



C-580-888

POR: 4/4/2017 - 12/31/2017

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January 10, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of
Countervailing Duty Administrative Review: Certain Carbon and
Alloy Steel Cut-To-Length Plate from the Republic of Korea; 2017

I. Summary

The Department of Commerce (Commerce) analyzed the case and rebuttal briefs submitted by interested parties in the administrative review of the countervailing duty (CVD) order on certain carbon and alloy steel cut-to-length plate (CTL plate) from the Republic of Korea (Korea) covering the period of review (POR) April 4, 2017 through December 31, 2017.

As a result of this analysis, we have made one change since the *Preliminary Results*.¹ We recommend that you approve the positions described in the “Discussion of Comments” section of this memorandum.

Below is a complete list of the issues in this administrative review for which we received comments from interested parties:

- Comment 1: Whether Commerce Should Apply Adverse Facts Available (AFA) for Industrial Technology Innovation Promotion Act (ITIPA) Grants Received During the Average Useful Life (AUL) Period
- Comment 2: Whether Tax Deductions Under Restriction of Special Taxation Act (RSTA) Article 10-2 Are Countervailable
- Comment 3: Whether Tax Credits Under Article 57 of the Corporate Tax Act (Article 57) Are Countervailable

¹ See *Certain Carbon and Alloy Steel Cut-To-Length Plate from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2017*, 84 FR 34123 (July 17, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (Preliminary Decision Memorandum).



II. Background

A. Case History

On July 17, 2019, Commerce published the *Preliminary Results* of this administrative review in the *Federal Register*, and invited interested parties to comment.² On September 18, 2019, Nucor Corporation (Nucor, or the petitioner) submitted pre-verification comments on the record of this administrative review.³ Between September 23, 2019, and September 27, 2019, we conducted verifications of the questionnaire responses submitted by POSCO and the Government of Korea (GOK). We released verification reports on November 13, 2019.⁴ On October 10, 2019, Commerce postponed the final results of review by 57 days until January 10, 2020.⁵ On December 2, 2019, Nucor, POSCO, and the GOK submitted timely case briefs.⁶ Nucor and POSCO also submitted timely rebuttal briefs on December 9, 2019.⁷

B. Period of Review

The POR is April 4, 2017 through December 31, 2017.

III. Partial Rescission of Administrative Review

On August 7, 2018, we received a timely filed no-shipment certification from Hyundai Steel Company (Hyundai).⁸ On August 15, 2018, Commerce issued a no-shipment inquiry to U.S. Customs and Border Protection (CBP) requesting any information that might contradict Hyundai's no-shipment claim.⁹ We received no information from CBP that contradicts Hyundai's claim of no sales, shipments, or entries of subject merchandise to the United States during the POR.¹⁰ Consequently, in the *Preliminary Results*, Commerce announced its intent to

² *Id.*

³ See Nucor's Letter, "Comments Regarding Verification of POSCO's Questionnaire Responses," dated September 18, 2019.

⁴ See Memoranda, "Verification of the Questionnaire Responses of POSCO," dated November 13, 2019 (POSCO Verification Report); and "Verification of the Questionnaire Responses of the Government of the Republic of Korea," dated November 13, 2019 (GOK Verification Report).

⁵ See Memorandum, "Extension of Deadline for Final Results of Countervailing Duty Administrative Review," dated October 10, 2019.

⁶ See Nucor's Letter, "Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Case Brief," dated December 2, 2019 (Nucor Case Brief); POSCO's Letter, "Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea, Case No. C-580-888: POSCO's Case Brief," dated December 2, 2019 (POSCO Case Brief); and GOK's Letter, "Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea, 04/04/2017-12/31/2017 Administrative Review, Case No. C-580-888: Case Brief of the Government of Korea," dated December 2, 2019 (GOK Case Brief).

⁷ See Nucor's Letter, "Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Rebuttal Brief," dated December 9, 2019 (Nucor Rebuttal Brief); and POSCO's Letter, "Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea, Case No. C-580-888: POSCO's Rebuttal Brief," dated December 9, 2019 (POSCO's Rebuttal Brief).

⁸ See Hyundai's Letter, "Carbon and Alloy Steel Cut-To-Length Plate from Korea: Notice of No Sales," dated August 7, 2018.

⁹ See Message number 8227311, "No shipments inquiry for certain carbon and alloy steel cut-to-length plate from the Republic of Korea produced and/or exported by Hyundai Steel Co. and/or Hyundai Steel Company (C-580-888)," dated August 15, 2018.

¹⁰ See Memorandum, "No shipment inquiry with respect to the company below during the period 04/04/2017

rescind the review of Hyundai.¹¹ No interested party submitted comments on Commerce's intent to rescind the review of Hyundai. Because there is no evidence on the record to indicate that Hyundai had entries, exports, or sales of subject merchandise to the United States during the POR, we are rescinding the administrative review of Hyundai pursuant to 19 CFR 351.213(d)(3).

IV. Scope of the Order

The products covered by this order are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been "worked after rolling" (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

- (1) except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an order existing on that specific country (*i.e.*, *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Orders*, 81 FR 67960 (October 3, 2016)); and
- (2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching,

through 12/31/2017," dated August 16, 2018.

¹¹ See *Preliminary Results*, 84 FR at 34124; and Preliminary Decision Memorandum at 4.

beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this order unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

- (1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;
- (2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:
 - MIL-A-12560,
 - MIL-DTL-12560H,
 - MIL-DTL-12560J,
 - MIL-DTL-12560K,
 - MIL-DTL-32332,
 - MIL-A-46100D,
 - MIL-DTL-46100-E,
 - MIL-46177C,
 - MIL-S-16216K Grade HY80,
 - MIL-S-16216K Grade HY100,
 - MIL-S-24645A HSLA-80;
 - MIL-S-24645A HSLA-100,
 - T9074-BD-GIB-010/0300 Grade HY80,
 - T9074-BD-GIB-010/0300 Grade HY100,
 - T9074-BD-GIB-010/0300 Grade HSLA80,
 - T9074-BD-GIB-010/0300 Grade HSLA100, and
 - T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this order;

- (3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;
- (4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;
- (5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23-0.28,
- Silicon 0.05-0.20,
- Manganese 1.20-1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0-2.5,
- Molybdenum 0.35-0.80,
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270-300 HBW,
- (ii) 290-320 HBW, or
- (iii) 320-350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23-0.28,
- Silicon 0.05-0.15,
- Manganese 1.20-1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20-1.50,
- Molybdenum 0.35-0.55,
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,

- Hydrogen not greater than 2 ppm, and
 - Nitrogen not greater than 60 ppm;
- (b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;
- (c) Having the following mechanical properties:
- (i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at -75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01-75; or
 - (ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at -40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);
- (d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and
- (e) Conforming to magnetic particle inspection in accordance with AMS 2301;
- (7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:
- (a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):
- Carbon 0.25-0.30,
 - Silicon not greater than 0.25,
 - Manganese not greater than 0.50,
 - Nickel 3.0-3.5,
 - Sulfur not greater than 0.010,
 - Phosphorus not greater than 0.020,
 - Chromium 1.0-1.5,
 - Molybdenum 0.6-0.9,
 - Vanadium 0.08 to 0.12
 - Boron 0.002-0.004,
 - Oxygen not greater than 20 ppm,
 - Hydrogen not greater than 2 ppm, and
 - Nitrogen not greater than 60 ppm.

- (b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);
- (c) Having the following mechanical properties: A Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at -40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);
- (d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and
- (e) Conforming to magnetic particle inspection in accordance with AMS 2301.

At the time of the filing of the petition, there was an existing countervailing duty order on certain cut-to-length carbon-quality steel plate from Korea. *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea*, 64 Fed. Reg. 73,176 (Dep't Commerce Dec. 29, 1999), as amended, 65 Fed. Reg. 6,587 (Dep't Commerce Feb. 10, 2000) (*1999 Korea CVD Order*). The scope of the countervailing duty order with regard to cut-to-length plate from Korea covers only (1) subject cut-to-length plate not within the physical description of cut-to-length carbon quality steel plate in the *1999 Korea CVD Order* regardless of producer or exporter, and (2) cut-to-length plate produced and/or exported by those companies that were excluded or revoked from the *1999 Korea CVD Order* as of April 8, 2016. The only revoked or excluded company is Pohang Iron and Steel Company, also known as POSCO.

The products subject to the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the order may also enter under the following HTSUS item numbers: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the order is dispositive.

V. Rate for Non-Examined Companies

In the *Preliminary Results*, we determined that POSCO, the sole mandatory respondent in this review, received countervailable subsidies that are above *de minimis*. Because the only individually calculated rate was not zero, *de minimis*, or based entirely under section 776 of the Act, we preliminarily assigned POSCO's rate of 0.56 percent *ad valorem* to all non-examined producers and exporters, pursuant to 705(c)(5)(A)(i) of the Act. For these final results, we have calculated a net countervailable subsidy rate above *de minimis* (*i.e.*, 0.50 percent) for POSCO. Therefore, consistent with Commerce's practice, as described in the *Preliminary Results*,¹² the countervailable subsidy rate calculated for POSCO (*i.e.*, 0.50 percent) is the rate assigned to all non-selected producers and exporters, pursuant to section 705(c)(5)(A)(i) of the Act.

VI. Subsidies Valuation Information

A. Allocation Period

Commerce made no changes to, and the interested parties raised no issues in their briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Results*. For a description of allocation period and the methodology used for these final results, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 10.

B. Attribution of Subsidies

Commerce made no changes to, and the interested parties raised no issues in their briefs regarding, the methodologies used in the *Preliminary Results* for attributing subsidies. For a description of the methodologies used for these final results, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 10-13.

C. Benchmarks and Discount Rates

Commerce made no changes to, and the interested parties raised no issues in their briefs regarding, the benchmarks used in the *Preliminary Results*. For a description of the benchmarks and discount rates used for these final results, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 13-14.

D. Denominators

Commerce has made no changes to, and the interested parties raised no issues in their briefs regarding, the denominators used in the *Preliminary Results*. For a description of the denominators used for these final results, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 14.

¹² *See* Preliminary Decision Memorandum at 9-10.

VII. Use of Facts Otherwise Available

A. Legal Standard

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended (the Act) provide that Commerce shall, subject to section 782(d) of the Act, apply facts otherwise available if necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by Commerce, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

B. Application of Facts Otherwise Available

Commerce relied on “facts otherwise available” for the following findings in the *Preliminary Results*.¹³

Ricco Metal Co. (Ricco Metal) was acquired by POSCO M-Tech during the AUL period (*i.e.*, in January 2013), and for the *Preliminary Results*, we considered whether any non-recurring subsidies that Ricco Metal received could pass through to POSCO M-Tech. However, POSCO M-Tech was unable to provide certain information for Ricco Metal for the 2002 through 2008 reporting period, because POSCO M-Tech stated that it disposed of certain of Ricco Metal’s accounting records which pre-dated the 2013 merger in compliance with Korean law with respect to document archival.¹⁴ Therefore, in accordance with section 776(a) of the Act, for purposes of the *Preliminary Results*, we selected from among the facts otherwise available with respect to Ricco Metal, because necessary information was not on the record.¹⁵ As facts available, we assumed that Ricco Metal used the same non-recurring subsidies during the years for which we are missing information (*i.e.*, 2002-2008) as it did for the years in which we have information (*i.e.*, 2009-2012).¹⁶ On this basis, we preliminarily determined that Ricco Metal did not receive subsidies that conferred a measurable benefit.¹⁷

Similarly, Pohang Steel Processing and Fabricating Center Co., Ltd. (Pohang SPFC) was acquired by Steel Processing and Fabricating Center Co., Ltd. (SPFC) during the AUL (*i.e.*, in January 2013), and we considered whether any non-recurring subsidies that Pohang SPFC received could have passed through to SPFC.¹⁸ However, SPFC was unable to provide certain information for Pohang SPFC for the year 2008 reporting period, because SPFC stated that it destroyed documents relating to Pohang SPFC before the merger that were older than five years,

¹³ See Preliminary Decision Memorandum at 15-16.

¹⁴ See POSCO’s Letter, “Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea, Case No. C-580-888: Notification of Reporting Difficulty and Request to Modify Reporting Instructions,” dated September 28, 2018 (POSCO Reporting Difficulties Letter) at 3.

¹⁵ See Preliminary Decision Memorandum at 15-16.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

i.e., between 2008 and 2012.¹⁹ Pohang SPFC did, however, have access to accounting voucher information from 2009-2012.²⁰ Therefore, in accordance with section 776(a) of the Act, for purposes of the *Preliminary Results*, we applied facts available with respect to Pohang SPFC, because necessary information was not on the record.²¹ As facts available, we preliminarily found that Pohang SPFC used the same non-recurring subsidies during the year for which we are missing information (*i.e.*, 2008) as it did for the years in which we have information (*i.e.*, 2009-2012).²²

For further descriptions of these decisions, *see* the *Preliminary Results*.²³ Because no party commented on this issue, Commerce continues to use facts available for these final results for Ricco Metal and Pohang SPFC.

VIII. Analysis of Programs

A. Programs Determined to be Countervailable

1. *Restriction of Special Location Taxation Act Article 78(4): Reduction and Exemption for Industrial Complexes*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 17-18. The final program rate remains unchanged as follows:

POSCO: 0.01 percent *ad valorem*²⁴

2. *RSTA Article 26: GOK Facilities Investment Support*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 18-19. The final program rate remains unchanged as follows:

POSCO: 0.14 percent *ad valorem*²⁵

3. *RSTA Article 104(15): Development of Overseas Resources*

No issues were raised by the interested parties regarding this program. For the description,

¹⁹ See POSCO Reporting Difficulties Letter at 7; *see also* Preliminary Decision Memorandum at 15-16.

²⁰ See POSCO Reporting Difficulties Letter at 7; *see also* Preliminary Decision Memorandum at 15-16.

²¹ See Preliminary Decision Memorandum at 17.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 19.

analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 19. The final program rate remains unchanged as follows:

POSCO: 0.05 percent *ad valorem*²⁶

4. *RSTA Article 11: Tax Credit for Investment in Facilities for Research and Manpower*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 20. The final program rate remains unchanged as follows:

POSCO: 0.06 percent *ad valorem*²⁷

5. *RSTA Article 9: Reserve for Research and Human Resources Development*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 20. The final program rate remains unchanged as follows:

POSCO: 0.01 percent *ad valorem*²⁸

6. *RSTA Article 25(2): Tax Deductions for Investments in Energy Economizing Facilities*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 21. The final program rate remains unchanged as follows:

POSCO: 0.17 percent *ad valorem*²⁹

7. *RSTA Article 8-3: Tax Credit when Making Contributions to Funds for Collaborative Cooperation between Large Enterprises and Small and Medium-Size Enterprises (SMEs)*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 22. The final program rate remains unchanged as follows:

²⁶ *Id.*

²⁷ *Id.* at 20.

²⁸ *Id.*

²⁹ *Id.* at 21.

POSCO: 0.02 percent *ad valorem*³⁰

8. *RSTA Article 10-2: Special Taxation for Contribution, etc. for Research and Development (R&D)*

Interested parties raised issues with regard to *de facto* specificity of this program. After considering those arguments, Commerce determined to make no changes to the *Preliminary Results* regarding this program. For a further discussion, *see* Comment 2 *below*.

POSCO: 0.01 percent *ad valorem*³¹

9. *Various R&D Grants Provided Under the ITIPA*

Interested parties raised issues with regard to whether there is a basis in the record to apply facts available or an AFA subsidy rate to POSCO for its use of the ITPIA program. After considering those arguments, Commerce determined to make no changes to the *Preliminary Results* regarding this program. *See* Comment 1 *below*.

POSCO: 0.01 percent *ad valorem*³²

10. *Energy Savings Program Subsidies: Demand Response Market Program*

No issues were raised by the interested parties regarding this program. For the description, analysis, and calculation methodology for this program, *see* the *Preliminary Results* and accompanying Preliminary Decision Memorandum at 26. The final program rate remains unchanged as follows:

POSCO: 0.02 percent *ad valorem*³³

B. Programs Determined to Be Not Used or Not to Confer a Measurable Benefit

No interested parties filed case or rebuttal comments regarding Commerce's preliminary analysis regarding the following programs. Thus, Commerce's determination with respect to these programs remains unchanged for the final results.³⁴

1. RSTA Article 22: Tax Exemption on Investment in Overseas Resources Development
2. RSTA Article 10(1)(3): Tax Reduction for Research and Human Resources Development
3. RSTA Article 94: Acquisition of Facilities to Improve Corporate Welfare
4. RSTA Article 104(14): Third Party Logistics Operation
5. RSTA Article 104(8)(1): Tax Credits for Electronic Returns

³⁰ *Id.* at 22.

³¹ *Id.* at 23.

³² *Id.* at 24.

³³ *Id.* at 26.

³⁴ *Id.* at 27-28.

6. RSTA Article 121(2): Corporate Tax Reductions or Exemptions for Foreign Investment
7. Power Business Law Subsidies
8. Provision of LNG for LTAR
9. Short-Term Export Credits
10. Export Factoring
11. Export Loan Guarantees
12. Trade Bill Rediscounting Program
13. Loans under the Industrial Base Fund
14. Export Credit Guarantees
15. Clean Coal Subsidies
16. GOK Subsidies for “Green Technology R&D” and its Commercialization
17. Support for SME “Green Partnerships”
18. Research, Supply, or Workforce Development Investment Tax Deduction for “New Growth Engines” under RSTA Article 10(1)(1)
19. Research, Supply, or Workforce Development Expense Tax Deductions for “Core Technologies” under RSTA Article 10(1)(2)
20. Tax Reductions and Exemptions in Free Economic Zones
21. Exemptions and Reductions of Lease Fees in Free Economic Zones
22. Grants and Financial Support in Free Economic Zones
23. Sharing of Working Opportunities/Employment Creating Incentives
24. Dongbu’s Debt Restructuring
25. PDC – Various Transactions with KDB during 2015
26. Hyosung – Korea Finance Corporation/KDB Facility Loans
27. Hyosung – KDB Usance Loans
28. Hyosung – Industrial Bank of Korea Short-Term Discounted Loans for Export Receivables
29. Unreported Government Subsidies Indicated on POSCO M-Tech’s Income Tax Return
30. Energy Savings Program Subsidies - Demand Adjustment Program of Emergency Load Reduction
31. RSTA Article 25(3): Tax Credit for Investment in Environmental and Safety Facilities
32. Asset revaluations pursuant to Article 56(2) of the Tax Reduction and Exemption Control Act
33. Port Usage Grants for Pohang Youngil Port
34. Provision of Electricity for MTAR
35. Power Generation Price Difference Payments
36. KEXIM Overseas Investment Credit Program
37. Long-Term Loans from the Korean Resources Corporation (KORES) and the Korea National Oil Corporation (KNOC)
38. Modal Shift Program
39. RSTA Article 7-2: Tax Credit to Improve Corporate Payment System Including Negotiable Instruments
40. RSTA Article 24: Investment in Productivity Improving Facilities
41. RSTA Article 25: Investment in Certain Enumerated Safety Facilities³⁵
42. RSTA Article 30: Investment in Certain Fixed Assets for Use for Business Purposes
43. Pre-1992 Directed Credit Loans

³⁵ We inadvertently did not include this program in the *Preliminary Results*.

44. R&D and Other Subsidies in AUL Period
45. Grants from the Korea Workers' Compensation and Welfare Service
46. Grants Under the Human Resources Consortium Program
47. Special Accounts for Energy and Resources (SAER) Loans
48. PNR-Long-Term Facility and General Loans from KDB
49. KEXIM Import Financing
50. Various Government Grants Contained in Financial Statements
51. PDC's Debt Workout

C. Program Determined to Be Not Countervailable

1. Adjustment for any Foreign Source Income under Article 57 of the Corporate Tax Act

We preliminarily determined that this program was countervailable based on *de facto* specificity.³⁶ Interested parties raised issues regarding whether this program is specific. For these final results, we determine that this program is not countervailable. *See* Comment 3 *below*.

IX. Discussion of Comments

Comment 1: Whether Commerce Should Apply AFA for ITIPA Grants Received During the AUL Period

Nucor Case Brief

- Commerce should apply a 1.65 percent AFA subsidy rate to POSCO for its ITIPA program R&D grants.³⁷
- Information collected at verification confirms that POSCO has not reported AUL benefits from grants under ITIPA based on the year of approval. In its initial questionnaire response, POSCO stated that it was “providing a list of all R&D grants received under the ITIPA program during the AUL period that shows that the benefits are less than 0.5 percent of POSCO sales in the year of receipt.”³⁸ In the relevant exhibit in the same response, POSCO performed the 0.5 percent test based on the amounts of grants received in each year of the AUL period.
- POSCO also “note{d} that that the amounts initially approved for the projected life of a project are usually subject to separate interim approvals covering one or two years during the course of the project, such that “the amounts received in each year are generally the amounts approved for that year.”³⁹
- The verification exhibits that Commerce collected confirm that POSCO did not report its ITIPA grants in accordance with Commerce's rules.⁴⁰

³⁶ *See* Preliminary Decision Memorandum at 23-24.

³⁷ *See* Nucor Case Brief at 1.

³⁸ *Id.* at 3 (citing POSCO's Letter, “POSCO's and POS-Himetal's Initial Questionnaire Response,” dated November 9, 2019 (POSCO's IQR) at 3 and Exhibit B-7).

³⁹ *Id.* (citing POSCO's IQR at 26-27).

⁴⁰ *Id.* at 12 (citing POSCO Verification Report at Exhibit 10).

- For one of the reported ITIPA grants, POSCO reported that its approval date is within the POR. However, the relevant contract documentation demonstrates that the actual year of approval was earlier than the reported year of approval.⁴¹ For this grant, therefore, POSCO withheld information regarding some benefits potentially allocable to the AUL period.
- Similarly, for two of the reported ITIPA grants, relevant contracts demonstrate that the actual year of approval is earlier than the year of approval POSCO reported.⁴²
- Further, one of these contracts in the verification exhibit includes information establishing the total amount approved for the project. This document confirms that POSCO's improper treatment of ITIPA disbursements as separate "approvals" has resulted in substantial benefit amounts being withheld from Commerce.⁴³ The document confirms that the actual total approval amount is greater than the amount of approval reported by POSCO. POSCO's improper treatment of ITIPA disbursements as separate "approvals" has resulted in substantial benefit amounts being withheld from Commerce.⁴⁴
- POSCO withheld information pertaining to the total approval amount for the other ITIPA grants other than the one ITIPA grant included in the verification exhibit, in an attempt to avoid allocation of AUL period grant benefits. Therefore, necessary information to perform the 0.5 percent test under 19 CFR 351.524(b)(1)-(2) is missing from the record.
- Under U.S. law, AFA is warranted where a respondent fails to cooperate to the best of its ability, including a failure to provide necessary information in the form requested and within the deadlines established by Commerce.⁴⁵
- Because POSCO withheld information that is necessary for Commerce to calculate accurate subsidy rates in accordance with its rules, AFA is warranted. Commerce should apply the same methodology it employed in its final determination in *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, and apply a 1.65 percent AFA subsidy rate to POSCO.⁴⁶

POSCO Rebuttal Brief

- POSCO fully and accurately reported ITIPA grants approved during the AUL period.⁴⁷
- POSCO was transparent about its reporting methodology for ITIPA grants and explained that "the amounts initially approved for the projected life of a project" are subject to interim approvals for the periods defined by contracts.⁴⁸ POSCO also explained that the amounts received and approved are generally the same because the amounts received are based on interim approvals of the life of the R&D project.⁴⁹

⁴¹ See POSCO IQR at Exhibit B-6, B-8; see also POSCO Verification Report at Exhibit 10.

⁴² See Nucor Case Brief at 4 (citing POSCO Verification Report at Exhibit 10, pages 112 and 116).

⁴³ See Nucor Case Brief at 4 (citing to POSCO Verification Report at Exhibit 10, page 114).

⁴⁴ *Id.* at 5.

⁴⁵ See Nucor Case Brief at 1.

⁴⁶ *Id.* at 8 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Final Affirmative Determination*, 81 FR 49946 (July 20, 2016) (*Cold-Rolled Steel Flat Products from the Republic of Korea*), and accompanying Issues and Decision Memorandum).

⁴⁷ See POSCO's Rebuttal Brief at 10.

⁴⁸ *Id.* (citing POSCO's IQR at 26-27).

⁴⁹ *Id.* at 2.

- Commerce did not ask supplemental questions about POSCO's reporting methodology. Commerce then conducted a verification and found no issues with POSCO's ITIPA grant reporting method.⁵⁰
- The petitioner relies on its own interpretation of a page of POSCO's verification exhibit to suggest that POSCO's reporting was not credible. Specifically, the petitioner claims that the total approved amount of POSCO's grant under a ITIPA project is actually greater than the amount reported.⁵¹ However, the amount that the petitioner asserts should have been reported as the approval amount for this project represents the total projected amount that will be received at the conclusion of multiple ITIPA projects, and the amount also includes amounts for a different non-reporting participant in another ITIPA project. The amounts for the years prior to the POR in this document reflect actual amounts received under prior interim approvals and the amounts for future years in the project remain projections.⁵²
- Further, the total amounts received at the conclusion of the project cannot be a proxy for what the petitioner believes POSCO should have reported as the approved amount in the original year of approval. As stated in the initial questionnaire response, the amounts initially approved for the projected life of a project are also subject to separate interim approvals.⁵³
- There is no basis to apply facts available, which requires that "necessary" information be missing from the record or that a respondent withholds requested information, fails to provide information in a timely manner or in the form requested, significantly impedes the review, or provides information that could not be verified.⁵⁴
- With no basis to apply facts available, there is no basis to apply AFA. Nevertheless, the petitioner attempts to create an AFA issue based on a mischaracterization of certain POSCO verification exhibits.⁵⁵

Commerce's Position:

We agree with POSCO that there is no basis to apply facts available or AFA. Pursuant to section 776(a) of the Act, Commerce shall, subject to section 782(d) of the Act, use the facts otherwise available if necessary information is not available on the record, or an interested party or any other person: (1) withholds information that has been requested; (2) fails to provide such information by the deadlines or in the form and manner requested, subject to sections 782(c)(1) and 782(e) of the Act; (3) significantly impedes the proceeding; or (4) provides such information but the information cannot be verified. Under section 776(b) of the Act, Commerce may use facts available with an adverse inference only when it finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

The petitioner's reliance on information included in the verification exhibit to establish that POSCO did not accurately report the total amount approved for the project is unavailing.

⁵⁰ *Id.*

⁵¹ *Id.* at 9-10 (citing Nucor Case Brief at 4).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2 (citing section 776(a)(1) of the Act).

⁵⁵ *Id.* at 12.

Specifically, the petitioner cites to a page in the verification exhibit to support its claim that the total approved amount of POSCO's grant under an ITIPA project is greater than the amount reported.⁵⁶ This document, provided to substantiate the amount received by POSCO under one ITIPA project during the POR, specifies the amount of government contribution allocated for each participant in the project for each year for the duration of the project.⁵⁷ We agree with POSCO that the amounts for the POR specified in this document reflect actual amounts approved under an interim approval.⁵⁸ However, Commerce did not ask any supplemental questions regarding the amounts specified in this document for the other years under the same project. Similarly, in its initial questionnaire response, the GOK stated, regarding the ITIPA R&D grants, "the R&D projects under this program are generally multi-year projects, and the amount of funds to be received each year from the government is set out in the original contract."⁵⁹ Commerce did not ask any supplemental questions regarding the information submitted by POSCO or the GOK in their questionnaire responses. Additionally, the information collected at verification does not contradict the information that was previously placed on the record, as both POSCO and the GOK explained prior to verification that there are different approval amounts (initial and interim) for each project.⁶⁰ Therefore, necessary information is available on the record. As we did not ask further questions regarding the methodology used by POSCO in reporting any of the ITIPA grant amounts for the AUL period, we have no basis to conclude that POSCO withheld information that was requested, failed to provide information, significantly impeded the proceedings, or provided such information but the information could not be verified under section 776(a) of the Act. Further, we note that even if we agree with the petitioner's argument that the entire amount reported in the verification exhibit should have been reported as the approval amount, the amount would not have passed the "0.5 percent test" and thus would have been expensed in the year of receipt.⁶¹ Accordingly, for the reasons described above, we determine that the use of facts available with adverse inferences is not warranted.

Comment 2: Whether Tax Deductions Under RSTA Article 10-2 Are Countervailable

GOK Case Brief

- The purpose of RSTA Article 10-2 is to promote companies' R&D activities. Under this program, when the company receives an R&D contribution from the government, it may elect not to report this as income in the relevant tax year. However, a corporation that takes advantage of this program must subsequently recognize the contribution as income in future tax years. Thus, this is not a reduction in taxes, but a deferral.⁶²
- The eligibility for this program is not limited to enterprises or companies designated in certain geographic areas, and industry and sector are not considered to determine eligibility.

⁵⁶ See Nucor Case Brief at 4 (citing to POSCO Verification Report at Exhibit 10, page 114).

⁵⁷ See POSCO Verification Report at Exhibit 10, page 114.

⁵⁸ *Id.*

⁵⁹ See GOK's Letter, "Response to the Initial Questionnaire," dated November 9, 2018 at 39.

⁶⁰ *Id.*; see also POSCO Verification Report at Exhibit 10; and POSCO's IQR at 26-27.

⁶¹ See POSCO's IQR at Exhibit D-18; see also POSCO Verification Report at Exhibit 10, page 114. We used the petitioner's asserted amount as the numerator, and POSCO's reported total sales for 2010 as the denominator to perform the 0.5 percent test.

⁶² See GOK Case Brief at 2-3.

The eligibility for this program is not limited based on export performance or potential, or if the company uses domestic goods vs. imported products, and this program is not limited to SMEs. Therefore, RSTA Article 10-2 is not *de jure* specific.⁶³

- In the *Preliminary Results*, Commerce determined that this program is *de facto* specific because the actual number of recipients is limited, indicating that 25,214 SMEs and general corporations used this program during the POR and comparing this number to the 47,495 SME and general corporations tax returns filed.⁶⁴ However, RSTA Article 10-2 is not *de facto* specific because the actual recipients of the tax deduction are not limited in number.⁶⁵ The comparison Commerce used in the *Preliminary Results* does not evidence specificity, because it demonstrates that over 50 percent of SME and general corporations used this program. It does not constitute a limited number of companies but rather has broad availability.
- In addition, there is no information on the record to indicate that a certain enterprise or industry is a predominant user of this program or that a certain enterprise or industry receives a disproportionately large amount of this tax deduction.⁶⁶
- If the criteria are met, the tax assistance under this program is automatically granted in accordance with law. Thus, there is no discretion in determining eligibility for this program. This means that this program is not *de facto* specific.⁶⁷

POSCO Case Brief

- In the *Preliminary Results*, Commerce determined that RSTA Article 10-2 is *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because the actual number of recipients is limited.⁶⁸ However, record evidence, as well as Commerce's previous determinations, demonstrate that this program is not specific and, therefore, Commerce should reverse this finding in the *Final Results*.⁶⁹
- In the *Preliminary Results*, Commerce indicated that 25,214 SMEs and general corporations used this program during the POR, and compared this number to the 47,495 SMEs and general corporations tax returns filed, to find this program *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because the actual number of recipients is limited.⁷⁰ However, this comparison does not constitute a limited number of companies but rather reflects broad availability and usage. Consistently, Commerce previously found that this program was not specific during just one tax year prior to the POR in this review.⁷¹

⁶³ *Id.*

⁶⁴ *Id.* (citing *Preliminary Results*, 84 FR at 34123)

⁶⁵ *Id.* (citing 771(5A)(D)(iii)(I)).

⁶⁶ *Id.* (citing 771(5A)(D)(iii)(II)-(III)).

⁶⁷ *Id.*

⁶⁸ See *POSCO Case Brief* at 6.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 6 (citing Preliminary Decision Memorandum at 23).

⁷¹ *Id.* (citing *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2016*, 83 FR 51446 (October 11, 2018) (*Cold-Rolled Preliminary Results*), and accompanying Preliminary Decision Memorandum).

Nothing has changed about RSTA Article 10-2 during the 2017 POR that should cause Commerce to change its position regarding this tax program.⁷²

- If, for the final results, Commerce determines that this program is specific and thus countervailable, it should modify its calculation of the benefit from that used in the *Preliminary Results*.⁷³
- In the *Preliminary Results*, Commerce determined that under this program, “[t]he benefit conferred on the recipient is the difference between the amount of taxes paid and the amount of taxes that it would have paid in the absence of this program.”⁷⁴ In other words, Commerce treated the benefit as the amount of tax that would be applicable on income deducted from taxable income under this program as a permanent reduction in taxable income.⁷⁵
- However, as stated in the GOK Verification Report, “a corporation that takes advantage of this program must subsequently recognize the contribution {that gives rise to the deduction} as income in future tax years.”⁷⁶
- Thus, the benefit from this program is not a reduction in taxes, but a tax deferral where the benefit of the deferred income tax payable is the equivalent of a short-term interest-free contingent liability loan.⁷⁷
- Thus, as with another tax program (RSTA Article 9), which Commerce has also determined provides a benefit in the form of a short-term, interest-free contingent liability loan, Commerce should calculate the benefit as the interest that POSCO would have paid during the POR on a comparable commercial loan in the amount of the tax savings on the income deferred under this program.⁷⁸

Nucor Rebuttal Brief

- In POSCO’s initial questionnaire response, POSCO explained that the benefit under RSTA Article 10-2 is a tax deduction. POSCO now argues, based on the Korean government’s explanation at verification, that Commerce should treat this program as an income tax deferral and calculate the benefit as a short-term interest-free contingent liability loan.⁷⁹
- POSCO also argues that this program is not *de facto* specific because 25,214 companies used this program out of 47,495 corporate tax returns filed, which does not suggest that the actual recipients of the subsidy are limited in number. POSCO failed to mention, however, that the Korean government did not actually provide any information relevant to the specificity of RSTA Article 10-2. Instead, the data that the Korean government provided in its questionnaire responses applied to RSTA Article 10.

⁷² *Id.* (citing GOK’s Letter, “Response of the Government of Korea to Section II of the Department’s September 14, 2018 Questionnaire,” dated November 9, 2018 at 7 (stating that “[t]here were no changes to this program affecting income tax returns filed during calendar year 2017”)).

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 8 (citing Preliminary Decision Memorandum at 20-21).

⁷⁵ *Id.*

⁷⁶ *Id.* (citing GOK Verification Report at 2).

⁷⁷ *Id.*

⁷⁸ *Id.* (citing Preliminary Decision Memorandum at 20-21).

⁷⁹ See Nucor Rebuttal Brief at 5-7.

- It appears that the GOK inaccurately characterized the program as a “deferral” at verification to justify its failure to provide program-specific information and to mislead Commerce to base its specificity determination on data for a broader basket of RSTA tax programs.⁸⁰
- Commerce should continue to find that this program is specific and should determine the benefit based on the amount reported by POSCO and confirmed at verification.⁸¹

Commerce’s Position:

In the *Preliminary Results* of this review, Commerce found this program *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act because the actual number of recipients is limited.⁸² Commerce further preliminarily determined that the benefit conferred on the recipient under this program is the amount of tax credit claimed by the recipient.⁸³

In the initial questionnaire response, POSCO stated that RSTA Article 10-2 is a temporary reduction from a company’s total taxable income for the tax year.⁸⁴ The GOK reported that it did not keep statistics on the number of tax filers which used Article 10-2. However, in a supplemental response, the GOK stated that 25,214 companies received the tax benefits under RSTA Article 10, which includes RSTA Articles 10-1, 10-2, and 10-3.⁸⁵ Because RSTA Article 10-2 is included in this tax statistic, it can be assumed that the number of recipients under RSTA Article 10-2 is less than the total number of companies that received tax benefits under Article 10, and significantly less than the 47,495 SMEs and general corporations tax returns filed.⁸⁶ Because we have no information on the record regarding only Article 10-2, as facts available, Commerce continues to determine that it is appropriate to find this program *de facto* specific because the actual number of recipients is limited.

Further, POSCO asserts that Commerce should calculate the benefit as the interest the company would have paid during the POR on a comparable commercial loan in the amount of the tax savings on the income deferred under this program.⁸⁷ The GOK indicates, to defer the taxes, companies must record these funds in separate accounts.⁸⁸ However, there is no information on the record which demonstrates that POSCO maintained these funds in a separate account as required by Korean law in order to claim the deferral.

For the final results of this review, Commerce continues to find RSTA Article 10-2 is *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act, because the actual number of

⁸⁰ *Id.*

⁸¹ *Id.* at 7.

⁸² See Preliminary Decision Memorandum at 23 (citing *e.g.*, *Large Diameter Welded Pipe from the Republic of Korea: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 83 FR 30693 (June 29, 2018), and accompanying Preliminary Decision Memorandum at 19; unchanged in *Large Diameter Welded Pipe from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 84 FR 6369 (February 27, 2019)).

⁸³ *Id.*

⁸⁴ See POSCO’s IQR at Exhibit A-7, at 1.

⁸⁵ See GOK’s Letter, “Response to the Supplemental Questionnaire,” dated June 3, 2019 at 6. We note that this statement was further confirmed at verification. See GOK Verification Report at 2 and Exhibit VE-1.

⁸⁶ See GOK Verification Report at 2 and Exhibit VE-1.

⁸⁷ See POSCO’s Case Brief at 8.

⁸⁸ See GOK’s Letter, “Response to the Supplemental Questionnaire,” dated August 13, 2019 (GOK SQRII) at 3.

recipients is limited in number. Further, because there is no evidence on the record that POSCO maintained the funds related to this program in a separate account, we will not treat the funds as tax deferred, interest-free loans, but instead will continue to treat them as tax credits in accordance with 19 CFR 351.509(a).

Comment 3: Whether Tax Credits Under Article 57 of the Corporate Tax Act Are Countervailable

POSCO Case Brief

- Contrary to long-standing precedent, Commerce determined that the tax credits received under Article 57 were *de facto* specific and thus countervailable. However, there is nothing on the record to support the conclusion that this program is either *de facto* or *de jure* specific.⁸⁹
- As noted in Commerce’s GOK Verification Report,⁹⁰ domestic corporations that have foreign-sourced income included in their tax base are able to deduct the amount of foreign corporate tax paid or payable from the amount of domestic corporate tax payable for the relevant year or include the amount of foreign corporate tax paid or payable as a deductible expense when calculating their income. It is common for countries to enter into agreements structured to avoid double taxation. POSCO provided an agreement on the avoidance of double taxation between the United States and Korea as an example.⁹¹
- Commerce has never found tax credits under Article 57 to be countervailable and previously determined that this article is not specific.⁹² Further, Commerce affirmed at verification that Article 57 is not specific. GOK officials explained that domestic and foreign entities with permanent establishment in Korea qualify as “domestic corporation{s}” under this program, which is not limited to a specific enterprise or industry or a group of enterprises or industries and thus is not *de jure* specific.⁹³
- Similarly, Article 57 is not *de facto* specific, as the recipients of this tax credit are not limited in number. Commerce incorrectly determined that because 1,624 companies approved for assistance under this program compared to the 28,253 corporate tax returns not subject to a minimum tax is evidence of a limited number of companies which are eligible for this tax credit. As indicated in the GOK Verification Report, Ministry of Economics and Finance (MOEF), Tax Relief Division and International Tax Division, does not “limit” the number of recipients in any way, nor does it have the ability to exercise discretion in granting this tax credit to certain enterprises or industries over others.⁹⁴
- There is no information on the record to indicate that any particular enterprise or industry receives a disproportionately large amount of the tax credit under Article 57, or that any

⁸⁹ See POSCO’s Case Brief at 2

⁹⁰ *Id.* (citing GOK Verification Report at 3).

⁹¹ See POSCO’s Case Brief at 3 (citing POSCO’s IQR at 50-51 and Exhibit C-36).

⁹² *Id.* (citing *e.g.*, *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*, 2016, 83 FR 55517 (November 6, 2018), and accompanying Preliminary Decision Memorandum at 17; unchanged in *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 2016, 84 FR 28461 (June 19, 2019)).

⁹³ *Id.* at 4 (citing GOK Verification Report at 4).

⁹⁴ *Id.* at 5.

enterprise or industry is a predominant user of this tax credit. Therefore, tax credits received under Article 57 are neither *de jure* nor *de facto* specific.⁹⁵

GOK Case Brief

- The purpose of Article 57 is to provide relief for double taxation of the same income. Under this article, domestic corporations that have foreign-sourced income included in their tax base are able to deduct the amount of foreign corporate tax paid or payable from the amount of corporate tax payable for the relevant year or include the amount of foreign corporate tax paid or payable as a deductible expense when calculating their income. Korea and the United States also entered into an agreement on the avoidance of double taxation.⁹⁶
- This program is not *de jure* specific; as long as a company has permanent establishment in Korea, it is eligible for the program.⁹⁷
- This program is not *de facto* specific. MOEF, which is responsible for administering the program, does not limit the number of recipients in any way, nor does it have the ability to exercise discretion in granting this tax credit to certain enterprises or industries over others. Applicants will be granted the tax relief as long as they meet the requirements set out in Article 57.⁹⁸

Petitioner's Rebuttal Comments

- Commerce properly found that tax credits received under Article 57 were *de facto* specific and thus countervailable.⁹⁹
- POSCO conflates *de jure* and *de facto* specificity, effectively asserting that a subsidy program cannot be *de facto* specific unless it is limited by law.¹⁰⁰
- In *Softwood Lumber from Canada*, Commerce articulated the distinction between its *de jure* and *de facto* specificity analyses in rejecting arguments that are effectively identical to the ones that POSCO presents in this case. POSCO's argument that the tax credits under the Article 57 program are not *de facto* specific because the regulation does not limit eligibility for the subsidy makes the same legal error and should be rejected.¹⁰¹
- POSCO's citations to *Cold-Rolled Steel from Korea* and *Hot-Rolled Steel from Korea* to support its argument is unavailing. In those reviews, Commerce cited to the mandatory respondents' questionnaire responses to find that "the information concerning these tax exemptions do not indicate that the GOK limited these programs to certain enterprises or

⁹⁵ *Id.*

⁹⁶ See GOK Case Brief at 3-4 (citing GOK SQR II at Exhibit SQ2-1).

⁹⁷ *Id.*

⁹⁸ *Id.* at 5.

⁹⁹ See Nucor Rebuttal Brief at 2.

¹⁰⁰ *Id.* at 1.

¹⁰¹ *Id.* (citing *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) (*Softwood Lumber from Canada*), and accompanying Issues and Decision Memorandum at Comment 62.

industries.”¹⁰² In this case, to the contrary, the record includes information provided by the Korean government establishing the number of recipients of the subsidy relative to the total number of tax returns filed.¹⁰³

Commerce’s Position:

In the *Preliminary Results*, we found this program to be *de facto* specific based on the number of corporations that received tax credits, and found that the number of recipients was limited in number.¹⁰⁴ However, upon further review of the record, verification, and arguments made by interested parties, we determine that this program is not countervailable.

As noted in the *Preliminary Results*, the purpose of Article 57 is to provide relief from double taxation.¹⁰⁵ Under Article 57, Korean companies that earn foreign income on which they pay taxes in foreign jurisdictions may deduct the amount of foreign corporate tax from the amount of corporate tax for the relevant business year or include the amount of foreign corporate tax paid or payable on foreign-source income, in deductible expenses when calculating the amount of income for each business year.¹⁰⁶ Indeed, the administrative record of this proceeding contains an agreement between the United States and Korea, which addresses the double taxation on earned corporate income.¹⁰⁷ The terms of that agreement are applicable to any corporation or person in Korea.¹⁰⁸ Given that this mechanism ensures Korean corporations do not pay corporate income tax that is otherwise taxed in another jurisdiction, there is no revenue forgone (*i.e.*, taxes otherwise due to the Korean government).¹⁰⁹ Accordingly, we have removed this program from the calculation of POSCO’s overall subsidy rate for these final results.

¹⁰² *Id.* at 4 (citing *Cold-Rolled Preliminary Results* and accompanying Preliminary Decision Memorandum at 17, unchanged in *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 2016, 84 FR 24087 (May 24, 2019)).

¹⁰³ *Id.*

¹⁰⁴ See Preliminary Decision Memorandum at 23-24.

¹⁰⁵ *Id.*

¹⁰⁶ See GOK’s Letter, “Response to the Initial Questionnaire,” dated November 9, 2018, at Appendix 27, page 271 and Exhibit Tax-1.

¹⁰⁷ See GOK SQRII at Exhibit SQ2-1.

¹⁰⁸ *Id.*

¹⁰⁹ See section 771(5)(D)(ii) of the Act.

X. Recommendation

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



Agree

Disagree

1/10/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance