains a careful analysis of these factors in relation to a number of exporters including a member of the Steelforce Group. The analysis concerning that member included consideration of confidential costing and price information and the Commissioner's conclusion was that its analysis did not ... *cause it to consider that the modifications of alloyed HSS exported by Dalian Steelforce are greater than 'slight'*.[2] The Commissioner reached similar conclusions in relation to four other exporters. No substantive challenge to those conclusions exists and we submit that the determination that the goods were slightly modified was the correct and preferable decision.

Occurrence of Circumvention Activity

The Steelforce application argues on two grounds that no circumvention activity in relation to the original notice has been established by the Commissioner and consequently it was not open to the Parliamentary Secretary to publish a notice under s.269ZDBH(1)(b) of the Act.

The first claim is based entirely on an alleged 'finding' by the Commissioner at page 24 of Rep 291 that ...*No circumvention activity has occurred prior to 1 April 2015.* This single

[2] Rep 291: p.32

sentence appears as an incongruous non-sequitur to unrelated content in a paragraph considering the issue of modification. The inclusion of the orphan sentence appears to be either an editorial error arising out of the misapplication of the facilities of the MS Word software program or an unfortunate amalgam of typographical errors. It is not stated to be a finding of the Commission and cannot be regarded as such.

Relevant findings on the subject and recommendations based on those findings can be found in REP 291 at pages 9, 35 and 60 as well as individual findings of the existence of circumvention activity in relation to each of the five specified exporters, including Dalian Steelforce. The applicant's proposal that a single aberration in the report should prevail over a number of unequivocal and detailed findings and recommendations is, with respect, untenable.

The second claim is that because Regulation 48 did not operate until 1 April 2015 no circumvention activity could have taken place before that date. Furthermore, the applicant argues, in gathering evidence of relevant 'activity' the Commission focussed entirely on an inquiry period that ended prior to the operation of the Regulation.

The inquiry period fixed by the Commissioner was from 1 July 2010 to 31 March 2015 and at pages 24 - 25 of the report the rationale for this decision was expressed as follows:

> The inquiry period was established to examine patterns of behaviour to assess whether the tests in subsections 48(2) and 48(3) of the Regulation can be met. Behaviour occurring prior to 1 April 2015 is not addressed in the alterations to the original notice. The alterations will only have effect at a date post the Regulation.
>
> The purpose and intent of the anti-circumvention regulation is to stop circumvention behaviour. The inquiry process involved the analysis of data from the beginning of the inquiry period of the original investigation. This information was only used for the intent of reaching a conclusion as to whether circumvention activities took place.

Obviously to meet the requirements of subsection 48(3) the Commissioner was obliged to examine activities occurring during an extended historical period and, in particular, for the purposes of paragraph (j), to specify a period that included the investigation period relating to the original notice.

The Commissioner has concluded, having regard to all the evidence which is undisputed by the applicant, that activities occurred in the inquiry period that meet all the criteria attaching to the 'circumstance' described in the Regulation. Thus all the indicia necessary to ground a finding that circumvention activities had occurred were established and the activities, while not actionable under Division 5A before 1 April 2015, were nonetheless 'circumvention activities' that had occurred in relation to the original notice for the purpose of s.269ZDBG(1)(d) of the Act.

Backdating the Notices

Both GPMI and Steelforce object on similar grounds to the Parliamentary Secretary's decision to specify the day of publication of the notice initiating the inquiry as the date of effect of the alterations to the original notice. The first reason advanced is that the Commissioner's statement that *...the application of the anti-dumping measures from the date of initiation of these inquiries provides the most effective remedy to the Australian industry available under the terms of the legislation ...* was an insufficient reason to backdate the operation of the alteration notice. Citing judicial authority GPMI makes the unexceptional point that the protection of Australian industry is not the only objective of Australia's anti- dumping laws. However, in relation to the anti-circumvention provisions forming part of those laws we submit that the overwhelming, if not sole, objective is indeed to remedy the material injury suffered by Australian industry as a result of the adoption of the avoidance practices set out in Division 5A and Section 48.

A further claim by the applicants is that slight modification of goods is at the lower end of the scale of moral turpitude attaching to the six legislated circumvention activities and that consequently the discretion to specify the date of commencement of the alteration notice should have been exercised in a more generous manner. Attributing a moral scale to the various specified circumvention activities finds no support in the terms of the legislation and some of the claims by the applicants in relation to some activities are, with respect, simply wrong. While some of those activities may constitute offences under the Customs Act none involve the 'evasion' of dumping duties. However, they all involve the avoidance of dumping duties and since the introduction by the legislature of anti-circumvention measures and provided the relevant statutory criteria are met, they are subject to potential remedial action that eliminates the commercial advantage enjoyed as result of the adoption of the circumvention activity.

Of course, as with any regulatory scheme, there is always the possibility that an unwitting, inexperienced, uninformed 'innocent' party may be impacted by remedial action taken by the administering authority. Such an occurrence may well justify a recommendation by the Commissioner based on an accommodating exercise of the alleged discretion but the present matter is not such a case.

Both applicants are represented by very experienced and highly regarded trade law experts. The existence of anti-circumvention measures for minor modification avoidance practices in some foreign jurisdictions has been well known for some years. The public record of the concerns of the Australian Government and the Parliament with the practice of minor modification of goods extends at least as far back as the announcement on 16 October 2014 of an inquiry by the House of Representatives Standing Committee on Agriculture and Industry into the Circumvention of Anti-Dumping Laws. This was followed by a media release by the

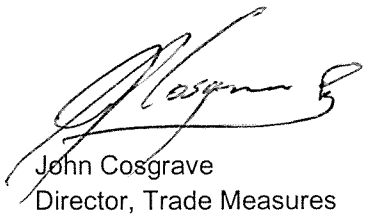
Minister for Industry on 15 December 2014 announcing a package of reforms to the anti-dumping system including ...*reforms to address practices where products are slightly modified to avoid the payment of dumping duties.*

Despite these warning signs the applicants were entitled, of course, to continue their then lawful circumvention activities but their decision to 'roll the dice' inevitably involved risks that in the near future they would have to face the commercial consequences of a retroactive application of s.269ZDBH(8). We submit that in these circumstances the attack on the decision of the Parliamentary Secretary to specify 11 May 2015 as the date of operation of the alteration notice is unjustified and should be rejected.

The Atpak Application

In relation to the Atpak application, we refer the Panel to our own application of 18 April 2016 on behalf of our client. The central contention of that application is that having established that at least one circumvention activity described in Regulation 48 has occurred, it is incumbent on the Minister to publish an alteration notice under s.269ZDBH that applies to all exports of alloyed HSS from all countries specified in the original notices. We repeat that contention which, when recommended by the Panel and adopted by the Minister, would apply to all exports by Atpak of alloyed HSS.

Yours faithfully
MinterEllison



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