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International Trade Administration
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Investigation
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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman 
Senior Advisor
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Investigation of Large Residential Washers from Mexico

Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of large residential washers (washers) from Mexico. As a result of this analysis and/or based on our findings at verification, we have made changes to the margin calculations for the only cooperative respondent in this case: Electrolux Home Products, Corp. NV/Electrolux Home Products De Mexico, S.A. de C.V. (Electrolux). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation on which we received comments from parties.

General Issues

1. Scope Exclusion of Smaller Top-Load Washers
2. Request to Exclude Larger-Width Washers from the Scope

Company-Specific Issue

3. Electrolux's Affiliated Party Transactions

Background

On August 3, 2012, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value (LTFV) investigation of large residential washers from Mexico. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers from Mexico, 77 FR 46401 (August 3, 2012) (Preliminary Determination). The period of investigation (POI) is October 1, 2010, through September 30, 2011.



We invited parties to comment on the Preliminary Determination. We received comments from the petitioner¹ and Electrolux.² Both parties withdrew their requests for a hearing, so no hearing was held in this case. Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margin for Electrolux from that presented in the Preliminary Determination.

The Department originally extended the deadline for this final determination until December 16, 2012. As explained in the memorandum from the Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days. The revised deadline for the final determination of this investigation is now December 18, 2012.³

Margin Calculations

We calculated constructed export price (CEP) and normal value (NV) for Electrolux using the same methodology stated in the Preliminary Determination, except as follows below.

Electrolux

We revised the reported U.S. and comparison-market sales data, where appropriate, to take into account our findings from the sales verification. See revised sales databases submitted on October 22 and 24, 2012. We made additional revisions as noted below:

- For Electrolux's comparison-market sales, we deducted from the reported gross unit prices an additional rebate amount CREBATE1T (which was reported as a correction at verification).
- For Electrolux's U.S. sales, we deducted from the reported gross unit prices an additional rebate amount REBATE3U (which was reported as a correction at verification).

For further details, see Memorandum to the File entitled "Final Determination Margin Calculation for Electrolux Home Products Corp., N.V./Electrolux Home Products De Mexico, S.A. de C.V. (collectively "Electrolux")," dated concurrently with this memorandum.

We made the following change to Electrolux's reported cost data based on our verification findings:

¹ The petitioner in this investigation is Whirlpool Corporation (Whirlpool).

² Electrolux submitted a case brief and Whirlpool submitted a rebuttal brief.

³ See Memorandum to the Record from Paul Piquado, AS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Hurricane," dated October 31, 2012.

- For a model sold but not produced during the POI, we used the revised surrogate total cost of manufacturing.

For further details, see Memorandum to the File entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Electrolux Home Products Corp., N.V./Electrolux Home Products De Mexico, S.A. de C.V.,” dated concurrently with this memorandum.

Discussion of the Issues

I. General Issues

Issue 1: *Scope Exclusion of Smaller Top-Load Washers*

Prior to the preliminary determinations of the antidumping (AD) investigations of washers from Mexico and Korea, and the countervailing duty (CVD) investigation of washers from Korea, the petitioner requested that the Department exclude smaller top-load washers (*i.e.*, washers with vertical rotational axes and a rated capacity of less than 3.70 ft³) from the scope of the investigations. Based on the comments received from interested parties and the information provided to the Department by U.S. Customs and Border Protection (CBP), we amended the scope of the AD investigations in the AD preliminary determinations to exclude smaller top-load washers. We subsequently amended the scope of the CVD investigation to exclude this merchandise on July 31, 2012.⁴

LG maintains that the Department improperly modified the scope of these investigations, and should reincorporate smaller top-load washers into the scope of the investigations. LG acknowledges that the Department’s standard practice is to provide ample deference to the petitioner with respect to the definition of the product for which it seeks relief during the investigation phase of an AD or CVD proceeding. Nevertheless, LG maintains that there are limits to such deference, and that in this case the Department should reverse its decision to exclude smaller top-load washers from the scope. Additionally, LG maintains that excluding smaller top-load washers substantially alters the scope of the investigations and raises serious concerns as to whether the International Trade Commission (ITC) made its preliminary injury determination based upon a scope that is significantly different from the revised scope of the investigations. Furthermore, LG argues that the Department should determine that interested parties were deprived of the procedures of notice and comment integrated in AD and CVD laws because the exclusion request was made so late in the proceedings, and suggests that the delay in the petitioner’s scope exclusion request could have negative implications on the ITC’s final injury determinations. Finally, LG contends that the Department should not reward what it characterizes as a deliberate attempt on behalf of the petitioner to inflate the margin by excluding a substantial number of washer sales which would otherwise be subject to scope of the investigations.

⁴ See Large Residential Washers from the Republic of Korea: Amendment to the Scope of the Countervailing Duty Investigation, 77 FR 46715 (August 6, 2012).

The petitioner maintains that the Department should reject LG's request to reverse its scope exclusion decision because no overarching reasons have arisen since the preliminary determinations which support reversing the decision, and the petitioner continues not to have an interest in obtaining AD or CVD relief on smaller top-load washers. Moreover, the petitioner argues that LG's claim that the scope exclusion threatens the legitimacy of the investigations is speculative given that the Department has revised the scope language between the ITC's preliminary and final determinations in numerous past cases without hindering the legitimacy of those cases.⁵ Additionally, the petitioner claims that, in the event that the smaller top-load washers had been included in the scope of the investigations at the AD preliminary determinations, there would have been a minor or nonexistent difference in the actual margin calculated because LG had only a small volume of U.S. sales of smaller top-load washers during the POI and Samsung had none. Accordingly, the petitioner argues that LG's claim that the scope exclusion substantially altered the present investigations is unsubstantiated, and does not support the reversal of the Department's scope exclusion decision.

Department's Position:

We disagree with LG, and for the reasons explained below, have continued to exclude smaller top-load washers from the scope of the investigations in the final determinations.

If the Department and ITC determine in an investigation that the implementation of an AD or CVD order is warranted, one of the purposes of the investigation is to determine that the scope of that order adequately reflects the product(s) for which the domestic industry is seeking relief, and excludes those products for which the petitioner does not seek relief.⁶ Therefore, as acknowledged by LG and the petitioner, the Department's practice is to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during the investigation phase of an AD or CVD proceeding.⁷

⁵ See, e.g., Narrow Woven Ribbons with Woven Selvedge from Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 FR 7236, 7240-41 (February 18, 2010); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Live Swine From Canada, 69 FR 61639, 61640-41 (October 20, 2004).

⁶ See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977, 33979 (June 16, 2008) (excluding products which fell within the general scope definition, but for which the petitioner did not seek relief); see also Initiation of Antidumping Duty Investigations: Spring Table Grapes from Chile and Mexico, 66 FR 26831, 26832-26833 (May 15, 2001) (Spring Table Grapes from Chile).

⁷ See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 51788, 51789 (September, 5 2008); Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products From Canada, 67 FR 15539 (April 2, 2002), and accompanying Issues and Decision Memorandum at Scope Issues (stating that the Department possesses the authority to define or clarify the scope of an investigation throughout the investigation); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Outboard Engines from Japan, 69 FR 49863, 49871 (August 12, 2004) (citing Final Determination of Sales at Less Than Fair Value: Certain Carbon Alloy Wire Rod from Japan, 59 FR 5987, 5988-5989 (February 9, 1994) and accompanying Issues and Decision Memorandum at Comment 1); and Allegheny Bradford Com. v. United States, 342 F. Supp. 2d 1172, 1187-88 (CIT 2004) (Allegheny) (explaining the deference given to the Department in

Additionally, section 732(b)(1) of the Act states that a “petition may be amended at such time, and upon such conditions, as the administering authority . . . may permit.”⁸ Nevertheless, the Court of International Trade (CIT) has indicated that, at a certain point in an investigation, significant changes to the scope can raise a number of procedural concerns, such as whether or not injury has been or can be properly determined based on a revised scope.⁹ As such, in determining the scope of an investigation, the Department must not only focus on whether the language of the scope contains a clear physical description of the products for which the petitioner seeks relief (as well as any exclusions), but also the Department must consider whether the scope language is administrable.

The Department granted the petitioner’s request to exclude smaller top-load washers from the scope because, *inter alia*, the scope modification: (1) consisted of a scope reduction rather than expansion; (2) contained an exclusion that was based on a specific physical characteristic of the products for which the petitioner sought exclusion (*i.e.*, washers with vertical rotational axes and a rated capacity less than 3.70 ft³); and (3) CBP indicated that the scope exclusion request would be administrable, as the request specifically described the method by which the product would be determined to be out of the scope. We also found it contrary to the intent of AD and CVD laws to include products within the scope for which a petitioner has specifically stated that it does not wish to seek relief.¹⁰

We disagree with LG that the timing of the petitioner’s exclusion request potentially threatens the conduct of future investigations and deprived the parties in the washers investigations of an opportunity to adequately defend their interests. The petitioner submitted its exclusion request before the issuance of any of the preliminary determinations in the washers investigations. Therefore, there was adequate opportunity for LG and the other parties to respond to the exclusion request and provide commentary on whether or not such an exclusion should be granted.¹¹ Moreover, as noted by the petitioner, the scope may often change during the course of the ITC’s investigation without necessarily complicating the ITC’s final injury determination. As a result, we have concluded that if the petitioner does not seek relief from imports of smaller top-load washers, then the inclusion of those washers in the scope of the investigations and possible AD and CVD orders does not appear to be warranted.

determining the scope of AD and CVD orders).

⁸ See also Section 702(b)(1) of the Act.

⁹ See Smith Corona Corp. v. United States, 796 F. Supp. 1532, 1535 (CIT 1992); and Allegheny, 342 F. Supp. 2d at 1187-88.

¹⁰ See Spring Table Grapes from Chile, 66 FR at 26833 (stating the domestic industry is in the best position to identify the imports that they compete against and believe to be unfairly traded).

¹¹ See Smith Corona Corp., 796 F. Supp. at 1535 (in which the CIT held that there are various procedural safeguards included in the administration of AD and CVD laws which provide parties with the opportunity to respond and be heard during the course of a proceeding, all which applied in this case).

Finally, the motivations of the petitioner in requesting a scope exclusion is not a factor which the Department has been tasked by Congress to consider as part of its analysis. The records of the washers investigations contain no evidence of manipulation on the part of the petitioner, and we otherwise find no reason to question the fact that the petitioner is not requesting relief from the potential harm caused by smaller top-load washers exported from Korea and Mexico. Accordingly, we have continued to exclude smaller top-load washers from Korea and Mexico from the scope of the investigations.

Issue 2: *Request to Exclude Larger-Width Washers from the Scope*

LG argues that the Department should exclude larger-width washers (*i.e.*, washers with widths of 29 inches or greater) from the scope of the investigations. LG asserts that the Department possesses the inherent authority to revise the scope of an investigation during an ongoing proceeding,¹² and notes that in accordance with section 732(b)(1) of the Act, “a petition may be amended at such time, and upon such conditions as the Department and ITC may permit.” Additionally, LG asserts that, while one of the main purposes of AD and CVD laws is to provide relief to industries from unfair trade practices, the Department’s practice is to exclude merchandise covered under the scope which the petitioner lacks interest.¹³ In light of the fact that neither the petitioner nor any U.S. producer manufactures larger-width washers, LG maintains that the petitioner cannot have an actual interest in seeking AD and CVD duty relief on larger-width washers. While LG acknowledges that the petitioner is not required to produce every single permutation of products within the scope,¹⁴ it maintains that larger-width washers are not produced or sold in the United States, and represent a new class of products that are physically different from the other products covered under the scope of the investigations. Furthermore, LG acknowledges that the petitions¹⁵ cover washers up to 32 inches in width. Nevertheless, in response to the petitioner’s argument that products are often included in the scope of an investigation because they are similar and competitive with domestic products, LG argues that this line of reasoning is inapplicable to larger-width washers because they were not produced and sold in the United States when the petitions were filed, and have only been recently sold in the United States by LG. Finally, LG maintains that the rationale behind the petitioner’s request to exclude smaller top-load washers (*i.e.*, because they were not sold in the United States and the petitioner did not have an interest in seeking AD and CVD relief for them) is analogous to the rationale behind LG’s scope exclusion request with respect to larger-width washers.

¹² See Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value, 50 FR 45447, 45449 (October 31, 1985).

¹³ See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27323 (May 19, 1997).

¹⁴ See Aluminum Extrusions From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 18524, 18532 (April 4, 2011).

¹⁵ See Petitions for the Imposition of Antidumping and Countervailing Duties: Large Residential Washers from the Republic of Korea and Mexico, dated December 30, 2011.

The petitioner opposes LG's request that larger-width washers be excluded from the scope of the investigations. Citing Ad Hoc Shrimp Trade Action Comm. v. United States, 637 F. Supp. 2d 1166, 1174 (CIT 2009), the petitioner maintains that the Department should give deference to the scope of the petition and the petitioner when analyzing scope modification requests. In light of the fact that excluding larger-width washers would be contrary to scope of the petitions and the petitioner's expressed intent in including them within the scope, the petitioner contends that the Department should deny LG's scope modification request.¹⁶ The petitioner maintains that it is not required to produce every individual product within the scope, and notes that the Department has repeatedly rejected claims to modify the scope of a petition based on the fact that the product has not been produced in the United States.¹⁷ Moreover, the petitioner argues that LG failed to support its assertion that larger-width washers represent a different class of product from the other products covered in the scope, particularly in regards to the Department's Diversified Products analysis.¹⁸ The petitioner also argues that any attempt to demonstrate that larger-width washers constitute a different class or kind of products would be unsuccessful because they fall squarely within, and compete directly with, the class of products included in the scope of the petitions. Furthermore, the petitioner argues that LG's assertion that larger-width washers were not produced in the United States is inaccurate given that the petitioner offered a larger-width washer with a rated capacity of 5.30 cubic feet for sale to an OEM customer.

Department's Position:

We disagree with LG, and for the reasons explained below, have not excluded larger-width washers from the scope of the investigations in the final determinations.

As stated above in Issue 1, the Department's practice is to provide ample deference to the petitioner with respect to the definition of the product for which it seeks relief under the AD and CVD laws. Absent an "overarching reason to modify" the scope in the petition, the Department accepts the scope as proposed.¹⁹ Although the Department has the authority to define the scope of an investigation, that authority cannot be used to deprive the petitioner of relief with respect to

¹⁶ See Notice of Final Determination of Sales at Less Than Fair Value: Outboard Engines From Japan, 70 FR 326 (January 4, 2005), and accompanying Issues and Decision Memorandum at Comment 2.

¹⁷ See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Prestressed Concrete Steel Wire Strand From Mexico, 68 FR 42378, 42379 (July 17, 2003) (Prestressed Concrete Steel Wire Strand from Mexico).

¹⁸ See 19 CFR 351.225(k)(2). See also Diversified Products Corporation v. United States, 572 F. Supp. 883, 887 (CIT 1983) (Diversified Products).

¹⁹ See Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011), and accompanying Issues and Decision Memorandum at Comment 1; Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 51788, 51789 (September, 5 2008); Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 12; and Mitsubishi Heavy Industries, Ltd. v. U.S., 986 F. Supp. 1428 (CIT 1997).

products the petitioner clearly and explicitly intended to be included in the investigation, unless the resulting order would be otherwise unadministrable. Therefore, without the petitioner's consent, the Department has rarely used its authority to narrow the scope of an investigation.²⁰

In this case, the plain language of the scope explicitly states that "large residential washers" denotes all automatic clothes washing machines, regardless of the orientation of the rotational axis, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and ***no more than 32.0 inches*** (81.28 cm) (emphasis added). Given the clarity of this language, and the absence of any overarching reasons to modify it, we find no reason to amend the scope language by excluding larger-width washers (*i.e.*, washers with widths of 29 inches or greater) which are clearly included in the scope. Moreover, the statute does not require the petitioner to produce every type of product covered by the scope of the investigation.²¹ Thus, while a petitioner is required to produce the domestic like product, it need not produce every permutation or model of the domestic like product. Furthermore, the petitioner has expressed its intent to continue to seek AD and CVD relief on larger-width washers. Accordingly, based on our analysis of the descriptions of the merchandise in the petitions, we find no reason to exclude larger-width washers from the scope of the investigations.

II. Company-Specific Issue

Issue 3: Electrolux's Affiliated Party Transactions

Electrolux purchases all of its labor and overhead services from three affiliated Mexican companies: Appliance Electrolux de Juarez S.A. de C.V. (MXH), Servicios Electrolux de Juarez S.A. de C.V. (MXS), and Electrolux Home Products de Mexico S.A. de C.V. (MXP). Each of these companies charges Electrolux for its services at full cost plus an pre-established markup. In Electrolux's audited financial statements, the cost of these services is captured at the full value charged by the affiliates inclusive of the markup. In reporting labor and overhead costs to the Department, Electrolux excluded the markup and reported only the affiliates' costs. In the Preliminary Determination, we adjusted Electrolux's reported direct labor, variable overhead and fixed overhead costs to reflect the transfer prices charged by MXH, MXS and MXP, in accordance with section 773(f)(2) of the Act.²²

²⁰ Prestressed Concrete Steel Wire Strand from Mexico, 68 FR at 42379 (July 17, 2003), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico, 68 FR 68350 (December 8, 2003).

²¹ Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 19400, 19402 (April 13, 2004), unchanged in Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 5; Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan; 65 FR 42985 (July 12, 2000), and accompanying Issues and Decision Memorandum at Comment 1; and Prestressed Concrete Steel Wire Strand from Mexico at 42379.

²² See Memorandum to Neal M. Halper from Robert B. Greger, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Electrolux Home Products Corp., N.V. and Electrolux Home Products, Inc.," dated July 27, 2012 (Preliminary Determination Cost Calculation Memo).

Electrolux argues that the Department should not include the internal mark-ups on the labor and overhead services provided by its affiliates in the reported cost of production. Electrolux asserts that because these markups are entirely internal accounting entries between legal entities that exist solely to comply with Mexican tax law, they should not be treated as production costs under the antidumping law. Rather, according to Electrolux, the Department should recognize that in substance all of Electrolux's Mexican companies function as a single operational entity, *i.e.*, BMX, and it should therefore base the reported costs on the actual costs incurred for labor and overhead, rather than the full amount charged.

Electrolux asserts that the manufacturer of the subject merchandise is BMX, a division of Electrolux Home Products Corp., NV (BEE). Electrolux maintains that BMX owns all of the production machinery and equipment at the plant in Mexico where the subject merchandise is produced, and purchases all of the materials and components used in production. Electrolux adds that MXP, MXH and MXS provide the management, labor and overhead services to operate the plant using the equipment and materials owned by BMX. Electrolux notes that BEE, MXP, MXH and MXS are all ultimately owned by AB Electrolux, which is the ultimate parent of all Electrolux companies.

This legal structure notwithstanding, Electrolux argues, the substance of the operation is that MXP, MXH and MXS are "paper" entities that are subsumed within the operations of BMX. Electrolux holds that these companies do not have separate physical locations, but rather operate under the same roof and with the same management as BMX. Thus, Electrolux infers, all of their operations are interwoven and completely integrated. Moreover, Electrolux asserts, MXP, MXH and MXS exist solely to provide contract services to BMX, and provide no goods or services to any outside entity.

Electrolux cites section 773(b)(3) of the Act and argues that the internal markups are not part of the cost of materials and fabrication of the subject merchandise, but rather only paper accounting entries made to comply with Mexican regulations. Further, Electrolux contends, the markups are not actual costs associated with the production and sale of the merchandise under consideration as stipulated under section 773(f)(1)(A) of the Act. Rather, Electrolux posits, the markups are simply internal allocations among legal entities that are ultimately owned by the same parent company and, as such, they do not reasonably reflect BMX's actual production costs.

Additionally, Electrolux disagrees with the Department's citation to section 773(f)(2) of the Act (*i.e.*, the transactions disregarded rule) as the basis for its adjustment in the Preliminary Determination.²³ Electrolux notes that section 773(f)(2) allows the Department to disregard transactions between affiliated parties when they are not deemed to be at arm's length. However, according to Electrolux, the Department is not "disregarding" any transaction between affiliates in this case. Rather, Electrolux argues, it is doing the exact opposite by including an accounting charge between 100-percent-owned affiliates that does not represent a transaction in any meaningful sense. Electrolux asserts that section 773(f)(3) of the Act (*i.e.*, the major input rule)

²³ See Preliminary Determination Cost Calculation Memo at page 1.

likewise does not provide any support for this adjustment, as none of the services provided by MXP, MXH or MXS qualifies as a major input to the production of the subject merchandise.

Electrolux cites the Memorandum to The File entitled “Verification of the Cost Response of Electrolux Home Products, Corp N.V. and Electrolux Home Products, Inc. in the Antidumping Investigation of Bottom Mount Combination Refrigerator-Freezers from Mexico,” dated December 22, 2011, and asserts that the Department was presented with the exact same fact pattern in the bottom mount refrigerators investigation. Electrolux notes that the Department did not question its reliance on the consolidated labor and overhead costs in that proceeding, and hence did not make any adjustment to include the inter-company markups in the reported costs. Accordingly, Electrolux asserts that it fails to see how the Department’s position in the current proceeding can be reconciled with its position in the bottom mount refrigerators investigation when the essential facts have not changed.

Electrolux argues that the Department’s treatment of the internal markups in the Preliminary Determination is also inconsistent with its practice regarding the collapsing of affiliated entities. According to Electrolux, when the Department collapses affiliated producers, it considers the collapsed entity as a single integrated producer and treats the transactions between the entities therein as if they were transfers between divisions of the same company.²⁴ Thus, Electrolux maintains, the Department does not include internal markups between the entities in the calculation of the cost of production, and does not apply the transactions disregarded or major input rule to such transactions.²⁵ Citing AK Steel Corporation. v. United States,²⁶ Electrolux asserts that the Department’s practice of not recognizing inter-company markups between collapsed entities has been upheld by the Court of International Trade. Electrolux argues that the logic for disregarding internal markups among affiliated entities applies even more strongly here than in the case of collapsed producers. Electrolux explains that when the Department collapses affiliated producers, it treats them as if they were a single entity when, in fact, they are distinct entities with at least some separate operations. In contrast, Electrolux maintains, BMX, MXP, MXS and MXH are in fact one single integrated producer in all substantive respects, and exist only as separate legal entities to comply with Mexican tax law. Thus, Electrolux concludes, including the internal markups in the cost of production only serves to inflate artificially the actual cost of producing the subject merchandise.

The petitioner disagrees with Electrolux and asserts that the Department should continue to make an adjustment to the reported cost of production to capture the markups paid by Electrolux to its affiliated suppliers. The petitioner posits that the Department verified that the markups are

²⁴ See 19 CFR 351.401(f)(1).

²⁵ See, e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Steel Nails from the United Arab Emirates, 73 FR 33985 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 10 (Nails from the UAE) and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 76910 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 5.

²⁶ See AK Steel Corporation. v. United States, 34 F. Supp. 2d 756 (1998) (AK Steel Corporation v. United States).

included in Electrolux's books and records, and that they are associated with the production of subject merchandise. Because Electrolux failed to include the markups in its reported costs, the petitioner asserts, the Department must continue to add them back in the final determination.

The petitioner argues that the Department reasonably relied upon the antidumping statute to include the markup in Electrolux's reported costs. According to the petitioner, section 773(f)(2) of the Act requires the Department to test the prices between affiliated parties to determine if they reflect fairly the amount usually reflected in sales of the merchandise under consideration. Thus, the petitioner maintains, the Department must compare the transfer price inclusive of the markup to determine if it represents a market price. Accordingly, the petitioner reasons, the statute requires the Department to use the price charged inclusive of the markup because an unaffiliated party would have included the markup in the prices it charged to BMX.

Contrary to Electrolux's assertion, the petitioner argues, the inclusion of the markup is in full compliance with section 773(f)(1)(A) of the Act because the markups are recorded in Electrolux's normal books and records. In fact, the petitioner posits, the inclusion of the markups in the cost of production is mandatory under the Act. The petitioner points out that the markups are recorded in the normal books as required under Mexican generally accepted accounting principles and maquila law. Further, the petitioner notes, the full cost of labor and operations in Mexico including the total markups is included in the cost of manufacturing in Electrolux's audited financial statements.²⁷ Citing Wire Rod from Indonesia,²⁸ the petitioner contends that the markups paid reasonably reflect the costs of the subject merchandise because the profit that a supplier earns on the sale of services represents a cost to the buyer/ producer, whether or not the supplier is an affiliate.

The petitioner refutes Electrolux's argument that the markups are not actual costs but rather internal allocations among legal entities. According to the petitioner, the Department must rely on Electrolux's reported books regardless of Electrolux's *post-hoc* claims that these costs are somehow a "fiction." Moreover, the petitioner posits, Electrolux's assertion that neither the transactions disregarded nor major input rules apply here is not on point, because both of these provisions require the Department to compare the transfer price to an unaffiliated market price.²⁹ As the Department has verified, the petitioner asserts, MXP, MXH and MXS all charge a transfer price for their services which includes the actual costs incurred plus the markup. Accordingly,

²⁷ See Memorandum to The File entitled "Verification of the Cost Response of Electrolux Home Products Corp. N.V. in the Antidumping Duty Investigation of Large Residential Washers from Mexico," dated September 10, 2012 (Cost Verification Report).

²⁸ See Carbon and Certain Alloy Steel Wire Rod from Indonesia: Final Results of Antidumping Duty Administrative Review, 70 FR 60787 (October 19, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (Wire Rod from Indonesia).

²⁹ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand, 69 FR 34122 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 5; and Notice of Final Determination of Sales at Less Than Fair Value: Citric Acid and Certain Citrite Salts from Canada, 74 FR 16843 (April 13, 2009), and accompanying Issues and Decision Memorandum at Comment 5.

the petitioner maintains, either provision would include the markup in the transfer price in order to fully capture the cost to the producer. Thus, the petitioner reasons, the Department must include the markups in the reported costs in the final determination.

Finally, the petitioner argues that Electrolux's assertion that the markups charged by MXP, MXH and MXS should be disregarded as internal transactions within one integrated producer lacks basis in law and fact. Citing the Department's regulations at 19 CFR 351.401(f)(1), the petitioner asserts that the Department's collapsing regulation relates to two or more affiliated producers that have production facilities for similar or identical products. In this case, the petitioners point out, the record firmly established that MXH, MXS and MXP do not have separate production facilities for similar or identical products. Thus, the petitioner posits, collapsing these entities would be contrary to the Department's regulations. Accordingly, the petitioner concludes, the transfer prices inclusive of the markups charged are not intra-company transfers and they must be included in the cost of producing the merchandise under consideration at the final determination.

Department's Position:

We disagree with Electrolux that we should exclude the markups charged on labor and overhead services provided by its affiliates from the reported cost of production.

Under section 773(f)(2) of the Act, transactions between affiliated parties may be disregarded if the transfer price charged by an affiliate does not fairly reflect the amount usually reflected in the market under consideration. In applying the statute, the Department normally compares the transfer price paid by the respondent for production inputs or services to the price paid by unaffiliated suppliers or, if this is unavailable, to the price at which the affiliated parties sold the input or provided the service to unaffiliated purchasers in the market under consideration.³⁰ If the affiliated supplier made no such sales or provided no such services during the POI and this price is also unavailable, then we may consider other market values that are reasonably available and on the record. Because Electrolux buys all of its labor and overhead services from MXH, MXS and MXP, and, as noted by Electrolux itself, these three companies do not sell their services to any other outside parties, we have therefore used the affiliates' cost of production as a proxy for the market price. Consequently, we compared the transfer price charged by each affiliate for these services to each affiliate's corresponding cost of production.³¹ Because the transfer price in each case exceeded the affiliate's cost of production, we determined that the respondent did not receive such inputs at preferential prices. As such, the prices Electrolux paid to its affiliates should be reflected in the reported costs in accordance with section 773(f)(2) of the Act.

³⁰ See, e.g., Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (March 24, 2004), and accompanying Issues and Decision Memorandum at Comment 7.

³¹ See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia, 72 FR 60636 (October 25, 2007), and accompanying Issues and Decision Memorandum at Comment 5, where the Department compared the transfer price charged to the respondent to the affiliate's cost of production when faced with a similar fact pattern.

As Electrolux has noted, the producer and seller of the merchandise under consideration is the BMX division of BEE.³² MXH, MXS and MXP are not a part of either the BMX division or BEE at all, but rather distinct, separate legal entities.³³ Thus, contrary to Electrolux's assertions, the transactions between BMX and its affiliates are not simply internal accounting entries, but rather actual transactions between distinct legal entities. Accordingly, the full cost plus markup charged by each affiliate reflects the actual cost paid by the producer of the merchandise under consideration. Further, the full cost plus markup equals the actual cost captured in BEE's trial balance and audited financial statements.³⁴ Thus, these costs represent the actual cost associated with the production and sale of the merchandise under consideration as recorded in Electrolux's normal books and records, in accordance with section 773(f)(1)(A) of the Act.

We disagree with Electrolux's argument that our treatment of the markups charged by MXH, MXS and MXP in the Preliminary Determination is inconsistent with the Department's practice regarding transactions between collapsed entities because the entities at issue do not meet the Department's criteria for collapsing. Under 19 CFR 351.401(f), the Department will treat two or more affiliated producers as a single entity "where those producers have production facilities for similar or identical products that would not require substantial retooling in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." In this case, there is only one producer, BEE, and three affiliated suppliers, none of which owns or operates its own production facility. Thus, the Department's criteria for collapsing are not met, and the argument as to whether the Department's treatment of the transactions between BEE and its affiliates is in accordance with the Department's treatment of transactions between collapsed entities is inapposite.

We also disagree with Electrolux's implication that because the Department did not include the transfer price charged by its affiliates in the reported costs in the bottom mount refrigerators investigation that it should somehow do so in this proceeding. We note that this issue was not raised by either party in that proceeding and, therefore, no inference should be drawn one way or the other from the Department's silence on the matter.

Accordingly, because the full cost plus the markup charged by Electrolux's affiliates for labor and overhead services provided during the POI represents the actual price paid by Electrolux as recorded in its normal books and records, and reasonably reflects the amount usually reflected in the market under consideration, we have continued to include the markups in the reported costs in the final determination.

³² See April 10, 2012, Section A Response at 7-8, and Electrolux Case Brief at 2.

³³ See April 10, 2012, Section A Response at 8.

³⁴ See Cost Verification Report at 3.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the Federal Register.

Agree

Disagree



Paul Piquado
Assistant Secretary
for Import Administration

18 DECEMBER 2012
(Date)