



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration

Washington, D.C. 20230

C-533-825


POR: 01/01/2009-12/31/2009

Public Document

IA/O6: TP

December 5, 2011

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Countervailing Duty Administrative Review of Polyethylene
Terephthalate Film, Sheet, and Strip (PET Film) from India

I. Summary

We have analyzed the case and rebuttal briefs submitted by interested parties in response to the preliminary results of this review. See Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Countervailing Duty Administrative Review, 76 FR 47558 (August 5, 2011) (Preliminary Results). The “Subsidies Valuation Information” and the “Analysis of Programs” sections below set forth our determinations with respect to the programs under review as well as the methodologies applied in analyzing these programs. These sections are followed by the “Analysis of Comments” section, which contains the Department of Commerce’s (the Department) response to the issues raised in the briefs. We recommend that you approve the positions described in this memorandum.

Comments were submitted by Dupont Teijin Films, Mitsubishi Polyester Film of America, SKC, Inc., and Toray Plastics (America), Inc. (collectively, Petitioners), as well as by the respondent company, Ester Industries Ltd. (Ester or Respondent). Below is a complete list of issues raised by interested parties in their case and rebuttal briefs:

- Comment 1: **Respondent’s Sales Figures**
- Comment 2: **Calculation of Respondent’s DEPS Benefit**
- Comment 3: **Calculation of Respondent’s EPCGS Benefit**
- Comment 4: **Calculation of Respondent’s Pre- and Post-Export Financing Benefit**
- Comment 5: **The State of Uttar Pradesh Sales Tax Incentive Program**



II. Subsidies Valuation Information

Period of Review (POR)

January 1, 2009, through December 31, 2009.

Allocation Period

Under 19 CFR 351.524(d)(2)(i), we presume the allocation period for non-recurring subsidies to be the average useful life (AUL) prescribed by the Internal Revenue Service (IRS) for renewable physical assets of the industry under consideration (as listed in the IRS's 2006 Class Life Asset Depreciation Range System, and as updated by the Department of the Treasury). This presumption will apply unless a party claims and establishes that these tables do not reasonably reflect the AUL of the renewable physical assets of the company or industry under investigation. Specifically, the party must establish that the difference between the AUL from the tables and the company-specific AUL or country-wide AUL for the industry under investigation is significant, pursuant to 19 CFR 351.524(d)(2)(i) and (ii). In the IRS Tables, PET Film falls under the category "Manufactured Chemicals and Allied Products." For that category, the IRS tables specify a class life of 9.5 years, which is rounded to establish an AUL of 10 years.

In the investigation period of this case, Respondent rebutted the presumption and the Department determined that the application of a company-specific AUL of 18 years was appropriate. See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India, 67 FR 34905 (May 16, 2002) (PET Film Final Determination), and accompanying Issues and Decision Memorandum at "Allocation Period." In the instant administrative review, Respondent argued that the Department should adjust its 18 year company-specific AUL to 20 years for any non-recurring subsidies received after the period of investigation (POI). For the preliminary results of this countervailing duty administrative review, the Department determined that Respondent did not provide the type of information required to establish that its AUL should be changed in accordance with the Department's regulations as set forth in 19 CFR 351.524(d)(2)(i) and (iii) and that Respondent's proposed AUL should not be used to determine the allocation period for non-recurring subsidies received after the POI. The Department will continue to use the original company-specific AUL of 18 years that Respondent demonstrated in the investigation to allocate all non-recurring subsidies for these final results.

Benchmark Interest Rates and Discount Rates

For programs requiring the application of a benchmark interest rate or discount rate, 19 CFR 351.505(a)(1) states a preference for using an interest rate that the company would pay on a comparable commercial loan that the company could obtain on the market. Also, 19 CFR 351.505(a)(3)(i) states that when selecting a comparable commercial loan that the recipient "could actually obtain on the market" the Department will normally rely on actual short-term and long-term loans obtained by the firm. However, when there are no comparable commercial loans, the Department may use a national average interest rate, pursuant to 19 CFR 351.505(a)(3)(ii).

Pursuant to 19 CFR 351.505(a)(2)(iv), if a program under review is a government-provided, short-term loan program, the preference would be to use a company-specific annual average of the interest rates on comparable commercial loans during the year in which the government-provided loan was taken out, weighted by the principal amount of each loan. For this review, the Department required a rupee-denominated short-term loan benchmark rate to determine benefits received under the Pre-Shipment and Post-Shipment Export Financing program. For further information regarding this program, see the “Pre- and Post-Shipment Export Financing” section below.

In prior reviews of this case, the Department determined that Inland Bill Discounting (IBD) loans are more comparable to pre- and post-shipment export financing loans than other types of rupee-denominated short-term loans. See, e.g., Notice of Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India, 70 FR 46483, 46485 (August 10, 2005) (PET Film Preliminary Results of 2003 Review), unchanged in Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India, 71 FR 7534 (February 13, 2006), and accompanying Issues and Decision Memorandum at “Benchmarks for Loans and Discount Rate” (PET Film Final Results 2003 Review).

In the Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination With Final Antidumping Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India, 66 FR 53389, 53390-91 (October 22, 2001), unchanged in PET Film Final Determination, the Department determined that, in the absence of IBD loans, cash credit (CC) loans are the next most comparable type of short-term loans to pre-shipment and post-shipment export financing. Like pre-shipment export financing, CC loans are denominated in rupees and take the form of a line of credit which can be drawn down by the recipient. There is no new information or evidence of changed circumstances which would warrant reconsidering this finding. Respondent did not obtain IBD loans during the POR; however, it did take out CC short-term loans during the POR. Therefore, for these final results, we used the weighted average interest rate (derived from the amount of interest paid by Respondent on its rupee-denominated short-term CC loans) as the benchmark for Respondent’s pre- and post-shipment export financing.

Pursuant to 19 CFR 351.505(a)(2)(iii), in selecting a comparable loan if a program under review is a government-provided, long-term loan program, the preference would be to use a loan the terms of which were established during, or immediately before, the year in which the terms of the government-provided loan were established. Pursuant to 19 CFR 351.505(a)(2)(ii), the Department will not consider a loan provided by a government-owned special purpose bank to be a commercial loan for purposes of selecting a loan to compare with a government-provided loan. The Department has previously determined that the Industrial Development Bank of India (IDBI) is a government-owned special purpose bank. See PET Film Final Results 2003 Review, and accompanying Issues and Decision Memorandum at Comment 3. Further, the Department previously has determined that the Industrial Finance Corporation of India (IFCI) and the Export-Import Bank of India (EXIM) are government-owned special purpose banks. See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 73 FR 7708 (February 11, 2008) (PET Film Final Results 2005

Review), and accompanying Issues and Decision Memorandum at “Benchmark Interest Rates and Discount Rates.” As such, the Department does not use loans from the IDBI, IFCI, or EXIM, if reported by the respondents, as a basis for a commercial loan benchmark.

In this review, Respondent had comparable commercial long-term rupee-denominated loans for some of the required years which the Department was able to use for long-term benchmarks. However, for the years in which we did not have company-specific loan information, and where the relevant information was on the record, we relied on comparable long-term rupee-denominated benchmark interest rates from the immediately preceding year as directed by 19 CFR 351.505(a)(2)(iii). When there were no comparable long-term rupee-denominated loans from commercial banks during either the year under consideration or the preceding year, we used national average long-term interest rates, pursuant to 19 CFR 351.505(a)(3)(ii), from the International Monetary Fund’s publication, International Financial Statistics (IMF Statistics).

Respondent received exemptions from import duties on the importation of capital equipment under the Export Promotion Capital Goods Scheme (EPCGS) program. As discussed in more detail below, Respondent had not fulfilled its export obligation for certain EPCGS licenses. We treat EPCGS licenses with unfulfilled export obligations as interest-free contingent liability loans. See, e.g., PET Film Preliminary Results of 2003 Review, 70 FR at 46488, unchanged in PET Film Final Results 2003 Review. For the EPCGS licenses with unfulfilled export obligations, the Department used, as long-term benchmarks, Respondent’s long-term loans from the required year or the preceding year as well as interest rates from IMF Statistics, as described above.

Finally, grants are considered to provide non-recurring benefits under 19 CFR 351.524. As such, the Department must identify an appropriate discount rate for purposes of allocating these non-recurring benefits over time in accordance with 19 CFR 351.524(d)(3). The regulations provide several options in order of preference. The first among these is the cost of long-term fixed-rate loans of the firm in question for each year in which the government agreed to provide the non-recurring subsidies excluding any loans which have been determined to be countervailable and excluding loans from government banks. See 19 CFR 351.524(d)(3)(i)(A). As the second option, the regulations direct us to use the average annual cost of long-term, fixed-rate loans in the country in question. See 19 CFR 351.524(d)(3)(i)(B). In accordance with this hierarchy, we used as a discount rate, when available, the cost of Respondent’s long-term fixed-rate commercial loans that met the criteria specified by 19 CFR 351.524(d)(3)(i)(A). For those years for which Respondent did not report any long-term fixed-rate commercial loans, we used the yearly average long-term lending rate in India from the IMF Statistics as the discount rate.

Denominator

When selecting an appropriate denominator for use in calculating the ad valorem subsidy rate, the Department considers the basis for the respondent’s receipt of benefits under each program at issue. As discussed in further detail below, we determine that the benefits received by Respondent under all of the programs found countervailable were contingent upon export performance. Therefore, for our calculations for EPCGS benefits, we are using total export sales inclusive of deemed exports as the denominator. Because the Duty Entitlement Passbook Scheme (DEPS) and Pre- and Post-Shipment Export Financing programs require that the

recipient demonstrate physical exports, we used total export sales net of deemed exports. See 19 CFR 351.525(b)(2); see also Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Countervailing Duty New Shipper Review, 76 FR 30910 (May 27, 2011), and accompanying Issues and Decision Memorandum at “Denominator.” In addition, the Department has previously found that exporters qualify for Post-Shipment Export Financing by presenting their export documents to the lending bank. See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 72 FR 6530 (February 12, 2007), and accompanying Issues and Decision Memorandum at “Pre-Shipment and Post-Shipment Export Financing.” Therefore, we used Respondent’s total export sales of subject merchandise to the United States as the denominator for Post-Shipment Export Financing. Comments regarding Respondent’s sales denominator are discussed below in Comment 1.

III. Analysis of Programs

A. Programs Determined to be Countervailable

1. Pre- and Post-Shipment Export Financing

The Reserve Bank of India (RBI), through commercial banks, provides short-term pre-shipment financing, or “packing credits,” to exporters. Upon presentation of a confirmed export order or letter of credit to a bank, companies may receive pre-shipment loans for working capital purposes (i.e., purchasing raw materials, warehousing, packing, transportation, etc.) for merchandise destined for exportation. See PET Film Final Determination, and accompanying Issues and Decision Memorandum at “Pre-Shipment and Post-Shipment Export Financing.” Companies may also establish pre-shipment credit lines upon which they draw as needed. Limits on credit lines are established by commercial banks and are based on a company’s creditworthiness and past export performance. Credit lines may be denominated either in Indian rupees or in a foreign currency. See id. Commercial banks extending export credit to Indian companies must, by law, charge interest at rates determined by the RBI. See id.

Post-shipment export financing consists of loans in the form of discounted trade bills or advances by commercial banks. See id. Exporters qualify for this program by presenting their export documents to the lending bank. The credit covers the period from the date of shipment of the goods to the date of realization of the proceeds from the sale to the overseas customer. See id. Under the Foreign Exchange Management Act of 1999, exporters are required to realize proceeds from their export sales within 180 days of shipment. See id. Post-shipment financing is, therefore, a working capital program used to finance export receivables. In general, post-shipment loans are granted for a period of not more than 180 days, and may be obtained in Indian rupees and in foreign currencies. See Notice of Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip From India, 69 FR 18542, 18544 (April 8, 2004) (PET Film First AR Preliminary Results), unchanged in Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India, 69 FR 51063 (August 17, 2004) (PET Film First AR Final Results). In the original investigation, the Department determined that the pre-shipment and post-shipment export financing programs conferred countervailable

subsidies on the subject merchandise because: (1) the provision of the export financing constitutes a financial contribution pursuant to section 771(5)(D)(i) of the Tariff Act of 1930, as amended (the Act), as a direct transfer of funds in the form of loans; (2) the provision of the export financing confers benefits on the respondents under section 771(5)(E)(ii) of the Act to the extent that the interest rates provided under these programs are lower than comparable commercial loan interest rates; and (3) these programs are specific under section 771(5A)(B) of the Act because they are contingent upon export performance. See PET Film Final Determination, and accompanying Issues and Decision Memorandum at “Pre-Shipment and Post-Shipment Export Financing.” There is no new information or evidence of changed circumstances that would warrant reconsidering this finding. Therefore, for these final results, we continue to find this program countervailable.

Respondent reported receiving both pre- and post-shipment export financing during the POR. The benefit conferred by the pre-shipment and post-shipment loans is the difference between the amount of interest the company paid on the government loan and the amount of interest it would have paid on a comparable commercial loan (i.e., the short-term benchmark). Because pre-shipment loans are tied to a company’s total physical exports rather than physical exports of subject merchandise, we calculated the subsidy rate for these loans by dividing the total benefit by the value of Respondent’s total exports, net of deemed exports, during the POR. See 19 CFR 351.525(b)(2). Because post-shipment loans are tied to specific shipments of a particular product to a particular country, we divided the total benefit from post-shipment loans tied to exports of subject merchandise to the United States by the value of total exports of subject merchandise to the United States during the POR pursuant to 19 CFR 351.525(b)(4). On this basis, we determine the countervailable subsidy from pre- and post-shipment export financing for Respondent to be 1.31 percent ad valorem.¹

The Department’s position on the parties’ comments regarding Pre- and Post-Shipment Export Financing are discussed in Comment 4, below.

2. Export Promotion Capital Goods Scheme

The EPCGS provides for a reduction or exemption of customs duties and excise taxes on imports of capital goods used in the production of exported products. Under this program, producers pay reduced duty rates on imported capital equipment by committing to earn convertible foreign currency equal to four to five times the value of the capital goods within a period of eight years. Once a company has met its export obligation, the Government of India (GOI) will formally waive the duties on the imported goods. See PET Film First AR Preliminary Results, 69 FR at 18545, unchanged in PET Film First AR Final Results. If a company fails to meet the export obligation, the company is subject to payment of all or part of the duty reduction, depending on the extent of the shortfall in foreign currency earnings, plus an interest penalty. See id.

In the investigation, the Department determined that import duty reductions or exemptions provided under the EPCGS are countervailable export subsidies because the scheme: (1)

¹ See Memorandum from Toni Page, International Trade Analyst, to Thomas Gilgunn, Program Manager, Re: Revisions to the Rate Calculations for Ester Industries Ltd. (Ester) (December 5, 2011) (Final Calculation Memorandum).

provides a financial contribution pursuant to section 771(5)(D) of the Act; (2) provides two different benefits under section 771(5)(E) of the Act; and (3) is specific pursuant to section 771(5A)(B) of the Act because the program is contingent upon export performance. See, e.g., PET Film Final Determination, and accompanying Issues and Decision Memorandum at “EPCGS.” Because there is no new information or evidence of changed circumstances that would warrant reconsidering our determination that this program is countervailable, we continue to find that this program is countervailable for these final results.

Under the EPCGS, the exempted import duties would have to be paid to the GOI if the accompanying export obligations are not met. It is the Department’s practice to treat any balance on an unpaid liability that may be waived in the future, as a contingent-liability interest-free loan pursuant to 19 CFR 351.505(d)(1). See, e.g., PET Film Final Determination, and accompanying Issues and Decision Memorandum, at “EPCGS.” Since the unpaid duties are a liability contingent on subsequent events, these interest-free contingent-liability loans constitute the first benefit under the EPCGS. The second benefit arises when the GOI waives the duty on imports of capital equipment covered by those EPCGS licenses for which the export requirement has already been met. For those licenses for which the GOI has acknowledged that the company has completed its export obligation, we treat the import duty savings as grants received in the year in which the GOI waived the contingent liability on the import duty exemption pursuant to 19 CFR 351.505(d)(2). Import duty exemptions under this program are approved for the purchase of capital equipment. The preamble to our regulations states that, if a government provides an import duty exemption tied to major equipment purchases, “it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non-recurring . . .” See Countervailing Duties, 63 FR 65348, 65393 (November 25, 1998). In accordance with 19 CFR 351.524(c)(2)(iii) and past practice, we are treating these import duty exemptions on capital equipment as non-recurring benefits. See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 75 FR 6634 (February 10, 2010), and accompanying Issues and Decision Memorandum at Comment 9.

Ester imported capital goods at reduced import duty rates under the EPCGS in the years prior to the POR. Information provided by Respondent indicates that its EPCGS licenses were issued for the purchase of capital goods for the production of both subject and non-subject merchandise. See Respondent’s Second Supplemental Questionnaire Response (July 1, 2011) (SQR-2) at Exhibit 10. Based on the information and documentation submitted by Respondent, we cannot determine which EPCGS licenses are tied to the production of a particular product within the meaning of 19 CFR 351.525(b)(5). As such, we find that all of Respondent’s EPCGS licenses benefit all of the company’s exports.

Ester met the export requirements for certain EPCGS licenses prior to December 31, 2009, and the GOI has formally waived the relevant import duties. For most of its licenses, however, Respondent has not yet met its export obligation as required under the program. Therefore, although Respondent has received a deferral from paying import duties for the capital goods that were imported, the final waiver of the obligation to pay the duties has not yet been granted for many of these imports.

To calculate the benefit received from the GOI's formal waiver of import duties on Respondent's capital equipment imports where its export obligation was met prior to December 31, 2009 (the end of the POR), we considered the total amount of duties waived, *i.e.*, the calculated duties payable less the duties actually paid in the year, net of required application fees, in accordance with section 771(6) of the Act, to be the benefit and treated these amounts as grants pursuant to 19 CFR 351.504. Further, consistent with the approach followed in the investigation, we determine the year of receipt of the benefit to be the year in which the GOI formally waived Respondent's outstanding import duties. See PET Film Final Determination, and accompanying Issues and Decision Memorandum at Comment 5. Next, we performed the "0.5 percent test," as prescribed under 19 CFR 351.524(b)(2), for the total value of duties waived, for each year in which the GOI granted Respondent an import duty waiver. For any years in which the value of the waived import duties was less than 0.5 percent of Respondent's total export sales, we expensed the value of the duty waived to the year of receipt. For years in which the value of the waivers exceeded 0.5 percent of Respondent's total export sales in that year, we allocated the value of the waivers using Respondent's company-specific allocation period of 18 years for non-recurring subsidies, in accordance with 19 CFR 351.524(d)(2). See "Allocation Period" section, above. For purposes of allocating the value of the waivers over time, we used the appropriate discount rate for the year in which the GOI officially waived the import duties. See "Benchmark Interest Rates and Discount Rates" section, above.

As noted above, import duty reductions or exemptions that Respondent received on the imports of capital equipment for which it has not yet met export obligations may have to be repaid to the GOI if the obligations under the licenses are not met. Consistent with our practice and prior determinations, we are treating the unpaid import duty liability as an interest-free loan. See 19 CFR 351.505(d)(1), PET Film Final Determination, and accompanying Issues and Decision Memorandum at "EPCGS"; see also Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin From India, 70 FR 13460 (March 21, 2005), and accompanying Issues and Decision Memorandum at "Export Promotion Capital Goods Scheme (EPCGS)."

The amount of the unpaid duty liabilities to be treated as an interest-free loan is the amount of the import duty reduction or exemption for which the respondent applied, but had not been officially waived by the GOI, as of the end of the POR. Accordingly, we find the benefit to be the interest that Respondent would have paid during the POR had it borrowed the full amount of the duty reduction or exemption at the time of importation. See, e.g., PET Film Preliminary Results of 2003 Review, 70 FR at 46488, unchanged in PET Film Final Results 2003 Review.

As stated above under this section, the time period for fulfilling the export requirement expires eight years after importation of the capital good. As such, pursuant to 19 CFR 351.505(d)(1), the benchmark for measuring the benefit is a long-term interest rate because the event upon which repayment of the duties depends (*i.e.*, the date of expiration of the time period to fulfill the export commitment) occurs at a point in time that is more than one year after the date of importation of the capital goods (*i.e.*, under the EPCGS program, the time period for fulfilling the export commitment is more than one year after importation of the capital good). As the benchmark interest rate, we used the weighted-average interest rate from all of Respondent's comparable commercial long-term, rupee-denominated loans for the year in which the capital good was

imported. For the years when Respondent did not have any comparable long-term commercial loans, we used the loans from the preceding year or the national average interest rates from the IMF Statistics, pursuant to 19 CFR 351.505(a)(2)(iii) and (a)(3)(ii). See “Benchmarks Interest Rates and Discount Rates” section, above, for a discussion of the applicable benchmark. We then multiplied the total amount of unpaid duties under each license by the long-term benchmark interest rate for the year in which the capital good was imported and summed these amounts to determine the total benefit from these contingent liability loans.

The benefit received under the EPCGS is the sum of: (1) the benefit attributable to the POR from the formally waived duties for imports of capital equipment for which the respondents met export requirements by the end of the POR; and (2) interest due on the contingent-liability loans for imports of capital equipment that have not met export requirements. We then divided the total benefit received by Respondent under the EPCGS program by Respondent’s total exports, inclusive of deemed exports, to determine a countervailable subsidy of 3.08 percent ad valorem.²

The Department’s position on the parties’ comments regarding EPCGS is discussed in Comment 3, below.

3. Duty Entitlement Passbook Scheme (DEPS)

India’s DEPS was enacted on April 1, 1997, as a successor to the Passbook Scheme (PBS). As with PBS, DEPS enables exporting companies to earn import duty exemptions in the form of passbook credits rather than cash. See PET Film Final Results 2005 Review, and accompanying Issues and Decision Memorandum at “Duty Entitlement Passbook Scheme (DEPS/DEPB).” All exporters are eligible to earn DEPS credits on a post-export basis, provided that the GOI has established a standard input-output norm for the exported product. DEPS credits can be applied to subsequent imports of any materials, regardless of whether they are consumed in the production of an exported product. DEPS credits are valid for twelve months and are transferable after the foreign exchange is realized on the export sales from which the DEPS credits are earned. See id.

The Department has previously determined that DEPS is countervailable. See, e.g., PET Film Final Determination, and accompanying Issues and Decision Memorandum at “DEPS.” In the investigation, the Department determined that, under DEPS, a financial contribution, as defined under section 771(5)(D)(ii) of the Act, is provided because the GOI provides credits for the future payment of import duties. Moreover, the GOI does not have in place and does not apply a system that is reasonable and effective to confirm which inputs, and in what amounts, are consumed in the production of the exported products. Id. Therefore, under section 771(5)(E) of the Act and 19 CFR 351.519(a)(4), the entire amount of import duty exemption earned during the POI constitutes a benefit. Finally, this program is only available to exporters and, therefore, it is specific under sections 771(5A)(B) of the Act. No new information or evidence of changed circumstances has been presented in this review to warrant reconsideration of this finding. Therefore, we continue to find that the DEPS is countervailable.

² See Final Calculation Memorandum.

In accordance with past practice and pursuant to 19 CFR 351.519(b)(2), we find that benefits from the DEPS are conferred as of the date of exportation of the shipment for which the pertinent DEPS credits are earned. See, e.g., Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From India, 64 FR 73131, 73134 and 73140 (December 29, 1999) (Final Determination Carbon Steel Plate from India). We calculated the benefit on an as-earned basis upon export because DEPS credits are provided as a percentage of the value of the exported merchandise on a shipment-by-shipment basis and, as such, it is at this point that recipients know the exact amount of the benefit (e.g., the value of the duty exemption).

Respondent reported that it received post-export credits under the DEPS during the POR. Because DEPS credits are earned on a shipment-by-shipment basis, we normally calculate the subsidy rate by dividing the benefit earned on subject merchandise exported to the United States by total exports of subject merchandise to the United States during the POR. See, e.g., Final Determination Carbon Steel Plate from India, 64 FR at 73134. Respondent reported that it earned DEPS credits on exports of both subject and non-subject merchandise. Although Respondent reported that it was able to separate the DEPS credits earned on exports to the United States in the DEPS data it provided to the Department, our analysis indicates that Respondent earned DEPS credits for shipments of subject and non-subject merchandise as well as for shipments to multiple countries on the same DEPS license. Therefore, since we are unable to tie the benefits received to subject merchandise in accordance with 19 CFR 525(b)(5), we have calculated the subsidy rate using the value of all DEPS export credits that Respondent earned during the POR. We divided the total amount of the benefit by Respondent's total export sales to all markets, net of deemed exports, during the POR. On this basis, we determine Respondent's countervailable subsidy from DEPS to be 7.43 percent ad valorem.³

The Department's position on the parties' comments regarding DEPS is discussed in Comment 2, below.

B. Programs Determined To Be Not Used

Based on the questionnaire responses, we determined that Respondent did not apply for or receive benefits during the POR under the programs listed below:

GOI Programs

1. Duty Free Replenishment Certificate (DFRC)
2. Target Plus Scheme
3. Capital Subsidy
4. Exemption of Export Credit from Interest Taxes
5. Loan Guarantees from the GOI

³ See Final Calculation Memorandum.

State Programs

6. Octroi Refund Scheme State of Maharashtra (SOM)
7. Waiving of Interest on Loans by SICOM Limited (SOM)
8. Capital Incentive Scheme State of Uttar Pradesh (SUP)
9. State Sales Tax Incentive Schemes
10. Infrastructure Assistance Schemes (State of Gujarat)
11. Capital Incentive Scheme Uttaranchel
12. Capital Incentive Schemes (SOM)
13. Electricity Duty Exemption Scheme (SOM)
14. Union Territories Sales Tax Exemption

IV. Analysis of Comments

Comment 1: Respondent's Sales Figures

Respondent's Arguments:

- The Department made a ministerial error in converting its sales figures from the shortened format to the full-length format.
- Ester reported its sales figures to the Department by truncating the amounts by 100,000 as indicated by "(Rs. 00'000)."
- The Department acknowledged that the figures were truncated by adding the indication (Rs. 00'000) in the header of its sales summary in the Preliminary Calculation Memorandum.⁴ However, in converting the truncated figures to the actual sales figures, the Department multiplied the truncated figures by 10,000 instead of 100,000.
- The sales data reported in its questionnaire responses supports the argument that the conversion from the truncated to the actual sales numbers was done incorrectly. See Respondent's Questionnaire Response (October 18, 2010) (QR) at 10-15 and SQR-2 at 4-7.
- According to 19 CFR 351.224(f), a ministerial error is an error in addition, subtraction or other arithmetic function, clerical error resulting from inaccurate copying, duplication or the like and any other similar type of unintentional error which the Department considers ministerial.
- If the Department finds that this is not a ministerial error, a correction should still be made. The Court of Appeals for the Federal Circuit (CAFC) has supported the need to

⁴ See Memorandum from Toni Page, International Trade Compliance Analyst, to File Re: Respondent Preliminary Calculation (August 1, 2011) (Preliminary Calculation Memorandum).

correct errors found between the preliminary and final determination in NTN Bearing Corp. v. United States, 74 F.3d 1204, 1207 (CAFC 1995) and Timken United States Corp. v. United States, 434 F.3d 1345, 1353 (Fed. Cir. 2006).

Petitioners' Rebuttal Arguments:

- The Department should reject Respondent's ministerial error claim because these comments were untimely submitted. According to 19 CFR 351.224(c)(2), parties are required to file ministerial error comments within five days of the Secretary's release of disclosure documents. However, Respondent submitted ministerial error comments for the first time in its case brief dated September 28, 2011.
- In this review, the Department disclosed its calculations for the preliminary determination on August 1, 2011.⁵ Therefore, both parties were obligated to submit ministerial error comments by Monday, August 8, 2011 (August 6, 2011, the five-day deadline, was a Saturday).
- Because Respondent voluntarily classified this alleged error as exclusively ministerial, the five-day deadline of 19 CFR 351.224(c)(2) applies. The Department should not voluntarily revise its preliminary calculation along the lines suggested in Respondent's untimely comments. In Jinan Yipin Corp., Ltd. v. United States, 774 F. Supp. 2d 1238, 1249 (CIT 2011), the Court of International Trade affirmed the Department's prerogative not to correct any putative ministerial errors in its preliminary calculations if comments about those errors are not timely filed.

Department Position:

We revised our conversion of Respondent's truncated sales denominator figures for the final results. Specifically, the Department has converted Respondent's truncated sales figures by adding five extra zeroes to the sales figure or multiplying them by a factor of 100,000, which results in the same outcome. Notwithstanding, the Department disagrees with Respondent's position that the Department committed a ministerial error when it converted its sales figures from the truncated format to the actual number. Based upon Respondent's submitted sales information, the Department reasonably interpreted the "00'000" in the Preliminary Results to mean the sales figures were truncated by a factor of ten thousand.

In its initial questionnaire response, Respondent indicated that the reported sales figures were truncated by millions. See QR at 10-15. Respondent then indicated in its subsequent questionnaire responses that the company sales figures were truncated by 00'000. After evaluating all of the information on the record, we find that what we originally thought was a factor of 10,000 is actually a factor of 100,000. This fact can be seen when examining the sales information provided in Ester's QR, First Supplemental Questionnaire Response (March 9, 2011) (SQR-1), SQR-2, and Third Supplemental Questionnaire Response (September 8, 2011) (SQR-3). Respondent's sales figures in its QR were truncated by millions while the sales figures as reported in SQR-1 and SQR-2 were shortened by five zeroes or multiplying the shortened numbers by a factor of 100,000. Performing either function described

⁵ See Preliminary Calculation Memorandum.

above, i.e. multiplying the sales figures in the QR by a million or multiplying the sales figures reported in the subsequent questionnaire responses by 100,000, results in the same long-form sales figures as reported by Ester in SQR-3.

That said, we note that, pursuant to 19 CFR 351.224(c), comments “concerning ministerial errors made in the preliminary results of a review should be included in a party’s case brief.” As such, regardless of our finding that this does not constitute a ministerial error, we find that Respondent’s allegation itself was timely.

Comment 2: Calculation of Respondent’s DEPS Benefit

Respondent’s Arguments:

- According to 19 C.F.R. 351.525(b)(4) and (5), “if a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market;” or “if a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.”
- Respondent’s DEPS subsidies can be tied to both the market and the product; therefore, the Department should limit the calculation of the DEPS benefit to sales of subject merchandise to the United States.
- In the Preliminary Results, the Department did not explain exactly why it was unable to tie the benefits received on sales of subject merchandise to the United States. Moreover, the Department’s own calculation sheets for DEPS have information on the exported product and country of destination. Therefore, the DEPS benefit for sales of subject merchandise to the United States could have been easily filtered.
- In order to calculate the correct benefit under the DEPS program in accordance with the regulations, the Department needs the following information, which is available on the record:
 - 1) License number - QR at Exhibit 12
 - 2) Product - QR at Exhibit 12 (listed by HTS code)
 - 3) Market - QR at Exhibit 12
 - 4) FOB Value - QR at Exhibit 12
 - 5) Application fees - QR at Exhibit 12
 - 6) Benefit calculated based on FOB value
 - 7) Benefit calculated on the per unit value
- The Department requested, and Respondent provided, clarification with regard to the meaning of “export product” as listed on the DEPS spreadsheet the company provided.
- The sample DEPS license issued by the GOI, and provided by Respondent, identifies 1) Shipping bill numbers covered; 2) Shipping bill date; 3) Port code and port name; 4) FOB value for each shipping bill; 5) Product code and DEPS number; and 6) Item description. The sample license thus shows that the DEPS license is invariably linked to a particular product.
- The sample DEPS application Respondent placed on the record contains the following information, separately, for each shipping bill: 1) Shipping bill number and date; 2)

Reference to customs file; 3) Invoice; 4) DEPS code; 5) the DEPS rate; 6) FOB value; 7) Item description (e.g. subject or non-subject merchandise); and 8) Value cap rate for each.

- As with sales and DEPS credits earned, Respondent provided the necessary information to calculate the benefit of credits sold on a market- and product-specific basis.
- The Department ignored the fact that there is a statutory maximum for DEPS benefits when it calculated the DEPS benefit. The difference between the “DEPB rate” and “DEPB credit” earned by the company is due to the GOI statutory cap on DEPS benefits.
- In the first supplemental questionnaire, the Department stated “In Exhibit 12 of the Respondent QR, some of the rates under the ‘DEPS Rate’ Column do not match the amounts provided in ‘FOB Value of Shipment’ and ‘Value of DEPS Credit.’ {...} Please explain and correct all discrepancies in Exhibit 12.” Respondent explained in its response that the difference was due to “value cap,” in which the GOI restricts the maximum value of the product for the purpose of determining DEPS credit. In SQR-2 Respondent clearly stated that the DEPS benefit is restricted to the lesser of (a) 7 percent of the unit selling price (FOB) or (b) 5.60 Rs/kg for plain polyester film (plain film). In the case of metalized polyester film, the limit is 10 percent of the unit selling price (FOB) or 10.0 Rs./kg.
- The Department only used the 7 percent of the FOB value and in a number of situations this overstated the actual benefit received. Respondent’s chart demonstrates that the Department’s methodology overstated the benefit for nearly 85 percent of the sales of subject merchandise. See Respondent Case Brief at 16 and SQR-2 at 24.

Petitioners’ Rebuttal Arguments:

- The Department’s preliminary calculation of Respondent’s benefit under the DEPS for this review was based on unreliable, unsupported evidence submitted by Respondent about the magnitude of its DEPS benefits.
- Respondent’s 2009-2010 Annual Report contains the most reliable evidence on the record about Respondent’s actual benefit under the DEPS during the calendar year 2009. It indicates that from April 1, 2009, to March 31, 2010, Respondent benefited from the DEPS in the amount of 63,837,000 rupees.
- In the previous year (from April 1, 2008, to March 31, 2009), Respondent’s benefits were even higher, at 64,923,000 rupees. Although these two figures do not overlap perfectly with the POR in this case, they do indicate that Respondent consistently benefited from the DEPS at a rate at least as high as 63,837,000 rupees per year.
- In light of the inconsistencies, flaws, and lack of supporting evidence for the license-by-license data which the Department used to preliminarily calculate Respondent’s benefit under the DEPS, the Department should instead use the relatively more reliable information in Respondent’s Annual Report and attribute (at least) 63,837,000 rupees of DEPS benefits to Respondent during the POR.
- Apart from this information in Respondent’s Annual Report, the remaining evidence on the record pertaining to Respondent’s benefit under the DEPS is flawed, and therefore the Department should not use it to derive its benefit calculation. For instance, Respondent has submitted license-by-license data indicating a total benefit of one amount. See

Respondent SQR-2 at Exhibit SSQ-CVD-22. However, Respondent also submitted an accounting reconciliation that implies a total DEPS benefit of a different amount during the period of review. See Respondent SQR-2 at Exhibit SSQ-CVD-27 and Petitioner's Rebuttal Brief at Table 1.

- Respondent took issue in its case brief with the Department's preliminary finding that it could not tie the license-by-license data in SQR-2 Exhibit SSQ-CVD-22 to particular markets or particular products; however, Respondent failed to address the Department's central concern that single licenses were used for exports to more than one country and for more than one product.
- Respondent has not provided any new clarifying information, nor has it disputed the Department's factual observation that Respondent earned DEPS credits for shipments of subject and non-subject merchandise as well as for shipments to multiple countries on the same DEPS license.
- The fact that Respondent undertook the administrative hassle of mixing and matching multiple shipments of multiple products to multiple countries on a single DEPS license suggests that its total DEPS benefits would have been lower had it taken the administratively simpler route. In other words, Respondent's DEPS benefit for any single shipment was inflated by the presence of other shipments on the same DEPS license, and thus the benefits of that single shipment cannot be tied to the country to which it was sent, or the product that it contained.
- If the Department continues to rely on SQR-2 Exhibit SSQ-CVD-22 for its DEPS benefit calculation, then it should not revise its preliminary calculation by attempting to tie DEPS benefits to particular markets and/or products.
- Although Respondent argues that the Department should have recognized a statutory maximum for DEPS benefits, Respondent provides no citation to relevant legal authority, nor any supporting evidence other than its own previous responses to the Department. There is insufficient information on the record to support a finding that such a statutory maximum applies.
- The documents provided by Respondent do not indicate under what conditions such a value cap would apply.
- If the Department continues to rely on the license-by-license data in SQR-2 Exhibit SSQ-CVD-22 to calculate Respondent's benefit under the DEPS, then it should reject Respondent's "statutory maximum" argument and calculate the benefit using the same formula as it used in the preliminary calculation.

Department Position:

We have continued to calculate the subsidy rate for this program using the value of all DEPS export credits that Respondent earned during the POR. Respondent has continued to argue that, according to 19 CFR 351.525 (b)(4) and (5), "if a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market;" or "if a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product." As stated in the Preliminary Results, information on the record clearly indicates that Respondent earned DEPS credits for exports to multiple countries as well for both subject and non-subject merchandise on the same license. See SQR-2 at Exhibit SSQ-CVD-22. Therefore, we are unable to tie Respondent's DEPS credits to sales to a particular

market or to sales of a particular product in accordance with 19 CFR 351.525(b)(4) and (5). Accordingly, we will continue to calculate Respondent's subsidy rate using the value of all DEPS export credits earned during the POR and then dividing that amount by total export sales to all markets, net of deemed exports.

In addition, the Department has not adjusted Respondent's DEPS rate to account for a capping of benefits. As noted by Respondent, the Department requested information as to why the amounts listed under "DEPS Rate" did not match the amounts Ester reported under the "FOB Value of Shipment" and "Value of DEPS Credit" columns in its DEPS spreadsheet. See SQR-2 at 22-25. However, Respondent did not provide any supporting regulations from the GOI stating that DEPS benefits are capped at a certain percentage or under what conditions the cap applies. Nor did Respondent provide any supporting information demonstrating or explaining under what circumstances the DEPS credits earned are capped. Therefore the Department has continued to rely on the methodology used in the Preliminary Results to calculate Respondent's DEPS benefits.

Finally, while we agree that aspects of Respondent's responses were unclear (e.g., its "truncated sales figures"), Petitioners have not demonstrated that Respondent's DEPS information in SQR-2 Exhibit SSQ-CVD-22 is so unreliable as to be unusable, and we have no basis otherwise to question the data's reliability. Therefore, we have continued to rely on the license-by-license data in SQR-2 Exhibit SSQ-CVD-22 to calculate Respondent's benefit under the DEPS, and have calculated the benefit using the same methodology we used in the Preliminary Results.

Comment 3: Calculation of Respondent's EPCGS Benefit

Petitioners' Arguments:

- The Department did not account for all of Respondent's EPCGS licenses in its preliminary calculations.
- The licenses in question were listed in SQR-2 at Exhibit SSQ-CVD-10 and in SQR-3 at Exhibit TSQ-7.
- The Department should correct this omission and revise its preliminary calculations for EPCGS accordingly.

Respondent's Rebuttal Arguments:

- Petitioners' claim that the Department omitted certain EPCG licenses from the preliminary calculations is inaccurate because the licenses listed by Petitioners were completed or cancelled prior to the current administrative review.
- The Department explained in the Preliminary Calculation Memorandum that it calculated the benefit for the licenses that were completed at or before the POI by using the information from the investigation calculations. A review of the excel spreadsheet accompanying the Preliminary Calculation Memorandum shows that the Department did as it said it would do in the memorandum.

- The Department moved the calculation sheet from the original investigation to the record of this review. Within the calculation sheets from the investigation are the figures used for the Department's preliminary calculations.
- Each of the licenses that Petitioners allege are missing were accounted for in the Department's Preliminary Calculation Memorandum under tab "EPCGS - Completed III." This tab shows that the Department calculated the benefit for the waivers from 1992 - 1993, 1994-1995, and 1997-1998. Therefore, each of these licenses has been accounted for in the Department's preliminary results.

Department Position:

The Department has not revised its final calculations for the EPCGS in the manner suggested by Petitioners because the EPCGS licenses referenced by Petitioners were not omitted and were properly accounted for in the preliminary calculations. The identifying information for the particular EPCGS licenses is business proprietary information (BPI). Therefore, the full discussion regarding how the licenses were accounted for in the Preliminary Results is included in the Final Calculation Memorandum at "Export Promotion Capital Goods Scheme (EPCGS)."

Comment 4: Calculation of Respondent's Pre- and Post-Export Financing Benefit

Petitioners' Arguments:

- The Department should adjust its final calculation of Respondent's benefit from this program to account for new loan information that was submitted by Respondent in SQR-3.

Respondent's Rebuttal Arguments:

- Respondent did not submit rebuttal comments to this argument.

Department Position:

The Department has included all of Ester's loans in the final calculations for the Pre- and Post-Shipment Export Financing program. The identifying information for Ester's loans is BPI. Therefore, the full discussion regarding the updated loan information is included in the Final Calculation Memorandum at "Pre- and Post-Export Financing."

Comment 5: The State of Uttar Pradesh Sales Tax Incentive Program

Petitioners' Arguments:

- The Department should revise its finding that Respondent did not benefit from any Indian state sales tax incentive scheme.
- According to information submitted by Respondent in SQR-2 at Exhibit SSQ-CVD-24, the applicable sales tax rate in effect during the POR was 4 percent–4.5 percent VAT, plus an additional tax of 0.5 percent for goods listed in Schedule II(B) of "the said Act."

However, this same exhibit shows that the Uttarakhand VAT Act of 2005 provides for a special sales tax rate of two percent for certain dealer-to-dealer sales under a section entitled “Special relief to certain manufacturers,” Respondent apparently benefited from this preferential sales tax rate for manufacturers.

- Because Respondent did not submit a Schedule II(B) on the record of this review, the Department should conclude on the basis of facts available the additional 0.5 percent of sales tax would have been due, if Respondent had not benefited from the sales tax incentive scheme.
- Respondent stated that all of its input suppliers located in Uttar Pradesh are obligated to collect sales taxes; thus, Respondent’s benefits from the program take the form of uncollected sales taxes from suppliers. It is also possible that Respondent has benefited from the scheme in other ways.
- Respondent’s benefit under this program would equal a percentage of Respondent’s total purchases from Uttar Pradesh during the POR, with certain adjustments for the purchases where the actual sales tax was paid.

Respondent’s Rebuttal Arguments:

- Ester paid the full tax rate for all of its purchases made in the state of Uttar Pradesh. As an initial matter, it was clearly stated in Ester’s questionnaire responses that the Respondent had only one manufacturing facility, which was located in the state of Uttarakhand, and not in the state of Uttar Pradesh.
- Supporting documentation in SQR-2 at Exhibit SSQ-CVD-24 showed the applicable sales tax rates for inter-state purchases from Uttar Pradesh as well as intra-state purchases made within Uttarakhand.
- Information regarding the sales tax paid on purchases provided in SQR-2 at Exhibits SSQ-CVD-23 and SSQ-CVD-25 demonstrate that Ester paid a tax rate consistent with the specified tax rate shown in Exhibit SSQ-CVD-24. Therefore, Respondent did not receive any benefit on its purchases as alleged by Petitioners.
- Petitioners have ignored the fact that different commodities in the state of Uttar Pradesh are charged with different tax rates. Petitioners’ argument is the equivalent of saying that a purchaser of apples, which have no tax rate, has received a subsidy because purchasers of cigarettes have to pay a 25 percent sales tax.
- Even if a benefit were provided, Petitioners have not alleged that the program is specific to a company, group of companies, industry or group of industries as required by the Act.

Department Position:

We continue to find that Respondent did not receive benefits under the State of Uttar Pradesh Sales Tax Incentive Program. Specifically, it is clear on the record that Respondent (which is located in Uttarakhand) paid the appropriate “inter-state” sales tax rate (the 2% Central Sales tax rate) on purchases from Uttar Pradesh. See SQR-2 at Exhibits SSQ-CVD-23 and 24.

However, in examining Petitioners’ arguments, we found that Respondent may have benefitted from a reduced sales tax rate on its intra-state purchases within Uttarakhand. The Uttarakhand tax law placed on the record by Respondent shows that the sales tax rate is 4 percent for most

commodities; but it appears that there is a reduced tax rate of 2 percent on certain purchases under the section entitled “Special Relief to Certain Manufacturers.” See SQR-2 at Exhibit SSQ-CVD-24. Because this provision of the Uttarakhand tax law was identified late in the proceeding, information necessary for the Department to conduct a full analysis of this possible subsidy is not on the record of this review. For example, there is no information on the record regarding how companies qualify to pay this lower sales tax rate. In addition, it appears that the reorganization of various states within India may have had an effect on the applicable tax rates for Ester.⁶ Therefore, we would need information regarding possible changes in the tax law due to this reorganization.

Under 19 CFR 351.311(c), “{i}f the Secretary concludes that insufficient time remains before the scheduled date for the final determination or final results of review to examine {a practice that appears to provide a countervailable subsidy with respect to subject merchandise}, the Secretary will... defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.” As described above, analyzing the sales tax incentives under the Uttarakhand tax law would entail soliciting and reviewing additional information from interested parties, which would have required time and resources not available to the Department in the closing stages of this administrative review. Thus, in reference to any program relating to sales tax incentives in the state of Uttarakhand, we defer making a finding in this administrative review, but, pursuant to 19 CFR 351.311(b)-(c), will revisit this program in subsequent segments of this proceeding, if a respondent has factories located in these states.

⁶ During the investigation, the Department found that the State of Uttar Pradesh (SUP) was re-organized in 2001 into two states: the SUP and the State of Uttaranchal (SOU). In the investigation, Ester reported that its manufacturing facility became domiciled in the newly formed SOU due to the reorganization of the states. Because the programs at issue originated in the SUP, the Department referred to the sales tax incentive programs of the newly formed states as the Sales Tax Incentive Program of SUP. See PET Film Final Determination, and accompanying Issues and Decision Memorandum at “State of Uttar Pradesh–Sales Tax Incentives” and footnote 6. In this administrative review, Ester reports that the same facility is now located in the state of Uttarakhand. Ester also reports that Uttarakhand came into existence in 2000 and prior to that, the same facility was located in Uttar Pradesh. Further information would be needed to understand the effect of the reorganization of these states on Respondent’s tax liability.


V. Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are approved, we will issue and publish in the Federal Register the final results in accordance with these recommendations.

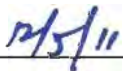
✓

Agree

Disagree



Paul Piquado
Assistant Secretary
for Import Administration



Date