

# LAW OFFICES OF NITHYA NAGARAJAN, LLC

## INTERNATIONAL TRADE LAW AND CONSULTING

### NON-MARKET ECONOMY SEPARATE RATE APPLICATION PROCESS

An antidumping duty review is unlike any other litigation that most companies will have experienced. When the review involves a country classified by the U.S. Department of Commerce as a Non-Market Economy (or “NME”), such as China or Vietnam, the review involves two distinct tracks of investigation. The first type involves investigations by the U.S. Department of Commerce (DOC) into the sales and prices in the United States and the “factors of production” for the manufactured product. In the review, the DOC seeks to establish whether U.S. prices are below normal value -- which is the definition of dumping. The defense of a complete antidumping duty review requires substantial effort and substantial expense.

The second type of investigation, which is unique to an NME case, is the Separate Rate Investigation or Review, in which the DOC determines whether or not a particular company demonstrates independence with respect to its export activities such that it should be eligible for either an individually calculated rate, or a rate based on a weighted average of the rates applied to other investigated companies. Such "separate rates" are often significantly lower than the NME-wide rate under a particular antidumping duty order.

When an NME antidumping investigation is initiated, the initiation notice will announce that NME exporters of the subject merchandise under investigation can apply for a separate rate by completing an application for separate rates. In order to qualify for a separate rate, the first mandatory step a company must take is to complete, and submit to the DOC, a separate rate application within 60 days of the initiation of a review. A company may apply for a separate rate even if the Department does not select it as a respondent in an antidumping proceeding. The DOC has specific procedures and guidelines for submitting a Separate Rate application, and an exporter must follow these guidelines with precision in order to be eligible to receive a separate rate. Otherwise the DOC treats the exporter as being part of the China-wide entity, in most cases resulting in application of the highest rate available.

In order to request and qualify for separate rate status in an investigation or administrative review, a company must have exported the subject merchandise to the United States during the period of investigation or review, and it must provide information responsive to the following considerations:

1. Absence of *De Jure* Control: The DOC considers the following *de jure* criteria in determining whether an individual company may qualify for a separate rate: 1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the government decentralizing control of companies.

2. Absence of *De Facto* Control: Typically, the DOC considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: 1) whether the export prices are set by, or subject to the approval of, a governmental authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3)

whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

The Law Offices of Nithya Nagarajan, LLC can assist your company in preparing the Separate Rate Applications to ensure that all factors considered by the Department are adequately explained such that your company can obtain separate rate status in order for it to be able to continue to export merchandise to the United States.