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Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Rm. 1870
Pennsylvania Ave. and 14th Street, N.W.
Washington, D.C. 20230

Re: Drawback Practice in Antidumping Proceedings

Dear Mr. Assistant Secretary:

This letter responds to the Department of Commerce's (Commerce's) invitation in the Federal Register for comments on the agency's practice regarding adjustments for duty drawback in antidumping calculations. 70 Fed. Reg. 37764 (June 30, 2005). Our firm routinely represents U.S. manufacturers in antidumping proceedings and therefore has an interest in the issue.

The Federal Register Notice raises four questions, which we answer respectively below. The subject is important, of course, because 19 U.S.C. 1677a(c)(1)(B) requires Commerce to increase United States prices, in antidumping calculations, by the amount of drawback paid to exporters on exports to the United States. In the words of the statute itself, it requires an increase for "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States ***." Thus these adjustments directly result in decreasing or eliminating antidumping margins.

Commerce's four questions are these:

1. What should the requirements be for making a duty drawback adjustment in an antidumping proceeding? For example, should a party seeking such adjustment be required to demonstrate that it actually paid import duties that were not rebated on some portion of raw material inputs during the relevant period, i.e., that exports did not account for all of the imported materials in question. Please explain, in detail, any changes to the Department's current practice that would be required to implement such modification.

As we understand it, Commerce allows drawback adjustments to avert "apples to oranges" comparisons. If prices on exports to the United States on which duty drawback payments were made, by reason of the exportation, are compared to prices in the home market for goods without a comparable refund, the respective sales are arguably not fairly comparable. This conclusion is colorable, however; only if the home-market sales are of like products that were actually produced from imported duty-paid inputs, as distinct from inputs obtained locally. However, there is no reason to assume this automatically, except where the producer obtained its entire supply of the input in question from suppliers located abroad. If some portion of the input in question was obtained locally, then the assumption is simply unjustified on its face. In this case there is no good reason to make the assumption that underlies the drawback adjustment in antidumping law.

To correct this problem, Commerce should require a respondent wishing to claim an advantageous adjustment to demonstrate that its home-market sales were of goods produced from inputs inputs on which import duties were paid. Absent such evidence of record, the appropriateness of the adjustment is not established on the facts. In these circumstances the drawback adjustment can become a windfall under antidumping law.

2. How do you propose the amount of adjustment should be determined, assuming that some domestically sourced and some imported material was used?

For the reasons above, we believe that Commerce should require strict proofs on the home-market sales. There is no reason in logic or fairness to make any automatic assumptions. However, if Commerce finally determines otherwise, then we believe the agency should require some form of allocation based on fair and reasonable assumptions, and adjust drawback claims accordingly. The allocation could be as follows. The amount of duties paid on imports of inputs into the foreign country could be allocated to all production of goods potentially using those inputs, and the amount of the antidumping adjustment should not exceed the appropriate amount allocable to the exports to the United States. This would be the appropriate amount even if the exporter in question received a greater drawback amount from its government at the time of exportation.

3. If duty drawback (or exemption) is claimed for some, but not all, exports incorporating the material input in question, how do you propose the amount of any duty drawback adjustment should be determined?

We answer this question without reference to the discussions above. For purposes of the answer below, we assume that Commerce is willing to make the automatic assumption that underlies its current practice in regard to drawback adjustments.

The standard should be reasonableness. If a foreign producer can *directly trace* particular imported duty-paid inputs through the subsequent production process and into particular finished goods that are exported to the United States, then Commerce should of course allow the adjustment in the full amount of drawback received. This is frequently impossible, however, when the producer sources the input at least in part from domestic suppliers. In these often more likely situations, the exported goods may or may not have actually incorporated the imported inputs on which import duties were paid. In these cases Commerce should allow alternative proofs in support of drawback claims for anti-

dumping calculations. A reasonable solution could involve allocating the drawback received to all exports that *may have* incorporated the duty-paid inputs in question. This methodology would reasonably avert excessive claims for drawback adjustments for antidumping calculations.

A hypothetical example illustrates the point. We can assume a foreign producer produces only subject merchandise, and consumes raw material "X" in order to produce it. We can further assume that the producer imports 50 percent of its "X" consumption and obtains the balance locally. Still further, we can assume the producer exports 100 percent of its total production, 50 percent to the United States and the remaining 50 percent to Canada. We can finally assume that the drawback law, in the country of exportation, allows "substitution drawback," such that the exporter can pick and choose the export shipments for basing its claims. Under these imagined circumstances, the producer could, under Commerce's current practice, claim drawback only on shipments for export to the United States – with U.S. antidumping motivations in mind. As a theoretical matter, it could do so even if none of the articles exported to the United States actually used imported "X," but was produced solely from domestic supply. This would be a clear manipulation – and one that Commerce should not allow.

Commerce could avert this result through an appropriate allocation methodology. Under a fair and appropriate method, Commerce would allow only 50 percent, of the total drawback received, for assignment to the exported goods destined for the United States. For a respondent to claim additional amounts, it should be necessary for it to trace particular inputs through the production process and into particular finished goods that are exported to the United States and become the subject of particular sales.

The question remains of what should be done if Commerce agrees with our discussions for Questions 1 and 2 above. We believe that it might be possible to develop a somewhat complex methodology to account for all of the issues presented based on fair and reasonable assumptions. However, in this regard the basic rule must remain that respondents claiming "favorable" adjustments always carry the burden of proof. *See Statement of Administrative Action*, H. Doc. 103-316, 103d Cong., 2d Sess., 829 (1994). There is no reason for an exception to this rule for drawback adjustments.

4. Please provide any additional views on any other matter pertaining to the Department's practice regarding duty drawback adjustments.

As noted, drawback adjustments either reduce or eliminate dumping margins. Therefore, they should be neither automatic nor excessive. Accordingly, Commerce should require proofs that any adjustments actually promote the objectives of the antidumping law and do not dilute import relief.

Conclusion

We applaud Commerce for reviewing its practice regarding adjustments for drawback. The practice has generated substantial controversy and deserves a full and thorough review. Given that the courts are often inclined to defer to Commerce's expertise in the complex area of antidumping law, Commerce should make its very best attempt to develop fair and accurate positions so that it can fulfill its obligation of calculating dumping margins as accurately as possible.

Our firm appreciates this opportunity to express its views.

Respectfully submitted,

Stewart and Stewart

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