

Flowers: (1) roses, like flowers, are extremely perishable; (2) rose growers have relatively minor control over short-term production; (3) rose production is also affected by exogenous factors (e.g., weather, disease, etc.) like other flowers; and (4) roses cannot be stored and we note that there are only very minor alternative uses (e.g., drying).

In conclusion, we have determined that the factors that led the Department use CV instead of third country prices in *Flowers* are present in these investigations. Therefore, we have adopted CV as the basis for comparison with U.S. prices.

Comments Pertaining to Related Party Commissions

Comment 7: Related Party Commissions

Petitioner requests that commissions paid to consignment agents should be deducted from USP even where consignees are related parties. Specifically, petitioners argue that (1) the statute directs us to deduct commissions from USP in ESP situations, without discretion to disregard U.S. commissions in related party transactions; (2) in *Timken*, the court recognized that the statute required a deduction when a U.S. importer was paid commissions, as opposed to earning "profits;" (3) the statute should be followed, regardless of the fact that commissions were not deducted in *Flowers*; and (4) we should deduct U.S. indirect selling expenses if such expenses exceed the related consignee's commissions, in accordance with 19 U.S.C. 1677a(e)(2).

Respondents claim that the Department's treatment in the preliminary determination of related party sales commissions is invalid. They argue that deducting the related importer's commission from U.S. price has the effect of deducting the importer's profit, which the Department does not have the authority to do. The Department should deduct the importer's actual selling expenses rather than intracompany transfers. Respondents argue that the Department's approach is inconsistent with past practice since related party commissions have never been treated as a direct selling expense, but rather have been collapsed in the past for the purposes of determining U.S. price and expenses. Moreover, respondents assert that the Department's statute and regulations do not authorize the Department to deduct the higher of related party commissions or related party actual expenses. Respondents claim that in selectively choosing deductions of commissions or actual

expenses, the Department fails to account for the fact that the commission it treats as a cost is also sales related income to the related importer. Respondents maintain that the Department should ignore the sales commissions paid between related parties on ESP sales, regardless of whether such commissions are at arm's length, and treat as U.S. indirect selling expenses the importer's share of operating and selling expenses allocable to the exporter's subject sales.

DOC Position

The difference between a related consignee's commission and the related consignee's U.S. indirect selling expenses is equal to the related consignee's profit. The Department does not deduct profit from USP in ESP transactions because the law does not allow it. 19 C.F.R. 353.41(e) (1) and (2) do, however, instruct us to make adjustments in ESP situations for commissions and expenses generally incurred by or for the account of the exporter in selling the merchandise.

With respect to treatment of related party commissions paid in the U.S., we have in the past looked to the definition of "exporter" which provides that related party importers are to be collapsed with, and treated as part of, the exporter. 19 U.S.C. 1677(13). In this context, it is inappropriate to treat a commission the exporter has paid to itself as an expense. The expense is the actual costs incurred by or for the account of the exporter.

In *LMI-Le Metall Industriale, S.p.A. v. United States*, 912 F.2d 455, 459 (Fed. Cir. 1990) (*LMI*), the CAFC indicated that related party commissions can and should be adjusted for if the commissions are at arm's-length and are directly related to the sales under review.¹ By implication, an arm's-length commission includes the actual indirect selling expenses incurred by the commissionaire and the commissionaire's profits. Thus, *LMI* allows us to deduct the profits that are implicit in the commission. The facts in *LMI*, however, are distinguishable from the facts in these investigations. In *LMI*, the Court directed the Department to adjust for sales commissions paid to a related subsidiary of the respondent in the home market. The sales on which

¹ In *Coated Groundwood Paper from Finland*, 56 FR 56363 (November 4, 1991), which was subsequent to *LMI*, we developed guidelines to determine whether commissions paid to related parties, either in the United States or in the foreign market, are at arm's-length. If, based on the guidelines, we found commissions to be at arm's-length, we stated that we would make an adjustment for such commissions.

the commissions were paid in the home market were purchase price-type transactions made with the assistance of the related party selling agent. The issue of how to treat any selling expenses incurred by the related party selling agent in addition to commissions earned by that related party selling agent did not arise in *LMI*.

In the instant investigations, the sales on which the commissions were paid are ESP transactions where, because the importer of the merchandise is related to the exporter, we collapse the two pursuant to 19 U.S.C. 1677(13) and base USP on the sale to the first unrelated party. In contrast to *LMI*, therefore, the producer and its related party selling agent in these investigations are collapsed. Thus, the commission represents an intracompany transfer of funds. Under these circumstances, our past practice of ignoring intracompany transfers is still applicable.

Furthermore, ESP transactions are fundamentally different from purchase price transactions in that, with respect to ESP transactions, 19 U.S.C. 1677a(e), specifically allows for deductions of indirect expenses. In contrast, with respect to purchase price transactions, 19 U.S.C. 1677a(d) only allows an adjustment for indirect expenses when there are commissions in one of the two markets. Therefore, when commissions are paid in an ESP situation, the opportunity for double counting exists; this problem does not arise in a purchase price situation like the one reviewed by the Court in *LMI*.

Whether the sales involved are purchase price or ESP, the Department's goal is to derive a reliable USP by subtracting actual expenses from actual sales prices. A commission paid by the exporter to its collapsed related importer is not an expense incurred by the exporter; rather the actual expenses incurred by the exporter are the indirect selling expenses of the related consignee.

At the preliminary determination, we determined that related party commissions were directly related to the sales under consideration. However, we agree with respondents and, for the final determination, considered commissions an intracompany transfer. We have therefore, deducted only the amount of U.S. indirect selling expense for all companies with related party commissions.

Comments Pertaining to Accounting

Comment 8: Inflation Adjusted Depreciation and Amortization

Petitioner argues that the Department should compute respondents'