

Final Results of Redetermination Pursuant to Court Remand
Certain Hot-Rolled Carbon Steel Flat Products from India
United States Steel Corp. and Nucor Corp. v. United States and Essar Steel Limited
Court No. 08-00216; Slip Op. 11-66 (CIT 2011)

SUMMARY

The Department of Commerce ("Department") has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("Court" or "CIT") issued on June 14, 2011, in *United States Steel Corp. and Nucor Corp. v. United States and Essar Steel Limited*, Court No. 08-00216; Slip Op. 11-66 (CIT 2011) ("Remand Order"). The Court issued its opinion and remand order following Plaintiffs' (United States Steel Corp. (US Steel) and Nucor Corp. (Nucor), together "petitioners") challenge to the final results of the 2005-2006 administrative review of the antidumping duty order on Certain Hot-Rolled Carbon Steel Flat Products from India. See *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 FR 31961 (June 5, 2008) ("*Final Results*"), and accompanying Issues and Decision Memorandum ("Decision Memorandum"). The Court remanded the *Final Results* to the Department to: (1) determine whether record evidence proves Essar Steel Limited's ("Essar's") contingent liability for deferred import duties under the duty-drawback program has been removed or permanently excused, and (2) reevaluate record evidence and change, or more fully explain, the selection of date of sale.

In accordance with the Court's remand order and in reconsideration of the record evidence, the Department has determined that Essar adequately demonstrated through documentary evidence that any contingent liability on the duty-free importation of raw materials was removed by the Government of India ("GOI") upon export. Therefore, we are continuing to

grant Essar its duty-drawback adjustment. In accordance with our voluntary remand request, we have re-examined the record and concluded that Essar's quantity and sale values were not finalized at the date of the letter of credit or the amended letter of credit. Accordingly, the Department is revising Essar's margin calculation and using the invoice date as the appropriate U.S. date of sale, in accordance with the Department's regulations.

REMAND PROCEEDING

The Court remanded this matter to the Department on June 14, 2011. On July 27, 2011, the Department re-opened the record of the 2005-2006 review and requested that Essar respond to a supplemental questionnaire regarding its claimed duty-drawback adjustment. See the Department's July 27, 2011, questionnaire to Essar requesting duty-drawback documents ("July Questionnaire"). On August 8 and August 11, 2011, we granted Essar's requests for additional time to complete the supplemental questionnaire. See the Department's August 8 and 11, 2011, letters granting the extensions. On August 17, 2011, Essar responded to our supplemental questionnaire. See Essar's August 17, 2011, response on the Department's duty-drawback questionnaire ("Essar's August 17th Response").

On September 6, 2011, the Department disclosed the draft remand) to all parties. Comments on the draft remand were due September 13, 2011. On September 13, 2011, Essar (Essar's September 13 submission") and the petitioners filed its comments regarding the draft remand ("petitioners' September 13 submission").

† See the Department's September 6, 2011, *Draft Results of Redetermination Pursuant to Court Remand Certain Hot-Rolled Carbon Steel Flat Products from India, United States Steel Corp. and Nucor Corp. v. United States and Essar Steel Limited*, Court No. 08-00216; Slip Gp. 11-66 (CIT 2011) ("draft remand").

COMMENTS RECEIVED BY PARTIES

In Essar's September 13 submission, Essar maintains that it adequately demonstrated through its August 17 Response that any contingent liability on its duty free importation of raw materials was removed by the GOR.

However, Essar disagrees with the Department's date of sale decision to revise the margin calculation in the draft remand. Essar asserts that the Department provided no further analysis explaining why it changed its position from the *Final Results*. In contrast to the *Final Results*, Essar states that the Department was wrong in solely relying on a review of possible changes to quantity and value² to determine the appropriate date of sale for Essar's U.S. sale.

In the petitioners' September 13 submission, petitioners maintain that the Department correctly used Essar's invoice date as the U.S. date of sale for its margin calculations in the draft remand. Moreover, the petitioners assert that Essar provided information to support its duty-drawback claim, however, it was incomplete. The petitioners maintain that the Department should make two adjustments if it continues to grant Essar's requested duty drawback adjustment: 1) deny Essar's duty-drawback claim with respect to a particular invoice that Essar could not link to the Advance License, and 2) in adjusting Essar's export price for duty-drawback, the Department should adjust Essar's cost of production to include the import duties that were excused on its importation of the raw materials use to produce subject merchandise. We address, and respond to, each of these contentions in the issues below.

Issue 1: Duty-Drawback Adjustment

During the administrative proceeding, Essar requested, and the Department granted, a duty-drawback adjustment to Essar's U.S. sales price. *See Final Results*. The Department

² See Essar's September 13 submission at 5, citing to *Nucor v. United States*, 612 F Supp.2d 1264, 1271 (CIT 2009).

concluded that "Essar's advance license program used SIA_N (the standard the Gal uses to calculate the quantity of imports that are eligible for duty-drawback based on a specified quantity of exports), and that this meets the requirements of the **Department's two-prong test.**" *See* Decision Memorandum at Comment 18. The Court disagreed that the evidence of SIA_N sufficiently proved duty-free importation linked to exportation for the duty-drawback adjustment. *See* Remand Order at 9. Rather, the Court held that Essar had the burden of establishing entitlement to the duty-drawback adjustment and that there was nothing on the record to suggest that subsequent collection of deferred import duties by the Gal for any non-compliance with the requirements of the advance license program was precluded simply by export to the United States. *See* Remand Order at 11. The Court held that proof of permanent excuse or removal by affirmative action of Essar's contingent liability for import duties is not obvious from the administrative record. *Id.*

Because record evidence presented in the administrative review did not affirmatively demonstrate that Essar's contingent liability was excused or permanently removed, we requested additional information from Essar. In Essar's supplemental questionnaire response, Essar provided the Department with the following information for each license request: 1) application lodged with the Gal, for redemption of the advance license; 2) letter from the Gal releasing Essar Steel from its obligation to pay duties upon completion of the required exports, including the appropriate linkage between imports and exports; 3) bank realization certificate confirming inward remittance of export proceeds; and 4) bills of lading confirming shipment to the United States. *See* Essar's August 17th Response. Essar explained that for its advance licenses (numbers 0310331383, 0310328648, 0310371289, and 0310391869), the duty-free import of raw materials took place prior to the exportation of the finished goods. *See id.* Essar Steel submitted

each shipping bill that contains an endorsement that specifies the advance license number and date. *See id.*

The Department will determine that a respondent is eligible for a duty-drawback adjustment if it satisfies the two-prong test. *See Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1286 (CIT 2006). The test requires the respondent to establish that (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and (2) the respondent has demonstrated that there are sufficient imports of the raw material to account for the duty-drawback on the exports of the subject merchandise. *See Allied Tube & Conduit Corp. v. United States*, 374 F. Supp 2d 1257 (CIT 2005). As the Court explained, the burden to establish entitlement to this adjustment is with the respondent. *See Remand Opinion at 11 (citing Fujitsu General Ltd. v. United States*, 88 F. 3d 1034, 1040 (CAFC 1996)); *see also Rajinder Pipes Ltd. v. United States*, 70 F. Supp. 2d 1350, 1359 (CIT 1999).

In our draft remand, we determined based on the foregoing, that Essar provided sufficient documentation to prove or corroborate the complete removal of the contingent liability for deferred import duties under the GOI advance license program in accordance with the Court's Remand Order. *See Remand Order at 12.*

The petitioners asserted in their September 13 submissions that the Department should deny Essar's duty drawback claim with respect to one particular U.S. invoice. The petitioners asserted that Essar did not provide documentation that would link that particular invoice to duty drawback under any of Essar's **advance** licenses. The petitioners further claimed that the documentation Essar provided shows that the particular advance license identifies other invoices

in the database, but fails to indicate that sales pursuant to the one invoice were made pursuant to the identified advance license.

We reviewed the information submitted by Essar during this remand as well as in its responses during the review and agree with the petitioners that, for one particular invoice for which Essar claimed duty drawback, nothing on the record links exports pursuant to that invoice to any of Essar's advance licenses. Therefore, we have disallowed the duty drawback claimed on exports pursuant to that particular invoice.

After reviewing the submitted documents in Essar's August 17 Response, we are able to confirm that all of the other invoices for which Essar claimed duty drawback are linked directly to Essar's advanced licenses for which Essar provided evidence that the contingent liability had been removed. *See* Essar's August 17 Response. Further, Essar provided documentation establishing the required nexus between imports and exports. *See id.* and Essar's Section A and C Responses at C-33, C-34, and Ex. C-13-C and Essar's August 16, 2007, Supplemental Sections A-D Questionnaire Response at Exhibits 16 through 18. Essar submitted copies of the applications it filed to the GOI seeking redemption or closure of the Advance Licenses, shipping bills' statements of exports under a specific Advance License, and copies of the original shipping bills along with the details of bills of entry which establishes the GOI's redemption or closure letter removing Essar's contingent liability of the import of duty-free raw materials. *See* Essar's August 17 Response.

Accordingly, we continue to determine, as we did in the draft remand, that Essar adequately demonstrated the complete removal of the contingent liability for deferred import duties under the GOI advance license program in accordance with the Court's Remand Order.

See Remand Order at 12. With respect to one invoice, we have adjusted our calculation to disallow Essar's duty drawback claim.

Issue 2: Whether to adjust Essar's Cost of Manufacture To Account For Duty Drawback Adjustments

In their comments to the draft remand redetermination, petitioners claim that the Department should increase Essar's cost of manufacture to account for the duty drawback adjustments. Relying on the Federal Circuit's opinion in *Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F. 3d 1335 (CAFC 2011), the petitioners claim that it is the Department's well-established practice to include import duties in Essar's cost of production.

Neither Nucor nor US Steel raised this claim for an adjustment during the administrative proceeding. Nor did either petitioner raise this claim in their complaints filed with the Court of International Trade. Both Nucor and US Steel participated in this administrative review, yet failed to preserve their argument that an adjustment to Essar's cost of manufacturing is necessary if the Department grants the duty drawback adjustment.

Moreover, in litigating this issue, neither party contended that the Department erred by not making the adjustment in the first instance. The reason for this is likely because neither party could make this argument. As explained in *Mittal Steel*, Nucor and US Steel "were} procedurally required to raise the issue before Commerce at the time Commerce was addressing the issue." See *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) (*Mittal Steel*). The Court would have likely required both to exhaust their administrative remedies. See *Corus Staal BV v. United States*, 502 F. 3d 1370, 1379 (Fed. Cir. 2007) (The Court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases."); *Carpenter Tech. Corp. v. United States*, 452 F. Supp. 2d 1344, 1346 (Ct. Int'l Trade 2006) (citing *Woodford v. Ngo*, 548 U.S. 81,

88-90 (2006» ("This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review - advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency.")

Because neither party raised it as an issue, the Court did not address it and did not remand the matter to the Department for that purpose. Rather, the Court held that the Department must determine whether record evidence proves Essar's contingent liability for deferred import duties under the duty drawback program has been removed or permanently excused without considering any calculation changes should the Department continue to grant the duty drawback adjustment. Slip Op. at 9. Furthermore, because the duty drawback adjustment had been granted in the administrative proceeding, and we continued to grant it here upon remand, nothing has changed, and the remand is not an opportunity for parties to raise a new issue that should have been administratively in the first instance. *See Dorbest Ltd. v. United States*, 604 F. 3d 1363, 1375 (CAFC 2010).

The petitioners were required to raise this issue previously to preserve the argument. Accordingly, we are not addressing it here in this limited remand to determine whether the contingent liability for deferred import duties under the duty drawback program has been removed or permanently excused.

Issue 3: Date of Sale

In the *Final Results*, the Department agreed with Essar that the appropriate date of sale was the date on Essar's letters-of-credit. *See Final Results* and Calculation Memorandum dated May 30, 2008, at 7. However, we requested a voluntary remand to reevaluate the record and determine whether record evidence supported our conclusion that the material terms of sale were

fixed on the letter-of-credit date. Because we now conclude that the material terms of sale were not fixed on the letter of credit date or amended letter of credit date, we are revising Essar's date of sale.

Section 351.401(i) of the Department's regulations specifies that "in identifying the date of sale of the subject merchandise...the Secretary normally will use the date of invoices, as recorded in the exporter or producer's records kept in the ordinary course of business." But, the regulation explains that "the Secretary may use a date other than the date of invoice is the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale."

Because the invoice date is the presumptive date of sale, a party seeking to use a date other than invoice date has the burden of showing that the alternative date better reflects the date on which the material terms are established. *See Allied Tube & Conduit Corp. v. United States*, 127 F. Supp. 2d 207,219 (CIT 2000). The party must establish that "the material terms of sale undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date." *See Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001).

The statute does not specify the manner in which the Department shall determine the date of sale. However, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act explained that the date of sale is the "date when the material terms of sale are established." Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-316. Accordingly, Courts have affirmed the Department's discretion to determine the appropriate date of sale. *See Allied Tube and Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 219 (CIT 2000) ("Congress "has expressed its intent that, for antidumping purposes, the date of sale be

flexible so as to accurately reflect the true date on which the material elements of sale were established."); *Sahaviriya Steel Indus. Pub. Co. v. United States*, 714 F. Supp. 2d 1263, 1280 (CIT 2010) ("Flexibility is the cornerstone of Commerce's date of sale analysis."). Pursuant to this discretion, the Department has developed a rebuttable presumption that invoice date will normally be identified as the date of sale. 19 CFR 351.401(i). Because the presumption is in favor of invoice date, it is the respondent's burden to present sufficient evidence to establish that the material terms (*i.e.*, price, quantity, delivery terms, payment terms, and tolerances) are set at a different time. *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27349 ("*Preamble*") ("If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale."); *see also Sahaviriya Steel*, 714 F. Supp. 2d at 1279; *Nakornthai Strip Mill Public Co. v. United States*, 614 F. Supp. 2d 1323, 1334 (CIT 2009) ("*Nakornthai III*").

In reexamining the record evidence from the *Final Results*, the Department finds that the material terms of Essar's U.S. sales were not always met at the date of the letter of credit or the amended letter of credit for Essar's export price ("EP") sales. Essar added the date of the letter of credit for all its export price (EP) sales in its August 16, 2007, supplemental response at 32 and Exhibit 29. However, contrary to Essar's assertion that its U.S. date of sale was met at the date of the letter of credit or amended letter of credit, Essar's submitted documents showed that the material terms for its U.S. sales varied from the letter of credit, amended letter of credit, and invoice dates. Thus, the appropriate date of sale for Essar's U.S. sales is the invoice date when the material terms were finally set. As explained in the Memorandum to the File, Essar's material terms of sale were altered outside of the built-in tolerances in the sales contracts and

these changes occurred up to the invoices in Essar's submitted sales documentation.³ See Essar's April 13, 2007, Section C Response and Essar's August 16, 2007, supplemental sections A-D Questionnaire Response at 32 and Exhibit 29.

Here, Essar contends that the material terms of sale were established at the letter of credit, or amended letter of credit, dates because the sales contract contains terms prohibiting modification, which were incorporated into the letters of credit, and the letters of credit were irrevocable.⁴ But, the irrevocability of the letters of credit and the prohibition on modification of the contract terms are belied by record evidence that establishes the material terms were altered and altered in ways which exceeded the allowed tolerances.

Essar mistakenly relies on *Nakornthai III* and *Nucor Corp. v. United States*, 612 F. Supp. 2d 1264, 1271 (CIT 2009) for the proposition that the date of sale analysis does not hinge on a single change in price or quantity. In each of those cases, the material term of sale changed on one contract. See *Nakornthai*, 614 F. Supp. 2d at 1326 ("one U.S. sale of hot-rolled steel pursuant to a contract" which was changed); *Nucor*, at 1301 ("a price change as to one of ICDAS' U.S. contracts"). See Memorandum to the File. As explained in the Memorandum to the File, Essar's material terms of sale changed on many transactions in contrast with the cases Essar cites for support.

Simply put, substantial evidence does not support Essar's contention that the Department should alter its presumption that invoice date is the proper date of sale. See Essar's April 13, 2007, Section C Response and Essar's August 16, 2007, supplemental sections A-D

³ Due to the business proprietary nature of this discussion, see the Department's October 3, 2011, memorandum to the file, through Melissa Skinner from Victoria Cho, entitled "Remand of the 2005-2006 Antidumping Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India; The Appropriate Date of Sale for Essar Steel Limited's U.S.' Sales"; (Memorandum to the File).

⁴ See Essar's April 13, 2007, Section C Response and Essar's August 16, 2007, supplemental sections A-D Questionnaire Response at 32 and Exhibit 29.

Questionnaire Response at 32 and Exhibit 29. The respondent bears the burden to support its argument that a date other than the invoice date should be used in the Department's dumping analysis to define the date of sale, and the Department finds that Essar has failed to provide sufficient record evidence.

Because Essar provided the Department with a database of U.S. sales which includes the invoice date, the Department needs **no** additional information from Essar to complete its dumping analysis. *See id.* Accordingly, we have recalculated Essar's dumping margin based on the reported invoice dates as the U.S. date of sale.

FINAL RESULTS OF REDETERMINATION

Pursuant to the Court's Remand Order, we have reviewed the record evidence and continued to grant Essar a duty drawback adjustment and reconsidered Essar's date of sale. We have determined that the record evidence demonstrates that Essar is entitled to a duty drawback adjustment because the record indicates that all contingent liability for the duty free importation of raw materials was permanently removed with export of the subject merchandise. In addition, we have determined that the material terms of sale were not set at letter of credit date, and, therefore, the appropriate U.S. date of sale is the invoice date in accordance with the Department's regulatory presumption and past practice.

With these changes, we have recalculated Essar's dumping margin. As a result of these final remand results, the dumping margin for Essar for this period of review is 12.5 percent.

Ronald K. Lorentzen

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

October 3, 2011

Date