

January 5, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy 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 in the
Sixth Administrative Review of the Countervailing Duty Order on
Dynamic Random Access Memory Semiconductors from the
Republic of Korea

Background

On September 14, 2010, the Department of Commerce (“the Department”) published the preliminary results of this administrative review. See [Dynamic Random Access Memory Semiconductors From the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review](#), 75 FR 55764 (“Preliminary Results”). The “Analysis of Programs” and “Subsidies Valuation Information” sections, below, describe the subsidy programs and the methodologies used to calculate the benefits from these programs. We have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the “Analysis of Comments” section, below, which also contains the Department’s responses to the issues raised in the briefs.¹ We recommend that you approve the positions described in this memorandum. Below is a complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties:

Comment 1: Income Tax Treatment of Hynix’s Debt Restructuring

Comment 2: Allocation Method for Tax Benefit

Comment 3: Clerical Error Allegations

Comment 4: Circumvention of the Order

¹ The Department received case and rebuttal briefs from Micron Technology, Inc. (“Micron”) and joint case and rebuttal briefs from Hynix Semiconductor, Inc. (“Hynix”) and the Government of Korea (“GOK”).

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the average useful life (“AUL”) of the renewable physical assets used to produce the subject merchandise. 19 CFR 351.524(d)(2) creates a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service’s 1977 Class Life Asset Depreciation Range System (the “IRS Tables”). For dynamic random access memory semiconductors (“DRAMs”), the IRS Tables prescribe an AUL of five years. During this review, none of the interested parties disputed this allocation period. Therefore, we continue to allocate non-recurring benefits over the five-year AUL.

Discount Rates and Benchmarks for Loans

For loans that we found countervailable in the investigation or in prior administrative reviews, and which continued to be outstanding during the period of review (“POR”), we have used the benchmarks from the prior administrative reviews. These benchmarks are described below.

For long-term, won-denominated loans originating in 1986 through 1995, we used the average interest rate for three-year corporate bonds as reported by the Bank of Korea (“BOK”) or the International Monetary Fund’s (“IMF’s”) International Financial Statistics Yearbook.

For long-term, won-denominated loans that originated in the years in which we previously determined Hynix to be uncreditworthy (2000 through 2003), we used the formula described in 19 CFR 351.505(a)(3)(iii) to determine the benchmark interest rate. We did not use the rates on Hynix’s corporate bonds for 2000-2003 for any calculations because Hynix either did not obtain bonds or obtained bonds through countervailable debt restructurings during those years. For the probability of default by an uncreditworthy company, we used the average cumulative default rates reported for the Caa- to C- rated category of companies as published in Moody’s Investors Service, “Historical Default Rates of Corporate Bond Issuers, 1920-1997” (February 1998). For the probability of default by a creditworthy company, we used the cumulative default rates for investment grade bonds as published in Moody’s Investors Service: “Statistical Tables of Default Rates and Recovery Rates” (February 1998). For the commercial interest rates charged to creditworthy borrowers, we used the rates for won-denominated corporate bonds as reported by the BOK and the U.S. dollar lending rates published by the IMF for each year.

For countervailable short-term, foreign currency-denominated loans, pursuant to 19 CFR 351.505(a)(2)(iv), we would normally use an annual average of the interest rates on comparable commercial loans during the year in which the government-provided loans were taken out. However, the record does not have information on such loans. Thus, consistent with 19 CFR 351.505(a)(3)(ii), we followed our prior practice and relied upon lending rates reported in the IMF’s International Financial Statistics Yearbook. See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122 (June 23, 2003) and accompanying Issues and Decision Memorandum at 5 – 7 (“DRAMs Investigation Decision Memorandum”).

Analysis of Programs

I. Program Determined To Confer a Subsidy During the POR - Income Tax Treatment of Hynix's Debt Restructuring

In the NSA Memo,² we initiated an investigation into the tax treatment of Hynix's debt restructurings under which Hynix issued shares in 2002 and 2003. In their respective February 25, 2010 and February 26, 2010, questionnaire responses, Hynix and the GOK responded to the Department's standard questions on this program and provided additional explanation. On May 27, 2010, we sent a supplemental questionnaire to the GOK on this program. The GOK responded on June 25, 2010.

For the Preliminary Results, we found that the GOK's tax treatment of Hynix's 2002 share issuance under the debt restructuring provided a countervailable subsidy to Hynix during the POR.³ We found that the GOK's tax treatment constituted a financial contribution within the meaning of section 771(5)(D)(ii) of the Tariff Act of 1930, as amended ("the Act"), because the GOK forewent income tax revenue that it otherwise would have collected.⁴ We also found that Hynix received a benefit under 19 CFR 351.509(a) because the exemption reduced the base (*i.e.*, Hynix's taxable income) used to calculate Hynix's income taxes for the 2007 tax year.⁵ Finally, we found the exclusion to be specific to Hynix under section 771(5A)(D)(iii)(III) of the Act because Hynix received a disproportionately large share of the income tax benefits relative to its size among all companies in the Republic of Korea ("ROK").⁶

Consistent with the Preliminary Results, we continue to find that the GOK's tax treatment of Hynix's debt restructuring provided a countervailable subsidy to Hynix during the POR. As we explain below in Comment 2, however, we have changed the allocation method from the Preliminary Results. Specifically, we are allocating the benefit to Hynix's sales for calendar year 2008, rather than to Hynix's sales only for the months corresponding to the POR. See Comment 2, below.

To calculate the benefit under this program, in accordance with 19 CFR 351.509(a) and 19 CFR 351.509(c), we divided the income taxes Hynix otherwise would have paid in the absence of the exclusion by Hynix's total sales during 2008. On this basis, we determine that Hynix received a countervailable subsidy of 1.83 percent ad valorem.

We have addressed parties' comments on this program in Comments 1 and 2 of the "Analysis of Comments" section, below.

² See Memorandum to Susan Kuhbach, Director, Office 1, "Sixth Countervailing Duty Administrative Review: Dynamic Random Access Memory Semiconductors from Korea: New Subsidy Allegations Memorandum" (December 22, 2009) ("NSA Memo").

³ For the Preliminary Results, based on proprietary information in Hynix's February 25, 2010, questionnaire response, we found that only the 2002 share issuance applied to the current POR. See Memorandum from Shane Subler to Susan Kuhbach, "Preliminary Results Calculations for Hynix Semiconductor, Inc." (September 7, 2010). No interested party has contested this finding.

⁴ See Preliminary Results, 75 FR at 55768.

⁵ Id.

⁶ Id.

II. Program Previously Determined to Confer a Subsidy - Import-Export Bank of Korea (“KEXIM”) Loan

Hynix carried balances into the POR on loans received from KEXIM under this program in 2006 and 2007. See Hynix’s February 25, 2010 supplemental questionnaire response at 18 and Exhibit 10.

In a prior administrative review, the Department found that the above program constituted a financial contribution pursuant to sections 771(5)(B)(i) and 771(5)(D)(i) of the Act, and also conferred benefits equal to the difference between what Hynix paid on its loans and the amount it would have paid on comparable commercial loans within the meaning of section 771(5)(E)(ii) of the Act. See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 74 FR 60238, 60239 (November 20, 2009). The Department also found the program to be de facto specific within the meaning of section 771(5A)(D)(iii)(I) of the Act. Id. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find this program to be countervailable.

To calculate the benefit under this program, we used the benchmarks described in the “Discount Rates and Benchmarks for Loans” section above, as well as the methodology described in 19 CFR 351.505. We then divided the benefit during the POR by Hynix’s total sales during the POR. On this basis, we determine that Hynix received a countervailable subsidy of 0.10 percent ad valorem under this program.

III. Subsidy Programs Determined to Provide No Measurable Benefit During the POR

A. Government of the Republic of Korea (“GOK”) Entrustment or Direction Prior to 2004

In the investigation, the Department determined that the GOK entrusted or directed creditor banks to participate in financial restructuring programs, and to provide credit and other funds to Hynix, in order to assist Hynix through its financial difficulties. The financial assistance provided to Hynix by its creditors took various forms, including new loans, convertible and other bonds, extensions of maturities and interest rate reductions on existing debt (which we treated as new loans), Documents Against Acceptance financing, usance financing, overdraft lines of credit, debt forgiveness, and debt-for-equity swaps (“DES”). The Department determined these were financial contributions that constituted countervailable subsidies during the period of investigation.

In prior administrative reviews, the Department found that the GOK continued to entrust or direct Hynix’s creditors to provide financial assistance to Hynix throughout 2002 and 2003. The financial assistance provided to Hynix during this period included the December 2002 DES and the extensions of maturities and/or interest rate deductions on existing debt.

With the exception of loans outstanding during the POR, all forms of assistance under GOK Entrustment or Direction Prior to 2004 were either fully allocated prior to the POR or were not

outstanding during the POR. Thus, we have only calculated the benefit from loans outstanding during the POR. In calculating the benefit, we have followed the same methodology used in prior administrative reviews. We followed the methodology described at 19 CFR 351.505, using the benchmarks described in the “Discount Rates and Benchmarks for Loans” section above.

We divided the total benefit from the outstanding loans by Hynix’s POR sales. On this basis, we determine the countervailable subsidy from this program to be less than 0.005 percent ad valorem during the POR. Therefore, consistent with our past practice, we did not include this program in our net countervailing duty rate. See, e.g., Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007), and accompanying Issues and Decision Memorandum at 15 (“CFS from the PRC”); and Final Results of Countervailing Duty Administrative Review: Low Enriched Uranium from France, 70 FR 39998 (July 12, 2005), and accompanying Issues and Decision Memorandum at “Purchases at Prices that Constitute ‘More than Adequate Remuneration’” (“Uranium from France”) (citing Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada, 69 FR 75917 (December 20, 2004), and accompanying Issues and Decision Memorandum at “Other Programs Determined to Confer Subsidies”).

B. 21st Century Frontier R&D Program

Hynix reported that it had loans from the 21st Century Program outstanding during the POR. See Hynix’s February 25, 2010 questionnaire response at 16-17 and Exhibit 10.

In the investigation, we determined that this program conferred a countervailable subsidy to Hynix.⁷ No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these loans confer a countervailable subsidy.

To calculate the benefit of these loans during the POR, we compared the interest actually paid on the loans during the POR to what Hynix would have paid under the benchmark described in the “Discount Rates and Benchmarks for Loans” section above. We then divided the benefit by Hynix’s total sales in the POR to calculate the countervailable subsidy rate. On this basis, we find countervailable benefits of less than 0.005 percent ad valorem during the POR. Therefore, consistent with our past practice, we did not include this program in our net countervailing duty rate. See CFS from the PRC and Uranium from France.

C. Import Duty Reduction Program for Certain Factory Automation Items

Hynix reported that it received duty reductions under this program during the POR. See Hynix’s February 25, 2010 questionnaire response at 17-18 and Exhibit 13.

In a prior administrative review, the Department found that the above program constituted a financial contribution in the form of revenue forgone, which conferred a benefit in the amount of

⁷ See DRAMS Investigation Decision Memorandum at 26-27.

the duty savings. See section 771(5)(D)(ii) of the Act and 19 CFR 351.510(a). See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 73 FR 14218 (March 17, 2008) (“DRAMS 3rd AR Final”), and accompanying Issues and Decision Memorandum at 6 – 7 and Comment 6. The Department also found the program to be de facto specific under section 771(5A)(D)(iii)(III) of the Act. Id. No interested party provided new evidence that would lead us to reconsider our earlier finding. Therefore, we continue to find that these duty reductions confer a countervailable subsidy.

To calculate the benefit, we divided the total duty savings Hynix received during the POR by Hynix’s total sales during the POR. On this basis, we determine the countervailable subsidy to be less than 0.005 percent ad valorem during the POR. Therefore, consistent with our past practice, we did not include this program in our net countervailing duty rate. See CFS from the PRC and Uranium from France.

D. KEXIM Short Term Export Financing

As the GOK explained in its June 25, 2010, supplemental questionnaire response, at 5-6, KEXIM provides short-term export financing to small-, medium- and large-sized companies (not including companies included in the largest five conglomerates in the ROK, unless the company’s headquarters is located outside the Seoul Metropolitan area). The loans are not tied to particular export transactions. However, a company, along with the financing application, must provide its export performance periodically for review by KEXIM. Further, any loan agreement may only cover an amount ranging from 50 to 90 percent of the company’s export performance up to 30 billion won.

Hynix carried a balance on a loan under this program during the POR and provided documentation (e.g., loan application, approval document, and loan agreement), as well as data regarding the loan amount and interest paid during the POR. See Hynix’s February 25, 2010 questionnaire response at Exhibits 10, 12, and 18. Based on Hynix’s submitted interest payment information for this loan, we determine that the interest Hynix paid was greater than the interest Hynix would have paid under the benchmark interest rate. Thus, we determine that Hynix received no benefit from this loan during the POR.

E. Export Insurance

In its February 25, 2010, questionnaire response, at 22-25, Hynix reported that it purchased short-term export insurance from the Korea Export Insurance Corporation (“KEIC”) during the POR. In its supplemental questionnaire response dated June 3, 2010, at 1, Hynix stated that it received no insurance payouts from the KEIC during the POR and otherwise made no claims on KEIC insurance.

Under 19 CFR 351.520(a)(1), the Department will find that export insurance provides a benefit if the premium rates charged are inadequate to cover the long-term operating costs and losses of the program. If the Department finds that an export insurance program provides a benefit under 19 CFR 351.520(a)(1), the Department will normally calculate the benefit from an export

insurance program as the difference between the amount of premiums paid by the firm and the amount received by the firm. See 19 CFR 351.520(a)(2). Because Hynix did not receive any payouts from the KEIC during the POR, we did not examine whether the premium rates are inadequate to cover the KEIC's long-term operating costs and losses of the program. Thus, we determine that Hynix received no benefit from this program during the POR.

IV. Programs Previously Found Not to Have Been Used or Provided No Benefits

We determine that the following programs were not used during the POR:

- A. Reserve for Research and Human Resources Development (formerly Technological Development Reserve) (Article 9 of the Restriction of Special Taxation Act ("RSTA") / formerly, Article 8 of Tax Reduction and Exemption Control Act ("TERCL"))
- B. Tax Credit for Investment in Facilities for Productivity Enhancement (Article 24 of RSTA /Article 25 of TERCL)
- C. Tax Credit for Investment in Facilities for Special Purposes (Article 25 of RSTA)
- D. Reserve for Overseas Market Development (formerly, Article 17 of TERCL)
- E. Reserve for Export Loss (formerly, Article 16 of TERCL)
- F. Tax Exemption for Foreign Technicians (Article 18 of RSTA)
- G. Reduction of Tax Regarding the Movement of a Factory That Has Been Operated for More Than Five Years (Article 71 of RSTA)
- H. Tax Reductions or Exemption on Foreign Investments under Article 9 of the Foreign Investment Promotion Act ("FIPA")/FIPA (Formerly Foreign Capital Inducement Law)
- I. Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates
- J. Electricity Discounts Under the Requested Load Adjustment ("RLA") Program
- K. Import Duty Reduction for Cutting Edge Products
- L. System IC 2010 Project
- M. Operation G-7/HAN Program

Analysis of Comments

Comment 1: Income Tax Treatment of Hynix's Debt Restructuring

Hynix and the GOK contest the Department's decision that Hynix benefited from the GOK's tax treatment of Hynix's issuance of shares in June 2002 under a DES. Specifically, Hynix and the GOK contest the following aspects of the Department's determination:

- A. Department's Interpretation of Korean Tax Laws and Rulings

In the Preliminary Results, Hynix and the GOK note, the Department relied on a published GOK tax principle in Korean Taxation that the exemption or lapse of debts results in a taxable gain.⁸ Hynix and the GOK note, however, that the definition of "taxable gain" in Korean Taxation

⁸ See Preliminary Results, 75 FR at 55767.

specifically excludes paid-in capital. Thus, Hynix and the GOK assert, the Department erred in applying the general GOK principle to the more specific circumstances of Hynix's capital transaction.

Further, Hynix and the GOK contest the Department's interpretation in the Preliminary Results of the GOK's Bubin 46012-1608 tax ruling in 2000. Hynix and the GOK note that the Bubin 46012-1608 ruling, which cites Korean Taxation and Section 17.1-1 of the GOK's Corporate Income Tax Act, states that companies should not include premiums on the par value of issued stock in taxable income.⁹ Hynix and the GOK also note that Hynix issued its stock at a discount to par value, which is not the type of stock issuance that Bubin 46012-1608 covers.

Referencing additional GOK rulings that Micron cited in its original allegation, Hynix and the GOK also argue that the Department erred by implicitly relying on Micron's interpretations of these rulings. First, Hynix and the GOK refer to Jaebubin 46012-191, a 1999 GOK tax ruling applicable to companies under formal court debt workouts. Micron, according to Hynix and the GOK, claimed the Bubin 46012-1608 ruling in 2000 was an extension of the GOK's Jaebubin 46012-191 ruling. Further, Hynix and the GOK refer to Bubin 46012-37, a 2003 ruling that amended the 1999 Jaebubin 46012-191 ruling. Hynix and the GOK contend that all of these GOK rulings primarily are instructions on how to calculate the premium on the par value of issued stock. Hynix and the GOK note that Hynix's 2002 stock issuance, by contrast, was at a discount to par value.

B. Double-counting of Benefits

Citing the DRAMS 1st AR Decision Memorandum and the CVD Preamble, Hynix and the GOK note that the Department assigned zero value to the shares Hynix issued in June 2002 under its DES.¹⁰ Hynix and the GOK argue that the Department's position in the Preliminary Results runs contrary to its position in the DRAMS 1st AR Decision Memorandum, thereby resulting in a double-counting of benefits from the DES. Specifically, Hynix and the GOK argue that the Department treated the shares Hynix issued as having no value in the DRAMS 1st AR Decision Memorandum but treated the shares as having value in the Preliminary Results by determining that Hynix received a taxable gain from the share issuance. Hynix argues that the Department already fully countervailed any tax consequences of the share issuance in the first administrative review by assigning zero value to the shares.

⁹ See Hynix and the GOK's case brief at 5, citing Micron's October 5, 2009, New Subsidy Allegations.

¹⁰ See Hynix and the GOK's case brief at 9, citing Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 71 FR 14174 (March 21, 2006), and accompanying Issues and Decision Memorandum at Comment 12 ("DRAMS 1st AR Decision Memorandum"); and Countervailing Duties: Final Rule, 63 FR 65348, 65374-75 ("CVD Preamble").

C. Receipt of Benefit During POR

Regardless of the Department's final position on the countervailability of Hynix's share issuance, Hynix and the GOK argue, Hynix could not have received a benefit during the current POR. Citing Hynix's 2007 financial statements and 2007 tax return, Hynix and the GOK claim that Hynix could have zeroed out any potential tax liability by applying available tax credits to taxable income. Hynix and the GOK ask the Department to address the availability of these tax credits in the final results.

Micron responds to Hynix and the GOK's arguments as follows:

A. Department's Interpretation of Korean Tax Laws and Rulings

First, Micron contests the significance of the principle for paid-in capital in Korean Taxation cited by Hynix and the GOK. As Micron notes, Hynix and the GOK cite the principle in Korean Taxation that an issuance of stock in excess of par value does not produce a taxable gain. Contesting the relevancy of Hynix and the GOK's assertion, Micron argues that a purchase of stock in excess of par value produces no taxable gain because the purchase price is, by definition, at a market price.

Micron asserts that DES are a special type of stock issuance because the creditor typically forgives debt with a value greater than the value of newly issued stock. Micron argues that the Department properly applied the principle in Korean Taxation regarding debt forgiveness to Hynix's stock issuance under its DES. Further, citing Korean Financial Accounting Standard ("SKAS") No. 13, Micron claims that Korean financial accounting standards are in accordance with this debt forgiveness principle in Korean Taxation.¹¹ SKAS No. 13, Micron asserts, provides that a DES produces a gain when the value of debt forgiven exceeds the market value of the new equity.

Finally, Micron contests Hynix and the GOK's argument that the GOK consistently determined taxable gains by reference to par value. Citing Bubin 46012-1608, Micron notes that the GOK deemed debt exemption gains resulting from the difference between the issue price of shares and the market price (a taxable event) to be the same as the difference between the issue price of shares and par value (a non-taxable event) for companies undergoing voluntary restructuring. Thus, Micron claims, the Department correctly determined that the GOK, under Bubin 46012-1608, deemed that any gain from debt forgiveness occurring through a DES could be excluded from taxable income.

B. Double-counting of Benefits

Rejecting Hynix and the GOK's argument that the Department's position results in double-counting, Micron counters that Hynix's 2001 bailout and subsequent preferential tax treatment of

¹¹ See Micron's case brief at 4, citing Micron's New Subsidy Allegations (October 5, 2009) at Attachment 2, page 90.

the bailout constitute two separate subsidy programs. Micron argues that the Department, consistent with 19 CFR 351.509(a)(1), must measure the benefit from the tax treatment as the reduction in tax that Hynix paid as a result of the GOK's preferential treatment.

C. Receipt of Benefit During POR

Rejecting Hynix and the GOK's argument that Hynix could not have benefited from the program during the POR, Micron notes that Hynix applied loss carryforwards from 2002, the year of Hynix's share issuance, to the 2007 tax year. Citing the Preliminary Results, Micron asserts that the Department correctly found that the loss carryforwards reduced Hynix's taxable income during the POR.¹²

Department's Position:

We agree with Micron. The following sections address each of Hynix and the GOK's specific arguments.

A. Department's Interpretation of Korean Tax Laws and Rulings

First, Hynix and the GOK assert that the definition of "gain" in Korean Taxation excludes paid-in capital and related activities. Hynix and the GOK, however, are inaccurately conflating DES with paid-in capital transactions. In a paid-in capital transaction, an investor pays in capital in exchange for equity. In Hynix's DES, Hynix's creditors forgave 2.994 billion won of debt in exchange for shares with a market value of 1.649 billion won.¹³ Thus, Hynix's creditors forgave a portion of Hynix's debt by receiving shares with a market value lower than the value of debt forgiven. Although SKAS No. 13 does not specifically address the tax consequences of Hynix's DES, SKAS No. 13 recognizes that a company experiences an accounting gain when the value of debt forgiven is higher than the value of newly issued shares under the swap.¹⁴ Thus, the definition of "gain" in Korean Taxation addresses the tax treatment of paid-in capital, but does not address the tax treatment of debt forgiveness under a DES.

Hynix and the GOK do not dispute the facts of Hynix's DES.¹⁵ They also do not contend that the debt forgiveness principle in Korean Taxation did not apply to Hynix's DES because Hynix received no debt forgiveness. Instead, Hynix and the GOK contend that the Bubin 46012-1608 ruling and the GOK's other tax rulings did not apply to Hynix's DES. Hynix and the GOK assert that the GOK's Corporate Income Tax Act, which the Bubin 46012-1608 ruling cites, directed Korean companies to exclude the value of a stock issuance in excess of par value from the calculation of taxable income. The full text of the Bubin 46012-1608 ruling, however, is as follows:

¹² See Micron's rebuttal brief at 8, citing Preliminary Results, 75 FR at 55767.

¹³ See Micron's October 5, 2009, New Subsidy Allegations at Attachment 7 (Hynix's 2002 Financial Statements at 60).

¹⁴ Id. at Attachment 3, page 2.

¹⁵ See Hynix and the GOK's case brief at 3-4.

In case a domestic corporation carries out debt-equity swap in accordance with the corporate normalization plan, with respect to the amount accounted, pursuant to the corporate financial accounting standards, as debt exemption gains resulting from the amount of difference between the issuance price of the concerned stock and its market price, said amount ought to be deemed as the amount in excess of the par value of the stock issued, in accordance with the provisions set forth in Section 17, Para. 1, and Sub-Para. 1 of the Corporate Income Tax (Act), or as the amount of discounts on stock issued, in accordance with the provisions set, forth in Section 20 and Sub-Para. 3 of said law; and as such, said amount shall not be included into the taxable income or deductible expense of each (applicable) business year.¹⁶ (emphasis added.)

Hynix and the GOK assert that the GOK's tax rulings cited by Micron, including Bubin 46012-1608, did not apply to Hynix's DES because these rulings primarily addressed the calculation of a premium on par value. They contend that Hynix's 2002 stock issuance, by contrast, was at a discount to par value. As the Bubin 46012-1608 ruling states, however, the GOK deemed the difference between issue price and market price to be the amount in excess of the par value of issued stock. Thus, because Hynix issued shares at a premium to the market price, the Bubin 46012-1608 ruling applied to Hynix's share issuance under the DES.

Because the GOK deemed the difference between issue price and market price to be the premium on par value with the Bubin 46012-1608 ruling, Article 17(1)-1 of Korea's Corporate Tax Act now applied to DES where the issue price exceeded the market price. Article 17(1)-1 states that companies should not include the amount exceeding the face (i.e., par) value of stocks at issuance in taxable income.¹⁷ Consistent with Bubin 46012-1608, Hynix did not have to report the difference between the price of its June 2002 share issuance (based on the amount of debt forgiven) and the market price as part of taxable income.

The record does not show a specific GOK law, ruling, or principle prior to the Jaebubin 46012-191 ruling in 1999 that specifically addressed the tax treatment of DES.¹⁸ Under the standard in Korean Taxation, however, the forgiveness of debt under Hynix's DES would otherwise have been taxable.¹⁹ With the Bubin 46012-1608 ruling, the GOK established an official policy for the tax treatment of DES for companies undergoing voluntary restructuring. In effect, the Bubin 46012-1608 ruling provided companies undergoing voluntary restructuring with clear guidance on how to treat a transaction (i.e., a DES) for which no specific GOK tax laws, rulings, or principles existed.

With the Bubin 46012-1608 ruling, the GOK effectively determined that the debt forgiveness principle from Korean Taxation did not apply to DES for companies undergoing voluntary restructuring. Debt forgiveness, however, is part of a DES when a creditor accepts shares in exchange for the forgiveness debt with a higher value. Thus, we continue to find that Hynix

¹⁶ See Micron's October 5, 2009, New Subsidy Allegations at 6 and Exhibit 13.

¹⁷ See the GOK's February 26, 2010, Questionnaire Response at Exhibit 12, page 2.

¹⁸ The Jaebubin 46012-191 ruling applied to companies in formal court debt workouts. Hynix underwent a voluntary restructuring, which is the type of restructuring covered by the Bubin 46012-1608 ruling in 2000.

¹⁹ See Preliminary Results, 75 FR at 55767.

received a countervailable subsidy for the 2007 tax year as a result of the Bubin 46012-1608 ruling.²⁰

B. Double-counting of Benefits

We agree with Micron. Although Hynix and the GOK claim that the Department already countervailed any tax consequences of the DES by assigning zero value to the shares issued, Hynix and the GOK offer no support for this claim. As a result of the Bubin 46012-1608 ruling, the tax consequence of the DES is the exemption for debt forgiveness described in our finding. The GOK and Hynix have not identified any other tax consequences that result in double-counting.

In short, the 2002 equity infusion in Hynix was a distinct financial contribution from the tax exemption being considered. See sections 771(5)(D)(i) and (ii) of the Act, respectively. Moreover, these distinct financial contributions gave rise to distinct benefits. See 19 CFR 351.507 and 19 CFR 351.509, respectively.

C. Receipt of Benefit During POR

We agree with Micron. 19 CFR 351.509(a) states:

In the case of a program that provides for a full or partial exemption or remission of a direct tax (e.g., an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program.

In its case brief, at 12, Hynix notes that it had tax credits set to expire during the 2007 tax year and other tax credit options available to it for the 2007 tax year. Hynix's hypothetical use of these tax credits, however, is not part of our analysis. The tax treatment of the DES, not the tax credits, is the program Hynix actually used to lower the amount of tax it had to pay for the 2007 tax year. Thus, the tax exemption is the program in question under 19 CFR 351.509(a).

Comment 2: Allocation Method for Tax Benefit

Hynix and the GOK argue the Department should pro-rate the benefit from the tax treatment of Hynix's June 2002 DAS, as discussed under Comment 1, if it continues to find the program to be countervailable. Citing 19 CFR 351.524(a), Hynix and the GOK argue that the Department must allocate recurring benefits to the year of receipt. Thus, Hynix and the GOK contend, the Department's allocation of the full amount of the tax benefit to the POR, which in this segment of the proceeding is less than one year, was inconsistent with 19 CFR 351.524(a).

²⁰ Hynix and the GOK also raise arguments about a March 5, 2003, GOK ruling (Bubin 46012-37). See Hynix and the GOK's case brief at 8. The ruling stated, "Please be aware that the amended contents shall be enforced starting from the first transaction that creates tax liability on or after the effective date of this document." See Micron's October 5, 2009, New Subsidy Allegations at Attachment 14. Thus, the record shows that this ruling did not apply to Hynix's June 2002 share issuance.

Hynix and the GOK contend that the tax exemption benefitted Hynix during the entire calendar year, and they assert that the Department misaligned the allocation of sales and benefits by using the POR sales in the denominator. Hynix and the GOK further argue that the Department cannot offset the over-allocation of benefits in a future administrative review because this is the last review of the order. To remedy this error, Hynix and the GOK argue, the Department must allocate the benefit across all of 2008 and attribute only 223 days of the allocation (i.e., the length of the 2008 POR) to POR sales.

Micron points to Hynix's tax return for the tax year ending December 31, 2007, due in March 2008, to argue that the Department correctly allocated the benefit under 19 CFR 351.509(b) and 19 CFR 351.525(a). Rejecting Hynix and the GOK's argument concerning the over-allocation of benefits, Micron argues that there will not be any allocation of benefits to the sales made from August 10 to December 31, 2008, or countervailing duties assessed on entries during this timeframe because the order has been revoked. Micron further argues that the Department would not fully countervail the benefit from the tax program if it were to allocate the benefit over the calendar year, as the GOK and Hynix request.

Department's Position:

We agree with Hynix and the GOK. Under 19 CFR 351.509(c), the Department will normally allocate the benefit from a tax exemption to the year in which the benefit is considered to have been received. Further, in PET Film from India, the Department stated the following:

{S}ubsidies provided by a government are sometimes provided only once a year, such as tax breaks, provided at only certain times, or provided unevenly during a year. Accordingly, the Department's regulations allocate most types of subsidies over a 12-month period. See 19 CFR. 351.504 and 19 CFR 351.524(d)(2).²¹

The POR in PET Film from India was October 22, 2001, through December 31, 2002. In PET Film from India, the respondent received a tax exemption in 2001.²² Regarding the benefit from this exemption, the Department stated the following:

Pursuant to 19 CFR 351.509(b), the Department will normally consider a tax benefit as having been received on the date on which the firm filed its tax return. Further, 19 CFR 351.509(c) provides that the Department will normally allocate the benefit of a tax exemption to the year in which the benefit is considered to have been received. As explained in Comment 1 above, the Department is basing the POR on calendar years. Therefore, the Department allocated the amount of benefits from tax returns filed in 2001 to calendar year 2001 and allocated the amount of benefits from tax returns filed in 2002

²¹ See Polyethylene Terephthalate Film, Sheet, and Strip ("PET Film") from India: Final Results of the 2001-2002 Countervailing Duty Administrative Review, 69 FR 51063 (August 17, 2004) ("PET Film from India"), and accompanying Issues and Decision Memorandum at Comment 1.

²² Id. at Comment 2.

to calendar year 2002.²³

Hynix's case is analogous to PET Film from India. Under 19 CFR 351.509(c), Hynix received the benefit from the tax exemption on the date in March 2008 when it filed its 2007 annual tax return. As the Department stated in PET Film from India, however, the Department's regulations allocate most types of subsidies, including tax programs, over a 12-month period. Therefore, in PET Film from India, the Department allocated the benefit from the respondent's tax return filed in 2001 to the calendar year 2001, even though the POR was not the entire calendar year.

Consistent with PET Film from India, 19 CFR 351.509(b), and 19 CFR 351.509(c), we find that it is appropriate to allocate the benefit from the tax treatment of Hynix's DES to the calendar year 2008. Accordingly, to determine the subsidy rate, we have divided the full amount of the benefit by Hynix's 2008 calendar year sales.

Comment 3: Clerical Error Allegations

Citing the Hynix Prelim Calc Memo,²⁴ Hynix and the GOK claim the Department incorrectly calculated the service sales adjustment, resulting in a double deduction of service sales from free on board ("FOB") merchandise sales. Hynix also claims that the Department erroneously deducted an additional sales adjustment from Hynix's FOB sales.

Micron did not respond to Hynix and the GOK's allegation.

Department's Position:

We agree with Hynix and the GOK that we erroneously doubled the deduction for service sales. We also agree that we erroneously deducted the additional sales adjustment from Hynix's FOB sales. We have corrected both ministerial errors for the final results calculation.²⁵

Comment 4: Circumvention of the Order

Micron points to an increase in Hynix's shipments of subject merchandise after the revocation of the order as evidence that Hynix may have circumvented the order. Micron asks the Department to follow up with U.S. Customs and Border Protection ("CBP") and the Foreign Trade Zones Board ("FTZ Board") to see if they have done additional investigation on Micron's allegations of circumvention from previous reviews, and to report back to Micron.

Hynix and the GOK contend that Hynix's increase in shipments after termination of the order is not compelling evidence of circumvention. Hynix and the GOK argue that Micron has not

²³ Id. at Comment 2.

²⁴ See Memorandum from Shane Subler and Yasmin Nair to File, "Preliminary Results Calculations for Hynix Semiconductor, Inc." (September 7, 2010) ("Hynix Prelim Calc Memo").

²⁵ See Memorandum from Shane Subler and Jennifer Meek to File, "Final Results Calculations for Hynix Semiconductor, Inc." (January 5, 2011).

provided any new evidence to warrant further investigation of its claims of circumvention.

Department's Position:

The Department gives serious attention to allegations of circumvention of an order. We investigate thoroughly allegations of circumvention under section 781 of the Act. Regarding customs fraud, we share with CBP any evidence of customs fraud that arises during the course of our proceedings, and we comply with CBP's requests for information, in accordance with U.S. law.

In the DRAMS 4th AR Decision Memorandum, we addressed Micron's allegations that Hynix committed customs fraud.²⁶ In recognition of Micron's concerns over potential customs fraud, we shared the DRAMS 4th AR Decision Memorandum with CBP.²⁷ We also explained, however, that CBP, not the Department, is the agency in charge of investigating customs fraud.²⁸

In its case brief, at 2-3, Micron notes that Hynix's shipments of DRAMS increased following termination of the order in August 2008. Micron contends that this increase is evidence of possible circumvention. We disagree. A rise in shipments following the termination of an order reflects the economic logic of the lower rates that result. While the order was still in place in 2008, entries of subject merchandise were subject to cash deposit rates of 31.86 percent and 23.78 percent, reflecting the imposition of countervailing duty rates in excess of standard rates that would otherwise apply absent an order.²⁹ In the case of DRAMS, the standard duty rate on imports from the ROK in 2008 was zero.³⁰ With the termination of the order, the duty rate dropped to the standard rate of zero, thereby lowering the cost of entry for the merchandise. Hence, it is reasonable to expect that entries of DRAMS would rise following termination of the order and the removal of the duties imposed under the order.

Therefore, we do not find that an increase in Hynix's shipments following termination of the order is evidence of customs fraud. We addressed Micron's previous allegations of customs fraud in the DRAMS 4th AR Decision Memorandum. In recognition of Micron's continuing concerns and the Department's awareness of the importance of sharing information with CBP, we are again sharing this decision memorandum with CBP. We will comply with CBP's requests, in accordance with U.S. law.³¹

²⁶ See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 74 FR 7395 (February 17, 2009), and accompanying Issues and Decision Memorandum at Comment 2 ("DRAMS 4th AR Decision Memorandum").

²⁷ Id.

²⁸ Id.

²⁹ See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 72 FR 7015, 7016 (February 14, 2007) (showing a cash deposit rate of 31.86 percent effective February 14, 2007); see also DRAMS 3rd AR Final, 73 FR at 14220 (showing a cash deposit rate of 23.78 percent effective March 17, 2008).

³⁰ See Chapters 84 and 85 of the 2008 Harmonized Tariff Schedule of the United States, available on the U.S. International Trade Commission's website (http://www.usitc.gov/tata/hts/bychapter/_0800.htm).

³¹ Micron has requested that we follow up with the FTZ Board. In past reviews, Micron requested that the FTZ Board take certain action with respect to Micron's allegations. CBP, not the FTZ Board, conducts enforcement with

Recommendation

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

AGREE _____ DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

(Date)

regard to alleged customs fraud involving foreign trade zones. In that context, the FTZ Board will provide CBP with information that CBP requests, in accordance with law.