

REMAND DETERMINATION

NSK Ltd. v. United States

Consol. Court No. 04-00519, slip op. 06-19 (CIT Jan. 31, 2006).

Summary

This remand determination, submitted in accordance with the order of the U.S. Court of International Trade (the Court) of January 31, 2006 (Slip Op. 06-19), involves challenges to the determinations of the U.S. Department of Commerce (the Department) in the administrative review of the antidumping duty order on ball bearings and parts thereof from Japan (Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part, 69 FR 55574 (September 15, 2004) (AFBs 14)), concerning the period of review from May 1, 2002, through April 30, 2003. In accordance with the Court's Order, the Department has denied all of the lump-sum billing adjustments reported by Koyo Seiko Co., Ltd. (Koyo), and recalculated Koyo's antidumping margins accordingly. The changes to our calculations with respect to Koyo resulted in a change in the weighted-average margin for ball bearings from 5.56 percent to 5.55 percent. The Department also has explained its treatment of the high-profit sales reported by NTN Corporation (NTN).

Background

On March 13, 2006, we released our draft results of redetermination to interested parties for comment. On March 17, 2006, the Department received comments from Koyo, NTN, and Timken US Corporation.

Discussion

I. Koyo's Lump-Sum Billing Adjustments

The Court held that the Department's denial of Koyo's negative lump-sum billing adjustments in AFBs 14 was not in accordance with law. The basis of the Court's holding was that in this review "there has been no factual showing that Koyo is able to produce more specific data on the particular allocation of its billing adjustments, and Commerce has presented no legal or factual basis to deny only the negative adjustments as an 'incentive.'" Slip. Op. 06-19 at 13. Further, the Court stated that the Department does not have a reasonable justification for its differential treatment of the billing adjustments in the absence of evidence in the record showing that Koyo had been recalcitrant in providing information to the Department.

The Department respectfully disagrees with the Court's decision. The Department can identify information on the record that shows Koyo is able to produce more specific data on the particular allocation of its billing adjustments and, in fact, did maintain the types of records required for an accurate reporting of its billing adjustments, albeit not electronically. Therefore, the Department believes that accepting the positive billing adjustments provides an incentive for Koyo to report its data as precisely as possible to the Department.

Based on the Court's decision, the Department has interpreted that the Court intended the Department to not treat Koyo's positive lump-sum billing adjustments and its negative lump-sum billing adjustments differently. Therefore, on remand, we have denied both Koyo's positive lump-sum billing adjustments and its negative lump-sum billing adjustments and recalculated the dumping margin for Koyo.

Comment 1: Koyo argues that the Department's draft remand results are inconsistent with

the Court's decision. Koyo asserts that the Court expressly stated in its opinion at page 10 that "Koyo's negative billing adjustments were unreasonably disallowed by Commerce." Thus, according to Koyo, the Court's clear intent was that the Department should remedy its inappropriate differential treatment of the billing adjustments by granting, not denying, all of Koyo's lump-sum billing adjustments.

Department's Position: We disagree with Koyo. Koyo cites to the Court's caption of the issue -- "Koyo's Negative Billing Adjustments Were Unreasonably Disallowed By Commerce." The Court held that "Commerce does not have a reasonable justification for its differential treatment of the billing adjustments" and that our determination in AFBs 14 was not in accordance with law on those grounds. See NSK Ltd. v. United States, Slip Op. 06-19, 13-14 (CIT Jan. 31, 2006). The Court did not order us to accept Koyo's negative lump-sum billing adjustments. The Court did not indicate in its decision that it disagreed with our grounds for denying Koyo's negative lump-sum billing adjustments (i.e., that the methodology Koyo used to allocate them was unreasonably distortive). Indeed, the Court cites to Koyo's proposed remedy for our differential treatment of its lump-sum billing adjustments, which is to "deny all, and not only the negative billing adjustments if Commerce considers the billing adjustments distortive." NSK Ltd. v. United States, Slip Op. 06-19 at 10, citing Koyo's Brief at 28. Therefore, consistent with the Court's opinion, we remedied the differential treatment of Koyo's lump-sum billing adjustments by denying both positive and negative adjustments.

Comment 2: Koyo objects strongly to the Department's suggestion that, merely because Koyo may have paper records concerning its billing adjustments, it would be legitimate for the Department to reject Koyo's negative billing adjustments but not its positive billing adjustments in

order to provide Koyo with an incentive to do a better job in providing this information to the Department. Koyo asserts that the existence of paper records does not demonstrate the feasibility for Koyo to review those records manually in allocating its billing adjustments. Koyo contends that the opposite is true given the size of its database. Koyo argues that the Department has never suggested otherwise in any post-URAA administrative review. Koyo asserts the Department recognized this fact when it stated in its verification report that it found “no evidence that Koyo keeps the information electronically which it needs to allocate the billing adjustments to the specific sales on which they were incurred” (Koyo’s emphasis), citing Koyo Home Market Sales Verification Report dated April 14, 2004, at page 5 (C.R. Doc. 109). Koyo concludes that it is inconsistent, if not disingenuous, for the Department now to assert that adverse facts available was merited in this case in order to provide an incentive to do a better job.

Department’s Position: We disagree with Koyo that an incentive to report its data accurately is not warranted. Although Koyo emphasizes the phrase “which it needs” in its citation of the verification report, we would emphasize the word “electronically” that immediately precedes “which it needs.” In other words, what prevents Koyo from being able to report its lump-sum billing adjustments on the basis on which they were incurred is the fact that Koyo elects not to keep this data electronically. This fact should not excuse Koyo's “burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment.” 19 C.F.R. 351.401(b)(1). We do not disagree that it would be a burdensome task for Koyo to report the data accurately based on a manual review of paper records after the period of review. If Koyo were to maintain the data electronically, it would not be unduly burdensome for Koyo to report its lump-sum billing adjustments accurately.

Sorting manually through hundreds of paper records after it has accumulated over the period of review would indeed be a burdensome task. If the individuals who prepare the paper records simply enter the data into a centralized database at the same time they prepare the paper records, Koyo would have the data it needs in an electronic format. Moreover, it appears that the individual who prepared the paper records during the 2002-03 period of review actually did enter the data electronically. The notification to the customer of a price adjustment, which includes the time period, model numbers, original prices, new prices, and the adjustments, all appear to have been entered electronically. See Koyo Home Market Sales Verification Report at Exhibit 7, page 4 (C.R. Doc. 109). Thus, we believe it is not unduly burdensome for Koyo to have a database in which it can record its lump-sum billing adjustments on the basis on which they were incurred.

If Koyo were to begin maintaining the records electronically, it would be able to report more precise data for its lump-sum billing adjustments in future reviews. For purposes of this review, however, Koyo did not maintain information concerning its lump-sum billing adjustments accurately. Therefore, an incentive for Koyo to report its data accurately is warranted.

Comment 3: Timken argues that the Court's order did not mandate a particular methodology but, rather, found that the Department had not presented sufficient justification of the approach taken. Therefore, according to Timken, the Department remains at liberty to adopt its original remedy and provide a sufficient justification. Timken agrees with the Department that Koyo's methodology for allocating its lump-sum billing adjustments was unreasonably distortive and that the appropriate remedy, where the billing adjustments would lower normal value (and, as a result, the antidumping margin for Koyo), is to deny such adjustments. Timken argues that such a decision recognizes the remedial nature of the antidumping law, which requires that the

Department capture the entire dumping margin. Timken argues further that such a decision recognizes that the respondent has an incentive to attempt to temper the full application of the law. Thus, Timken contends, the Department's decision was not punitive nor is it guided by a desire to provide an incentive to a respondent to modify its reporting method. Timken asserts that the decision merely recognizes that Koyo's reporting methodology does not permit the Department to determine which reported prices are more accurate and that the Department has a statutory obligation to capture the full margin of dumping.

Department's Position: While it is true that the Court did not provide an explicit instruction with respect to how we should treat Koyo's lump-sum billing adjustments, the Court was clear that it found our differential treatment of Koyo's positive and negative lump-sum billing adjustments to be unsupportable. Furthermore, we believe that, had the Court intended for us to only provide more explanation, it would have specified this in the same manner as it remanded AFBs 14 for further explanation with respect to NTN's reported high-profit sales. Therefore, we have denied both Koyo's positive and negative lump-sum billing adjustments consistent with the Court's opinion.

II. NTN's Reported High-Profit Sales

The Court remanded for further explanation the Department's reasoning in finding that NTN's sales were not outside the ordinary course of trade. The Court identified three factors NTN raised as relevant to an ordinary-course-of-trade analysis which the Department did not address in the AFBs 14: 1) aberrationally high profits, 2) low volumes, and 3) special circumstances with respect to these sales.

In the AFBs 14, the Department denied NTN's claim that its reported high-profit sales

should be excluded from the calculation of normal value because NTN did not demonstrate that these sales have characteristics that would make them outside the ordinary course of trade.¹ The Department has the discretion to interpret section 771(15) of the Tariff Act of 1930, as amended (the Act), to determine which sales are outside the ordinary course of trade, such as sales involving aberrational prices and abnormally high profits.² As enunciated in Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany, 61 FR 38166 (July 23, 1996), the Department's practice is that, in order to determine that profits are abnormally high, there must be certain unique or unusual characteristics related to the sales in question. Further, high profits by themselves are not sufficient for the Department to determine that sales are outside the ordinary course of trade.³

The record evidence in this case does not substantiate NTN's claim that its reported high-profit sales were made outside the ordinary course of trade. NTN defined high-profit sales as sales of bearings at profit levels of [* * *] percent and above and in "small quantities."⁴ To measure further whether NTN's reported high-profit sales were unusual or sold at aberrational prices or

¹ Issues and Decision Memorandum accompanying AFBs 14 at Comment 33.

² NTN Bearing Corp. of America, et al., v. United States, 24 CIT 385, 428-29, F. Supp. 2d 110, 119-20 (2000).

³ See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, 64 FR 35590, 35620-21 (July 1, 1999), and Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof From France, et al., 67 FR 55780 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comment 27.

⁴ NTN's Questionnaire Response dated September 25, 2003, at 1315-1318 (C.R. Doc. 1315-1318).

quantities, we have conducted an analysis of NTN's high-profit sales for this remand, which we attached to the draft results of redetermination dated March 10, 2006.

First, NTN did not seek to demonstrate that its claimed high-profit sales resulted in an abnormally high profit. NTN did not explain, nor does the record evidence support, its assertion that sales with profits above [* * *] percent are outside the ordinary course of trade whereas sales with profits above [* * *] percent, for example, are made within the ordinary course of trade. NTN did not explain how it arrived at the [* * *]-percent figure as the level which distinguishes one group of sales from another. The history of NTN's claims that high-profit sales are outside the ordinary course of trade suggests that there is nothing particular or unique about the [* * *]-percent figure NTN adopted for this review. As the Court observed, it affirmed the Department's decision in a prior review to not allow NTN's high-profit sales as sales outside the ordinary course of trade because NTN had not demonstrated that they were actually outside the ordinary course of trade. See NTN v. United States, 306 F. Supp. 2d 1319, 1344 (CIT 2004). In this review, NTN "refined" its methodology by selecting a different profit level and claiming that special circumstances exist with regard to these sales.

Based on its benchmark of [* * *] percent, we found that NTN designated [* * *] transactions as high-profit sales, not including sample sales, in its home-market sales database.⁵ There are approximately 240 days during the sample months (eight sample months times 30 days per month), and NTN averaged nearly [* * *] so-called high-profit sales per day. By contrast, NTN reported [* * *] sample sales in its home-market database, which averages to [* * *]

⁵ See Log of the Analysis Program attached to draft remand, attachment A, after line 62.

sample sales per month.⁶ Although NTN's high-profit sales are few ([* * *]) relative to the total number of sales NTN made during the period of review, the frequency of these sales suggests that, far from being unusual, such sales are a part of NTN's ordinary course of business. As a result, we find that NTN's claimed high-profit sales did not have abnormally high profits. Thus, this analysis supports our conclusion that NTN's high-profit sales are not unusual and that they were made within the ordinary course of trade.

Second, the record evidence does not support NTN's assertion that its reported high-profit sales were made in "minute" or low quantities. In our analysis of NTN's high-profit sales, we found that over [* * *] percent of NTN's sales transactions, representing over [* * *] transactions, were sold in quantities of fewer than 10 pieces.⁷ This alone demonstrates that very low-quantity sales are not unusual or atypical for NTN. Furthermore, the highest quantity of any sale which NTN designated as being a high-profit sale was of [* * *] pieces. We found that over [* * *] percent of NTN's sales transactions, representing over [* * *] transactions, were sold in quantities of fewer than [* * *] pieces.⁸ Thus, there is a substantial overlap in the quantities of NTN's high-profit sales and NTN's other sales. As a result of this analysis, we find that the quantities in which NTN sold its reported high-profit sales were neither unusual nor extraordinary.

We also compared sales that NTN classified as "high profit" to other sales of the same model to the same customer. We found that the average price of the high-profit sales was more than [* * *] the average price of other sales of the same model to the same customer. The average

⁶ Id.

⁷ See Output of the Analysis Program attached to draft remand, attachment B, at page 1.

⁸ Id. at 2.

quantity of the high-profit sales was also more than [* * *] the average quantity of other sales of the same model to the same customer.⁹ Given that NTN arbitrarily defined high-profit sales as sales having a profit greater than [* * *] percent, we find it unsurprising that the average price of the high-profit sales was greater than that of the other sales of the same model to the same customer. In addition, the average quantity of the high-profit sales was also greater than that of the other sales of the same model to the same customer. Thus, this analysis reveals that the record does not support NTN's assertion that these high-profit sales were sold in abnormally low quantities. This indicates further that NTN's claim that its high-profit sales were sold in extraordinarily low quantities is not supported by evidence on the record. Rather, the record demonstrates that NTN's reported high-profit sales were made, in fact, in NTN's usual commercial quantities despite NTN's claims to the contrary.

Finally, NTN argued that its high-profit sales were outside the ordinary course of trade because the sales reflected unique circumstances such as "often represent{ing} spot sales for maintenance and repair, sales to research and development facilities for testing or evaluation, and other sales outside the usual channels of trade."¹⁰ NTN submitted an analysis of [* * *] such transactions to support its claim that such sales had aberrationally high profits and low quantities.¹¹

Of the [* * *] sales NTN analyzed, NTN indicated that [* * *] sales were sample sales, which the Department had already found were outside the ordinary course of trade and which it

⁹ Id. at 4.

¹⁰ NTN's Questionnaire Response dated September 25, 2003, at B-49, C.R. Doc. 17.

¹¹ NTN's Questionnaire Response dated September 25, 2003, Exhibit B-10, C.R. Doc. 60.

excluded from the calculation of normal value.¹² NTN indicated that the remaining [* * *] sales were sales of bearings as replacement parts.¹³ Selling bearings as replacement parts (i.e., for maintenance and repair) is not in any way unusual or extraordinary because bearings are subject to break or wear down and are likely to be replaced over time. In addition to these sales which NTN indicated were sold as replacement parts, NTN reported [* * *] sales to aftermarket customers in its home-market sales database.¹⁴ Aftermarket sales are, by definition, sales for maintenance and repair.¹⁵ Therefore, we are not aware of any reason to conclude that selling bearings as replacement parts would not be part of NTN's ordinary course of trade.

As a result of the above analysis, we conclude that the only factor truly distinguishing NTN's reported high-profit sales from other sales is the fact that there was a higher profit on such sales. The Department has found consistently that high profits alone are not sufficient to demonstrate that sales were made outside the ordinary course of trade. With the exception of sales for samples, which we had already excluded from our calculation of normal value, none of the "special circumstances" which NTN claimed suggests that the sales were outside its ordinary course of trade. In addition, we found that NTN's reported high-profit sales were not sold in unusually low quantities. Finally, NTN did not demonstrate that the profits on these sales were

¹² NTN Preliminary Results Analysis Memorandum dated February 2, 2004, at pages 7-8.

¹³ NTN's Questionnaire Response dated September 25, 2003, Exhibit B-10-1, 2, 3, 4, 5, 7, and 12 (C.R. Doc. 60).

¹⁴ See Output of the Analysis Program, attachment B, at page 7.

¹⁵ The Merriam-Webster online dictionary defines "aftermarket" as "the market for parts and accessories used in the repair or enhancement of a product (as an automobile)." See <http://www.m-w.com/dictionary/aftermarket>. Presumably, bearings are not used to "enhance" a product in the same manner as, for example, an aftermarket car stereo would be purchased as an upgrade of the factory-installed stereo which came with an automobile when purchased.

aberrationally high. Accordingly, because there is nothing which genuinely distinguishes NTN's high-profit sales from other sales made in the ordinary course of trade, we continue to find that NTN has not substantiated its claim.

Comment: NTN disagrees with the Department's characterization of its high-profit sales. NTN contends that the fact that it averaged several high-profit sales per day is insignificant for a company as large as NTN. NTN contends that the high-profit sales are relatively few compared with total sales. NTN asserts further that the Court had these facts on the record before it and concluded that the Department had not sufficiently shown a reasonable basis for rejecting NTN's claim.

NTN also argues that the question of whether a quantity can be considered small or minute must depend on the context, *i.e.*, sales of the same model bearing. NTN contends that the Court instructed the Department to clarify why its rejection of NTN's claim was reasonable in this context. NTN contends further that the Department's analysis showing that a percentage of its sales was under ten pieces rebuts rather than supports the Department's argument. Using this rationale, NTN asserts, even sales of only one piece would not be considered of a low quantity. NTN concludes that this is not reasonable.

Timken contends that the Department complied with the Court's order.

Department's Position: We disagree with NTN. With respect to NTN's claim that its high-profit sales are relatively few compared with total sales, this fact, in and of itself, is not a standard by which we judge whether a group of sales is outside the ordinary course of trade. "Relatively few" does not mean "rare" or "unusual." While NTN's reported high-profit sales do not comprise a large portion of NTN's business, they do occur with a frequency such that we cannot conclude

that they are so unusual as to not constitute a part of NTN's ordinary course of business.

Indeed, any number of circumstances can be used to create a subset of sales which are "relatively few" compared to total sales, but this would not mean that such sales are outside the ordinary course of trade. For example, NTN reported [* * *] transactions it sold to the customer corresponding to consolidated customer code [* * *]. See NTN's home-market sales database which NTN submitted with its Questionnaire Response dated September 25, 2003 (C.R. Doc. 15). This is slightly fewer than the number of transactions which NTN reported as being "high profit." Thus, by NTN's logic, we could conclude that sales to this customer were outside the ordinary course of trade on the grounds that these sales are relatively few compared with total sales. We would not do this, however, because there have to be circumstances surrounding the sales in question such that we can reasonably conclude that the sales at issue are unusual and outside NTN's ordinary course of trade. As discussed above, except for the fact that NTN's high-profit sales had profit levels in excess of [* * *] percent, there are no circumstances surrounding these sales that suggest that there is anything unusual about them.

With respect to NTN's argument that the question of whether a quantity can be considered small must depend on the context, as described above, a part of our analysis was to compare NTN's high-profit sales to other sales of the same model sold to the same customer which NTN reported as being "normal" sales. As we stated above, we found that the quantities of the high-profit sales were not small but, on average, were twice as high as the quantities of other sales of the same model sold to the same customer. Thus, NTN's high-profit sales are not unusually or aberrationally low even when put "in context."

Furthermore, we are not claiming that NTN's high-profit sales were not sold in low

quantities in an absolute sense. Rather, we find that NTN's high-profit sales were not sold in low quantities relative to other ordinary sales made by NTN. As discussed above, NTN's high-profit sales were not sold in unusual or aberrationally low quantities such that we would conclude that such sales were outside the ordinary course of trade. NTN attempted to characterize the quantities of its high-profit sales as being unusual by virtue of being "minute." As we demonstrated above, however, if we were to disregard all sales which had quantities comparable to the quantities in which NTN sold its reported high-profit sales, we would disregard more than [* * *] of NTN's home-market sales database. Thus, we cannot conclude that the quantities in which NTN sold its reported high-profit sales were in any way unusual or minute relative to NTN's other sales. As described above, this is true even when we compare the quantities of the high-profit sales to other sales of the same model sold to the same customer.

Finally, NTN does not rebut the rest of our analysis (e.g., the fact that sales made for repair or maintenance is not unusual) which demonstrates that there were no facts surrounding these sales such that we can reasonably conclude they were made outside the ordinary course of trade. As we discussed above, the fact that sales have high profits does not, by itself, constitute a reason for concluding that such sales were made outside the ordinary course of trade. For these reasons, NTN's claim that its high-profit sales were outside the ordinary course of trade is not supported by evidence on the record. Therefore, this Court should find that our determination that NTN's sales were not outside the ordinary course of trade is supported by substantial evidence and is in accordance with law.

Results of Redetermination

In accordance with the remand order, we have recalculated the antidumping duty margin for

Koyo. The recalculated weighted-average percentage margin for the period May 1, 2002, through April 30, 2003, for ball bearings is follows:

<u>Company</u>	<u>Ball Bearings</u>
Koyo	
Original	5.56 percent
Revised	5.55 percent

These results of redetermination are pursuant to the remand order of the CIT in NSK Ltd. v. United States, Court No. 04-00519, Slip Op. 06-19 (January 31, 2006).

David M. Spooner
Assistant Secretary
for Import Administration

(Date)