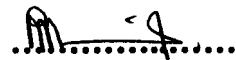


REPORT NO. 24

**RETROACTIVE WITHDRAWAL OF THE ANTI-DUMPING
DUTY ON CALCIUM PROPIONATE IMPORTED FROM
VERDUGT IN THE NETHERLANDS: FINAL
DETERMINATION**

The International Trade Administration Commission herewith presents its Report No. 24 RETROACTIVE WITHDRAWAL OF THE ANTI-DUMPING DUTY ON CALCIUM PROPIONATE IMPORTED FROM VERDUGT IN THE NETHERLANDS: FINAL DETERMINATION, with recommendation.



(Ms N Maimela)

Chief Commissioner

Pretoria

04/09/2003

REPUBLIC OF SOUTH AFRICA
INTERNATIONAL TRADE ADMINISTRATION COMMISSION
REPORT NO. 24

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CALCIUM PROPIONATE IMPORTED FROM VERDUGT IN THE
NETHERLANDS: FINAL DETERMINATION**

NOTE

The International Trade Administration Commission (the Commission) was established on 1 June 2003 in terms of the International Trade Administration Act, 71 of 2002 (the ITA Act). As regards anti-dumping matters it superseded the Board on Tariffs and Trade in all respects. For sake of simplicity all references in this report are to the Commission. All references in this report to the Commission, and which relate to the period prior to 1 June 2003, should be understood to be a reference to the Board, and all references to the ITA Act that relate to the period prior to 1 June 2003 should be understood to be a reference to the Board on Tariffs and Trade Act, 107 of 1986.

SYNOPSIS

On 28 May 1993 an anti-dumping duty was imposed on imports of calcium propionate from Verdugt in the Netherlands. The anti-dumping duty was amended on 21 November 1997 and was withdrawn on 27 July 2001,¹ after the Commission had found that the exporter no longer dumped the product on the SACU market. On 26 November 2002 Kim Pak, an importer of calcium propionate, requested that the anti-dumping duty be withdrawn retroactively to the start of the review period, as no dumping had been found for the review period or for the period it took the Commission to finalise its review.

The Commission received a request for the refund of the anti-dumping duty on calcium propionate originating in or exported from the Netherlands for the period during which such

¹ See Board Report 4109: Review of the Anti-Dumping Duty on Calcium Propionate Originating in or Imported from the Netherlands: Final Determination (27/06/2001).

duties were applied, but for which the Commission had found no dumping.

Considering South Africa's obligations under the World Trade Organisation's Anti-Dumping Agreement, after studying the procedures in place in other jurisdictions and following consultations with the Commissioner for SARS, the Commission decided to recommend to the Minister that the relevant anti-dumping duty be withdrawn with retroactive effect to 1 July 1998.

1. APPLICATION AND PROCEDURE

1.1 LEGAL FRAMEWORK

This investigation was conducted in accordance with the ITA Act.

1.2 APPLICANT

The application was lodged by Kim Pak, an importer of the subject product.

1.3 BASIS OF APPLICATION

Kim Pak submitted that the Commission, in its earlier review of the anti-dumping duty on calcium propionate originating in or imported from the Netherlands, had found that the product was no longer dumped. The Commission had accordingly recommended to the Minister that the anti-dumping duty be withdrawn. The anti-dumping duty was withdrawn with effect from 27 July 2001.

Kim Pak requested the Commission for a refund of the anti-dumping duties it had paid between the start of the review period, i.e. 1 July 1998, and the withdrawal of the anti-dumping duty on 27 July 2001, indicating that the Anti-Dumping Agreement provided that an anti-dumping duty could only be levied where the Commission had found evidence of injurious dumping and that any anti-dumping duty should not exceed the margin of injury.

1.4 INVESTIGATION PROCESS

Since the Commission has not received an application for the refund of an anti-dumping duty before, the Commission set out to establish its procedures in this regard, before attending to the specific application. The Commission considered the requirements of the Anti-Dumping Agreement, and considered the practice followed in the European Union and the United States. The Commission also consulted with the Commissioner of SARS regarding the procedures to be followed.

2. PRODUCTS, TARIFF CLASSIFICATION AND DUTIES

2.1 PRODUCT

The product that forms the basis of this application calcium propionate, which is used as a preservative in the bread industry.

2.2 TARIFF CLASSIFICATION

The product is currently classifiable as follows:

Tariff Subheading	Description	Duty	EU	SADC
2915.50.30	Calcium propionate	10%	10%	Free

2.3 ANTI-DUMPING DUTY

The anti-dumping duties of 25c/kg that had been in place against calcium propionate originating in or imported from the Netherlands were withdrawn with effect from 27 July 2001.

3. POLICY AND PROCEDURES

3.3 BACKGROUND

Where the Commission, after finalising a review, finds that no dumping took place during the period of review, the anti-dumping duty is withdrawn. Under existing Commission policy anti-dumping duties are still payable for the period of review, as well as the period taken to finalise the review, despite the fact that there was no dumping during this period. The Commission found that this may provide the SACU industry with unwarranted protection. As the Commission had never considered an application for refund of the anti-dumping duties it considered the requirements of the Anti-Dumping Agreement and the practice in other jurisdictions.

3.4 WTO REQUIREMENTS

The Anti-Dumping Agreement does not provide any indication as to the period to which the refund relates. However, Article 9.3 of the Anti-Dumping Agreement provides as follows:

“The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.”

The Commission found that this confirmed that no anti-dumping duties should be collected for the review period and the time taken to finalise a review where such review indicates that no dumping took place.

Paragraphs 2 and 3 of Article 9.3 of the Anti-Dumping Agreement provide as follows:

“9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.”

The Commission therefore found that the Anti-Dumping Agreement provides -

- (a) No deadline for the submission of refund requests;

- (b) That all refund applications should normally be considered and finalised within 12 months from the date of request, but in no case more than 18 months;
- (c) That once the decision has been taken to refund, the refund should take place within 90 days; and
- (d) That in determining whether a refund should take place, the Commission should consider the margin of dumping, excluding the anti-dumping duties, in its calculations.

The Anti-Dumping Agreement does not provide any guidance as regards the process to be followed or how an application for refunds should be evaluated.

3.3 EUROPEAN COMMISSION PRACTICE

In the EU anti-dumping duties are imposed on a prospective basis, as is the case in South Africa. In terms of EC Basic Regulation 384/96 importers may apply for refunds in cases where an exporter can prove that the anti-dumping duties collected exceeded the actual margin of dumping.

The EC requires the importer, rather than an exporter, to submit a refund application and such application must be lodged within 6 months from the date on which the amount of the definitive duties was determined, or within 6 months from the date of the decision to definitively collect provisional duties. Applications for refunds must contain –

- (a) The amount of anti-dumping duties paid;
- (b) All customs documents and calculations;
- (c) The export price actually paid;
- (d) The normal value; and
- (e) A declaration that the exporter or a third party did not reimburse the anti-dumping duty and that such duty will not be reimbursed in future.

The exporter may submit information on normal values direct to the EC.

The EC may either decide on the refund or to initiate an interim review based on the information received and the findings in such review shall be used to determine the extent of

the refund. Refund proceedings should be finalised within 12 months, and in no case more than 18 months, from the date of the request for such refund, while the actual refund should be paid within 90 days of the decision to grant such refund. This is in line with the requirements of the Anti-Dumping Agreement, as quoted above.

In its refund review the EC uses the same methodology used in the original investigation that resulted in the imposition of the said duties. Research has shown that a full refund was granted by the EC in 27% of all refund proceedings between 1982 and 1995, while partial refunds were granted in an additional 47% of cases.

3.4 UNITED STATES PRACTICE

The US uses a retroactive system of anti-dumping duty appraisal, whereby the level of duty is determined based on the actual import price of each transaction. A deposit is payable on the basis of the margin of dumping found during the investigation or the last review, but an administrative review is conducted each year on request to determine the actual margin of dumping for the preceding period. Exporters are required to submit information relating to both the normal value and the export price. Where the actual margin of dumping was higher than the duties paid, importers are required to pay the additional duty, and where the margin of dumping was lower than the anti-dumping duty paid, the difference will be refunded.

The Commission found that the refund procedure is built into the US's annual reviews and that anti-dumping duties are only collected for the actual margin of dumping.

3.5 CONSULTATIONS WITH THE COMMISSIONER FOR SARS

The Commission entered into consultations with the Commissioner for SARS to determine whether SARS could administer a refund of the anti-dumping duty. The Commissioner for SARS pointed out that the *Customs Act* did not make provision for the refund of anti-dumping duties, but only for the refund of provisional payments. The Commission and the Commissioner for SARS agreed that any successful refund application would have to be treated as a retroactive amendment of the anti-dumping duty. As an amendment to the level of the duty is an amendment to Schedule 2 of the *Customs Act*, such amendment can only be made on request of the Minister following a recommendation of the Commission.

3.6 COMMISSION PROCEDURES

Taking the above information and its draft regulations² into consideration the Commission decided that an application for a refund should take the form of an interim review and that the onus lies on the importer, or on the importer and the exporter combined, to prove that the margin of dumping has decreased to a level lower than the existing anti-dumping duty. To this extent the Commission may decide on the information required by it to properly consider any application. The Commission further decided that the level of the anti-dumping duty should be amended retroactively where it is found that the margin of dumping has decreased, but noted that where it found that the margin of dumping had increased, the duty cannot be increased retroactively. The Commission also found that the Commissioner for SARS should calculate the amount of the refund.

² Draft Anti-Dumping Regulations, Government Gazette 24600, 28 March 2003.

4. CONSIDERATION

4.1 PERIOD FOR WHICH NO DUMPING WAS FOUND

In its review, which led to the withdrawal of the anti-dumping duty, the Commission used a review period from 1 July 1998 to 30 June 1999. No dumping was found in respect of this period. Additionally, no information was placed before the Commission to indicate that dumping had taken place between 30 June 1999 and the withdrawal of the anti-dumping duty on 27 July 2001.

4.2 ANTI-DUMPING DUTIES PAID

Kim Pak submitted information substantiating that it had paid anti-dumping duties for the period during which no margin of dumping was found. It substantiated its application with all relevant original documentation, which reflected the anti-dumping duty paid in respect of each import transaction.

The Commission found that the importer had paid anti-dumping duties during the period 1 July 1998 and 27 July 2001 despite the Commission not having found any dumping during this period.

5 DETERMINATION

As the Commission had already found that dumping did not take place between 1 July 1998 and 30 June 1999, and as it found that no information had been placed before it to show that dumping had taken place subsequently, the Commission decided to recommend to the Minister that the anti-dumping duty on calcium propionate, classifiable under tariff subheading 2915.50.30, and originating in or imported from the Netherlands, be withdrawn with retroactive effect to 1 July 1998.