No. 20-1094

In the Supreme Court of the United States

HYUNDAI HEAVY INDUSTRIES CO., LTD., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the judgment of the Court of International Trade, which upheld the Department of Commerce's calculation of petitioner's antidumping duties under the Tariff Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is reported at 819 Fed. Appx. 937. The opinion and order of the Court of International Trade remanding to the Department of Commerce (Pet. App. 23a-63a) is reported at 332 F. Supp. 3d 1331, and its opinion and order affirming the remand redetermination (Pet. App. 3a-22a) is reported at 399 F. Supp. 3d 1305.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2020. The petition for a writ of certiorari was filed on February 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tariff Act of 1930 (Act), 19 U.S.C. 1673, establishes a remedial regime to combat unfair trade practices. It authorizes the Department of Commerce

(Commerce) to impose duties on imported merchandise that is sold, or is likely to be sold, in the United States "at less than its fair value" to the detriment of a domestic industry. 19 U.S.C. 1673(1), 1677(34). This practice is known as "dumping." See 19 U.S.C. 1677(34).

Under the Act, a producer in a domestic industry may file a petition asserting that imported products are being dumped. See 19 U.S.C. 1673a(b), 1677(9). If the petitioner satisfies certain criteria, Commerce initiates an antidumping investigation. 19 U.S.C. 1673a(c). To determine whether dumping is occurring, Commerce calculates the price of the goods in the foreign producer's home market (the "normal value") and compares that price to the price at which the imported goods are sold in the United States (the "export" or "constructed export" price). See 19 U.S.C. 1677(35)(A), 1677a, 1677b(a); see also 19 U.S.C. 1675(a)(2)(A)(i).

If Commerce finds that "the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value," the United States International Trade Commission (ITC) must then determine whether those sales have "materially injured" or threatened material injury to a domestic industry. 19 U.S.C. 1673d(a)(1) and (b)(1). If the ITC makes an affirmative determination, Commerce issues an antidumping order that imposes a duty in an amount equal to the difference between the normal value and the export or constructed export price. See 19 U.S.C. 1673d(c)(2), 1673e(a)(1). Commerce then revisits the appropriate duty on a periodic basis. See 19 U.S.C. 1675.

a. A dumping analysis requires extensive collection of information from regulated parties to determine the normal value and export or constructed export price.

Commerce issues an initial questionnaire to the exporters or foreign producers of the relevant product (known as the "respondents," see 19 C.F.R. 351.204(c)-(d), 351.213(f)), and issues supplemental questionnaires as necessary, see, *e.g.*, 19 C.F.R. 351.102(b)(21). By regulation, Commerce has established deadlines for the submission of factual information to ensure that all interested parties have the opportunity to comment and submit rebuttal information, and to enable Commerce to analyze the data and comments in a timely fashion. See 19 C.F.R. 351.301; see also 19 U.S.C. 1675(a)(3) (establishing deadlines for Commerce to issue preliminary and final determinations in periodic review proceedings).

In some cases, Commerce may rely on available facts outside the parties' submissions. It may use "facts otherwise available" to fill gaps in the record when the record omits necessary information. 19 U.S.C. 1677e(a). It may do the same when an interested party withholds requested information; fails to provide such information in the form and manner requested; significantly impedes the proceeding; or provides information that cannot be verified. *Ibid.* "[W]here *none* of the reported data is reliable or usable," Commerce may use "[t]otal facts available." *Zhejiang DunAn Hetian Metal Co.* v. *United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (emphasis added; citation omitted).

Before Commerce may use facts otherwise available due to deficient or incomplete information, it must "promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. 1677m(d). Commerce need only provide one opportunity to cure

deficient submissions. See, *e.g.*, *Maverick Tube Corp.* v. *United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017). Even when the information provided by a party does not meet all applicable requirements, Commerce "shall not decline to consider" that information if, among other things, a respondent has cooperated to the best of its ability and the information can be verified and is sufficiently complete that it can serve as a reliable basis for reaching a determination. See 19 U.S.C. 1677m(e).

When it uses "facts otherwise available," Commerce may choose to apply an adverse inference—known as "adverse" facts available—in selecting among those facts if an interested party has failed to cooperate to the "best of its ability." 19 U.S.C. 1677e(b). That standard requires a respondent to acquire "familiarity with all of the records it maintains" and to "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question." *Nippon Steel Corp.* v. *United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." *Ibid.* An adverse inference ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Statement of Administrative Action*, H.R. Doc. No. 316, 103d Cong., 2d Sess. 870 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4199.

b. The Act, in conjunction with agency regulations and practice, establishes detailed rules for calculating the normal value and export or constructed export price of the subject merchandise during the period under re-

view. See, *e.g.*, 19 U.S.C. 1677a, 1677b. Understatement of the former, or overstatement of the latter, may artificially depress the duty owed by a respondent.

As relevant here, Commerce classifies certain categories of revenue that are associated with the sale of the subject merchandise—but are not part of the sales price of the product itself—as "service-related revenue." Pet. App. 38a-39a. It treats such revenue as relevant to calculating the export or constructed export price of the subject merchandise only to the extent of the expenses associated with that revenue. This practice is known as "capping." *Id.* at 39a. For example, "although [Commerce] will offset freight expenses with freight revenue, where freight revenue earned by a respondent exceeds the freight charge incurred for the same type of activity, [Commerce] will cap freight revenue at the corresponding amount of freight charges incurred because it is inappropriate to increase gross unit selling price for subject merchandise as a result of profit earned on the sale of services (*i.e.*, freight)." Christian Marsh, Deputy Assistant Sec'y for Antidumping & Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Import Admin., *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review Of Circular Welded Carbon Steel Pipes And Tubes from Thailand: 2010-2011*, at 7 (Oct. 3, 2012), https://enforcement.trade.gov/frn/summary/thailand/2012-25040-1.pdf.

2. In 2011, Commerce initiated an antidumping investigation at the behest of, among others, ABB Inc., a respondent in this Court. See *Large Power Transformers From the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 Fed. Reg. 9204,

9204 (Feb. 16, 2012) (emphasis omitted). In 2012, Commerce issued a final determination that "imports of large power transformers from [South Korea] are being, or are likely to be, sold in the United States at less than fair value." Pet. App. 153a. Following an affirmative determination of material injury by the ITC, Commerce imposed an antidumping duty order. This case involves the third administrative review of that order, covering the period from August 2014 through July 2015. *Id.* at 24a. Petitioner disputes Commerce's classification in that proceeding of certain service-related revenues.

In the initial questionnaire, Commerce instructed petitioner to "report revenue in separate fields (e.g., ocean freight revenue, inland freight revenue, oil revenue, installation, etc.) and identify the related expense(s) for each revenue." Pet. App. 29a (citation omitted). In response, petitioner claimed that it had no separate revenues to report, explaining its understanding—purportedly based on prior agency proceedings—that it was required to report separate revenues only when "the customer issues a separate purchase order for services that are not part of the original term of sale." *Id.* at 29a-30a (citation omitted). Petitioner asserted that "the prices of its services are not separable from the price of the subject merchandise." *Id.* at 31a.

In a supplemental questionnaire, Commerce asked petitioner to "clarify whether [it] received revenue related to international freight, oil, installation, or any other expenses on U.S. sales" and, if so, to "report this revenue in a field separate from the related expense." Pet. App. 31a (citation omitted). Although the questionnaire was not limited to revenues received pursuant to a separate purchase order, petitioner again responded

that it did not have any revenue to report, based on the same supposed understanding expressed in its initial response. *Id.* at 31a-32a. However, petitioner also attached sales documentation containing separate service line items exceeding the expenses that petitioner had reported in its sales database. *Id.* at 32a.

Commerce then sent a second supplemental questionnaire. Noting ABB's argument that petitioner had "incurred expenses and obtained revenues for separately-negotiated services" for certain sales, Commerce instructed petitioner to "revise your U.S. sales database to report all such expenses and revenues for these sales in separate fields." Pet. App. 33a (citation omitted). The questionnaire added that if, in petitioner's opinion, "there were no additional expenses or revenues related to a sale," petitioner should "comment on each of the items cited by" ABB. *Id.* at 33a-34a (citation omitted). In its response, petitioner declined to revise its database. Petitioner contended that, although its sales documentation reflected separate line-item values for certain services, "those values were 'not severable from the lump-sum price'" for the transformers. *Id.* at 34a (citation omitted). Petitioner also provided a worksheet purportedly "listing on a category basis the values listed anywhere in the sales documentation for the breakdowns of the price of the [large power transformers] and the corresponding expenses." *Ibid.* (citation omitted).

In its final determination, Commerce concluded that, although the disputed services were "required under the terms of sale" of the subject merchandise and "invoiced on a lump-sum basis," petitioner's "sales documentation specifically indicates that these sales-related

services could be negotiable, apart from subject merchandise, since each service is shown/listed with the corresponding amount in purchase orders and/or invoices." Pet. App. 95a. Commerce explained that, although it had "permitted [petitioner] to include service-related revenues in the gross unit price on the basis of [petitioner's] claim in prior segments, the record evidence in this review indicates that there are separate line items for revenues from service-related revenues, as shown in purchase orders and/or invoices." *Id.* at 97a-98a. These revenues were accordingly subject to the capping methodology. Commerce determined that the purportedly responsive worksheet that petitioner had provided "very late in the process," after multiple requests, was incomplete, and that resort to facts available was therefore appropriate. *Id.* at 97a; see *id.* at 85a, 96a-97a. It further found that an adverse inference was warranted because petitioner had failed to act to the best of its ability by declining to provide the service-related revenue information in a timely fashion. *Id.* at 85a, 98a-99a.

In addition to petitioner's failure to report service-related revenues, Commerce identified three other deficiencies in petitioner's reporting that are not at issue here. Pet. App. 26a. Based on its findings taken together, Commerce applied total facts available with an adverse inference in calculating petitioner's dumping margin. *Id.* at 25a-26a.

Petitioner appealed to the Court of International Trade (CIT). The CIT held that "[s]ubstantial evidence support[ed] Commerce's finding that [petitioner] had separate service-related revenue to report, but failed to do so," thus "significantly imped[ing] the proceeding." Pet. App. 39a-40a. The CIT observed: "Commerce

asked [petitioner] on three separate occasions to separately report service-related revenue. Twice, [petitioner] did not; and the third time, [petitioner] provided a worksheet which was not responsive in the form or manner requested by Commerce." *Id.* at 41a. The court found that the application of adverse facts available was appropriate in these circumstances. *Id.* at 42a.

Petitioner argued that Commerce had "departed from the practice it relied upon in previous segments of the proceeding for determining whether separate service-related revenue existed or should have been reported." Pet. App. 36a. In rejecting that argument, the CIT explained that petitioner could not "rely on Commerce's factual conclusions from prior reviews in the instant review because each review is separate and based on the record developed before the agency in the review." *Id.* at 43a-44a. The court noted Commerce's explanation that the "separate line items for sales-related services" identified in petitioner's "sales documentation" had "demonstrated to the agency that the sales-related services could be negotiable, thereby distinguishing this review from prior segments of this proceeding." *Id.* at 36a. The CIT concluded that "[t]he fact that the records of prior segments did not support a conclusion that certain service-related revenues were separately reportable does not excuse [petitioner] from the burden of again establishing, on the record of this review, that such revenues were not separately reportable"—a burden petitioner had failed to carry. *Id.* at 43a.

Although the CIT sustained Commerce's finding regarding service-related revenues, the court determined that two of the four findings underlying Commerce's application of total adverse facts available were not supported by substantial evidence. See Pet. App. 54a, 59a.

The court accordingly remanded to the agency to "reconsider or further explain its decision to use total facts available with an adverse inference." *Id.* at 62a.

On remand, Commerce modified its findings but again determined that the application of total adverse facts available was appropriate. Pet. App. 7a. The CIT affirmed. *Id.* at 3a-22a.

3. Petitioner appealed to the Federal Circuit, which summarily affirmed. Pet. App. 1a-2a (citing Fed. Cir. R. 36 (permitting court of appeals to "enter a judgment of affirmance without opinion" when certain conditions exist and "an opinion would have no precedential value")).

ARGUMENT

Petitioner asserts (Pet. 14-17) that Commerce revised its methodology for classifying service-related revenues during the third administrative review and applied that revised methodology retroactively in calculating its antidumping duty. Petitioner contends that the Federal Circuit erred in approving this retroactive change. Those arguments lack merit.

Neither the Federal Circuit's summary affirmance nor the CIT's opinion found that Commerce had modified its methodology, much less that it had done so retroactively. Rather, as the CIT explained, the difference in outcome between prior administrative reviews and the Commerce review at issue here rested on differences in the record evidence assembled during the various proceedings. For the same reason, petitioner's claim (Pet. 16-18) of a conflict in the circuits over the retroactivity of agency methodologies is not implicated on these facts—and is, in any event, mistaken.

1. Petitioner asserts that, in the third administrative review, Commerce "belatedly" modified its approach to assessing service-related revenues and "then applied this methodology retroactively, penalizing [petitioner] with [adverse facts available] for both relying on its prior methodology, and for reporting [service-related revenue] in accordance with the new methodology * * * 'late in th[e] review process.'" Pet. 15-16 (citation omitted). Petitioner contends that the Federal Circuit's summary affirmance reflects that court's "permissive approach toward an agency's retroactive application of a revised methodology." Pet. 14; see Pet. 16-17. Petitioner's retroactivity argument lacks merit.

As an initial matter, petitioner overreads the Federal Circuit's judgment. Under established Federal Circuit practice, a Rule 36 judgment "simply confirms that the trial court entered the correct judgment. It does not endorse or reject any specific part of the trial court's reasoning. In addition, a judgment entered under Rule 36 has no precedential value and cannot establish applicable Federal Circuit law." *Rates Tech., Inc.* v. *Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012) (internal quotation marks omitted). The court of appeals' summary affirmance signifies only that the court approved of the CIT's judgment, which found Commerce's order "supported by substantial evidence and otherwise in accordance with law." Pet. App. 22a; see Fed. Cir. R. 36(a)(1)-(5).

In any event, the CIT did not find that Commerce had modified its methodology for classifying service-related revenue, much less that it had applied any revised methodology retroactively. Instead, the court noted Commerce's observation that it had "specifically requested that [petitioner] provide [separate revenue]

information in the instant review, because [petitioner's] sales documentation identifies separate line items for sales-related services." Pet. App. 36a (citation omitted). The court further observed that "[t]hose separate line items demonstrated to the agency that the sales-related services could be negotiable, thereby distinguishing this review from prior segments of this proceeding." *Ibid.* The CIT determined that petitioner could not "rely on Commerce's factual conclusions from prior reviews in the instant review because each review is separate and based on the record developed before the agency in the review." *Id.* at 43a-44a (citing, *e.g.*, *Jiaxing Bro. Fastener Co.* v. *United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016)).

Thus, rather than finding that Commerce had adopted a new methodology and applied it retroactively, the CIT simply found that the record evidence amassed during this review supported an outcome different from that of prior proceedings. The retroactivity issue on which petitioner focuses therefore is not presented here. Petitioner does not seriously challenge, and the question presented in the certiorari petition does not encompass, the CIT's *actual* holding that the facts of this review justified a different outcome. And even if petitioner had sought plenary review on that question, the court's factbound analysis of the sales documentation in this particular case would not warrant this Court's review.

2. Petitioner contends that the Federal Circuit's "permissive approach" to retroactivity stands in "contrast" to the D.C. Circuit's "far more restrictive approach." Pet. 16-17. Any such conflict is not implicated here. The CIT's determination that the facts of the instant review distinguished it from prior segments of the

proceeding obviated any need to address retroactivity. The court accordingly did not discuss or even cite any of the Federal Circuit decisions that, according to petitioner, had previously upheld Commerce's "discretion to make such changes with retroactive effect." Pet. 16 (citing cases).

Even if the Federal Circuit had condoned Commerce's retroactive application of a new methodology for calculating antidumping duties, its holding would not conflict with any decision of another court of appeals. *OXY USA, Inc.* v. *FERC*, 64 F.3d 679 (D.C. Cir. 1995), on which petitioner principally relies, involved a statutory provision embodying the "filed rate doctrine." *Id.* at 699. That provision "'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority'" and, as a "corollary," prohibits agencies from "alter[ing] rates retroactively." *Ibid.*; see *SFPP, L.P.* v. *FERC*, 967 F.3d 788, 801-802 (D.C. Cir. 2020) (per curiam) (similar). Petitioner does not suggest that the filed rate doctrine applies to antidumping reviews; indeed, petitioner acknowledges that the doctrine is "rooted in FERC's specific subject matter." Pet. 18; cf. 19 C.F.R. 351.212(a) ("[T]he United States uses a 'retrospective' assessment system under which final liability for antidumping * * * duties is determined after merchandise is imported."). Petitioner's allegation of a circuit conflict on the question presented therefore would be mistaken even if Commerce had applied a new antidumping methodology retroactively.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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