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Remand
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Lightweight Thermal Paper from Germany
Papierfabrik August Koehler AG v. United States,
Court No. 11-00147, Slip Op. 14-31 (Ct. Int'l Trade March 25, 2014)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (the "Department") prepared these final results of redetermination ("Final Redetermination") pursuant to the opinion and remand order of the U.S. Court of International Trade ("CIT" or the "Court") in *Papierfabrik August Koehler AG v. United States*, Court No. 11-00147, Slip Op. 14-31 (Ct. Int'l Trade March 25, 2014) ("*Remand Order*"). This remand concerns the Department's final results in the first administrative review ("AR1") of lightweight thermal paper ("LWTP") from Germany covering the 11/20/2008 – 10/31/2009 period of review ("POR").[1] The Court set aside the *AR1 Final Results* as unlawful and ordered a new determination upon remand that conforms to the *Remand Order* and re-determines Papierfabrik August Koehler AG's ("Koehler's") margin as necessary.

The Court held that the Department's decision to disallow an adjustment to Koehler's normal value for its monthly home market rebates ("monatsbonus") was unsupported by law because the governing regulations did not give the Department the discretion not to allow for such an adjustment.[2]

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[1] *See Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 FR 22078 (April 20, 2011) ("*AR1 Final Results*") and accompanying Issues and Decision Memorandum.
[2] *See Remand Order*, Slip Op. 14-31 at 6-22.

In accordance with the Court's instructions, we reconsidered the Department's findings in the *AR1 Final Results*.[3] The Department issued draft results of redetermination ("Draft Redetermination") on May 15, 2014, and invited interested parties to comment.[4] On May 23, 2014, Koehler and petitioner, Appvion, Inc. ("Appvion", formerly Appleton Papers, Inc.) submitted comments.

In compliance with the *Remand Order*, for this Final Redetermination we recalculated Koehler's margin allowing an adjustment for the monthly rebates. Koehler's recalculated rate is 0.03 percent, which is *de minimis*.

B. BACKGROUND

On April 20, 2011, the Department published the *AR1 Final Results*, in which the Department calculated a weighted-average margin of 3.77 percent for Koehler, the sole respondent. In the *AR1 Final Results*, the Department indicated a change from the *AR1 Preliminary Results*[5] with respect to its treatment of Koehler's monthly home market rebates ("monatsbonus") reported in the field REBATE1H.[6] In the *AR1 Preliminary Results*, the Department preliminarily accepted these rebates pursuant to 19 CFR 351.102(b)(38) and 351.401(c), which govern certain adjustments to normal value.[7] However, based upon further review of the information on the record and consideration of interested parties' comments, the Department determined that a price adjustment for the monthly rebates reported by Koehler was

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[3] The Department respectfully disagrees with the Court that the Department does not have the discretion to disallow an adjustment to Koehler's normal value for Koehler's monthly rebates and is conducting this remand under respectful protest. *See Viraj Group v. United States*, 343 F.3d 1371 (Fed. Cir. 2003) ("*Viraj*").

[4] *See* Draft Results of Redetermination in the Antidumping Duty Administrative Review of Lightweight Thermal Paper from Germany; 11/01/2008 – 10/31/2009 (May 15, 2014) ("Draft Redetermination").

[5] *See Lightweight Thermal Paper From Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 77831 (December 14, 2010) ("*AR1 Preliminary Results*").

[6] *See AR1 Final Results*, 76 FR at 22079, and accompanying Issues and Decision Memorandum at Comment 3.

[7] *See AR1 Preliminary Results*, 75 FR at 77835-36; *see also* Memorandum entitled, "Calculation Memorandum for the Preliminary Results -- Koehler," dated December 7, 2010 ("Calculation Memorandum for the Preliminary Results -- Koehler").

not supported by record evidence.[8] Specifically, the Department determined that, pursuant to its interpretation of the regulations, the preamble to the regulations, and its practice, Koehler failed to demonstrate that its monthly rebates were legitimate, *i.e.*, that its home market customers were aware of the terms and conditions of the rebates at the time of the sale.[9] Accordingly, the Department disallowed the monthly rebates reported in the field REBATE1H for the *AR1 Final Results*.[10]

Koehler challenged the *AR1 Final Results* in the CIT arguing that the Department acted contrary to the plain meaning of the regulations and wrongfully applied a test to determine whether its rebates were "legitimate".[11] On March 25, 2014, the Court agreed with Koehler and set aside the *AR1 Final Results*.[12]

In its decision, the court held that:

> In the situation presented by this case, Commerce lacked the discretion not to recognize a reduction in the purchaser's net outlay for the foreign like product that satisfied the definition of "price adjustment" in § 351.102(b)(38). 19 C.F.R § 351.401(c) ("In calculating . . . normal value (where normal value is based on price), the Secretary *will use* a price net of *any* price adjustment, as defined in § 351.102(b) . . ." (emphasis added)). As plaintiff notes, "[t]he term 'will' is of an 'unmistakably mandatory character.'" Pl.'s Supplemental Br. 3 (citing *Hewitt v. Helms*, 459 U.S. 460, 471 (1983)). Giving as examples "discounts, rebates, and post-sale price adjustments," the regulations set forth a broad definition of price adjustment encompassing "any change in the price charged for . . . the foreign like product" that "are reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38) (emphasis added). Here, §351.401(c) did not permit Commerce to use a home market price for the foreign like product that was not net of any price adjustment satisfying the § 351.102(b)(38) definition. The Decision Memorandum reaches the opposite conclusion by relying on irrelevant findings and on erroneous reasoning.[13]

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[8] *See AR1 Final Results*, 76 FR at 22079, and accompanying Issues and Decision Memorandum at Comment 3.
[9] *See id.*
[10] *See id.*
[11] *See Remand Order*, Slip Op. 14-31 at 8 (summarizing Koehler's arguments).
[12] *See id.* at 20.
[13] *Id.* at 10 (internal footnote omitted).

The Court also disagreed with the Department's arguments concerning the preamble to the regulations and its past practice, holding that the plain meaning of the regulations did not give the Department the discretion not to allow for Koehler's requested monthly rebate adjustments.[14] For these reasons, the Court directed the Department to reconsider its *AR1 Final Results* in light of the *Remand Order* and to re-determine Koehler's margin as necessary.[15]

In the Draft Redetermination, in accordance with the *Remand Order*, we recalculated Koehler's margin allowing an adjustment for the monthly rebates, which resulted in a *de minimis* recalculated rate for Koehler of 0.03 percent.[16] The Department invited interested parties to comment on the Draft Redetermination, and on May 23, 2014, Koehler and petitioner submitted comments.[17] On June 4, 2014, Koehler submitted rebuttal comments to petitioner's May 23, 2014 comments.[18] On June 5, 2014, the Department rejected this submission because it had not provided parties an opportunity to submit rebuttal comments in this remand proceeding.[19]

C. FINAL RESULTS OF REDETERMINATION

As described above, the Court disagreed with the Department's interpretation of 19 CFR 351.102(b)(38) and 351.401(c), under which the Department disallowed Koehler's monthly home market rebates as an adjustment to its normal value. While we respectfully disagree with the Court's finding, based on the Court's reasoning, we find that there is no alternative but to alter our *AR1 Final Results* and allow Koehler's monthly home market rebate adjustment on

[14] *See id.* at 10-19.
[15] *See id.* at 22.
[16] *See* Draft Redetermination at 4-5.
[17] *See* Koehler's May 23, 2014 comments on Draft Results of Redetermination; Petitioner's May 23, 2014 comments on Draft Results of Redetermination.
[18] *See* Antidumping Duty Administrative Review of Lightweight Thermal Paper (LWTP) from Germany Remand Proceeding: Rejection of Submission Filed by Papierfabrik August Koehler AG (Koehler) (June 5, 2014) (rejecting Koehler's June 4, 2014 submission).
[19] *See id.* (citing *Cover Letter Accompanying Draft Results of Redetermination in the Antidumping Duty Administrative Review of Lightweight Thermal Paper: 11/201/2008 – 10/31/2009*, May 15, 2014).

remand. Our decision in this regard is based on the Court's holding that the plain language of the regulation does not allow the Department the discretion to determine whether certain rebates are legitimate for purposes of determining an adjustment to normal value. As a result, we recalculated Koehler's margin allowing an adjustment to its normal value for the monthly rebate.[20] This adjustment changed Koehler's calculated margin from 3.77 percent to 0.03 percent, which is *de minimis*.

D. INTERESTED PARTY COMMENTS

In its comments, Koehler states that it agrees with the Department's Draft Redetermination and indicates that this determination was consistent with the Court's instructions.[21]

In its comments, petitioner indicates that it disagrees with the Court's decision in this remand that Koehler's "monatsbonus" monthly rebate must be treated as a "price adjustment" pursuant to 19 CFR 351.401(c), and states that it reserves the right to appeal this decision.[22]

Petitioner notes that it previously argued in the original review that if the Department allowed an adjustment for the "monatsbonus" monthly rebate, it should reallocate this rebate to all sales to the relevant customer.[23] Petitioner cites its argument from the *AR1 Final Results*:

> Petitioner argues that, even if the Department determines not to reject amounts reported in the REBATE1H field as post-sale price adjustments, it should, at the very least, reallocate those rebate amounts to sales of all thermal paper to a certain customer, rather than solely to sales of the KT 48 F20 product. Petitioner states that such a reallocation is appropriate because Koehler has not demonstrated that the amount of the rebate is linked directly and exclusively to purchases of the KT 48 F20 product.[24]

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[20] *See Viraj*, 343 F.3d 1371.
[21] *See* Koehler's May 23, 2014 comments on Draft Results of Redetermination at 2.
[22] *See* Petitioner's May 23, 2014 comments on Draft Results of Redetermination at 1.
[23] *See id.* at 2. The business proprietary version of petitioner's comments discusses the details regarding specific Koehler customers.
[24] *See id.* at 3-4 (quoting *AR1 Final Results* and accompanying Issues and Decision Memorandum at Comment 4).

Petitioner points out that because the Department disallowed this rebate in the *AR1 Final Results*, it did not address this issue.[25] Moreover, petitioner points out that the Court did not address this point in the *Remand Order*, and thus the Department may consider this issue in the first instance.[26] Petitioner therefore provides three reasons why the "monatsbonus" monthly rebate should be reallocated to all reported sales to the relevant customer.

First, petitioner argues that the Department does not have to accept Koehler's monthly rebates as reported because Koehler retroactively assigned the rebates in order to eliminate its dumping margin.[27] Petitioner states that Koehler limited its U.S. sales to a single product, KT 48 F20, and sold a small amount of identical merchandise in the home market; thus, a small number of home market sales formed the sole basis for normal value.[28] Moreover, petitioner argues that Koehler's monthly home market rebate was distinct from other rebates that Koehler provided because it was limited to a single product, and it was adjusted after the sales were made.[29] Petitioner argues that this allowed Koehler to control net prices for a small set of matching sales on a *post facto* basis.[30]

According to petitioner, Koehler never demonstrated that this "monatsbonus" monthly rebate had any legitimate commercial purpose.[31] Petitioner agrees with the Department's findings from the *AR1 Final Results* that this "is not a legitimate rebate program that should be treated as a price adjustment for this review."[32] Petitioner argues that in situations involving retroactive rebates with the potential for manipulation, that Department's long-standing practice,

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[25] *See id.* at 4.
[26] *See id.* at 4-5.
[27] *See id.* at 6-8.
[28] *See id.* at 6.
[29] *See id.* at 6-7.
[30] *See id.* at 7.
[31] *See id.*
[32] *See id.* at 8 (citing *AR1 Final Results* and accompanying Issues and Decision Memorandum at Comment 3).

up until the Court issued its opinion in this case, had been to disallow such illegitimate rebates altogether.[33] Petitioner argues that even if the Department cannot disallow the rebate, the Department still has the authority to address manipulation, which it can do through reallocation of the rebates.[34]

Second, petitioner argues that nothing in the regulations requires the Department to accept Koehler's rebate as reported, especially when doing so would allow Koehler to manipulate its normal value.[35] Petitioner argues that the "monatsbonus" monthly rebate is not related solely to sales of KT 48 F20, as these rebates were not paid according to any agreement, nor were the terms established at the time of sale.[36] Moreover, petitioner argues that there is not a positive correlation between the amount of KT 48 F20 sold and the amount of the rebate. Petitioner points out that there is an inverse relationship between the monthly rebate percentage and the purchase quantities of KT 48 F20, which demonstrates that Koehler paid the rebates for the purpose of manipulating its dumping margins, rather than incentivizing customer purchases.[37] According to petitioner, this demonstrates that Koehler's allocation of the "monatsbonus" monthly rebates is to eliminate dumping margins, and therefore, the Department should attribute the monthly rebate payments to sales of all products to the relevant customer.[38]

Third, petitioner argues that the Department does not have to accept Koehler's reported methodology for allocating the monthly rebates because doing so would cause inaccuracies or distortions.[39] Petitioner points out that in accordance with 19 CFR 351.401(g), the general preference is that price adjustments should be reported on the most specific basis possible, *i.e.*,

[33] *See id.*
[34] *See id.*
[35] *See id.* at 9-10.
[36] *See id.* at 9.
[37] *See id.* at 9-10.
[38] *See id.* at 10.
[39] *See id.* at 10-12.

"transaction-specific", or on as specific a basis as is feasible.[40] In addition, petitioner states that the regulation requires that the selected methodology not cause distortions or inaccuracies.[41] According to petitioner, Koehler's rebates are not "transaction-specific" because Koehler issues a single "monatsbonus" credit to its respective customer at the end of each month that applies to all shipments of KT 48 F20 during that month.[42] Petitioner argues that Koehler's methodology for allocating the "monatsbonus" monthly rebate on a monthly basis only to sales of KT 48 F20 may be more "specific" than allocating to all sales; however, this method is distortive and inaccurate "because it arbitrarily ascribes the rebate solely to sales of KT 48 F20."[43] Petitioner once again argues that there was no rebate agreement in place at the time of sale that would dictate the amount of the rebate paid, and thus, Koehler's motivation in providing rebates to its customers on the KT 48 F20 product was to manipulate its normal value.[44]

Petitioner concludes that the Department should find that the allocation methodology used by Koehler causes "inaccuracies or distortions".[45] Therefore, petitioner argues that the Department should allocate the "monatsbonus" monthly rebate using the most specific methodology that does not result in "inaccuracies or distortions" by assigning the "monatsbonus" monthly rebate to all sales of all products (including non-matching products) to the relevant customer during the month.[46] Petitioner notes that there are no relevant cases that the Department can look to for past practice, because up until this case, the Department was able to

[40] *See id.* at 10.
[41] *See id.* at 10-11.
[42] *See id.* at 11.
[43] *See id.* (emphasis omitted).
[44] *See id.*
[45] *See id.*
[46] *See id.*

disallow distortive rebates in their entirety.[47] Nonetheless, petitioner argues that the Department should make the reallocation in this Final Redetermination.

Department's Position

We disagree with petitioner that we should reallocate the rebate at issue to all sales to the relevant customer and, thus, we will continue to allocate Koehler's rebates as reported in its home market sales database.

In its comments, petitioner argues, as it did in the underlying review, that we should not accept Koehler's rebates as reported on a model-specific basis, and instead reallocate the rebates to all sales of paper to a given customer. Petitioner argues that Koehler's rebates were intended to manipulate its dumping margin. Similarly, petitioner argues that Koehler's attribution of the rebates solely to sales of the matching product was intended to manipulate the dumping margin, thus causing inaccuracies or distortions under 19 CFR 351.401(g). We note that although this issue was raised in the *AR1 Final Results*, because we disallowed Koehler's rebates in their entirety, we did not address petitioner's arguments at that time.[48] Thus, we address these comments now in the first instance.

As an initial matter, while we agree with petitioner that the "monatsbonus" is not a legitimate rebate for purposes of this antidumping proceeding, the court stated that "the regulations do not merely 'allow,' but require, Commerce to treat these rebates as post-sale price adjustments,"[49] and that "Commerce lacked the discretion not to recognize a reduction in the purchaser's net outlay for the foreign like product that satisfied the definition of a 'price

[47] *See id.* at 11-12.
[48] *See AR1 Final Results,* and accompanying Issues and Decision Memorandum at Comment 4.
[49] *Remand Order,* Slip Op. 14-31 at 12.

adjustment' in § 351.102(b)(38). 19 C.F.R. § 351.401(c)."[50] Therefore, under this interpretation of 19 CFR 351.102(b)(38) and 351.401(c), the Department does not have the discretion to consider the legitimacy of, and therefore the possible manipulation of the dumping margin through, such rebates.[51]

In considering petitioner's argument that we can address the possible manipulation of Koehler's dumping margin through reallocation of its reported rebates, we note that 19 CFR 351.401(g) of the Department's regulations indicates that in accepting price adjustments, such as rebates, the Department will rely on transaction-specific reporting if available, but if such transaction-specific reporting "is not feasible", then we may consider allocated price adjustments provided that we are satisfied that the allocation method "does not cause inaccuracies or distortions." 19 CFR 351.401(g)(2) and (3) further provide that a party seeking a price adjustment on an allocated basis must demonstrate to the Department's satisfaction that the allocation methodology used is on as specific a basis as is feasible and does not cause inaccuracies or distortions. The Department will make this determination by taking into account the respondent's records in the ordinary course of business, as well as normal generally accepted accounting principles ("GAAP") in the country and industry in question, and the number of sales made by the party during the POR.[52]

Koehler did not report its monthly rebates on a transaction-specific basis; however, Koehler reported that its monthly home market rebate program is: 1) comprised of a customer-

[50] *See id.* at 10 (parenthetical omitted).
[51] *See id.* at 16 (". . .the Decision Memorandum places on Koehler the burden of showing entitlement to a price adjustment 'by demonstrating that . . .(2) the monatsbonus was established in the ordinary course of business solely for legitimate commercial purposes.' The practice variously described in the Decision Memorandum imposes requirements unsustainable under the governing regulations, 19 C.F.R. § 351.401(c) and § 351.102(b)(38).") (internal quotation marks and citation omitted); *see also id.* at 10 ("...§ 351.401(c) did not permit Commerce to use a home market price for the foreign like product that was *not* net of any price adjustment satisfying the § 351.102(b)(38) definition." (emphasis in original)).
[52] *See* 19 CFR 351.401(g)(3).

specific rebate percentage, 2) changed and applied on a monthly basis, and 3) product-specific (only the KT 48 F20 product).[53] Koehler also explained that it tracks its monthly, quarterly, and yearly rebates in the normal course of business on a customer-specific basis.[54] For the Draft Redetermination, we accepted Koehler's reported allocation. Consistent with 19 CFR 351.401(g), we continue to find that Koehler's reported allocation methodology is on as specific a basis as is feasible, based on how it tracks these rebates in its normal course of business, and therefore, continue to apply the allocation method from the Draft Redetermination. Applying the total rebate amounts to all sales as suggested by petitioner would be unrelated to Koehler's actual commercial practices, and less specific than currently reported. Moreover, we do not have any clear practice with respect to reallocating these rebates as suggested by petitioner. Therefore, we have not made the reallocation proposed by petitioner.

E. CONCLUSION

In accordance with the Court's *Remand Order*, we allowed an adjustment to Koehler's normal value for the monthly rebate and recalculated Koehler's margin. This adjustment changed Koehler's calculated margin from 3.77 percent to 0.03 percent, which is *de minimis*.

Ronald K Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

June 20, 2014
Date

[53] *See* Koehler's February 16, 2010 Section B sales response at 22; Koehler's April 15, 2010 supplemental questionnaire response at 14 – 20; and Koehler's August 15, 2010, second supplemental questionnaire response at 7 – 10.

[54] *See* Koehler's November 15, 2010 3rd Section B – C Supplemental response at 3.