

ABB INC. v. United States
Consol. Court No. 16-00054, Slip Op. 20-21 (CIT February 19, 2020)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce (Commerce) prepared these final results of redetermination in accordance with the opinion and remand order of the U.S. Court of International Trade (the Court) issued on February 19, 2020, in *ABB INC. v. United States*, Consol. Court No. 16-00054, Slip Op. 20-21 (CIT 2020) (*Third Remand Order*). These remand results concern the final results in the antidumping duty (AD) administrative review of large power transformers (LPTs) from the Republic of Korea (Korea), and the period of review (POR) is August 1, 2013 through July 31, 2014.¹

In the *Third Remand Order*, the Court directed Commerce to recalculate Hyundai's normal value (NV) without making circumstance of sale (COS) adjustments related to the delayed delivery

¹ See *Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14087 (March 16, 2016) (*Final Results*), and accompanying Memorandum, "Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2013-2014"; see also Memorandum, "Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation, USA- Analysis Memorandum for the Final Results of the 2013/2014 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea," dated March 8, 2016 (Hyundai's Final Analysis Memorandum). On May 5, 2016, Commerce published amended final results upon consideration of various ministerial error allegations. See *Large Power Transformers from the Republic of Korea: Amended Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 27088 (May 5, 2016) (*Amended Final Results*); see also Memorandum, "Ministerial Error Memorandum for the Amended Final Results of the 2013/2014 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea," dated April 29, 2016 (Ministerial Error Memorandum).

charges for its U.S. sales.² According to the Court, Commerce’s use of the COS adjustments for delayed delivery charges is not in accordance with law.³ In accordance with the *Third Remand Order*, Commerce has removed the COS adjustments for delayed delivery charges by not increasing Hyundai’s NV by the amount of the delay delivery charges collected on the U.S. sales. Our final results are discussed below.

DISCUSSION

Statutory and Regulatory Background

Commerce conducts an administrative review in accordance with 19 CFR 351.221 pursuant to which Commerce sends AD questionnaires requesting company-specific information pertinent to the review. Commerce’s regulation, 19 CFR 351.102(21)(i), defines factual information as “evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party.”

In AD proceedings, section 772(c) of the Tariff Act of 1930, as amended (the Act), requires that Commerce make adjustments to the U.S. export price and constructed export price (CEP) for price comparison purposes. Additionally, section 773(a) of the Act requires Commerce to make adjustments to NV for price comparison purposes. Further, 19 CFR 351.401(c) directs Commerce to use a price that is net of any price adjustment, as defined in 19 CFR 351.102(b), that is attributable to the subject merchandise or the foreign like product (whichever is applicable).

² Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation, USA are referred to herein, collectively, as Hyundai.

³ See *Third Remand Order*, Slip Op. 20-21 (CIT 2020).

Factual Background

On August 29, 2014, ABB, Inc. (the petitioner) requested an administrative review of imports of LPTs from Korea produced by the following companies: Hyosung⁴, Hyundai, ILJIN, ILJIN Electric, and LSIS.⁵ On August 30, 2014, Commerce received requests for review from Hyosung, Hyundai, and ILJIN Electric.⁶ Based on these requests, on September 30, 2014, Commerce initiated an administrative review for the period August 1, 2013 through July 31, 2014.⁷ Commerce subsequently selected Hyosung and Hyundai as mandatory respondents.⁸ Relying on the factual information that it gathered through questionnaire responses, on September 4, 2015, Commerce determined preliminary dumping margins of 11.01 percent and 3.96 percent for Hyosung and Hyundai, respectively, in the *Preliminary Results*.⁹ On March 16, 2016, Commerce issued the *Final Results*, determining dumping margins of 9.40 percent and 4.07 percent for Hyosung and Hyundai, respectively.¹⁰ On May 5, 2016, Commerce issued the *Amended Final Results*, determining a dumping margin of 7.89 percent for Hyosung.¹¹ On March 31, 2016, and April 12, 2016, both the petitioner and Hyosung, respectively, initiated this action challenging certain aspects of the *Final Results* before the Court.¹²

⁴ Hyosung Corporation and HICO America Sales and Technology (HICO America) (collectively, Hyosung).

⁵ See Petitioner's Letter, "Large Power Transformers from the Republic of Korea - Petitioner's Request for Administrative Review," dated August 29, 2014.

⁶ See Hyosung's Letter, "Second Administrative Review of Large Power Transformers from the Republic of Korea: Request for Administrative Review," dated August 29, 2014; Hyundai's Letter, "Large Power Transformers from Korea," dated August 29, 2014; and ILJIN Electric's Letter, "Large Power Transformers from the Republic of Korea: Request for Administrative Review," dated September 2, 2014, respectively.

⁷ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 FR 58729 (September 30, 2014).

⁸ See Memorandum, "Antidumping Duty ("AD") Administrative Review of Large Power Transformers ("LPTs") from the Republic of Korea ("Korea"): Respondent Selection Memorandum," dated November 18, 2014.

⁹ See *Large Power Transformers from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 53496 (September 4, 2015) (*Preliminary Results*). Commerce also preliminarily applied a dumping margin of 7.49 percent to ILJIN Electric, ILJIN, and LSIS Co., Ltd.

¹⁰ See *Final Results*, 81 FR at 14088.

¹¹ See *Amended Final Results*, 81 FR at 27088. Commerce also applied an amended dumping margin of 5.98 percent to ILJIN Electric, ILJIN, and LSIS Co., Ltd.

¹² See *ABB INC. v. United States*, Consol. Court No. 16-00054, Slip Op. 18-156 (CIT 2018) (*Second Remand Order*) at 2.

In its *First Remand Order*, regarding the question of Commerce’s treatment of service-related revenues associated with Hyundai’s U.S. sales, the Court granted Commerce’s request for a voluntary remand, explaining that Commerce’s request to examine whether Commerce applied its revenue capping methodology consistently for both Hyundai and Hyosung is a concern that is substantial and legitimate.¹³ The Court directed Commerce to evaluate its revenue capping practice and ensure that its application of this practice is consistent with respect to Hyundai and Hyosung.¹⁴ Subsequently, pursuant to the Court’s directives, Commerce issued its draft remand results on January 9, 2018, and filed its final remand results before the Court on February 9, 2018.¹⁵ Commerce re-examined the record with respect to Hyundai’s reporting of the gross U.S. prices for the subject merchandise and determined that Hyundai had failed to separately report service-related revenues from its gross unit prices.¹⁶ Accordingly, Commerce relied on facts available, with an adverse inference, for certain of Hyundai’s U.S. sales.¹⁷

Following Hyundai’s challenge to Commerce’s February 9, 2018 Remand Results, in the *Second Remand Order*, for the purpose of capping service-related revenue, the Court directed Commerce not to rely on Hyundai’s internal communications when applying Commerce’s capping methodology.¹⁸ The Court found that such communications do not constitute substantial evidence that would support a finding that Hyundai’s provision of the services at issue were separately negotiable from the price of subject merchandise with the unaffiliated customer.¹⁹

¹³ See *ABB INC. v. United States*, Consol. Court No. 16-00054, Slip Op. 17-138 (CIT 2017) (*First Remand Order*) at 7-8; see also *Second Remand Order*, Slip Op. 18-156 at 3.

¹⁴ *Id.*

¹⁵ See Draft Results of Redetermination Pursuant to Court Remand: *ABB INC. v. United States*, Consol. Ct No. 16-00054; Slip Op. 17-138 (January 9, 2018); and Final Results of Redetermination Pursuant to Court Remand: *ABB INC. v. United States*, Consol. Ct No. 16-00054; Slip Op. 17-138 (February 8, 2018) (February 9, 2018 Remand Results); see also *Second Remand Order*, Slip Op. 18-156 at 4.

¹⁶ See *Second Remand Order*, Slip Op. 18-156 at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 29-30.

¹⁹ *Id.* at 24; see also *Third Remand Order*, Slip Op. 20-21 at 4-5.

Also in the *Second Remand Order*, while the Court sustained Commerce’s application of facts available, the Court directed Commerce to further consider or explain its use of adverse inferences to certain of Hyundai’s U.S. sales for the purpose of capping service-related revenue.²⁰ The Court found that in applying partial adverse facts available, Commerce had not adequately explained, citing record evidence, how Hyundai failed to cooperate to the best of its ability.²¹ Subsequently, in accordance with the Court’s directives, Commerce re-examined the record evidence and amended its capping methodology to require the capping for service-related revenues only in those transactions or services which indicate external communications.²² Additionally, Commerce did not apply its capping methodology to the delayed delivery charges associated with two transactions (*i.e.*, U.S. sale sequence numbers (SEQUs) 11 and 14), and instead made COS adjustments to NV for those delayed delivery charges.²³ Further, pursuant to the *Second Remand Order*, Commerce provided additional explanations regarding its decision to apply partial adverse facts available, concluding that an adverse inference was warranted because Hyundai had the service-related revenue information but failed to provide it as requested; thus Commerce found that Hyundai failed to cooperate to the best of its ability with regard to the reporting of service-related revenue.²⁴

Following the petitioner’s and Hyundai’s challenge to Commerce’s April 26, 2019 Second Remand Results, in the *Third Remand Order*, the Court directed Commerce to reconsider its COS adjustments for the delay delivery charges, while sustaining Commerce’s April 26, 2019 Second

²⁰ See *Second Remand Order*, Slip Op. 18-156 at 28-30; see also *Third Remand Order*, Slip Op. 20-21 at 5.

²¹ See *Second Remand Order*, Slip Op. 18-156 at 29.

²² See Draft Results of Redetermination Pursuant to Court Remand: *ABB INC. v. United States*, Consol. Ct No. 16-00054; Slip Op. 18-156 (April 2, 2019) (April 2, 2019 Draft Second Remand Results); and Final Results of Redetermination Pursuant to Court Remand: *ABB INC. v. United States*, Consol. Ct No. 16-00054; Slip Op. 18-156 (April 26, 2019) (April 26, 2019 Second Remand Results); see also *Third Remand Order*, Slip Op. 20-21 at 5-6.

²³ See April 26, 2019 Second Remand Results; see also *Third Remand Order*, Slip Op. 20-21 at 5.

²⁴ See April 2, 2019 Draft Second Remand Results; and April 26, 2019 Second Remand Results; see also *Third Remand Order*, Slip Op. 20-21 at 6.

Remand Results in all other respects.²⁵ In accordance with the *Third Remand Order*, Commerce released its Draft Third Remand Results on March 31, 2020 by recalculating NV without making COS adjustments related to the delayed delivery charges, and invited comments from interested parties.²⁶ ABB and Hyundai submitted comments on April 7, 2020.²⁷ After reviewing comments from interested parties, Commerce prepared these final results of redetermination in accordance with the Court's *Third Remand Order*.

Analysis

COS Adjustments

A. Legal Basis for Commerce's COS Adjustments

Section 772(c)(1) of the Act provides that Commerce shall increase the price used to establish export price and CEP (*i.e.*, U.S. price) in only the following three instances:

(1) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in a condition packed ready for shipment to the United States; (2) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States; and (3) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy.²⁸

Similarly, section 773(a)(6) of the Act provides that Commerce shall increase the price used to establish NV “by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States.”

²⁵ See *Third Remand Order*, Slip Op. 20-21 at 7 and 21.

²⁶ See Draft Results of Redetermination Pursuant to Court Remand: *ABB INC. v. United States*, Consol. Ct No. 16-00054; Slip Op. 20-21 (March 31, 2020) (Draft Third Remand Results).

²⁷ See ABB's Letter, “Large Power Transformers from the Republic of Korea – Petitioner's Comments on the Draft Third Remand Redetermination,” dated April 7, 2020 (ABB's Comments); see also, Hyundai's Letter, “Large Power Transformers from South Korea: Comments on the Department's Draft Results of Redetermination Pursuant to Court Remand,” dated April 7, 2020 (Hyundai's Comments).

²⁸ See sections 772(c)(1)(A)-(C) of the Act.

In addition, 19 CFR 351.401(c) directs Commerce to use a price that is net of any price adjustment, as defined in 19 CFR 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable). The term “price adjustment” is defined under 19 CFR 351.102(b)(38) 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.” The definition specifies that the adjustment applies to changes in the price charged for the subject merchandise or the foreign like product. Stated differently, whether adjusting U.S. price or NV, Commerce will increase such prices only by the adjustments stipulated in sections 772(c) and 773(a)(6).

Among other price adjustments, Commerce adjusts NV for differences between NV and U.S. price that are not otherwise provided for in the statute and are due to “other differences in the circumstances of sale.” Section 773(a)(6)(C)(iii) of the Act provides that Commerce shall adjust the price used to establish NV by the amount of other differences in the COS.

19 CFR 351.410(b) limits COS adjustments to “direct selling expenses” and “assumed expenses.” 19 CFR 351.410(b) states that “in general. With the exception of the allowance ... concerning commissions paid in only one market, {Commerce} makes {COS} adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses.”²⁹ 19 CFR 351.410(c) defines “direct selling expenses” as “expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question.” 19 CFR 351.410(d) defines “assumed expenses” as “selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses.”

²⁹ See 19 CFR 351.410(b).

B. Commerce’s Recalculation of NV Without Making COS Adjustments Related to the Delayed Delivery Charges for SEQUs 11 and 14

In Commerce’s April 26, 2019 Second Remand Results, Commerce re-examined the record and found that the delayed delivery charges related to SEQUs 11 and 14 did not constitute service-related revenue, and thus did not use such data for the purpose of capping service-related revenue.³⁰ Instead, Commerce found that because these charges were listed in the change order from Hyundai’s unaffiliated customer, the record indicated that such a customer requested delayed delivery of subject merchandise.³¹ Because Hyundai charged its customer due to the customer’s specific request to delay the delivery of subject merchandise in the context of its sale, Commerce found that making COS adjustments to NV, instead of capping revenue for the delayed delivery, was appropriate for these two SEQUs.³² Accordingly, Commerce increased NV by the amount of the delayed delivery charge collected on these sales.³³

In the *Third Remand Order*, the Court found that Commerce’s use of COS adjustments for delayed delivery charges is not in accordance with law, as 19 CFR 351.410(b) limits COS adjustments to “direct selling expenses” and “assumed expenses.” As 19 CFR 351.410(c) provides examples of “direct selling expenses,” all of which involve an “an actual or imputed expenditure by the respondent,” and Commerce found that the delayed delivery charge was not an expenditure but, instead, yield revenue, the Court held that Commerce’s use of COS adjustments for the delayed delivery charge is not in accordance with Commerce’s regulations.³⁴ The Court also found that Commerce’s interpretation of its regulation based upon the regulatory term “in

³⁰ See April 26, 2019 Second Remand Results at 22; see also *Third Remand Order*, Slip Op. 20-21 at 13.

³¹ See April 26, 2019 Second Remand Results at 22.

³² *Id.*; see also *Third Remand Order*, Slip Op. 20-21 at 13-14.

³³ See *Third Remand Order*, Slip Op. 20-21 at 14.

³⁴ *Id.* at 15.

general” in 19 CFR 351.410(b) lacks merit.³⁵ As this phrase is the heading to subsection (b) of 19 CFR 351.410 and not being part of the text, and it does not speak to the scope of the permissible adjustments, the Court held that the heading of a section cannot undo or limit that which the text makes plain.³⁶ The Court found that Commerce’s attempt to negate the explicit limitation the word “only” places on the types of permissible adjustments is misleading and erroneous.³⁷ As such, the Court directed Commerce to reconsider this issue.³⁸

Pursuant to the *Third Remand Order*, we have re-examined the delayed delivery charges associated with SEQUs 11 and 14, and find that these charges are, by nature, a fee which resulted from a customer’s specific request. We also find that these charges are fees that result from an inconvenience to Hyundai (*i.e.*, its production delay) and not an actual or imputed expenditure by Hyundai. As these charges are not part of the COS adjustment under in 19 CFR 351.410(b) and (c), we have removed such COS adjustments for the delayed delivery charges when calculating NV. As such, we have not increased NV by the amount of the delayed delivery charges collected on SEQUs 11 and 14.³⁹

Final Results of Redetermination

In light of the Court’s directive from the *Third Remand Order*, we have recalculated Hyundai’s NV without making COS adjustments related to the delayed delivery charges. By not increasing NV by the amount of the delayed delivery charge collected on SEQUs 11 and 14, the

³⁵ *Id.*

³⁶ *Id.* at 16 (citing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R Co.*, 331 U.S. 519, 529 (1947); and *Aqua Prods., Inc. v. Matal*, 872 F. 3d 1290, 1316 (Fed. Cir. 2017)).

³⁷ *Id.* (citing *Habaş Sinai Ve Tibbî Gazlar İstihsal Endüstrisi A.Ş. v. United States*, Slip Op. 19-130 (CIT 2019) at 10).

³⁸ See *Third Remand Order*, Slip Op. 20-21 at 16.

³⁹ See Memorandum, “Analysis of Data Submitted by Hyundai Heavy Industries (HHI) in the Draft Results of Third Remand of the Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea; 2013-2014,” dated concurrently with this draft remand results (Hyundai Third Draft Remand Analysis Memorandum).

weighted-average dumping margin for Hyundai for the period of review, August 1, 2013 through July 31, 2014, resulting from our modified calculation pursuant to this remand, is 16.13 percent.⁴⁰

DISCUSSION OF COMMENTS

Issue 1: No Adjustments for the Delayed Delivery Charges Collected on SEQUs 11 and 14 to the Calculation of Hyundai's NV or U.S. Price

ABB's Comments

- ABB disagrees with Commerce's decision to make no adjustment to Hyundai's U.S. price regarding the delayed delivery charges that Hyundai received for SEQUs 11 and 14 and believes that Commerce should have capped the revenue by the amount of the related expense for the service to the customer of delaying delivery. However, ABB is not challenging further Commerce's decision in the Draft Third Remand Results in this appeal.⁴¹

Hyundai's Comments

- Hyundai believes that Commerce's removal of COS adjustments for the delayed delivery charges collected on SEQUs 11 and 14 from Hyundai's NV calculation is consistent with the Court's *Third Remand Order*.⁴²

Commerce's Position:

We agree with Hyundai that recalculating Hyundai NV without making COS adjustments related to the delayed delivery charges collected for SEQUs 11 and 14 is consistent with what the Court directed us to do in the *Third Remand Order*. As to whether Commerce should have treated the delayed delivery charges for on SEQUs 11 and 14 as service-related revenue and employed its service-revenue capping methodology, Commerce already determined that the delayed delivery charges related to SEQUs 11 and 14 did not constitute service-related revenue in the April 26, 2019 Second Remand Results.⁴³ Further, the Court sustained this finding in the

⁴⁰ *Id.*

⁴¹ See ABB's Comments at 2.

⁴² See Hyundai's Comments at 2.

⁴³ See April 26, 2019 Second Remand Results at 22; see also *Third Remand Order*, Slip Op. 20-21 at 13.

Third Remand Order.⁴⁴ ABB also stated that it is not challenging further Commerce's decision in the Draft Third Remand Results in this appeal.⁴⁵ Accordingly, consistent with the Draft Third Remand Results, we have continued not to increase Hyundai's NV by the amount of the delayed delivery charges collected on SEQUs 11 and 14.

FINAL RESULTS OF REDETERMINATION

In accordance with the *Third Remand Order*, and the Court's directive, we have not increased Hyundai's NV by the amount of the delayed delivery charges collected on SEQUs 11 and 14 by removing COS adjustments for such charges related to these two U.S. sales when calculating NV. The weighted-average dumping margin for Hyundai for the period of review, August 1, 2013 through July 31, 2014, resulting from our modified calculation pursuant to this remand, is 16.13 percent.⁴⁶

4/14/2020

X 

Signed by: JEFFREY KESSLER
Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

⁴⁴ We note that the Court sustained Commerce's April 26, 2019 Second Remand Results in all other respects except for Commerce's COS adjustments related to the delayed delivery charges to Hyundai's NV.

⁴⁵ See ABB's Comments at 2.

⁴⁶ See Hyundai Third Draft Remand Analysis Memorandum.