

Trade & Customs e-Alert

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Challenging Anti-Dumping Duties: Absence Of Evidentiary Foundation

Asia Symbol (Guangdong) Paper Co Ltd v Anti-Dumping Review Panel is a recent decision by the Federal Court of Australia in respect of a judicial review application by a taxpayer which asserted that a government panel had no evidentiary foundation to issue its decision.

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Background Facts

The taxpayer is in the business of manufacturing A4 copy paper in China. They mainly export the same to Australia. The taxpayer applied for judicial review against the decision of the Parliamentary Secretary to the Minister for Jobs and Innovation (**Current Decision**), made under Section 269ZZM(1) of the Customs Act 1901, consequent upon the recommendations of the Anti-Dumping Review Panel in its report.

Current Decision

The Parliamentary Secretary revoked a previous decision of the former Parliamentary Secretary and imposed anti-dumping duties on the taxpayer's exports of A4 copy paper from the People's Republic of China (**PRC**). The previous decision was made on the basis of the Anti-Dumping Commission Final Report (**Previous Decision**).

- The Parliamentary Secretary substituted the Previous Decision with the Current Decision, being in the same terms except for, relevantly, a different normal value and resulting the dumping margin for the taxpayer to reduce from 3.1% to 3.0%.
- The effect of the decision was to require the importers of A4 copy paper exported by the taxpayer to Australia to pay an interim dumping duty under Section 8(3) of the Customs Tariff (Anti-Dumping) Act 1975 (Cth) to the Comptroller-General of Customs.

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Previous Decision

The taxpayer completed an exporter's questionnaire published by the Anti-Dumping Commission (**ADC**) followed by submissions in respect of a dumping duty notice of A4 paper exported to Australia from the PRC. After taking into consideration the relevant information provided by the taxpayer, the former Parliamentary Secretary accepted the findings and recommendations of the ADC and recorded the taxpayer's dumping margin as 3.1%.

The taxpayer then applied to the Anti-Dumping Review Panel (**ADRP**) for a review of the Previous Decision and made further submissions in respect of the dumping duty. The taxpayer emphasised that part of the upward adjustment that is not volume based must be reversed on the premise that part of the sales discounts on the domestic sales of the like goods is not volume related and was paid on the same product as was exported to Australia.

ADRP then requested the ADC to reinvestigate certain findings that relate to the taxpayer's discount and rebate policy. After the reinvestigation, the ADC affirmed its findings that the taxpayer's normal value should reflect the finding that very small quantity of exports to Australia would not attract the quantity rebates and discounts given to the taxpayer's domestic customers. In calculating the normal value, the taxpayer's net domestic price should be adjusted upwards to account for quantity rebates and discounts given to its domestic customers.

After considering submissions from both parties, the ADRP then recalculated the dumping margin which led to the Current Decision.

Application For Judicial Review

The taxpayer sought to set aside or quash the recommendation in the report of the ADRP, the Current Decision, in which the Parliamentary Secretary imposed a dumping margin of 3.0%.

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The grounds for the application were that:

- There was no evidence or other material to justify the recommendation made by the ADRP in the report, and consequently the re-calculation of the taxpayer's normal value, within the meaning of Section 5(1)(h) and (3)(b) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (**ADJR Act**). Specifically, the re-calculation adopted a purported quantity discount that in fact comprised both quantity and brand related criteria.
- In the absence of an evidentiary foundation for the recalculation of normal value, resulting in the dumping margin of 3.0%, such a recommendation in the report and the decision were an improper exercise of the power by the ADRP and the Parliamentary Secretary conferred by the enactment in pursuance of which they were purported to be made.

Taxpayer's Contention

Ground 1

The ADRP substituted the dumping margin of 3.1% for a margin of 3.0% based on an assertion of fact. This was the basis upon which the ADRP made their respective decisions, and it was "critical to the making of the decision" in so far as it purportedly accounted for the 0.1% reduction in the dumping margin. The taxpayer submitted that the decision was based on the existence of a particular fact, which does not exist. It was submitted that there had to be a logical or rational relationship.

Ground 2

The taxpayer submitted that the ADRP failed to take into account facts that a reasonable decision maker would have considered, and instead, took into accounts facts that are found unreasonably when making its decision. Therefore, the taxpayer also submitted that the ADRP took into account an irrelevant consideration and failed to take into account a relevant consideration. That incorrect fact-finding was an arbitrary process of reasoning.

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Ground 3

The taxpayer submitted that the error lay in the ADRP accepting the revised dumping margin in circumstances where the ADC has not altered its assumption and continued to treat the figure as based on quantity and a figure that represented non-brand based discounts and rebates. On that basis, the taxpayer submitted that there was no evidence to support the recalculation of the dumping margin as “an upwards adjustment to include all components other than brand related components”.

ADRP’s Contention

Ground 1

The “no evidence” ground of review under the ADJR Act could only be made in respect of a finding of fact. A “fact” in relation to “no evidence” did not extend to an expression of opinion or a matter of judgment. The taxpayer’s complaint was not that there was no evidence for a particular fact upon which the decision was based, but that there was “no evidence” to support the recalculation of the dumping margin as an upwards adjustment to include all components other than brand related components was an observation about the decision-making process itself. The process of calculation of the normal value of the taxpayer’s goods was not a “fact” that enlivened Section 5(1)(h) and (3)(b) of the ADJR Act. The evidence adduced by the taxpayer did not establish that the “fact” did not exist.

Grounds 2 and 3

ADRP submitted that the decision under review did not depend upon the prior establishment of a particular fact. There was evidence to support the ultimate decision under Section 269TG of the Customs Act. ADRP submitted that this was sufficient to defeat this ground of review. The taxpayer had not sought to establish that there was no evidence upon which ADRP could conclude that the rebates treated in the ADC’s calculation as quantity based were, in fact, quantity based.

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Court's Decision

It is important in this case, where the substantive argument is one of no evidence, to distinguish between simple errors of fact and judicially reviewable errors in fact-finding which warrant relief.

The issue at hand was whether the Parliamentary Secretary exercised his jurisdiction correctly in revoking the Previous Decision, resulting in a dumping margin of 3.0%.

Court's Decision On Ground 1

The statutory task was one of assessment of an appropriate figure, that being an assessment that involved many exercises of judgment. The court took the view that no separate legal errors arises from the fact, or terms by ADRP. The court also takes the position that there was at least some evidence or material to justify the finding, as there was a logical and rational relationship between the said evidence and the decision. Therefore, a question of no evidentiary foundation does not arise.

The evidence or material found by the court includes the statement in the exporter's questionnaire completed by the taxpayer, whereby it was stated that the taxpayer has entered into agreements with some of the distributors, where the parties agreed that the distributor's customers would be given a discount or rebate for reaching certain purchase targets.

Court's Decision On Grounds 2 and 3

The court also took the view that if a finding of fact constitutes a "decision" then the finding itself can be reviewed for unreasonableness, but, if the finding does not constitute a "decision", it is beyond review independently of such a "decision". A finding of fact will then be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts.

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Conclusion

The *Asia Symbol* case demonstrates the Federal Court of Australia's approach when an applicant to a judicial review asserts that ADRP had exercised its power improperly or there were no evidence to justify their decisions. It is important that the applicant takes into consideration all the evidence that were provided to ADRP as the courts will look in-depth into all the information available even prior to the issuance of ADRP's decision.

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