DEPARTMENT OF COMMERCE

International Trade Administration

[A–485–803]

Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of antidumping duty administrative review.

SUMMARY: In response to a request from one respondent, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on cut-to-length carbon steel plate from Romania. This administrative review covers one Romanian exporter of plate, Windmill International Romania branch (Windmill), for the period August 1, 1996 through July 31, 1997. We are rescinding this review as a result of the absence of any *bona fide* sales of subject merchandise during the period of review (POR).

EFFECTIVE DATE: September 4, 1998.

FOR FURTHER INFORMATION CONTACT: Fred Baker or John Kugelman, Enforcement Group III—Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–2924 (Baker), –0649 (Kugelman).

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are references to the provisions codified at 19 CFR Part 351 (62 FR 27296, May 19, 1997).

Scope of the Review

These products include hot-rolled carbon steel universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated, or coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot rolled carbon steel flat rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished or coated with plastics or other non-metallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedules of the United States (HTSUS) under item numbers 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in this review are flat-rolled products of non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling''); for example, products which have been beveled or rounded at the edges. Excluded from this review is grade X–70 plate.

Background

Windmill International PTE Ltd. of Singapore, Windmill International Romania Branch, and Windmill International Ltd. (U.S.A.) (collectively ''Windmill''), an exporter and importer of Romanian plate, submitted a request on August 29, 1997, that the Department review its U.S. sales made during the period August 1, 1996 through July 31, 1997. The Department initiated the review on September 25, 1997 (62 FR 50292).

SUPPLEMENTARY INFORMATION: In a January 16, 1998, submission Windmill explained that it made two sales during the POR. The first, shipped via ocean carrier, was made as a ''test shipment'' for the purpose of initiating this administrative review. When it became apparent in late July 1997 that this sale would not enter U.S. customs territory during the POR, Windmill and the same U.S. customer negotiated another sale, which was shipped by air, that entered U.S. customs territory on July 31, 1997, the last day of the POR. *See* Windmill's November 20, 1997 submission, p. C–15.

On July 24, 1998, Bethlehem Steel Corporation and U.S. Steel Group (a division of USX Corporation) (petitioners) requested that the Department rescind this review. Petitioners argue that the Department should disregard Windmill's first U.S. sale because it entered U.S. customs territory after the POR. They also argue that Windmill's second U.S. sale was not a *bona fide* sale. Petitioners claim that, for a sale to be *bona fide*, it must:

(1) Be at arm's length, and have a price that is negotiated, not artificially set;

(2) Be consistent with good business practices; and,

(3) Be sold pursuant to procedures typical of the parties' normal business practices.

Petitioners base these criteria on Court of International Trade (CIT) rulings in *PQ Corporation* v. *United States*, 652 F. Supp. 724, 729 (CIT 1987) (*PQ Corporation*) and *Chang Tieh Industry Co.* v. *United States*, 840 F. Supp. 141, 146 (CIT 1993) (*Chang Tieh*).

Regarding the first criterion, petitioners argue that the sale was not an arm's-length transaction because both parties were guided by the same legal counsel in setting the price and the shipping terms. They further argue that the parties artificially set the price for this sale because Windmill and the U.S. customer (by their admission) fixed a price and structured the arrangement ''to protect Windmill from legal attack in the present proceedings.'' *See* Windmill's March 3, 1998 submission, p. 5. Finally, petitioners argue that Windmill's U.S. customer cannot be viewed as an arm's-length buyer because it took a tremendous loss on the sale when it resold the merchandise. Petitioners argue that using the criteria outlined in *PQ Corporation* Windmill's sale to the U.S. is not an arm's-length transaction. In *PQ Corporation* (where the CIT found the sale at issue to be *bona fide*), the CIT based its determination in part on the fact that there was no danger of foreign producers creating fictitious markets in the United States because to do so a producer would have to raise the price above the market value. Here, petitioners argue, because Windmill's U.S. customer sold the merchandise for a lower amount than it paid for it, the Department cannot determine the market value, and the Department therefore cannot apply the reasoning of *PQ Corporation*.

Regarding the second criterion, petitioners argue that Windmill's sale was not consistent with good business practices. They argue that there is no reasonable commercial justification for the U.S. customer to have participated in this transaction. First, the U.S. customer resold the merchandise for substantially less than what it paid Windmill. Second, the U.S. customer paid more to warehouse the merchandise than it received from the resale of the merchandise to its customer. Third, there was no commercial reason for the U.S. customer to pay the high shipping charges it paid to obtain the industry's cheapest and most common product.

Regarding the third criterion, petitioners argue that the U.S. customer's sales procedures with respect to this sale were atypical of its normal business practices. First, Windmill's responses indicate that the U.S. customer functions as a trading company that typically purchases large quantities of steel in response to buyers' inquiries, and does not take physical possession of the merchandise. For this sale, however, the U.S. customer did not have an order until after it had purchased the product from Windmill and imported the plates into the United States. Additionally, the U.S. customer took possession of the steel plates for two weeks and paid the warehousing fees before the subsequent customer purchased the merchandise. Finally, petitioners argue that the U.S. customer would normally not resell products at a substantial loss.

In an August 13, 1998 letter to Windmill, the Department explained that it intended to review Windmill's first sale (if a review is requested) in the review of the period covering the date on which the sale entered U.S. customs territory. The Department also explained that it considered Windmill's second sale to be not a *bona fide* sale. The Department gave the following reasons for this determination:

a. The cost of the air freight, customs fees, brokerage expenses, warehousing, and miscellaneous expenses (which were borne by the U.S. customer, and not Windmill) was significantly greater than the total value of the sale.

b. By Windmill's own admission, the decision to send the shipment by air, rather than by ocean, was based solely on the need to enter the merchandise into the United States before the end of the POR. There was no customer emergency or particular need for costly air shipment rather than the usual surface shipment.

c. The quantity of the sale was atypical of that which Windmill normally sells to the U.S. customer, which was a trading company and not an end-user.

d. The U.S. customer's purchase of the merchandise prior to receiving an order for it from a customer was atypical of its normal business practice.

e. The same legal counsel guided both Windmill and the U.S. customer through the sales process, and by its admission helped negotiate a price for the sale solely for the purpose of obtaining for Windmill a lower cash deposit rate. There is no evidence that any commercial factors that normally influence price negotiations played any role in setting the price for this sale.

f. The U.S. customer resold the merchandise at a substantial loss.

We stated that we found these factors significant in light of the fact that the grade involved in this sale was one of the cheapest and most common grades of steel. Based on these factors we determined the sale was not commercially reasonable, and involved selling procedures atypical of Windmill's and the U.S. customer's normal selling procedures. We therefore concluded that it was not *bona fide.* Based on this determination, we indicated in our letter that we intended to rescind the review. We invited Windmill to comment on this determination. On August 20, 1998, we received comments from Windmill.

Windmill argues that until now existing precedents have permitted the Department to rescind reviews only where the test shipment or sale to the United States was fraudulent. *See PQ Corporation, Chang Tieh, Fresh and Chilled Atlantic Salmon from Norway,* 62 FR 1430 (1997) (*Salmon*), and *IPSCO, Inc.*, v. *United States,* 10 ITRD 1392, 1398, 687 F. Supp. 633, 641 (CIT 1988). The Department's determination, Windmill argues, creates a new, ''opaque'' standard which in effect changes the definition of *bona fide* to mean ''commercially reasonable,'' rather than its dictionary definition of ''legitimate.'' This new standard, Windmill argues, requires an artificially high standard of commercial and practical reasonableness. It would also require a test sale to be structured as if the antidumping order and high cash deposit rate did not exist before it could be accepted as *bona fide.*

Furthermore, Windmill argues that because this new standard is discretionary and capricious, it violates the URAA's purpose of making antidumping procedures more transparent. It also violates the URAA's purpose of expanding access to administrative reviews of antidumping orders, because no sale by a new shipper (which Windmill claims it is) can be commercially reasonable and typical of normal business practices when there have been no sales because of high dumping margins. Moreover, there is nothing in the URAA or in section 772 of the applicable U.S. statute that suggests that ''unusual,'' ''strange,'' ''atypical,'' or ''commercially unreasonable'' sales were to be excluded from antidumping calculations.

Additionally, Windmill argues that this new standard would severely undermine the solely remedial purpose of the U.S. antidumping law because it would turn antidumping orders into exclusion orders by increasing tenfold the difficulties foreign exporters face in lowering antidumping margins and cash deposit rates. This result, Windmill argues, is essentially punitive.

Furthermore, Windmill argues that the CIT and the Department have consistently declined to apply any ''ordinary course of trade'' requirement to U.S. sales. The Department's determination with regard to its sale in this review, Windmill argues, in effect reverses this practice. Windmill states that there is nothing commercially normal about any test shipment; by definition it differs from the normal course of business if only because it is the first sale in what the respondent hopes to establish as a major new market.

Additionally, Windmill argues that because its sale was sold at arms length and at a market price, it was by definition *bona fide*.

In addition to the above arguments, Windmill attempts a point-by-point rebuttal of each of the six factors the Department cited in its August 13, 1998, letter as the bases for its determination. First, with respect to its movement expenses relative to the value of the sale, Windmill argues that this point is irrelevant because the terms of sale were ex-works, loaded on truck. By citing this factor, Windmill states, the Department is essentially dismissing the sale because it is inconsistent with good business practices or is outside the ordinary course of trade. Windmill argues that the fact that the sale may not have been commercially viable or normal in some or all respects cannot in itself make it not *bona fide* for purposes of qualifying as a test shipment. Moreover, Windmill states, freight costs often exceed the cost of the goods; particularly in the steel trade, steel is often flown via air freight to meet a deadline. Additionally, both Windmill and the U.S. customer found it commercially reasonable for the U.S. customer to pay higher transportation costs in order to complete a test sale and to get the current cash deposit rate lowered.

Second, as for Windmill's decision to send the shipment by air being based solely on the need to have it enter the United States before the end of the POR, Windmill argues that the Department is again criticizing the sale as inconsistent with good business practices. Windmill states that there is nothing fraudulent about these circumstances, which is the correct standard to be applied. Furthermore, Windmill states that, contrary to the Department's assertion, there was a commercial need, namely, Windmill's need to have the sale enter U.S. customs territory by July 31, 1997.

Third, with respect to the quantity of the sale being atypical, Windmill argues that there is no ''typical quantity'' because it was a test shipment.

Fourth, with respect to the U.S. customer's purchase of the merchandise prior to receiving an order for it from a customer being atypical of its normal business practices, Windmill argues that, based on the CIT's determination in *Chang Tieh,* the issue is not whether the test shipment was ''atypical'' but whether the transaction was tainted by fraud. Furthermore, because the sale was a test shipment, it is irrelevant whether the selling procedures were typical. Moreover, Windmill did not learn the identity of the U.S. customer's buyer except in the context of these proceedings.

Fifth, with respect to the Department's statement that the same legal counsel helped negotiate a price for the sale, Windmill argues that the Department's information is incorrect. Windmill states Windmill itself negotiated the price, and that its legal counsel ''only advised Windmill to land a shipment in the United States by the end of July and to make the sale a *bona fide* arm's-length transaction at a market price.'' Furthermore, it argues that petitioners have submitted no evidence of what the market price was at the time of the sale. The standard reference for such price, Windmill states, is the journal *Metals Bulletin.* Windmill argues that *Metals Bulletin* substantiates that its price was a market price.

Finally, with respect to Windmill's U.S. customer having sold the merchandise at a substantial loss, Windmill argues that this loss is irrelevant because only Windmill's price to its U.S. customer is relevant to the new cash deposit rate.

We disagree with Windmill and find that its U.S. sale is not *bona fide.* In conducting an administrative review, section 751(a)(2) of the statute instructs the Department, in general, to determine a dumping margin for each entry. The CIT has, however, recognized that the Department has the authority to disregard a sale to the United States that is not *bona fide. See Chang Tieh* at 146. Therefore, we are disregarding the sale in question; moreover, because this sale is associated with the only entry during the period of review and there are no other entries to review, we are rescinding the review.

We disagree with Windmill's argument that the Department has improperly established a new, ''opaque'' standard which equates the term *bona fide* with ''commercially reasonable.'' In determining whether Windmill's sale is *bona fide* in this case, as in past cases, we have looked to whether the transaction has been so artificially structured as to be commercially unreasonable. The CIT has agreed, stating that where a transaction is an orchestrated scheme involving artificially high prices, the Department may disregard the sale as not resulting from a *bona fide* transaction. *Chang Tieh* at 146. Thus, evidence concerning whether the transaction is commercially reasonable is relevant to whether a sale is *bona fide.* Moreover, such evidence has been examined by the Department in past cases. For example, in *Manganese Metal from the Peoples' Republic of China,* 60 FR 56045 (November 6, 1995) (*Manganese Metal*), based on the timing of the single sale by one respondent relative to the filing of the petition, the price, which was significantly higher than the market price, and other commercially unusual facts about the transaction (these were proprietary), the Department found that the sale was not *bona fide* and disregarded it. Thus, judicial precedent and agency practice demonstrate that the standard applied by the Department in this case is neither new nor opaque.

In the present case Windmill has acknowledged that its ''test'' shipment was structured to address what it views as a commercial problem presented by the existence of the antidumping order and the high ''all others'' rate. The Department recognizes that exporters may make only a single sale in order to establish their own antidumping duty rate, particularly where the ''all others'' rate is high. We have, in fact, conducted reviews of single shipments. *See, e.g., Salmon; Chang Tieh; PQ Corp.* However, in all of those cases the evidence indicated that the sales were commercially reasonable. *Salmon* at 1432 (no evidence to indicate sale was not *bona fide;* no unusual sales procedures; price was consistent with the market at the time); *Chang Tieh* at 146 (no evidence that price was outside the appropriate market range); *PQ Corp.* at 729 (no evidence of dealings or relationship between exporter and buyer to indicate sale was other than *bona fide*; price was lower than that of U.S. supplier, therefore, consistent with good business practice). In contrast, in *Manganese Metal,* discussed above, where the evidence indicated that the sale was orchestrated to manipulate the margin calculation and was not commercially reasonable, we excluded it. To do otherwise would be a fraud upon the proceeding. *See Chang Tieh* at 144; *American Permac, Inc. et al.,* v. *United States,* 783 F. Supp. 1421 (Ct. Int'l Trade 1992) (noting that ''although periodic reviews set final duty rates for certain sales, they also set deposit rates for future years'').

The evidence in the present case leads us to conclude that Windmill's ''test'' sale was made solely for the purpose of obtaining a separate rate for Windmill. Such a purpose does not render a sale non-*bona fide* as long as the sale itself is at least arguably commercially reasonable. Here, although the price charged by Windmill does not appear to be unreasonable, the reasonableness of the transaction must be judged by the total costs borne by the U.S. importer. The extraordinarily high transportation costs incurred by the importer, combined with other expenses borne by the importer in connection with this sale and the fact that the merchandise was subsequently resold at a significant loss (excluding transportation and other costs) lead us to conclude that there is no basis upon which it could be found that the sale was commercially reasonable. Therefore, we find that the sale is not *bona fide.*

The fact that Windmill has not acted fraudulently, in the sense that it has not attempted to deceive the Department about the nature of the transaction, is irrelevant. That Windmill may have acted out of an erroneous interpretation of the law and the agency's practice, rather than an intent to deceive, does not change the nature of the transaction itself.

Moreover, on the facts of this case, finding that the sale is not *bona fide* does not, as respondent asserts, equate antidumping orders with exclusion orders. As noted above, single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices. Thus, we do not believe that the determination in this case violates the statute's remedial purpose or acts to exclude the respondent from the market.

For the foregoing reasons, we are rescinding this administrative review in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and section 351.213(d)(3) of the Department's regulations.

Dated: August 31, 1998.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration

[FR Doc. 98–23910 Filed 9–3–98; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–122–404]

Live Swine from Canada; Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of countervailing duty administrative review.

SUMMARY: On April 30, 1998, the Department of Commerce (''the Department'') published in the **Federal Register** its preliminary results of administrative review of the countervailing duty order on live swine from Canada for the period April 1, 1996 through March 31, 1997 (63 FR 23723). The Department has now completed this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended. For information on the net subsidy, please see the *Final Results of Review* section of this notice. We will instruct the U.S. Customs Service (''Customs'') to assess countervailing duties as detailed in the *Final Results of Review* section of this notice.

EFFECTIVE DATE: September 4, 1998.

FOR FURTHER INFORMATION CONTACT: Gayle Longest or Lorenza Olivas, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

The Department has determined that it is not practicable to conduct a company-specific review of this order because of the large number of producers and exporters which requested the review. Therefore, pursuant to section 777A(e)(2)(B) of the Tariff Act of 1930, as amended, we are conducting a review of all producers and exporters of subject merchandise covered by this order on the basis of aggregate data. This review covers 27 programs.

Since the publication of the preliminary results on April 30, 1998 (63 FR 23723), the following events have occurred. We invited interested parties to comment on the preliminary results. On June 10, 1998, case briefs were submitted by the Government of Quebec (''GOQ''), and the National Pork Producers Council (''petitioner''). On June 17, 1998, rebuttal briefs were submitted by the Government of Canada (''GOC''), GOQ, and the Canadian Pork Council (''CPC''). At the request of the GOQ, the Department held a public hearing on July 9, 1998.

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (''URAA'') effective January 1, 1995 (''the Act''). The Department is conducting this administrative review in accordance with section 751(a) of the Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR Part 351, published in the **Federal Register** at 62 FR 27296 (May 19, 1997).

Scope of the Review

The merchandise covered by this order is live swine, except U.S. Department of Agriculture (''USDA'') certified purebred breeding swine, slaughter sows and boars, and weanlings, (weanlings are swine weighing up to 27 kilograms or 59.5 pounds) from Canada. The merchandise subject to the order is classifiable under the *Harmonized Tariff Schedule* (''HTS'') item numbers 0103.91.00 and 0103.92.00. The HTS item numbers are provided for convenience and Customs purposes. The written description of the scope remains dispositive.

Allocation Methodology

In the past, the Department has relied on information from the U.S. Internal Revenue Service (''IRS'') on the industry-specific average useful life of assets in determining the allocation period for nonrecurring grant benefits. *See General Issues Appendix* appended to the *Final Countervailing Duty Determination; Certain Steel Products from Austria,* 58 FR 37063, 37226 (July 9, 1993). However, in *British Steel plc.* v. *United States,* 879 F. Supp. 1254 (CIT 1995) (*British Steel*), the U.S. Court of International Trade (''the Court'') ruled against this allocation methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for nonrecurring subsidies based on the average useful life (''AUL'') of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *See British Steel,* 929 F. Supp. 426, 439 (CIT 1996).

The Department has not appealed the Court's decision and, we intend to determine the allocation period for nonrecurring subsidies using company-specific AUL data where reasonable and practicable. In *Live Swine from Canada; Preliminary Results of Countervailing Duty Administrative Review* (62 FR 52426; October 7, 1996) and *Live Swine from Canada; Final Results of Countervailing Duty Administrative Review* (62 FR 18087; April 14, 1997) (*Swine Tenth Review Results*), the Department determined that it is not reasonable and practicable to allocate nonrecurring subsidies using company-specific AUL data because it is not possible to apply a company-specific AUL in an aggregate case (such as the case at hand). Accordingly, in this review, the Department has continued to use as the allocation period the average useful life of depreciable assets used in the swine industry, as set forth in the U.S. IRS Class Life Asset Depreciation Range System (*see Swine Tenth Review Results*), which is a period of three years.

The GOQ submitted a comment on the allocation period. The GOQ agreed with the Department that the IRS tax tables are appropriate for allocating nonrecurring grants in this review. However, because better sources of information may be available in future reviews of this case, the GOQ argues that the Department should accept suggestions from interested parties in future reviews regarding more appropriate sources to calculate the allocation period. In future reviews, the Department will allow interested parties to submit information and comment on any other reasonable and practicable approaches for complying with the Court's ruling with respect to the appropriate allocation period.

Analysis of Programs

Based upon the responses to our questionnaire, and written comments from the interested parties, we determine the following:

I. Programs Conferring Subsidies

In the preliminary results, we found that the following programs conferred countervailable benefits on the subject merchandise. We did not receive any comments on these programs from the interested parties, and our review of the record has not led us to change any findings or calculations. Accordingly, the net subsidies for each of these