RESULTS OF REDETERMINATION
PURSUANT TO REMAND

Agro Dutch Industries, Ltd. v. United States
Court No. 04-00493
Slip Op. 06-96 (Ct. Int'l Trade June 23, 2006)

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (the Court) in Agro Dutch Industries, Ltd. v. United States, Slip Op. 06-96 (CIT June 23, 2006) (Agro Dutch II).

In accordance with the Court's instructions, the Department has explained that the Department's computer program used to calculate the margin, to which the Court referred in Agro Dutch II, addresses not only the commission offset situation defined at 19 CFR 351.410(e), but also the circumstance-of-sale provision in general, as defined at 19 CFR 351.410(b). The programming used in this case is consistent with the Tariff Act of 1930, as amended (the Act), and the Department's regulations and practice.

BACKGROUND

In the administrative review covering the period of February 1, 2002, through January 31, 2003 (POR), the Department concluded that certain expenses incurred by Agro Dutch Industries, Ltd. (Agro Dutch) for returning merchandise to India were appropriately classified as U.S. indirect selling expenses. See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 69 FR 51630 (August 20, 2004) (Final Results), and the accompanying Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Certain Preserved Mushrooms from India - February 1, 2002, through January 31, 2003 (August 20, 2004) (Decision Memorandum), as amended by Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms From India, 69 FR 55405 (September 14, 2004).

Agro Dutch challenged the Department's Final Results. In Agro Dutch Industries, Ltd. v. United States, Slip Op. 06-40 (CIT March 28, 2006) (Agro Dutch I), the Court remanded the case, instructing us to further explain the impact of the movement expenses on the calculation of Agro Dutch's margin. In the Results of Redetermination Pursuant to Remand (May 11, 2006) (Redetermination), we explained that Agro Dutch's U.S. indirect selling expenses affected the circumstance-of-sale adjustment for commissions paid in one market, pursuant to 19 CFR 351.410(e). We also found that these expenses were not extraordinary or otherwise distortive to Agro Dutch's dumping margin.

In Agro Dutch II, the Court affirmed Department's determination to treat these movement expenses as U.S. indirect selling expenses. It also affirmed our finding that these expenses were

not extraordinary or distortive. However, the Court remanded the case again, directing us to explain how our computer program for calculating Agro Dutch's margin – specifically with respect to commission expenses – comports with 19 CFR 351.410(e).

DISCUSSION

Under 19 CFR 351.410(e) the Department

> ...will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under considerations, and no commission is paid in the other market under consideration. The Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

As the Court notes at page 9 of Agro Dutch II, the Department carries out this regulation in the computer program used to calculate the margin. See the computer program log in Attachment 2 to the September 2, 2004, Memorandum to Louis Apple, Office Director, entitled "Ministerial Error Allegations Regarding the Final Results" (Proprietary Document 53) (Amended Final Memo). Specifically, the programming instructions for this regulation are included at line 2691, which indicate that if there are no U.S. commissions (the computer variable MUSCOMM is equal to 0), the offset amount is equal to the lesser of MUSOTHIS (the computer variable that includes the U.S. indirect selling expenses) or CMCOMMIS (the computer variable that includes the amount of comparison market commissions, in U.S. dollars). See Redetermination at pages 3 - 4 for a full discussion of the programming language and computer variables.

In addition, the set of programming instructions at line 2691 also calculates an offset amount where the amount of the comparison market commissions differs from the amount of U.S. commissions. The Court is correct to note that these instructions do not comport with 19 CFR 351.410(e). Rather, these instructions relate to section 773(a)(6)(C)(iii) of the Act, which provides that the Department shall adjust normal value by the amount of any difference between export price (EP) and normal value that is due to differences in the circumstances of sale. These instructions also relate to 19 CFR 351.410(b), which states that:

> (b) In general. With the exception of the allowance described in paragraph (e) of this section concerning commissions paid in only one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses.

In carrying out this regulation, the Department has a long-established practice of making a circumstance-of-sale adjustment for differences in commissions. Commissions are direct selling expenses, as defined in 19 CFR 351.410(c). Therefore, it is proper, under 19 CFR 351.410(b), to make a circumstance-of-sale adjustment when there are differences in such direct selling expenses between the two markets under consideration.

As we articulated in Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy, 67 FR 3155 (January 23, 2002) (Italian Bar), at Comment 2:

> In this case, because commissions were paid in the home market and in the United States, but to a greater degree in the home market, we made an adjustment to offset the greater home market commission deduction. We made this circumstance-of-sale adjustment by adding the offset to home market price rather than subtracting it from the U.S. price. Thus, the overall adjustment to normal value involves deducting home market commissions and then adding U.S. indirect selling expenses up to the amount of the difference in commissions paid in the two markets. As noted above, in CEP situations, the amount of U.S. indirect selling expenses available for purposes of the commission offset is limited by the extent to which such indirect selling expenses were incurred in the home market for U.S. sales. This is done in order to avoid double-counting the same indirect selling expenses while making this adjustment in accordance with our statutory and regulatory mandate.
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> For EP sales, however, where home market commissions are greater than U.S. commissions, the commission offset that is added to normal value is equal to the lesser of (1) U.S. indirect selling expenses incurred in Italy on behalf of U.S. sales and (2) the difference between commissions paid in both markets.

This latter EP situation applies to observations 6 and 7 noted by the Court at page 10 of Agro Dutch II. Agro Dutch incurred commissions on these two U.S. sales, but the amounts of these commissions were less than the comparison market commission amount. Accordingly, the Department calculated an offset amount equal to the lesser of the U.S. indirect selling expenses or the difference between the commissions, consistent with the methodology outlined in Italian Bar and consistent with 19 CFR 351.410(b)-(c). In these particular instances, the offset calculated was the difference between the commission amounts.

Therefore, in answer to the Court's question, the programming at issue addresses not only 19 CFR 351.410(e), but also circumstance-of-sale adjustments in general in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(b). The programming is consistent with the Act and the Department's regulations and practice.

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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(date)