

UNITED STATES COURT OF INTERNATIONAL TRADE

ZHAOQING NEW ZHONGYA ALUMINUM
CO., LTD; ZHONGYA SHAPED
ALUMINUM; AND GUANG YA ALUMINUM
INDUSTRIES, CO. LTD,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Before: Donald C. Pogue,
Chief Judge

Consol. Court No. 11-00178¹

OPINION

[Commerce's final determination is AFFIRMED.]

Dated: October 11, 2012

Peter J. Koenig, Squire Sanders LLP, of Washington, DC, for the Plaintiffs Zhaoqing New Zhongya Aluminum Co., Ltd., Zhongya Shaped Aluminum (HK) Holding, Ltd., and Karlton Aluminum Company Ltd.

Mark D. Davis, Davis & Leiman P.C., of Washington, DC, for the Plaintiffs Guang Ya Aluminum Industries Co., Ltd., and Guang Ya Aluminum Industries (Hong Kong) Ltd.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were Stuart E. Delery, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director. Of counsel on the briefs was Rebecca Canto, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Stephen A. Jones and Daniel L. Schneiderman, King & Spalding LLP, of Washington, DC, for the Defendant-Intervenors, the Aluminum

¹ This case is consolidated with Court No. 11-00196.

Extrusions Fair Trade Committee.

Pogue, Chief Judge: In this action, Plaintiffs, who are Chinese producers of extruded aluminum, seek review of certain findings in the United States Department of Commerce's ("Commerce" or "the Department") antidumping investigation of extruded aluminum from the People's Republic of China ("China").² Specifically, Plaintiffs allege that Commerce erred in collapsing into a single entity three affiliated exporter/producers, the Guang Ya group, New Zhongya, and Xinya, and improperly applied

² Commerce published its preliminary determination in an antidumping investigation into certain aluminum extrusions from China on November 12, 2010. It published an Amended Preliminary Determination on January 4, 2011, and a Final Determination on April 4, 2011. Aluminum Extrusions from the People's Republic of China, 76 Fed. Reg. 18,524 (Dep't Commerce Apr. 4, 2011) (final determination of sales at less than fair value) ("Final Determination"), and accompanying Issues & Decision Memorandum, A-570-967 (Apr. 4, 2011), Admin. R. Pub. Doc. 513 available at <http://ia.ita.doc.gov/frn/summary/prc/2011-7927-1.pdf> (last visited Oct. 10, 2012) ("I & D Memo") (adopted in Final Determination, 76 Fed. Reg. at 18,525).

The period of investigation was July 1, 2009 - December 31, 2009. The investigation covers extruded aluminum shapes and forms made with aluminum alloys containing metallic elements which correspond to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or other certifying body equivalents). The final determination further describes the chemical composition of each of these numerical designations. Final Determination, 76 Fed. Reg. at 18,525. Aluminum extrusions are produced and imported in a wide variety of shapes, forms, and finishes and may be described as parts for finished products that are assembled after importation, including, inter alia, window and door frames, solar panels, or furniture. Id. at 18,525-26 (listing products included and excluded from the order).

adverse facts available ("AFA") to this collapsed entity when calculating antidumping duty rates. As explained below, Commerce's final determination is supported by a reasonable reading of the record.

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006)³ and 28 U.S.C. § 1581(c) (2006).

STANDARD OF REVIEW

Under this court's familiar standard of review, Commerce's determination will be affirmed unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means "more than a mere scintilla" of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). To determine if substantial evidence exists, the court reviews the record as a whole, including whatever "fairly detracts from [the conclusion's] weight." Id. at 488. It is also relevant here that the possibility of drawing

³ All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

two inconsistent conclusions from the evidence does not invalidate Commerce's conclusion as long as it remains supported by substantial evidence on the record. Id. ("[A] court may [not] displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.").

BACKGROUND

In its antidumping investigation, as is relevant here, Commerce initially found that the Plaintiffs were separate from the China-wide entity. It then determined that the Guang Ya group ("Guang Ya"), New Zhongya ("Zhongya"), and Xinya met the statutory and regulatory requirements for collapsing affiliated companies. Specifically, the relevant statute directs Commerce to consider as affiliated any "members of a family." 19 U.S.C. § 1677(33)(A). The applicable regulation calls for collapsing affiliated companies where: 1) a shift in production between factories would not require "substantial retooling" of either facility and 2) there is a "significant potential for the manipulation of price or production." I & D Memo at 31; 19 C.F.R. § 351.401(f). When evaluating potential for manipulation, Commerce considers relevant factors, including but not limited to: 1) the level of common ownership, 2) the extent to which managers and board members sit on the board of directors of an

affiliated firm, and 3) whether operations are intertwined. 19 C.F.R. § 351.401(f)(2).

As an initial matter, Commerce determined that the companies were affiliated and that a shift in production between them would not require significant retooling of facilities.⁴ I & D Memo, Comment 4 at 32. Commerce then turned to the relevant factors identified by the regulations for assessing potential for manipulation. Id.

With regards to the first factor, common ownership, Commerce found that the owners of these companies constituted a family grouping, pursuant to 19 U.S.C. § 1677(33)(A), and that this grouping satisfied the criteria for common control under 19 U.S.C. § 1677(33)(F) because members of the Kuang family grouping owned a substantial portion, if not all, of each of the three companies. Final Determination, 76 Fed. Reg. at 18,527. While Commerce initially stated that it did not know the exact ownership of Xinya,⁵ it later gathered evidence, all of which indicated that a member of the Kuang family owned Xinya, even though that evidence could interpreted in a manner that leads to

⁴ No party challenged these findings.

⁵ Aluminum Extrusions from the People's Republic of China, 75 Fed. Reg. 69,403, 69,407 (Dep't Commerce Nov. 12, 2010) (notice of preliminary determination of sales at less than fair value and preliminary determination of targeted dumping) ("Preliminary Determination").

inconsistent conclusions. I & D Memo, Comment 4 at 34-35.

Specifically, in this antidumping investigation, Guang Ya claimed a Kuang sibling was a Xinya shareholder, whereas Zhongya stated on the public record of an accompanying countervailing duty investigation that the same Kuang sibling owned Xinya.

Preliminary Determination, 75 Fed. Reg. at 69,407. Commerce attempted to ascertain who owned Xinya during the verification stage of this antidumping investigation, but Xinya refused to cooperate. I & D Memo, Comment 4 at 34-35. Commerce did, however, find undisputed record evidence that a Kuang brother-in-law was the general manager of Xinya. Id. at 32. Because none of the parties recanted earlier statements that the owner or shareholder of Xinya was a Kuang sibling, and because there was no evidence on the record to suggest that anyone other than a Kuang sibling controlled Xinya, Commerce concluded that the earlier evidence showing familial affiliation was credible and considered Xinya to be owned by the Kuang family grouping. Def.'s Opp'n to Pls.' Rule 56.2 M. For J. upon the Agency R., ECF No. 31 at 9 ("Def.'s Br.").

While Commerce did not find any common board members or management between the companies, it concluded that such a finding was unnecessary because the family grouping constituted a single unit, and Kuang family members managed or directed each of the three companies. Def.'s Br. at 14. Furthermore, Commerce

found other factors supported a finding of potential for price manipulation. Specifically, not only did the Kuang family hold senior leadership positions in each company, but the record showed money transfers from Xinya to Zhongya which Commerce took as indicia that the companies were intertwined.⁶ During verification, Zhongya offered two inconsistent explanations for the money transfers. Final Collapsing Memo at 4. Because the verification process acts as a spot check and is not designed to be exhaustive, Commerce concluded that "the fact [we] did not uncover additional evidence of intertwined transactions during the course of these verifications is not telling" and that the relationship between the three companies "poses a significant potential for the manipulation of price or production." Id. at 10. It therefore collapsed Guangya, Zhongya, and Xinya into a single entity when calculating AD duties.⁷ Final Determination,

⁶ The presence of one or two payments on Zhongya's books appears to have been discovered between the preliminary and final determinations. Final Affiliation/Collapsing Mem., A-570-967, ARP 09 (Mar. 28, 2011), Admin. R. Con. Doc. 190 [Pub. Doc. 515] at 4 ("Final Collapsing Memo"). Commerce in its preliminary collapsing memo concedes that at the time nothing on the record indicated the three companies' operations were intertwined. Prelim. Affiliation/Collapsing Mem., A-570-967, ARP 09 (Oct. 27, 2010), Admin. R. Con. Doc. 142 [Pub. Doc. 356] at 9 ("Preliminary Collapsing Memo"). Nonetheless, Commerce went on to find that "the relationship between the Guang Ya Group, New Zhongya and Xinya poses a significant potential for the manipulation of price or production." Id.

⁷ During the course of the investigation, Commerce earlier identified another producer/importer company, Da Yang Aluminum

76 Fed. Reg. at 18,527.

When calculating the applicable dumping margin for the collapsed entity, Commerce relied on adverse facts available, pursuant to 19 U.S.C. § 1677e(b), because each of the three companies that makes up the collapsed entity failed to cooperate. Id. at 18,528-29. According to Commerce, the resulting record was filled with "such extensive omissions and inaccuracies that a reasonably accurate, reliable dumping margin could not be calculated." Def.'s Br. at 15. First, Guang Ya possessed information concerning aluminum billet consumption, and knew that Commerce required this data, but, without explanation, removed the data from its database. I & D Memo, Comment 5 at 52. Even after Commerce requested the information in a supplemental questionnaire, Guang Ya did not produce it. Id. Guang Ya later submitted aluminum billet consumption data that was inconsistent with data that had already been verified. Id. Second, Zhongya failed to provide complete and accurate U.S. sales data upon Commerce's request. Id. Finally, Xinya was not responsive in any appreciable way to Commerce's multiple antidumping questionnaires, and during verification did not provide requested

Co., as potentially affiliated with the three at hand because it too was owned by the Kuang family. Preliminary Determination, 75 Fed. Reg. at 69,408. Da Yang, however, failed to respond to the initial quantity and value questionnaire sent by Commerce, so Commerce treated it as part of the China-wide entity and, therefore, not eligible for a separate rate. Id.

documents or make personnel available who could accurately answer Commerce's questions. Id.

Accordingly, using adverse inferences, Commerce calculated a final rate of 33.28% for the Guang Ya/Zhongya/Xinya entity. Final Determination, 76 Fed. Reg. at 18,530. Plaintiffs challenge this rate.

DISCUSSION

Plaintiffs claim both that the record cannot support a finding that the three companies are affiliated and that it does not support Commerce's decision to collapse the corporations into one entity. Plaintiffs also challenge Commerce's decision to impose an AFA rate. Each challenge is considered in turn.

I. Affiliation

Plaintiffs first argue that it was improper for Commerce to find that Xinya was affiliated with Zhongya and Guang Ya where Commerce was unable to verify who owned Xinya. Plaintiffs also claim that a mere finding of familial affiliation does not support a finding that the family's respective companies are also affiliated. These arguments fail.

Under the applicable statute, Commerce may find that "members of a family" are affiliated. 19 U.S.C. § 1677(33)(A). Prior decisions have approved a finding of company affiliation on the basis of ownership by a single family. Ferro Union, Inc. v.

United States, 23 CIT 178, 193-95, 44 F. Supp. 2d 1310, 1325-26 (1999). In such cases, Commerce makes the legitimate choice to treat the family grouping as a "person" under the statute. Id. at 194-96, 1326-27.

Commerce properly found that Xinya is owned by a Kuang sibling, that all three companies are controlled by the Kuang family, and therefore that the companies are affiliated. While the record does contain potentially conflicting information as to who owns Xinya, Commerce could not verify this information because Xinya refused to cooperate. I & D Memo, Comment 4 at 34-35. This forced Commerce to resort to the information that Guang Ya and Zhongya earlier placed on the record, evidence indicating that a Kuang sibling owns Xinya. Because neither Guang Ya nor Zhongya recanted their earlier statements with regard to Xinya's ownership, Commerce treated the evidence as reliable. Def.'s Br. at 9.

Plaintiffs mistakenly rely on Hontex Enterprises v. United States, 28 CIT 1000, 1012, 342 F. Supp. 2d 1225, 1235 (2004), for the proposition that Commerce cannot find that companies are affiliated based solely on their failure to undergo verification. This argument misses the point. Commerce did not base its decision to find affiliation solely on Xinya's failure to undergo verification. Rather, when Xinya was uncooperative during verification, Commerce turned to evidence previously on

the public record – statements that Zhongya and Guang Ya made on the public record of this AD investigation and the accompanying CVD investigation. While these statements are not perfectly consistent, they were not recanted and both implicated a Kuang sibling in the ownership or control of Xinya. Commerce had no reason to believe that someone other than a Kuang sibling owned or controlled Xinya.⁸ In addition, Commerce also found undisputed evidence on the record that the general manager of Xinya was a Kuang brother-in-law. Def.'s Br. at 8. Therefore, Commerce reasonably determined that the record supported a finding that Xinya was owned by a Kuang sibling.⁹

Commerce's attempts to verify Xinya's ownership failed because Xinya created a situation where Commerce was unable to

⁸ Xinya did not respond to Commerce's initial AD questionnaire but rather provided documentation purporting to show it was owned by Xinya Holdings. However, Commerce stated that Xinya's documentation failed to demonstrate it was not affiliated with Guang Ya and Zhongya, and sent both a supplemental questionnaire and another request to Xinya for the information sought in the initial AD questionnaire. I & D Memo, Comment 5 at 41-42. Xinya responded to the supplemental questionnaire, but stated that it was responding only to the supplemental questionnaire, not to the remainder of Commerce's request. Id. at 42.

⁹ Plaintiffs also assert incorrectly that even if all three companies were owned by members of the same family, Commerce failed to find that there was some measure of control between the companies and therefore erred in finding they were affiliated. This argument fails because the statute is disjunctive and Commerce need only find that persons are members of the same family or are under common control in order to be considered affiliated. 19 U.S.C. § 1677(33)(A) & (F).

obtain necessary data, leaving Commerce to rely on earlier record evidence. Even without Xinya's refusal to cooperate, however, there was still sufficient evidence on the record to support Commerce's conclusion that Xinya is owned by a Kuang sibling. See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (internal quotation marks omitted)); Universal Camera Corp., 340 U.S. at 488 (a court may not displace an agency's choice between two conflicting views, so long as its choice is supported by substantial evidence). Therefore, because Commerce's finding of affiliation was supported by substantial evidence, it will be affirmed.

II. Potential for Price or Production Manipulation

Plaintiffs next challenge Commerce's decision to collapse the three entities, arguing that Commerce could not establish a "significant potential for the manipulation of price or production." I & D Memo, Comment 4 at 31; 19 C.F.R. § 351.401(f).

As noted above, when evaluating potential for manipulation, Commerce considers relevant factors that are primarily, but not limited to: 1) the level of common ownership, 2) the extent to which managers and board members sit on the board of directors of an affiliated firm, and 3) whether

operations are intertwined. 19 C.F.R. § 351.401(f)(2). Commerce also looks for “relatively unusual situations, where the type and degree of relationship is so significant that [it] finds there is a strong possibility of price manipulation.” Nihon Cement Co. v. United States, 17 CIT 400, 426 (1993) (citation omitted). None of these factors alone are dispositive, and when Commerce evaluates them, it looks for actual price manipulation in the past and the possibility of future manipulation. Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,346 (May 19, 1997) (“[A] standard based on the potential for manipulation focuses on what may transpire in the future.”). Commerce considers these factors “in light of the totality of the circumstances,” when deciding whether collapsing is appropriate. Koyo Seiko Co. v. United States, 31 CIT 1512, 1535, 516 F. Supp. 2d 1323, 1346 (2007). When companies are deemed affiliated based on common family ownership, the court has recognized that “the existence of the family group, and the significant controlling ownership by the family members, reasonably supports Commerce’s collapsing decision.” Catfish Farmers of Am. v. United States, 33 CIT ___, 641 F. Supp. 2d 1362, 1371 (2009).

Addressing the first factor that Commerce considers when evaluating potential for manipulation of price or production, Plaintiffs assert incorrectly that there is no common ownership between the companies and that even if there were

common ownership, Commerce's reasons for collapsing are flawed because Commerce conflates family affiliation with risk of manipulation. These arguments are unavailing because, for the purposes of the investigation, Commerce treated the Kuang family as a unit when looking for common ownership, and the Kuang family "essentially [holds] full ownership" of Guangya, Zhongya, and Xinya. Final Determination, 76 Fed. Reg. at 18,527; I & D Memo, Comment 4 at 32 ("It is undisputed that this family is virtually the sole owner of the Guang Ya Group and New Zhongya, and the information on the record indicates that Xinya is also owned by the Kuang family."). Plaintiffs concede that if Commerce treats the family as a unit, then there is indeed common ownership. Pls.' Rule 56.2 Mem., ECF No. 27, at 9 ("Pls.' Br.") ("There are no common owners, unless one constructs a family group and says that it owns each company."). Pursuant to 19 C.F.R. § 351.401(f)(2)(i), Commerce is to examine the "level of common ownership" and here Commerce has found not only common ownership, but virtually sole ownership.¹⁰

With regards to the next § 351.401(f)(2) factor,

¹⁰ Plaintiffs assert that common family ownership is not a sufficient, sole indicator of price manipulation, Pls.' Br. at 10, but Commerce does not rely on this reasoning. Rather, as discussed in the remainder of this section, Commerce went on to analyze the rest of the § 351.401(f)(2) factors and, taking the record as a whole, concluded that there existed strong potential for manipulation.

Plaintiffs argue that because there is no overlap between the three companies' managerial employees or board members, Commerce erred in finding that potential for manipulation exists. This argument, however, again fails to recognize that Commerce is permitted to treat the Kuang family as a single unit. Because Commerce found that Kuang family members sit on the boards of directors and hold management positions in Guang Ya and Zhongya, Final Determination, 76 Fed. Reg. at 18,527, there is, therefore, overlap between management and boards of directors. Catfish Farmers, 33 CIT at __, 641 F. Supp. 2d at 1371-72.

Plaintiffs finally challenge Commerce's finding with regards to the third § 351.401(f)(2) factor: intertwined operations between the companies. They assert that the financial transactions at issue were one-time, personal transactions that were not between the companies and therefore not business related.

Plaintiffs are correct that the only evidence on the record to support Commerce's finding that the companies are intertwined is financial transfers that were discovered during Zhongya's verification. Final Collapsing Memo at 10. But when Commerce inquired as to the nature of these transactions, it received two different explanations that were inconsistent with Zhongya's accounting books. Id. Because verification is not exhaustive and Commerce was denied access to Xinya's

documentation, Commerce could not determine the exact nature of these transactions and therefore decided that, given the record as a whole, these transactions support the conclusion that the companies were intertwined. Id. While Plaintiffs strenuously disagree with Commerce's characterization of these transactions, they have not placed on the record any evidence to support the assertion that the transactions were of a personal nature.

Without such evidence, the court cannot give weight to Plaintiffs' claim. Pure Gold, Inc. v. Syntex, 739 F.2d 624, 627 (Fed. Cir. 1984) ("Mere conclusory assertions do not raise a genuine issue of fact." (emphasis omitted)). Therefore, on this record, Commerce's decision to collapse the affiliated companies, Guang Ya, Zhongya, and Xinya, is supported by substantial evidence that there was potential for manipulation of price or production.¹¹

¹¹ Plaintiffs also assert that because Xinya, like Da Yang, failed to respond to Commerce's questionnaires and does not export the subject merchandise, it should be part of the China-wide entity rather than collapsed with Guang Ya and Zhongya. However, as Commerce explains, it sent Da Yang a quantity and value questionnaire but not Xinya because Xinya was not initially identified as a potential producer/exporter by the Petitioners. I & D Memo, Comment 5 at 52. Based on the lack of response to the quantity and value questionnaire, Commerce inferred that Da Yang exported subject merchandise to the United States and therefore assigned it the China-wide rate. Id. Xinya, on the other hand, was identified by both Guang Ya and Zhongya as a "potential sibling" company only after the deadline for quantity and value questionnaires had passed. Id. Because both Guang Ya and Zhongya provided statements which implicated a Kuang sibling as either owning or controlling Xinya, as discussed supra,

III. Imposition of AFA Rate

Finally, challenging Commerce's decision to apply AFA to the entire collapsed entity, Plaintiffs claim that Guang Ya's reported consumption of aluminum billets was complete and accurate, that any "inadvertent omissions" were rectified, and that Commerce unreasonably refused to use the corrected data. These arguments also miss the point.

When Commerce finds both that a respondent's submissions may be replaced with facts otherwise available ("FA"), because the respondent withheld information, and that the respondent has failed to cooperate to "the best of its ability," the Department may draw adverse inferences when selecting from the FA to calculate a dumping margin, also known as adverse facts available ("AFA"). 19 U.S.C. § 1677e(a)-(b). Commerce looks to see if a respondent has "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce may conclude that an AFA rate is warranted when: 1) a reasonable and responsible party would have known that requested information was required to be kept and maintained and 2) it failed to promptly produce the requested information because it failed to put forth its maximum

Commerce therefore properly collapsed Xinya with Guang Ya and Zhongya.

efforts. Id. at 1382-83.

When calculating a rate for a collapsed entity, Commerce's practice is to apply AFA to the entire entity when one producer within it fails to cooperate. See Bicycles from the People's Republic of China, 61 Fed. Reg. 19,026, Comment 8 at 19,036 (Dep't Commerce Apr. 30, 1996) (final determination) ("If any company fails to respond, the entire entity receives a rate based on facts available."); Light-Walled Rectangular Pipe and Tube from Turkey, 69 Fed. Reg. 53,675, 53,677 (Dep't Commerce Sept. 2, 2004) (final determination).

Plaintiffs do not challenge Commerce's established practice of applying AFA to the entire collapsed entity when one company within it has met the statutory requirements for warranting an AFA rate. Nor do they challenge Commerce's finding that Xinya was not responsive to Commerce's AD questionnaires.¹² Because Xinya was properly collapsed with Guang Ya and Zhongya and failed to provide any reliable information for Commerce to

¹² Plaintiffs do assert, however, that the Guang Ya group is entitled to its own rate separate from that of the collapsed entity because it fully cooperated and provided corrected information after verification. Even if Plaintiffs were able to cite to authority supporting this position, their argument ignores the fact that Guang Ya unilaterally, without explanation, removed required data regarding aluminum billet consumption from its records after submitting its questionnaire response and later provided data that was inconsistent and could not be verified, leaving Commerce with more than four different sets of data, none of which could be verified. I & D Memo, Comment 5 at 48, 50-51; Def.'s Br. at 20.

use when calculating a margin, it was therefore proper for Commerce to apply AFA to the entire collapsed entity.

CONCLUSION

Because Commerce's decision to collapse the three affiliated exporter/producers is supported by substantial evidence, and because Commerce's application of AFA was also supported by a reasonable reading of the record, Commerce's final determination is AFFIRMED in all respects. Judgment will be entered accordingly.

 /s/ Donald C. Pogue
Donald C. Pogue, Chief Judge

Dated: October 11, 2012
New York, NY