Certain Cut-to-Length Carbon Steel Plate from Belgium
Final Results of Redetermination
Pursuant to Court Remand
Fabrique de Fer de Charleroi S.A. v. United States
Court No. 98-02-00359, Slip Op. 01-82 (July 3, 2001 CIT)

SUMMARY

On July 3, 2001, the U.S. Court of International Trade ("the Court") remanded the above-referenced proceeding to the Department of Commerce ("the Department") for reconsideration of the following issue: to determine what data should be used as a facts available substitute for Fabrique de Fer de Charleroi S.A.'s ("FAFER") indirect selling expenses. Fabrique de Fer de Charleroi S.A. v. United States, Slip Op. 01-82 (July 3, 2001 CIT) ("FAFER v. U.S.").

For these final remand results, we have reconsidered our methodology in accordance with the Court's instructions and we determine that the selling, general, and administrative (SG&A) expenses of FAFER's U.S. affiliate and sales agent, Fabrique de Fer de Charleroi (USA) ("CHUSA"), as reported in CHUSA's financial statements submitted by FAFER during the review, constitute a reasonable facts available substitute for FAFER's indirect selling expenses for its U.S. sale. Therefore, we have recalculated the adjustment using these expenses as listed on CHUSA's financial statements.

BACKGROUND

On January 20, 1998, the Department published its final results for the administrative review of certain cut-to-length carbon steel plate from Belgium for the period August 1, 1995, through July 31, 1996. See Final Results of Antidumping Duty Administrative Review of Certain Cut-to-Length Carbon Steel Plate from Belgium, 63 Fed. Reg. 2959 (January 20, 1998)

("Final Results"). During the administrative review the Department issued its standard and supplemental questionnaires to FAFER instructing FAFER to report expenses, including indirect selling expenses related to its U.S. sales. In its response to the questionnaire, FAFER did not identify these expenses in the manner, and with the specificity, requested by the Department.[1]

Because CHUSA, FAFER's U.S. sales agent, is affiliated with FAFER, the Department classified the sale as a constructed export price (CEP) sale, and the price for the sale had to be adjusted pursuant to 19 U.S.C. § 1677a(d)(1) to account for FAFER's direct and indirect selling expenses. FAFER had not reported these expenses, needed to calculate CEP, and therefore the Department had to resort to facts available to fill in the missing information. In the Final Results, the Department used the commission rate FAFER normally paid its U.S. affiliate as a facts available proxy for FAFER's U.S. indirect selling expenses. 63 Fed. Reg. at 2962 (January 20, 1998). In its opinion, the Court affirmed the Department's use of facts available in determining the appropriate deduction to FAFER's U.S. sales price. The Court, however, ordered the Department to choose another facts available substitute for these expenses, because the record indicated that the Department had determined that no commission was actually paid on the U.S. sale in question. The Court reasoned that, "{c}onsidering that there is no dispute

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[1] FAFER first reported that there were no U.S. indirect selling expenses applicable to the U.S. sale: "Not applicable. There were no cost of indirect selling expenses for the products under investigation that FAFER have incurred in the United States, either directly or indirectly." FAFER's November 18, 1996 Questionnaire Response, Section C, at 35. In response to a supplemental questionnaire, FAFER added that indirect selling expenses had been allocated based on information in its Section D response. FAFER's January 17, 1997 Questionnaire Response at 5. The Department determined that the application of facts available was warranted for both U.S. and home market indirect selling expenses. See Cut-to-Length Carbon Steel Plate From Belgium: Preliminary Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 48213, 48215 (September 15, 1997) (Preliminary Results) (applying facts available to U.S. indirect selling expenses) and Final Results, 63 Fed. Reg. at 2963 (January 20, 1998) (applying facts available to home market indirect selling expenses).

about the inapplicability of FAFER's actual general commission to the sale at issue, Commerce's use of such commission as a proxy for FAFER's indirect selling expenses is unreasonable." See FAFER v. U.S., Slip. Op. 01-82, at 17 (CIT July 3, 2001). The Court also noted that "{t}he mere possibility that FAFER's indirect selling expenses could be an amount near the amount to which Commerce arrived on the basis of facts available cannot serve as a valid argument in view of Commerce's admitted obligation to arrive to . . . the estimate most rational under the circumstances rather than the most similar." Id. at 17-18, note 4.

On September 6, 2001, the Department released its draft results of redetermination to the plaintiff and defendant-intervenors for comment. On September 13, 2001, the defendant-intervenors, Bethlehem Steel Corporation and United States Steel LLC, formerly U.S. Steel Group, a unit of USX Corporation, provided a timely brief commenting on the draft results. On September 14, 2001, plaintiff, Usinor Industeel, SA, formerly Fabrique de Fer de Charleroi S.A. (hereinafter FAFER), provided a timely brief commenting on the draft results. On September 19, 2001, the defendant-intervenors in this case provided a timely rebuttal brief. The Department's response to parties comments is included in the "Comments" section, below. The Department did not make any changes from the draft remand results.

DISCUSSION

The Department has determined that the SG&A expenses detailed on CHUSA's financial statements (refer to Attachment 1), submitted in FAFER's October 21, 1996 Questionnaire Response, are a reasonable estimate of FAFER's U.S. indirect selling expenses, as the reported expenses bear a rational relationship to FAFER's missing information. The statute does not use the term indirect selling expenses, but refers to any selling expenses other than direct selling expenses, commission expenses, and expenses paid by the seller on the buyer's behalf. See 19 U.S.C. §§ 1677a(d)(1)(D). Thus, it is appropriate to combine all SG&A expenses for purposes of this CEP deduction.

As stated at several points in FAFER's submissions to the Department, CHUSA incurs expenses to sell FAFER's products in the United States: "{CHUSA} acts on the U.S. market on behalf of FAFER (its mother company); their activity consists namely in selling the FAFER's products." FAFER's October 21, 1996 Questionnaire Response at 6. Moreover, "{n}o sale, no other operation is made directly with American customers or through other FAFER's affiliates or through other trading companies located in or outside the USA, and thus all US sales are made through this company." Id. at 3. Therefore, we conclude that these expenses were incurred by a FAFER affiliate in making the U.S. sale subject to the review.[2] Furthermore, we have found no indication on the record that any of these expenses, detailed in schedules 3 and 4 of CHUSA's financial statements, are accounted for elsewhere in our calculations. FAFER reported only two U.S. selling expenses: credit, and the cost of insuring against non-payment by the customer. In addition, the Department deducted an amount for a bank service charge. None of these expenses appear to be reflected in schedules 3 and 4.

In order to allocate an appropriate portion of these expenses to the U.S. sale, we have divided these expenses by the sales figure reported in CHUSA's financial statements, and applied the result to the gross unit price of FAFER's U.S. sale to obtain a per ton amount. The result is a

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[2] Section 1677a(d)(1) of Title 19 provides that the expenses to be deducted from a CEP sales price are "expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise." Thus, it is appropriate to deduct CHUSA's expenses from FAFER's CEP sales price because CHUSA is an affiliated seller for FAFER.

substitute for indirect selling expenses which is consistent with the Court's order because the expenses were actually incurred by FAFER's U.S. affiliate in making U.S. sales. They are FAFER's indirect selling expenses, at least that subset of FAFER's total indirect selling expenses incurred by its U.S. affiliate. Therefore, these expenses are a reasonable estimate of FAFER's indirect selling expenses, and are rationally related to the matter at issue. We recalculated the margin replacing the old amount with the new. Refer to Attachment 2.

FINAL RESULTS OF REDETERMINATION

Therefore, the Department determines that its aforementioned recalculation of the adjustment to CEP for indirect selling expenses is in accordance with the Court's order. Accordingly, for these final results pursuant to the Court remand, the recalculated weighted-average margin for the period of August 1, 1995 through July 31, 1996, is as follows:

Company	1995-1996 Final Results	1995-1996 Final Remand Results
Fabrique de Fer de Charleroi S.A.	13.75%	12.96%

COMMENTS SECTION

Comment 1

In its September 14, 2001 submission FAFER claims that the Department continues to use as a substitute for U.S. indirect selling expenses an amount that bears no rational relationship to the actual indirect selling expenses incurred because "the best available, indeed verified evidence is that indirect selling expenses, if any, were minimal or non-existent." See FAFER's

September 14, 2001 submission at 3 (FAFER Case Brief). In particular, FAFER states that the Department verified that "the particular sale in question was not treated as a normal sale, since it was a single sale by FAFER from its Belgian Headquarters, which had minimal participation by FAFER's U.S. subsidiary, Charleroi U.S.A." Id. at 2. It also states that these claims are "undisputed." Id.

Petitioners respond that the Court remanded the case to the Department to redetermine an appropriate substitute for indirect selling expenses, not to redetermine whether indirect selling expenses were incurred.

Commerce's Position:

The Department disagrees with FAFER that the Department verified that CHUSA "had minimal participation" in the U.S. sale. As noted in our preliminary determination:

> {T}he Department has determined that the agent did act as more than a processor of sales documents and a communications link between the unaffiliated U.S. customer and FAFER, the producer in Belgium. Although FAFER sets minimum list prices, its sales agent negotiates the sale with the customer. See Verification Exhibit 10. The sales agent essentially negotiates all sales in accordance with FAFER's minimum price list and the sales take place in the United States, not in Belgium.

Preliminary Results, 62 Fed. Reg. at 48215 (September 15, 1997). Thus, we did not find that CHUSA "had minimal participation." In fact, we found that its participation was actually so significant as to warrant classifying the sale as a CEP sale.

Moreover, as noted above, and in the draft results of redetermination, FAFER's questionnaire responses make clear that CHUSA incurs expenses to sell FAFER's products in the United States: "No sale, no other operation is made directly with American customers . . . all US sales are made through this company." FAFER's October 21, 1996 Questionnaire Response at 3. Therefore, FAFER's claim that CHUSA did not incur any applicable indirect selling expenses in selling FAFER's products in the United States is contrary to its own statement made in its questionnaire response.

In addition, indirect selling expenses are, by definition, expenses that cannot be attributed to individual sales. Therefore, FAFER's argument that CHUSA's indirect selling expenses apply to some sales and not to others is without merit.

We also agree with petitioners that the question of whether facts available is warranted to calculate a deduction for U.S. indirect selling expenses is not at issue in this redetermination. As FAFER notes, it did report that indirect selling expenses were "{n}ot applicable. There were no cost of indirect selling expenses for the products under investigation that FAFER have incurred in the United States, either directly or indirectly." <u>See</u> <u>FAFER Case Brief</u>, at 2-3 (quoting its Questionnaire Response, November 18, 1996, at 35). However, the Department determined that this response was inadequate and warranted the use of facts other available. <u>See</u> <u>Preliminary Results</u>, 62 Fed. Reg. at 48215 (September 15, 1997). The Court affirmed the Department's use of facts available. <u>See</u> <u>FAFER v. U.S.</u>, Slip. Op. 01-82, at 14. The Court remanded the case to the Department "to determine what data should be used in substitute for FAFER's indirect selling expenses . . . ." <u>Id.</u> at 25. Consistent with the Court's instructions, we have done so as described above.

<u>Comment 2</u>

FAFER also argues that data from the 1995 CHUSA financial statements, which cover calendar year 1995, do not reflect costs involved with a sale made on May 16, 1996. Petitioners respond that financial statements are rarely completely coterminous with the POR.

Commerce's Position:

We agree with petitioners' claim that information obtained from financial statements is not always completely coterminous with the POR because they are for fiscal years that do not necessarily coincide with the POR. Here the financial statements on the record are for January 1, 1995 through December 31, 1995, whereas the POR is for August 31, 1995 through July 31, 1996. These are, however, the only financial statements respondent provided for the record. Moreover, while we believe it is necessary to use financial information that is representative of the POR, we do not believe it is always necessary to tie this information to individual dates of sale.

It is the Department's practice to use fiscal year financial statements that most closely correspond to the POR. See e.g., Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review and New Shipper Review, 64 Fed. Reg. 13771, 13776 (March 22, 1999) (relying on the financial statements that most closely correspond to the POR for calculating general and administrative expenses, and interest ratios); see also Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From Thailand, 60 Fed. Reg. 22557, 22561 (May 8, 1995) (stating "under ordinary circumstances, the most appropriate full-year G&A period is that represented by the latest fiscal year for which the respondent has complete and audited financial statements").

Comment 3

FAFER notes that it stated in its November 18, 1996 questionnaire response that it allocated indirect selling expenses based on information in its Section D response. FAFER Case Brief, at 3.

Commerce's Position:

The Section D response does not provide a suitable substitute for FAFER's U.S. indirect selling expenses. The Section D response only itemizes labor expenses as possible indirect selling expenses, whereas schedules 3 and 4 make clear that indirect selling expenses incurred on behalf of the U.S. sale, by CHUSA, extend well beyond labor expenses. Moreover, FAFER's Section D response only accounts for its indirect selling expenses, and possibly only those incurred on behalf of its home market sales, which is what Section D of the Department's questionnaire requires, and not those of CHUSA, which actually made the U.S. sale.

Comment 4

FAFER argues that any expenses that might possibly be considered U.S. indirect selling expenses have already been accounted for by the Department in the deduction for a bank service charge.

Commerce's Position:

The Department responded to FAFER's argument in its Final Results. In the Final

Results the Department rejected the use of this bank service charge as a facts available proxy. Final Results, 63 Fed. Reg. at 2963 (January 20, 1998). Moreover, this charge does not account for the several selling expenses listed by CHUSA in its financial statements.

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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Date