

**FINAL RESULTS OF REDETERMINATION ON REMAND
PURSUANT TO
ROYAL THAI GOVERNMENT, ET AL. v. UNITED STATES
Slip. Op. 04-91 (Ct Int'l Trade, July 27, 2004)**

SUMMARY

In accordance with the U.S. Court of International Trade's (the Court's) opinion in Slip Op. 04-91, Consol. Court No. 00-02-00026 (July 27, 2004), the Department of Commerce ("Commerce") has prepared these final results of redetermination on remand with respect to Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 Fed. Reg. 50410 (October 3, 2001) ("Final Determination"), and the accompanying Issues and Decision Memorandum for the Final Determination (September 21, 2001). The Final Determination reflects the 1999 period of investigation. The Department respectfully disagrees with the Court's conclusions of law and fact relating to the duty exemption program in Thailand, and this redetermination in compliance with the Court's Order is made subject to all relevant rights of appeal. Having found that the IPA Section 36(1) duty exemption program is not countervailable and that it makes a normal allowance for waste, the Court requires the Department to find that there is no benefit from this program. Slip op. at 24. Accordingly, as required by the Court, Commerce finds that Section 36(1) is not countervailable, and consequently, after removing the subsidy attributable to that program, the total estimated net countervailing subsidy rate is, therefore, de minimis. Id. at 26.

REMAND ANALYSIS

For purposes of this remand, the Court instructed Commerce to find that the total estimated net countervailing subsidy rate is de minimis as a result of the Court finding that the IPA Section 36(1) drawback program is not countervailable because the program makes a normal allowance for waste.

In the Final Determination, Commerce found that the Royal Thai government (“RTG”) system failed entirely to account for a “normal” allowance for waste that considered whether any of the scrap was recoverable or saleable. Therefore, without an accurate allowance for waste, Commerce found that this system failed the “reasonable and effective” test under 19 C.F.R. § 351.519(a)(4) because Commerce was unable to confirm that the RTG had calculated a yield factor that reflected an appropriate allowance for waste. Commerce found that where a duty exemption program does not have a reasonable and effective system in place to determine “which inputs are consumed in the production of the exported product and in what amounts,” the regulations require the full amount of the exemption to be considered as the benefit.¹ Here, Commerce found that the entire amount of the import duty exemption was countervailable.² Thus, in the Final Determination, Commerce did not apply the measure of benefit in section 351.519(a)(3), because the RTG system failed to meet the separate threshold standard in section 351.519(a)(4) that exists to address when a duty drawback system is found to be inadequate.

In the Court’s opinion, Commerce’s reasoning was circular in forcing the entire amount to be countervailed when Commerce has found that a portion (waste) was not addressed properly. The Court found that Commerce’s interpretation that the entire duty exemption is countervailable if the system allows for excessive waste, would render 19 C.F.R. §351.519(a)(3)(i) meaningless “because there could never be a situation where only the excessive portion of the exemption

¹ Commerce’s Regulation, 19 C.F.R. § 351.519(a)(4), makes clear that such a system must exist for any amount less than the entire amount of the exemption to be counted as the amount conferring a benefit:

(4) Exception. Notwithstanding paragraph (a)(3) of this section, the Secretary will consider the entire amount of an exemption, deferral, remission or drawback to confer a benefit, unless the Secretary determines that: (i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export. (Emphasis supplied).

² Final Determination, Decision Memorandum at 10, P.R. 135.

would be countervailed.” Id. at 20-21. Accordingly, the Court found that Commerce’s interpretation effectively reads 19 C.F.R. §351.519(a)(3)(i) out of the regulations. Id. at 21. In addition, the Court also determined that Commerce’s decision in this case conflicted with its decision in the parallel countervailing duty (“CVD”) proceeding involving India, where the Department only countervailed the excess portion of duty exempted on items not used in the production of the exported product (i.e., the “over-rebate”). Id. at 21.³ Commerce continues to believe that its interpretation of its regulations is correct and that its decisions are consistent with its interpretation, and that the regulations were correctly applied in this proceeding.

In the Final Determination, Commerce found that the yield factor, approved by the RTG as representative of the normal allowance for waste, did not reflect actual waste, but instead included in the allowance recoverable and saleable scrap. In Commerce’s view, by the very definition of the term "waste," a company is unable to recover, and use or sell any waste resulting from the production process. Thus, recoverable and saleable scrap cannot be considered waste, as it does have value and can be recycled or sold. In fact, SSI did sell its scrap.⁴ At verification, Commerce reviewed documents relating to the proposal and approval of SSI's yield factor.⁵ Commerce identified two other sources of independent information that addressed SSI's yield factors. The first was an independent financial review, which showed a yield factor significantly lower than that approved by the RTG. The second source was the public yield and waste information reported in the companion antidumping investigation. That information showed a yield factor below the yield factor approved by the RTG.⁶ The record shows that this flaw in the

³ In the India proceeding, Commerce concluded that, unlike here, there was a reasonable and effective system. See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from India, 66 Fed. Reg. 49635 (Sept. 28, 2001).

⁴ See SSI Verification Report at 10 (Defendant-Intervenors's Confidential Appendix at Tab 9), P.R. 116.

⁵ See RTG Verification Report at pages 9-10 and BOI Exhibit 5, P.R. 117.

⁶ Final Determination, Decision Memorandum at 9, P.R. 135.

RTG system between the yield factor and SSI's actual experience resulted in an over-stated yield loss.⁷ Commerce found that the fact that the RTG did not take into account recoverable and saleable scrap whatsoever, is critical.⁸ The evidence on the record demonstrates that the RTG did not isolate and examine what was consumed in the production of the exported products and that it did not consider in its analysis whether any of the scrap was recoverable and saleable. Commerce considered both of these elements to be essential in determining a normal allowance for waste. Thus, Commerce concluded that because the RTG's system does not account for saleable scrap even though its approach to yield factors is company-specific, the RTG's system for determining which inputs are consumed in the exported product, and in what amounts, is not reasonable or effective for the purposes intended.⁹

The Court disagreed with Commerce's finding regarding the RTG's system of accounting for waste. The Court found that Commerce's distinction between waste that can be resold as scrap and waste that cannot be resold as scrap is not supported under 19 C.F.R. §351.519(a)(3)(i) because, in the Court's opinion, it does not matter what ultimately happens to the waste, as long as there is a normal allowance for waste. *Id.* at 22. The Court found that the record evidence shows that the IPA Section 36(1) makes a normal allowance for waste, and that Commerce erred in relying on "two extraneous sources of information" to support its finding that the waste rate is excessive. *Id.* at 24. According to the Court, Commerce should have made its finding for a normal allowance for waste based on generally accepted commercial practices in Thailand pursuant to 19 C.F.R. §351.519(a)(4)(i). *Id.*

Although Commerce continues to believe that substantial evidence supports its earlier findings, in order to comply with the Court's instructions, Commerce determines for this

⁷ Final Determination at 9-10, P.R. 135.

⁸ See SSI Verification Report at 10 (Defendant-Intervenors' Confidential Appendix at Tab 9), P.R. 116; Final Determination at 9-10, P.R. 135.

⁹ Final Determination at Comment 3, P.R. 135.

redetermination that (1) Section 36(1) is reasonable and effective for the purposes intended and is therefore not fully countervailable; and that (2) there is no excessive waste to be countervailed in this program. Consequently, after removing the subsidy attributable to Section 36(1), we find that the total estimated net countervailing subsidy rate is now de minimis. However, we respectfully disagree with the limitations that this ruling places on Commerce's ability to determine when a duty drawback system is unreasonable and fully countervailable based on the inadequacies in either the accounting for waste or some other aspect of the system. While the Court's interpretation of 19 C.F.R. §351.519(a)(3)(i) narrows the focus of the analysis on the excessive portion of the duty drawback system to be countervailed, it eliminates the initial and separate threshold standard in section 351.519 (a)(4) and thus writes out of the regulations Commerce's ability to make a finding of full countervailability. We also respectfully note that this ruling limits Commerce's discretion in analyzing and determining relevant industry-specific terminology such as waste and scrap, and how it is applied and factored into the relevant duty-drawback system under investigation.

REMAND RESULTS

In accordance with the instructions of the Court in its Order, Commerce determines the total estimated net countervailing subsidy rate to be de minimis. With this change, as instructed we find that no countervailable subsidies are being provided to the production or exportation of certain hot-rolled carbon steel flat products from Thailand.

James J. Jochum
Assistant Secretary
for Import Administration

Date