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DATE: April 5, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh *CBM*
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Lightweight Thermal Paper from Germany
(Period of Review: November 1, 2009, through October 31, 2010)

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2009-2010 Administrative Review of the Antidumping Duty Order
on Lightweight Thermal Paper from Germany

Summary

We have analyzed the case and rebuttal briefs submitted by petitioner, Appleton Papers, Inc. and Papierfabrik August Koehler AG (Koehler). As a result of our analysis, we have not made changes in the margin calculations. We recommend that you approve the positions described in the "Discussion of Interested Party Comments," infra. Outlined below is the complete list of the issues in this review for which we have received comments from petitioner and Koehler.

I. Background

On December 7, 2011, the Department of Commerce (the Department) published in the Federal Register the Preliminary Results of this administrative review. See Preliminary Results.¹ This review covers one manufacturer/exporter of the subject merchandise: Koehler.

¹ See Lightweight Thermal Paper From Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 FR 76360 (December 7, 2011) (Preliminary Results); see also Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 76 FR 20951 (April 14, 2011).



II. List of Comments

Comment 1: Whether the Language of the Statute and Governing Regulation Allows the Department's Disallowance of Certain Post-Sale Price Adjustments

Comment 2: Whether the Monatsbonus Rebate is Legitimate

Comment 3: Whether the Department's Decision Suggest That All Strategies Intended To Reduce Dumping Are "*Ipsa Facto* Illegitimate"

Comment 4: Whether to Recalculate Koehler's CEP Profit

III. Discussion of Interested Party Comments

Comment 1: Whether the Language of the Statute and Governing Regulation Allows the Department's Disallowance of Certain Post-Sale Price

For the reasons explained below, we continue to disallow certain post-sale price adjustments reported in the REBATE1AH and REBATE1CH fields.

Koehler's Comment

Koehler states that although the statute is silent as to whether the starting price is a gross price or a net price, the Department's regulations clarified that the Department will use a price that is net of any price adjustment, as defined in 19 C.F.R. § 351.102(b), including specifically "rebates," that is reasonably attributable to the subject merchandise or the foreign like product. See section 773(a)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 C.F.R. § 351.401(c). Thus, Koehler argues that the Department's refusal to use Koehler's home market price net of all actual rebates violates the Department's interpretation of the statute and regulation. Moreover, Koehler contends that the regulation is clear on its face and there is no need to read in selective comments from the regulatory history in the Preamble, because any interpretation of the regulatory history cannot trump the plain meaning of the regulation itself.

Koehler notes that Black's Law Dictionary defines "rebate" as "{a} return of part of a payment, serving as a discount or reduction."² Therefore, Koehler asserts that the "monatsbonus" is a rebate because it is a return by Koehler to a home market customer of a percentage of the payment for home market sales of the 48-gram LWTP product, which reduces the net cost to the customer.

Koehler claims that, the record evidence shows that its monthly rebates are attributable to 48-gram LWTP, which is within the product scope. Thus, Koehler argues there is no dispute that the monatsbonus is a rebate for purposes of 19 C.F.R. § 351.102(b), and that it is reasonably attributable to Koehler's matching home market sales of the 48-gram LWTP product for purposes of 19 C.F.R. § 351.401.

² See Black's Law Dictionary (8th ed. 1999) at 1295.

Petitioner's Comment

Petitioner states that the regulations do not define the term "rebate," nor do they explain what it means for a rebate to be "reasonably attributable" to sales of the foreign like product. However, petitioner notes that, the Department has broad authority to interpret its own regulations, so long as its construction is not "plainly erroneous or inconsistent with the regulation."³ Petitioner states that the Department's longstanding practice, before and after issuance of the 1997 regulations, of disallowing certain rebates made "after the fact" is not "plainly erroneous or inconsistent" with the Department's regulation.

Petitioner further notes that, the Department has long defined a "rebate" susceptible to deduction under 19 C.F.R. § 351.401(c) as one in which the terms and conditions are established between the buyer and seller at or before the time of sale. Petitioner contends that because Koehler's monatsbonus was determined after the sale date and applied retroactively, the Department should conclude that it is not a rebate for purposes of 19 C.F.R. § 351.102(b).

According to petitioner, Black's Law Dictionary also lists a more narrow alternative definition of a "rebate" as a "refund of portion of purchase price made by manufacturer to consumer to induce purchase of product."⁴ Petitioner claims that this alternative definition requires some knowledge of the rebate by the consumer at or before the time of sale, because otherwise it could not "induce" a purchase. Moreover, petitioner claims that the Department's longstanding construction of the regulation limits the type of rebates susceptible to deduction to the more narrow definition.

Petitioner asserts that Koehler's *post hoc* attribution of the monatsbonus payments solely to the matching 48-gram LWTP product was done for the purpose of manipulating the dumping margin rather than for the purpose of incentivizing sales of that product. Petitioner also asserts that because of the *post facto* nature of the price adjustment, nothing constrained Koehler from determining the total rebate amount at the end of the month, and then arbitrarily allocating those rebates exclusively to matching sales of KT 48 F20. Thus, petitioner argues that, under these circumstances, even if the monatsbonus were considered a "rebate," the Department should conclude that it is not "reasonably attributable" to sales of the 48-gram LWTP product.

Petitioner asserts that rebates granted "after the fact" are subject to manipulation, and for that reason are not "reasonably attributable" to the sales as purported by the respondent. Moreover, petitioner claims that, for this reason, even if the Department were to accept the monatsbonus rebate as a price adjustment under 19 C.F.R. § 351.401(c), which it should not, then the Department should reallocate the total amount evenly across home market sales of all products.

Department's Position:

The statute directs that the Department, in calculating normal value, shall use "the price at which the foreign like product is first sold ... for consumption in the exporting country...."⁵ The

³ See *Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1364 (Fed. Cir. 2005).

⁴ See Black's Law Dictionary (6th ed. 1990) at 1266.

⁵ See section 773(a)(1)(B)(i) of the Act.

Department's regulations explain that the price used for normal value will be "a price that is net of any price adjustment, as defined in 19 C.F.R. § 351.102(b), that is reasonably attributable to the ... foreign like product."⁶ A price adjustment, in turn, is defined as "any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments that are reflected in the purchaser's net outlay."⁷ Further, the Department's regulations make clear that the party seeking an adjustment, such as a price adjustment, has the burden of proving that it is entitled to that adjustment. The regulations state: "The interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."⁸

Although the term "rebate" is not specifically defined in the regulations, the Department has developed a practice for determining the legitimacy of a claimed rebate price adjustment.⁹ The Department has stated that it is our "practice to adjust normal value to account for rebates when the terms and conditions of the rebate are known to the customer prior to the sale and the claimed rebates are customer-specific."¹⁰ While the Department's regulations allow for post-sale price adjustments that are reasonably attributable to the subject merchandise, the Preamble to the regulations indicates that exporters or producers should not be allowed "to eliminate dumping margins by providing price adjustments 'after the fact.'"¹¹ Thus, the Department stated in Canned Pineapple from Thailand, "where a price adjustment made after the fact lowers a respondent's dumping margin, the Department will closely examine the circumstances surrounding the adjustment to determine whether it was a legitimate adjustment that was made in the ordinary course of business."¹² Further, the Court of International Trade (CIT) has upheld the Department's authority to reject price adjustments "that present the potential for price manipulation...."¹³

This practice regarding rebates is reflected in our questionnaire. As stated in the Department's initial questionnaire issued to Koehler, "{w}hen the seller establishes the terms and conditions under which the rebate will be granted at or before the time of sale, the Department reduces the

⁶ See 19 C.F.R. § 351.401(c)...

⁷ See 19 C.F.R. § 351.102(b)...

⁸ See 19 C.F.R. § 351.401(b)(1).

⁹ See Canned Pineapple Fruit from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 70948 (December 7, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (Canned Pineapple from Thailand); see also 19 C.F.R. § 351.401(b)(1)...

¹⁰ See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 FR 40064 (July 14, 2006), and accompanying Issues and Decision Memorandum at Comment 19.

¹¹ See Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27344 (May 19, 1997) (Preamble)...

¹² See Canned Pineapple, and accompanying Issues and Decision Memorandum at Comment 1. See also Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, 61 FR 13815, 13823 (March 28, 1996) (Plate from Canada) (noting, with respect to price adjustments by way of rebates, that the "purpose of requiring respondent to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of sale is to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review").

¹³ Koenig & Bauer-Albert AG v. United States, 15 F. Supp. 2d 834, 840 (CIT 1998)..

gross selling price by the amount of the rebate.”¹⁴ The initial questionnaire issued to Koehler also outlines the specific reporting requirements for rebates, as follows:

“(REBATEH): Description: Report the unit value of each rebate given to the customer. Create a separate field for reporting each rebate program. Rebates should be reported with the sales to which they apply. Narrative: Explain your policy and practice for granting rebates. Describe the terms and conditions of each rebate program and when the terms and conditions are established in the sales process. If rebates vary by customer category (field 6.0) or channel of distribution (field 7.0), provide an explanation of the rebates given to each. For rebates that have not yet been paid, describe how you computed the amount to be rebated. Include your worksheets as an attachment to the response. Where available, provide sample documentation, including sample agreements, for each type of rebate.”¹⁵

Thus, the Department requires that in order to allow price adjustments for rebates, the rebates must have been granted at or before the time of sale of subject merchandise.

We do not agree with Koehler’s argument that we are bound by the dictionary definition of the word “rebate” that Koehler cites. Rather, we analyze claimed rebates consistent with the regulations, practice, and cases just described. Further, we note that petitioner cites a dictionary definition of “rebate” indicating that a rebate induces sales and therefore that the terms should be known in advance.

Comment 2: Whether the Monatsbonus Rebate is Legitimate

Koehler’s Comment

Koehler argues that the Department’s position in the prior review that the record did not demonstrate that the “monatsbonus” is a legitimate rebate that should be treated as a price adjustment should not be followed in the current review.¹⁶ Koehler also argues that the Department’s position has no basis in the statute or the regulations, and should not be relied on in this administrative review. Thus, Koehler argues that the rebates are lawful transactions for which it paid, and the customer received, money, and therefore there is no basis for the Department to deem the rebates not to be legitimate.

Koehler contends that its monthly home market rebate is not illegitimate for the following reasons: (1) the rebates were not “after the fact,” (2) customers had prior knowledge of the rebate, (3) customers were aware of the precise terms of sale, and (4) Koehler had valid business reasons, independent of the effect on the dumping margin, for granting the rebates.

¹⁴ See Antidumping Duty Initial Questionnaire, dated January 3, 2011, at B-24. See also 19 C.F.R. § 351.401(b).

¹⁵ See *id.*

¹⁶ See Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review, 76 FR 22078 (April 20, 2011) (LWTP First Review), and accompanying Issues and Decision Memorandum (I & D Memo) at 15.

First, Koehler states that in LWTP First Review, the Department pointed to the Preamble to the 1997 regulations for the proposition that exporters or producers should not be allowed to eliminate dumping margins by providing price adjustments “after the fact.”¹⁷ However, Koehler argues that the Department quoted the Preamble out of its context, which was a rejection of a suggestion to invent a new requirement in the regulation that the Department will accept only rebates that are contemplated at the time of sale. Koehler argues that nothing in the record indicates that the monthly rebates are “after the fact,” because: (1) the Department has acknowledged that Koehler has been providing monthly rebates on 48-gram LWTP prior to the filing of the petition in September 2007;¹⁸ and (2) all of the monthly rebates during the POR were issued prior to the time that petitioner requested a review of Koehler.¹⁹ Koehler also asserts that it did not grant monthly rebates after the end of the POR.

Second, Koehler argues that the Department in the Preliminary Results erroneously determined that the “monatsbonus rebate program is applied retroactively to sales,” consistent with its determination in the first review that Koehler's customers had no prior knowledge of the rebate program.²⁰ Koehler further argues that this analysis was fundamentally flawed, because the Department conflated the question of knowledge of the precise terms of a rebate in a given month, versus knowledge of the existence of the rebate “program.” Koehler claims that in Certain Hot-Rolled Carbon Steel Flat Products from India, the Department established a standard for treating a price adjustment as a rebate where the Department stated that Essar’s customers had prior knowledge of Essar's rebate program, and the program was in existence before the sales were made.²¹ Koehler contends that, however, in the Department’s analysis of Koehler's monthly rebates, the Department took issue with the fact that, in certain circumstances, Koehler’s customer may not have known the precise rebate percentage applicable to some sales already made. According to Koehler, this has no bearing whatsoever on the fact that the customer has long been aware that it would be receiving some percentage rebate amount for those sales.

Third, Koehler claims that record evidence demonstrates that, for a majority of sales to customers receiving a monatsbonus, the customer was aware of the precise terms of sale prior to the individual sale. Specifically, Koehler claims that it provided a flag in the database to indicate the instances in which individual sales were made with definitive proof that the customer was aware of the precise rebate percentage.²² However, Koehler argues that despite this evidence, the Department incorrectly speculates in the Preliminary Results that “the customer cannot know with certainty” the amount of a rebate, and therefore these monthly rebates must be disallowed. Koehler also argues that the Department’s assertion that “Koehler randomly changes its monthly rebate percentages,” is not supported by record evidence.²³ According to Koehler, the rebate percentage is specified on the customer-specific price lists, pursuant to oral communications with the customer. Thus, Koehler argues that the record shows that Koehler negotiates the monthly

¹⁷ See id., at 16 (quoting Preamble, 62 FR at 27344).

¹⁸ See id., at 17.

¹⁹ See Supplemental Questionnaire Response (SQR) dated June 6, 2011, at Exhibit S-12.

²⁰ See LWTP First Review I&D Memo at 19 - 20.

²¹ 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), and accompanying Issues and Decision Memorandum at Comment 27.

²² See SQR at Exhibits S-11 and S-12.

²³ See Preliminary Results, 76 FR at 76362.

rebate percentage with the customer(s), and any changes to the rebate amounts are not random. Koehler also argues that there is no requirement that the customer know the exact rebate percentage at the time of sale. Furthermore, Koehler argues that the Department fails to note record evidence in this review proving that customers receiving other rebates from Koehler also did not know of the exact rebate percentage at the time of sale.²⁴ Koehler claims that according to the Department's logic, the Department should also deny this rebate for the entire year, because the actual rebate percentage paid was not known until after the period, and thus was "subject to change."

Fourth, Koehler claims that the Department's past practice, as set forth in SSSS from Mexico, is to allow rebates as long as there is no indication of manipulation of the dumping margins and it constituted the company's normal business practice.²⁵ According to Koehler, the facts in the instant case are similar to SSSS from Mexico, where after the fact rebates were allowed because the rebates were part of the company's normal business practice. However, Koehler argues that, in the prior review, the Department rejected its past practice and invented a new standard, i.e., whether "the monatsbonus was established in the ordinary course of business solely for 'legitimate commercial purposes.'²⁶ Koehler asserts that for the current review period, the Department should not continue its unwarranted rejection of its own past practice.²⁷

Koehler asserts that its monthly rebate is for legitimate commercial purposes by any reasonable standard. Koehler claims that the Department appears to have concluded that Koehler's monthly rebate is not legitimate from its observation that the monatsbonus is "unique because it differs significantly from Koehler's other rebates."²⁸ Koehler also claims that the Department supports its assertion that the monthly rebates are "unique" and therefore presumably illegitimate in the previous review by stating that: (1) the monthly rebate only applies to home market sales of the matching product; (2) the changes in the monthly rebate percentages are "significant" and (3) that there are "marked differences between the monthly and quarterly rebates."²⁹

Koehler states that in the current review, its monthly rebates in the home market were not applied only to 48-gram LWTP merchandise (i.e., the product matching to virtually all U.S. sales). However, Koehler argues that the Department rejected the monthly rebates on the 48-gram LWTP merchandise and accepted the monthly rebates on other LWTP gram products.³⁰

Koehler argues that in the prior review, the Department found, without explanation, that there were significant changes in monthly rebate percentages and marked differences with the

²⁴See Fourth Supplemental Questionnaire Response (Fourth SQR) dated November 11, 2011, at 8.

²⁵See Final Results Stainless Steel Sheet and Strip in Coils from Mexico, 69 FR 6259 (February 4, 2004) (SSSS from Mexico), and accompanying Issues and Decision Memorandum at Comment 1.

²⁶See LWTP First Review, I & D Memo at 19.

²⁷See Plate from Canada, 61 FR at 13828. See also Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Preliminary Results of Antidumping Duty Administrative Review, 63 FR 47465, 47468 (September 8, 1998)....

²⁸See LWTP First Review, I & D Memo at 15.

²⁹See id., at 21-22.

³⁰See Memorandum to the File Through James Terpstra, Program Manager, AD/CVD Operations, Office 3 from Stephanie Moore and George McMahon, Case Analysts, AD/CVD Operations, Office 3, titled Calculation Memorandum for the Preliminary Results – Koehler (Preliminary Calculation Memo – Koehler), dated November 30, 2011, at 6 through 8.

quarterly rebates.³¹ Nevertheless, Koehler asserts that in the current review, the monthly rebate percent changes for KT 48 F20 were very stable, and the fact pattern differs from the previous review.³² Therefore, Koehler argues that, the Department's finding in the previous review that there was significant volatility³³ is contrary to record evidence in this review. Moreover, Koehler argues that the Department provided no analysis, whether quantitative or qualitative, to show on what basis it concluded in the previous review that the differences between monthly and quarterly rebates were "marked." Koehler contends that to the extent that the Department relies on its determination in the first review, and that such a determination was based on a finding that the differences were "marked," the Department has failed to explain its basis for continuing to make such a finding given the facts in this review.

Finally, Koehler contends that the Department ignored the commercial reason Koehler provided in the prior review. Specifically, Koehler claims that it explained to the Department that the difference in the size of, and changes for, the monthly home market rebate for 48-gram LWTP product compared to other products was due to the different starting list prices. Koehler also claims that the facts in the instant review are the same as in the prior review.³⁴ Thus, Koehler argues that in conducting any analysis of legitimacy of its rebates in this review, the Department must consider this record evidence, and explain how the fact that the net price to customer A is virtually equivalent to the net price to other customers does not establish the legitimacy of the rebates provided to customer A.

Petitioner's Comment

Petitioner responds that the Department has previously stated that "the purpose of requiring a respondent to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of sale is to protect against manipulation of the dumping margins."³⁵ Petitioner asserts that, in this case, the customer was unaware of the terms and conditions for the monatsbonus at the time of sale, and, thus could not have made its purchasing decisions with any settled expectations of receiving a rebate. Therefore, the customer(s) was unaware of the terms and conditions of the monatsbonus at the time of sale and, consequently, the rebate is "after the fact."

Petitioner contends that Koehler's assertion that the Department's practice as established in Hot-Rolled Steel from India is to allow price adjustments for rebate "programs" known by the customer, even if the customer was unaware of the details of that "program" at the time of sale, is incorrect. Petitioner claims that there is no indication in Hot-Rolled Steel from India that Essar's customers were unaware, at the time of sale, of any details regarding the terms and conditions for obtaining the rebate at issue. Moreover, petitioner contends that in the instant case, the monatsbonus is not a traditional rebate "program." Rather, it represents a series of *ad hoc* refunds, none of which Koehler was contractually obligated to pay.

³¹ See LWTP First Review I & D Memo at 21.

³² See SQR at Exhibit S-II; see also Fourth SQR at Exhibit 11.

³³ See LWTP First Review I & D Memo at Comment 3....

³⁴ See Koehler's case brief at 21; and Fourth SQR at 12....

³⁵ See Canned Pineapple from Thailand at Comment 1 (quoting Plate from Canada, 61 FR at 13823).

Petitioner states that Koehler correctly observes that the customer cannot know, at the time of each purchase, the precise annual rebate that it will ultimately receive. However, petitioner claims that although the ultimate values of those variables may be unknown to the parties until the end of the year, it does not render the program an “after the fact” rebate. Petitioner argues that, unlike the monatsbonus, the “terms and conditions” for the other rebates are established before the sale date. Thus, the customer is aware, when it makes its purchases, of (1) the conditions that must ultimately be satisfied in order to obtain the annual rebate, and (2) the amount of the annual rebate that it will be entitled to receive should those conditions be satisfied.

Petitioner contends the flag methodology used by Koehler to indicate the instances in which there is “definitive proof” that the customer was aware of the precise rebate percentage for individual sales is not reliable because the monatsbonus was subject to change, within Koehler’s sole discretion, after the sale date.

Petitioner asserts that Koehler’s argument that the Department ignored evidence that the rebate percentage was negotiated orally with the customer should be rejected for the following reasons. First, even if changes to the rebate percentage were negotiated orally, those negotiations occurred with revisions effective retroactively to sales from the beginning of the month.³⁶ Second, there was no agreement between the parties at the time of sale that obligated Koehler to pay any monatsbonus. Third, there is no record evidence showing that rebate revisions were anything other than within Koehler's sole discretion.

Next, petitioner contends that Koehler has not shown that its monatsbonus rebate was established for legitimate commercial reasons, and not to manipulate the dumping margin. Petitioner claims that the facts of this case differ materially from those in SSSS from Mexico. Petitioner states that in SSSS from Mexico, the Department allowed Mexinox’s home market rebates because the terms were established at the time of sale.³⁷ Petitioner argues that this is in stark contrast with Koehler’s monatsbonus, the terms of which were not established by any pre-existing agreement. In addition, petitioner points out that in SSSS from Mexico, the Department also found that, unlike Mexinox's home market rebates, its U.S. rebates were not pursuant to pre-existing agreements. However, the Department allowed the U.S. rebates because the Department determined that the rebates constituted the respondent’s normal business practice.³⁸ Petitioner argues that the fact that Koehler historically has granted rebates, even if some were paid on a monthly basis, does not show that the monatsbonus rebate program as structured with retroactive rebates directed solely to home market sales of the matching 48-gram LWTP product was part of Koehler’s “normal business practice.”³⁹ Furthermore, petitioner argues that there is no record evidence that Koehler began issuing product-specific, retroactively-determined monthly rebates prior to the filing of the petition. Hence, petitioner asserts that the decision in SSSS from Mexico is not applicable to the instant case.

Petitioner contends that Koehler wrongly suggests that the monatsbonus applies to non-matching products and, is thus, “legitimate.” Petitioner states that in January 2010, Koehler had two

³⁶See SQR at Exhibit S-11.

³⁷See SSSS from Mexico, and accompanying Issues and Decision Memorandum at Comment 1.

³⁸See *id.*

³⁹See SQR at 18 - 19 and Exhibit S-8.

distinct monthly rebates, the “monatsbonus thermo” for all thermal products, and the “monatsbonus” for product KT48F20. Petitioner further states that the Department correctly distinguished between these two rebates in the Preliminary Results and disallowed only the “monatsbonus” for the KT48F20 product.⁴⁰

Petitioner asserts that any supposed decrease in the “volatility” of the monatsbonus percentage does not demonstrate “legitimacy.” According to petitioner, the key factor is that the rebate terms are established by Koehler after the relevant sale date. Moreover, petitioner claims that, even if Koehler revised the rebate less frequently in the second review than in the first review, this does not show that Koehler was not using the rebate to manipulate dumping margins.

Petitioner disagrees with Koehler’s argument that, because the net price to customer A is virtually equivalent to the net price to other customers, the rebates provided to customer A are legitimate. Petitioner contends that prices to other customers do not demonstrate that the monatsbonus was established for commercial reasons. Petitioner asserts that, on the contrary, Koehler’s monatsbonus rebate was not designed to result in a net price reflective of commercial reality. Rather, it results in artificial below-market prices intended only to manipulate the dumping margin. Furthermore, petitioner notes that Koehler had no other rebate programs that were determined “after the fact” and applied retroactively. Thus, petitioner asserts that it is this retroactive feature that enabled Koehler to manipulate the dumping margin.

Petitioner states that in Koenig & Bauer, the Court upheld the Department’s authority to reject retroactive price adjustments instituted after the filing of the petition.⁴¹ Petitioner also states that the Department continues to apply Koenig & Bauer, and it rejects price adjustments made after the filing of the petition in original investigations.⁴² Petitioner claims the holding in Koenig & Bauer is not, however, limited solely to original investigations where price adjustments are instituted after the filing of the petition. Rather, it upholds the Department’s broad authority to reject price adjustments in any situation where the Department finds “the potential for manipulation.”⁴³ As the Court noted, the Department “has a certain amount of discretion to act with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.”⁴⁴

Petitioner states the potential for manipulation exists here just as it did in Koenig & Bauer, even if the method of such manipulation is slightly different. According to petitioner, because the 48-gram product comprises a certain percentage of Koehler’s U.S. sales compared to its home market sales, the company can manipulate its dumping margin at the end of each month by (1) determining the net price for its U.S. sales during the preceding month, and then (2) issuing retroactive rebates for the matching sales during the same month at whatever amount is needed to eliminate dumping.

⁴⁰See Preliminary Results, 76 FR at 76362-63.

⁴¹See Koenig & Bauer-Albert AG v. United States, 15 F. Supp. 2d 834, 840 (CIT 1998) (Koenig & Bauer).

⁴²See, e.g., Certain Frozen and Canned Warmwater Shrimp from Ecuador, 69 FR 76913 (December 23, 2004) at Comment 11. (disallowing Expalsa’s “Adjustment B”).

⁴³Koenig & Bauer, 15 F. Supp. 2d at 840.

⁴⁴See id.

Department's Position:

While the Department's regulations allow for post-sale price adjustments that are reasonably attributable to the subject merchandise, the Preamble to the regulations indicates that exporters or producers should not be allowed "to eliminate dumping margins by providing price adjustments 'after the fact.'"⁴⁵ We disagree with Koehler's argument that in LWTP First Review, the Department quoted the Preamble out of its context regarding price adjustments "after the fact." It is clear that the term "after the fact" means after the sale. First, the comment to which the Department was responding referred to rebates contemplated at the time of sale.⁴⁶ Second, the Department's practice had been to require that the terms and conditions of a rebate be set before, or at the time of, the sale.⁴⁷ This remains our practice, as described above in Comment 1.A.

We also disagree with Koehler that nothing in the record indicates that the monthly rebates are "after the fact," because Koehler has been providing these rebates prior to the filing of the petition in September 2007. In the prior review, the Department stated that after examination of the underlying written documentation from 2002/03, the Department did not find that the terms described therein specifically support Koehler's monthly rebates.⁴⁸ We also stated that "it is evident that Koehler has some history of granting certain rebates over periods longer than a month, pursuant to the 2002/03 written documentation provided."⁴⁹ However, the Department determined that, "because Koehler is unable to demonstrate that the customer is aware of the final monthly rebate amount applied and is also unable to support the monatsbonus through any formal written agreement which outlines the terms and conditions which apply to the customers, the Department finds that Koehler has not sufficiently demonstrated that its customers had prior knowledge of the monatsbonus rebate program."⁵⁰

In the current review, Koehler again refers to the 2002/03 initial rebate agreement.⁵¹ Koehler reiterates that "while there were initially written agreements with customers when Koehler established its recent rebate programs (e.g., such as in 2002 or 2003), the rebate practices had become routine enough by the POR that the parties did not bother with formalized written rebate agreements. Rather, the rebate percentage (e.g., "Quartalbonus", which means quarterly rebate, or "Monatsbonus", which means monthly rebate, per the documents provided in Exhibit B-4) is simply specified on the relevant customer-specific price lists."⁵² Thus, there was no written agreement that specified the terms and conditions that apply to the customers.

According to Koehler, the only communications regarding the KT 48 F20 rebates were e-mail communications.⁵³ The record shows that Koehler often set the rebate amounts retroactively

⁴⁵ See Preamble, 62 FR at 27344...

⁴⁶ See Preamble, 62 FR at 27344.

⁴⁷ See Plate from Canada, 61 FR at 13822.

⁴⁸ See LWTP First Review, I & D Memo at Comment 3...

⁴⁹ See id....

⁵⁰ See Plate from Canada; Canned Pineapple from Thailand; see also Antidumping Manual (January 22, 1998) at Chapter 8, page 9.

⁵¹ See Initial Questionnaire Response Section B (Initial QNR), dated March 2, 2011, at B-23; see also SQR at 11....

⁵² See id., at B-4...

⁵³ See SQR at 16...

through e-mail communications with its customer occurring after the affected sales already had taken place. This practice meant that the customer could never have known with certainty what the rebate amount would be for any given sale. The rebate amount was always subject to retroactive change. Therefore, because the terms of the monatsbonus rebate were not known at the time of sale, the Department concludes that the monatsbonus is not a legitimate rebate program that should be treated as a price adjustment.

The Department agrees with Koehler that in Hot-Rolled Steel from India, the Department used its established standard for treating a price adjustment as a rebate. However, in the instant case, we find that, unlike Hot-Rolled Steel from India, Koehler has not sufficiently demonstrated: (1) the terms and conditions of its rebate program; (2) that customers had prior knowledge of the rebate program; and (3) that the program was in existence before the relevant sales were made. In fact, the monatsbonus program at issue is similar to the claimed post-sale price adjustments that the Department disallowed in Canned Pineapple from Thailand. Because Koehler is unable to demonstrate that the customer is aware at or before the time of sale of the final monthly rebate amount to be applied, and is also unable to support the monatsbonus through any formal written agreement which outlines the terms and conditions which apply to the customers, the Department finds that Koehler has not sufficiently demonstrated that its customers had prior knowledge of the monatsbonus rebate program.⁵⁴

Regarding Koehler's argument that it indicated the instances in which individual sales were made with definitive proof that the customer was aware of the precise rebate percentage, the Department continues to find that the customer could have not known with certainty the amount of a rebate at or before the time of sale. The Department finds that it is inappropriate to examine this rebate program on a transaction-specific basis, given the fact pattern whereby the rebate percentage is changed at the end of the month and applied retroactively to the beginning of the same month. Instead, as in the prior review, we evaluate the monatsbonus rebate program as a whole to determine whether customers under this program knew of the terms of the rebate and rebate percentage prior to the sale.⁵⁵

We continue to find that Koehler's flagging methodology does not provide proof that, prior to the sale, the customer knew the rebate percentage or the amount of the rebate. As a hypothetical example, if Koehler approved a monthly rebate of 18 percent on August 31, 2010, and retroactively applied it to all KT 48F20 sales in August, a customer might assume or guess that the 18 percent rebate will also be applicable to purchases made after August 31, 2010. However, the customer cannot know with certainty that the 18 percent rebate will be applicable to its purchases in September 2010, because Koehler may change the rebate to 12 percent on September 30, 2010, and retroactively apply a 12 percent rebate to September sales. Thus, we continue to find that Koehler created its flag methodology with information that was subject to change, and not always contemporaneous with the sales. Koehler has not demonstrated that the

⁵⁴See Plate from Canada; Canned Pineapple from Thailand; see also Antidumping Manual (January 22, 1998) at Chapter 8, page 9.

⁵⁵See LWTP First Review I & D Memo at Comment 3; see also Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008), and accompanying Issues and Decision Memorandum at Comment 27 (analyzing rebates as a program).

customer had knowledge of the amount of the “monatsbonus” monthly rebate or the terms and conditions at the time of purchase.

Contrary to Koehler’s contention that the Department allowed other rebates even though the actual rebate percentage paid out was not known until after the period, and thus was “subject to change,” the Department determined, and continues to determine, that the other rebates were different than the monatsbonus rebate. We noted in the prior review, as well as in the current review, that the written rebate documentation for 2002/03 provided by Koehler is not relevant to the monatsbonus; instead, it pertains to rebates that are based on longer periods of time (e.g., quarterly and annual periods). We also continue to find that, in contrast to the monatsbonus, there is no evidence that the quartalbonus or the annual rebate is retroactively applied on a routine basis. Therefore, we find that unlike the monatsbonus, a customer can reasonably rely on the fact that it will receive a specific quartalsbonus percentage rebate at the time that it makes its respective purchases. Thus, the Department continues to find a clear distinction between the monatsbonus and the quartalsbonus and the annual rebate programs. Accordingly, we conclude that the monatsbonus is not a legitimate rebate that should be treated as a price adjustment.

Koehler’s contends that although its case is similar to SSSS from Mexico, the Department rejected its past practice, and, instead invented a new standard. The Department finds that Koehler’s fact pattern is dissimilar to the circumstances in SSSS from Mexico. In SSSS from Mexico, the Department stated “{i}t is our general policy to allow rebates only when the terms of sale are predetermined in order to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review.”⁵⁶ We also stated in SSSS from Mexico that, however, in past cases we have also permitted adjustments for rebates where these rebates constituted the respondent’s normal business practice and, because we were satisfied the respondent was not engaged in the manipulation of dumping margins through the use of rebates.⁵⁷ However, in the instant case, we do not find the granting of rebates retroactively on home market sales of the matching 48-gram LWTP product to be normal business practice, and we find that this practice involves the potential for manipulation of the dumping margin. We also note that one of the rebates in SSSS from Mexico that Koehler points to was a rebate on U.S. sales, which would only lower U.S. price and therefore increase the dumping margin. Therefore, the concern for manipulation of the dumping margin was not present.

Koehler’s assertion that its monthly rebate is for legitimate commercial reasons, and that it applied monthly rebates to home market sales of other LWTP products besides the 48-gram LWTP, is misconstrued. First, the monatsbonus monthly rebate applies only to home market sales of 48-gram LWTP and to certain customers. The monthly rebates that the Department allowed are quarterly rebates that applied to all thermal paper products, including the 48-gram LWTP, which were converted to monthly rebates. As stated elsewhere, the Department finds that the quarterly rebate is different from the monatsbonus rebate, and at the time of sale, the customer had knowledge of the quarterly rebate percentage. Therefore, the Department allowed the monthly rebates that were converted from a quarterly rebate during the period of review. Thus, the application of the monthly rebates only to home market sales of the matching product

⁵⁶See SSSS from Mexico, 69 FR 6259 (February 10, 2004), and accompanying Issues and Decision Memorandum at Comment 1.

⁵⁷See, e.g., Corrosion-Resistant Steel from Japan, 63 FR at 47468...

supports a finding that Koehler's monatsbonus is unique. Second, all rebates, except the monatsbonus, are applicable to all LWTP products, are based on a long-standing practice that was first established by the 2002/2003 written agreement, and are not retroactively applied. Therefore, the customers can reasonably expect to receive a specific percentage in rebates at the time that they make their respective purchases. In contrast, for the monatsbonus there is no written agreement or long-standing practice, and it is retroactively applied on a routine basis by Koehler. Thus, we continue to find that customers are not aware of the rebate amount at the time of sale, and moreover, are not aware of when the rebate percentage would change. Third, although there were fewer changes in the monatsbonus percentage during this period of review than in the prior period of review, Koehler still made changes retroactively. In addition, as stated above, the Department finds that it is inappropriate to examine this rebate program on a transaction-specific basis. Therefore, the Department continues to find that the customer did not know the terms of the monatsbonus prior to or at the time of sale and that the monatsbonus rebate is not a legitimate rebate.

Comment 3: Whether the Department's Decision Suggests That All Strategies Intended To Reduce Dumping Are "Ipso Facto Illegitimate"

Koehler asserts that the Department's suggestion that rebates that are granted with the intent to reduce the dumping margin are *ipso facto* illegitimate is without any legal foundation. Koehler also asserts that the Department's preliminary decision, as well as its determination in LWTP First Review, mean that the Department has taken the novel position that a respondent's intent in establishing prices trumps actual price data on the record. Koehler further asserts that because it allegedly grants certain amounts in rebates in order to comply with the U.S. law, the rebate will not be accepted by the Department. Koehler states that aside from the limited exception where a respondent makes price adjustments after a petition is filed, or after a review of the respondent is requested, there is no legally permissible place for considering pricing intent in the administration of the antidumping duty statute.

Koehler argues that the Department's position in the current review and the prior review by disregarding pricing data on the record regarding rebates, and by imposing a duty by declaring these rebates "illegitimate," is contrary to the remedial purpose of the statute. Koehler claims that, if taking actions to comply with the law have no "commercial purpose" because those actions are taken only because of the order, then the logical conclusion is that all compliance actions are "illegitimate."

Petitioner counters that Koehler's argument that an adjustment should not be considered "illegitimate" merely because the exporter was motivated to grant it by dumping considerations rather than commercial considerations, is irrelevant and should be rejected. Petitioner states that the dumping law encourages remedial action to avoid dumping. Petitioner states that while Koehler is free to lower home market prices generally across the board to eliminate its margin, it cannot wait until after the fact, review its U.S. sales, and then retroactively lower prices solely on the matching sales by just enough to eliminate dumping. Petitioner states if Koehler was allowed to manipulate its U.S. sales in this manner, the dumping law would have no remedial effect. Petitioner contends that Koehler's rebate is not "illegitimate" solely because it was intended to eliminate dumping, but that it is illegitimate because it was implemented after the fact for that purpose.

Department's Position:

We disagree with Koehler's argument that the Department's determination implies that a respondent cannot eliminate its dumping margin by reducing its normal value. Reducing normal value is a legitimate way to eliminate or reduce a dumping margin. Home market rebates, of course, may reduce normal value and thereby reduce or eliminate a dumping margin. However, those rebates must be legitimate "rebates" within the meaning of the Department's regulations and practice. A respondent must demonstrate its entitlement to a rebate adjustment.⁵⁸ This means that the respondent must demonstrate that its customers were aware of the terms and conditions of the rebate before, or at the time of, sale.⁵⁹ If the respondent cannot demonstrate this, then it is not entitled to the rebate adjustment to normal value. In the prior review, as well as in the instant case, Koehler did not demonstrate that its customers were aware of the terms and conditions of monatsbonus rebate before, or at the time of, sale. This does not mean that it is not entitled, as a general matter, to eliminating or reducing its dumping margin by reducing normal value; it only means that it is not entitled to this rebate adjustment.

Comment 4: Whether to recalculate Koehler's CEP Profit

Petitioner alleges that the Department erroneously calculated CEP profit in the Preliminary Results by treating a certain item in the numerator calculation as an offset, rather than as an addition, to Earnings Before Taxes (EBT).

Koehler argues that the Department's calculation of CEP profit in the Preliminary Results was accurate and asserts that the Department should not change this calculation for the final results. Koehler states that the Department's rationale behind its position is that CEP profit should be calculated based on a company's non-investment operations.

Department's Position:

We agree with Koehler and find that the CEP profit for Koehler should be calculated based on Koehler's non-investment operations. Therefore, for the final results, we have made no changes to our CEP profit calculation. Due to the business proprietary nature of this issue, see Final Calculation Memo – Koehler for further discussion.⁶⁰

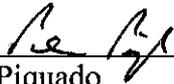
⁵⁸ See 19 C.F.R. § 351.401(b)(1)...

⁵⁹ See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 FR 40064 (July 14, 2006), and accompanying Issues and Decision Memorandum at Comment 19...

⁶⁰ See Memorandum to the File Through James Terpstra, Program Manager, AD/CVD Operations, Office 3 from Stephanie Moore and George McMahon, Case Analysts, AD/CVD Operations, Office 3, titled Calculation Memorandum for the Final Results – Koehler (Final Calculation Memo – Koehler), dated April 5, 2012, at 2 - 3.

IV. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results and the final weighted-average dumping margin in the Federal Register.



Paul Piquado
Assistant Secretary
for Import Administration

2 April 2012
Date