

DATE: April 13, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Sixth Administrative Review of the Antidumping Duty Order on
Certain Hot-Rolled Carbon Steel Flat Products from India

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2006-2007 administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from India. As a result of our analysis, we have made changes to the margin calculation. We recommend that you approve the positions described in the “Discussion of Issues” section of this memorandum.

Background

On December 19, 2008, we published in the preliminary results of the antidumping duty administrative review of certain hot-rolled carbon steel flat products from India for the period December 1, 2006, through November 30, 2007. See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 73 FR 77618 (December 19, 2008) (Preliminary Results). We invited parties to comment on our Preliminary Results. On January 29, 2009, United Steel Corporation (US Steel) and Nucor Corporation (Nucor) (collectively, Petitioners) filed their case briefs.¹ On February 5, 2009, Essar Steel Limited (Essar) filed a rebuttal brief. Below is a complete list of issues for which we received comments and rebuttal comments by parties and to which we have responded.

List of Comments:

Comment 1: Date of Sale
Comment 2: Commission

¹ Nucor and United States Steel Corporation re-submitted their case briefs with revised bracketing on February 9, 2009 and February 12, 2009, respectively.

Comment 3: Duty Drawback
Comment 4: Treatment of Sales Tax
Comment 5: Interest Expense Ratio Calculation

Discussion of Issues

Comment 1: Date of Sale

Petitioners state that the proper date of sale for Essar's U.S. sales should be the invoice date, rather than the final letter of credit date. Petitioners contend that the regulations of the Department of Commerce (Department) provide that the invoice date is the presumptive date of sale; however, the Department may use a date other than the date of invoice if it can be shown that such other date "better reflects the date on which the exporter or producer establishes the material terms of sale." See 19 CFR 351.401(i). Petitioners allege that, in the instant review, Essar has failed to meet the burden of proving that the letter of credit date is appropriate for the Department to use in its analysis. Relying on record evidence, Petitioners demonstrate that the material terms of sale changed between the letters of credit and invoices, and accordingly the Department must use invoice date as date of sale for Essar's U.S. sales.

Essar asserts that the material terms of sale were determined on the letter of credit date because price never changed between the letter of credit date and invoice date. Essar argues that although the quantity deviated from the amount specified in the letter of credit in a number of cases, a degree of variation in quantity is permissible. See Essar's rebuttal brief at 2-3. Essar alleges that Petitioners have failed to discuss how the quantity changes are relevant to the dumping calculation. Essar contends that the Department should reach the same conclusion as it did in the prior reviews that the letter of credit date is the appropriate date of sale for Essar's U.S. sales. Alternatively, Essar suggests that the Department use multiple dates of sale, *i.e.*, using the letter of credit dates where no change occurred and the invoice date where there was change.

Department Position: We agree with Petitioners. For the final results, we will use invoice date as the U.S. date of sale. The Department's regulations at 19 CFR 351.401(i) presume that date of sale is the invoice date unless there is a date that better reflects when all material terms are set. Specifically, 19 CFR 351.401(i) states:

In identifying the date of sale of the subject merchandise or the foreign like product, the Secretary will normally use the date of invoice, as recorded in the exporter or producer's record kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

In Hornos Electricos de Venezuela, S.A. (Hevensa) v. United States, 285 F. Supp. 2d 1353 (2003), the Court of International Trade reaffirmed the Department's regulatory presumption of invoice date as date of sale unless a party establishes otherwise:

Commerce correctly applied the regulatory presumption in favor of invoice date

in this instance. “{T}he party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to ‘satisfy’ the Department that ‘a different date better reflects the date on which the exporter or producer established the material terms of sale.’” (citation omitted).

Id. at 1367.

In the instant case, the record of this proceeding shows that one of the material terms of sale (i.e., quantity) for Essar’s U.S. sales changed after the final letter of credit date and up to the invoice date. Essar itself admits that “{i}n a number – but not all cases – the quantity deviated from the amount specified in the letter of credit.” See Essar’s rebuttal brief at 2-3. Additionally, Essar admitted that the changes in quantity exceeded the tolerance level specified in Essar’s letters of credit. Id. Because certain of Essar’s letters of credit differed in quantity from the final invoice and exceeded the tolerance level specified in the contracts, the Department determines that Essar cannot establish that the material terms were set on a date other than the date of invoice. See Essar’s rebuttal brief at Exhibit 1 and Essar’s September 2, 2008, supplemental questionnaire response at Exhibit SR-2. Accordingly, Essar has not overcome the regulatory presumption of invoice date as date of sale. Thus, we will use Essar’s invoice date as the date of sale for its U.S. sales, in accordance with our practice. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part, 73 FR 66218 (November 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

We disagree with Essar’s argument that because the Department used the letter of credit date as the date of sale in previous segments of this proceeding, we should continue to find that the letter of credit date is the appropriate date of sale for this proceeding. In the prior segment of this proceeding, the Department used letter of credit or amended letter of credit date to determine Essar’s U.S. date of sale because we determined that there were no changes in the material terms between the letters of credit or amended letters of credit and the invoices. However, in this review we found that the material terms of sale changed after the issuance of certain letters of credit (or amended letters of credit). Therefore, for the final results, we have revised the calculations to use the invoice date as the date of sale for all of Essar’s U.S. sales. As a result of the date of sales change, the margin increased from the Preliminary Results.

Comment 2: Commission

Petitioners argue that the Department should not use the commission rate that Essar reported for its U.S. sales, but rather the Department should apply the highest commission rate on the record as facts available. Petitioners state two reasons for the application of facts available: 1) Essar failed to disclose that it had paid a commission in its original Section C questionnaire response; and 2) Essar failed to substantiate the commission rate it reported in its supplemental questionnaire response. Petitioners also allege that in any event, Essar failed to demonstrate that it was entitled to an offset. Therefore, Petitioners argue that the Department should deny a commission offset. In addition, Petitioners argue that for the sales where the U.S. selling agent and the customer was the same company, the Department should treat payments to the selling agent as discounts, rather than as commissions.

Essar argues that there is no basis on the record of this case for a facts available determination because Essar corrected its misstatement in its original section C response and provided the information requested in its supplemental questionnaire response. Essar maintains that it provided all supporting documentation for the reported commission rate, including the amended commission agreement, three debit notes of all Essar's U.S. sales during the period of review (POR), and Essar's bank statements showing that the debit notes were paid in full. Essar argues that the Department should use the rate that is consistent with the company's books and records.

With respect to commission offset, Essar contends that because a commission is paid on its U.S. sales but none is paid on home market sales, it is entitled to a commission offset in accordance with 19 CFR 351.410(e). Essar also argues that the fees paid by Essar on its U.S. sales were correctly considered by the Department to be commissions and should not be considered discounts because the U.S. selling agent and the customer were not the same entity. See Essar's rebuttal brief at 8 for its full arguments of the proprietary information on this issue.

Department Position: First, we disagree with Petitioners that the Department should apply facts available because Essar failed to provide commission information in its original section C response. Section 782(d) of the Tariff Act of 1930, as amended (the Act) provides that if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. After we pointed out the discrepancies between Essar's statement in its section C response with regard to commissions and the facts on the record, Essar acknowledged that it made a misstatement in its section C response. Essar then provided the commission information in its supplemental questionnaire response. We do not find that Essar withheld the information or failed to cooperate by not acting to the best of its ability. Therefore, application of facts available is not warranted.

Second, we find that Essar is entitled to a commission offset in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(e). Moreover, we do not agree with Petitioners that we should treat the fees paid by Essar on its U.S. sales as discounts. Because there is no evidence on the record that Essar's U.S. selling agent and the customer were the same entity, and the selling agent was paid a commission, we will continue to treat Essar's payment to its selling agent as a commission.

Comment 3: Duty Drawback

Petitioners argue that the Department should deny Essar's claim for a duty drawback adjustment for its U.S. sales because Essar has failed to show its entitlement to the adjustment. Specifically, Petitioners allege that certain products that Essar imported were not consumed in the production process, and that Essar did not provide evidence demonstrating that it received duty exemption or rebate on the raw material imports. Therefore, Petitioners argue that Essar has failed to meet the Department's two-prong test in determining whether to increase a respondent's reported U.S. sales prices by the amount of duty drawback: first, the proponent of a duty drawback adjustment

must show that its duty exemptions on imported raw materials are directly linked to the export of the subject merchandise to the United States; and second, it must show that sufficient raw material imports were made to account for the claimed adjustment with respect to the exported merchandise.

Essar argues that it has provided record evidence meeting the Department's two-pronged test for a duty drawback adjustment. Specifically Essar states it provided evidence to show that it imported the raw materials in question and no duties were collected on those raw materials because of exportation of the subject merchandise to the United States. In addition, Essar asserts that it has provided evidence that the raw materials in question were consumed in the production process of subject merchandise. Therefore, Essar contends that consistent with section 772(c)(1)(B) of the Act, the Department should continue to grant the duty drawback adjustment.

Department's Position: We examined the record evidence and found that Essar's advance license program used Sion (the standard the government of India uses to calculate the quantity of imports that are eligible for duty drawback based on a specified quantity of exports). We have found that applications for an adjustment for duty drawback filed under this advanced license program meet the two-prong test (*i.e.*, 1) the import duties and rebates are directly linked to, and are dependent upon, one another, and 2) the company claiming the adjustment can demonstrate that there are sufficient raw material imports to account for the duty drawback received on exports of the manufactured product). See, e.g., Steel Concrete Reinforcing Bar From The Republic of Korea: Notice of Preliminary Results and Preliminary Rescission, in Part, of Antidumping Duty Administrative Review, 71 FR 59440 (October 10, 2006), unchanged in Steel Concrete Reinforcing Bar from The Republic of Korea: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 18630 (April 13, 2007). In the underlying investigation we granted a duty drawback adjustment for Essar which was filed under this same program. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 50406 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 5; see also Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008), and accompanying Issues and Decision Memorandum at Comment 18.

In this review, Essar placed on the record evidence linking the import duty payable and the duty drawback received. Specifically, the Department established the link through examination of the relevant documents concerning the duty-free imports made against the advance license, and supporting documentation (*e.g.*, Sion C-495) showing the inputs in question were consumed in the production process of subject merchandise. Further, Essar was able to demonstrate that there were sufficient imports of raw materials to account for the duty drawback received on exports of subject product. See Essar's August 22, 2008, submission at 20-24 and Exhibit SR1-15; and Essar's September 2, 2008, response at 20-21 and Exhibit SR2-24. We find that Essar's advance license program meets the requirements of the Department's two-prong test. Thus, for the final results, pursuant to section 772 (c)(1)(B) of the Act, the Department has granted Essar its U.S. duty drawback adjustment.

Comment 4: Treatment of Sales Tax

Petitioners allege that Essar charged its home market customers an amount for taxes on sales of the foreign like product, but was never required to remit the amount collected to the Indian authorities. Petitioners argue that the Department should include the amount of the sales tax collected by Essar, but not remitted to the Indian authorities, in the calculation of normal value. Petitioners maintain that not including the value of the unremitted taxes would understate the price that Essar actually received for its merchandise. Thus, Petitioners conclude, the Department should increase Essar's home market prices by the amount of tax which Essar did not remit to the government.

Essar maintains that the Department should not add taxes to normal value. Essar states that the state of Gujarat offered a specific reduced sales tax plan from 1993 and ending in February 2007. Pursuant to this program, Essar paid a reduced sales tax on its purchased inputs and did not charge sales tax on its sales. Essar explains that with the implementation of the value added tax (VAT), Essar was required to pay the VAT tax on purchases and charge sales tax on sales. Essar states that the amount collected and charged was used to offset the remaining incentive amount. This transition scheme ended in October 2006. However, with the normal tax scheme, the sales tax collected is used to offset the amount paid.

Essar asserts that it has included the amount of sales tax paid in the cost of production. Citing to Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review, 64 FR 6305 (February 9, 1999) and Elkem Metals Company v. United States, 468 F.3d 795 (2006), Essar argues that all of the VAT that Essar collected have been offset by the VAT paid and this amount should not be included as part of revenue or costs in accordance with the Department's policy and upheld by the Court of Appeals for the Federal Circuit.

Department's Position: We disagree with Petitioners that we should increase normal value by the taxes collected by Essar. We examined the record evidence concerning this issue in the last review and determined that an adjustment to normal value was not necessary. See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008), and accompanying Issues and Decision Memorandum at Comment 23. The facts on the record with regard to Essar's sales tax in the two consecutive reviews are identical.² In applying our standard practice, we are concerned with whether the respondent was able to recover the taxes paid. Since record evidence shows that the taxes at issue were recovered, we agree with Essar that the net amount of taxes paid on materials was accurately accounted for. Thus, we find that no further adjustment is warranted.

Comment 5: Interest Expense Ratio Calculation

Petitioners argue that the Department should use the highest level of consolidated audited financial statements of Essar Group (i.e., its parent company Essar Global Limited (EGL)) to calculate the financial expense ratio for Essar. Petitioners contend that it is the Department's practice to calculate the financial expense ratio based on the highest consolidated financial statements of a group of companies for the fiscal year that most closely corresponds with the

² Essar reported its home market sales from the last POR (with the subsequent addition of January 2007 and February 2007). See Essar's November 18, 2008, submission at 5.

POR which incorporates the results of the producing company. Petitioners assert that the critical fact is Essar was part of the Essar Group for half of the fiscal year that most closely corresponds with the CRP and its financial results were incorporated into EGL's consolidated financial statements. As such, according to Petitioners, Essar was subject to the group's control over its structure, financial costs, and the fungible nature of invested capital resources within the consolidated group. Thus, Petitioners maintain that Essar's financial expense ratio should be calculated based on the highest consolidated audited financial statements of EGL.

Essar argues that the Department should calculate its financial expense ratio based on its unconsolidated audited financial statements. According to Essar, it merged into its parent company, EGL, at the end of cost reporting period (CRP) and, thus, it was part of the Essar Group for only six months of the fiscal year which corresponds most closely to the CRP. Essar asserts that the purpose of using the highest level of consolidated financial statements of a group of companies for calculating the financial expense ratio is to recognize the parent company's ability to dictate the capital structure of the subsidiary. Essar contends that in this case, EGL could not have significantly impacted the capital structure of Essar because Essar was part of the Essar Group for only six months of the fiscal year. Thus, Essar maintains that the Department should calculate its financial expense ratio based on its unconsolidated audited financial statements.

Department's Position: We disagree with Petitioners and continue to calculate Essar's financial expense ratio based on its own financial statements and not of the consolidated audited financial statements of EGL. It is the Department's normal practice to calculate the financial expense ratio based on the highest level of consolidated financial statements which incorporate the results of the respondent company for the fiscal year that most closely corresponds with the POR. See Frozen Concentrated Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review, 65 FR 60406 (October 11, 2000), and accompanying Issues and Decision Memorandum at Comment 2; and Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Mexico, 67 FR 55800 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 8. This practice recognizes the fungible nature of invested capital resources within a consolidated group of companies and that the controlling entity within a consolidated group has the ultimate power to determine the capital structure and financial costs of each member within the group. However, due to the unusual fact pattern of this case, we disagree with Petitioners that we should calculate Essar's financial expense ratio based on EGL's consolidated financial statements. Specifically, Essar merged into EGL on October 5, 2006, two months prior to the end of CRP. As a result, EGL's consolidated financial statements for the fiscal year April 1 to March 31, captured only six months of financial activity for Essar and, out of these six months, only two months were within the CRP. As such, the Department finds that EGL's consolidated financial statements do not reasonably reflect Essar's interest expense incurred to produce the merchandise under consideration because it represents Essar's capital structure for only two months of the CRP. Accordingly, EGL's influence on Essar's capital structure and financial costs during the CRP were minimal (*i.e.*, the fungible nature of invested capital resources within the consolidated group of companies was limited to two months). Based on the foregoing, the Department maintains that it is reasonable to calculate Essar's financial expense ratio based on its own financial statements in this case.

V. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results and the final weighted-average dumping margins in the Federal Register.

Agree _____

Disagree _____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

(date)

