

specific to the instant review and was not presented to the *IPSCO* court.

Petitioners respond that it is inappropriate to combine prime and non-prime merchandise in determining whether the quantity of below cost sales is sufficiently large to warrant disregarding those sales in determining FMV. Petitioners contend that Thyssen has taken the inconsistent positions that the Department should separate prime and non-prime merchandise for the arm's length test, but combine both types of merchandise for the cost test. Petitioners argue that the comparison of U.S. sales with CV is mandated by statute whenever such or similar home market merchandise fails the COP test, that Thyssen admits that its sales of seconds fail this test, and that, accordingly, U.S. sales of non-prime merchandise should be compared to CV. Petitioners add that Thyssen did not provide any evidence that the costs of the merchandise consisting of a combination of both prime and non-prime merchandise would be recovered over a reasonable period of time, even if such an analysis were relevant.

**Department's Position:** Thyssen is essentially requesting that the Department modify the below-cost test it applied in the preliminary results to include sales of seconds for matching purposes whenever the corresponding sales of prime were at above cost prices. In this regard, Thyssen mistakenly relies on the Senate report accompanying the 1974 Trade Reform Act to contend that the Department should not disregard sales of seconds, regardless of whether they were at prices below cost. We disagree.

The Act requires the Department to determine whether a respondent's sales were made over an extended period of time and in substantial quantities so as to warrant disregarding those sales in determining FMV. This test applies across sales of a model as a whole, whether they be prime, seconds or otherwise. See 19 U.S.C. § 773(b). The 1974 Senate report did list several exceptions to this test, including obsolete and end-of-model year merchandise, which the Department should not disregard regardless of the whether they were below cost.

This category of exceptions is narrow, however, and is designed only to permit the inclusion of below-cost sales which can be expected to occur on an "infrequent" basis. S. Rep. No. 1298, 93d Cong., 2d Sess. 173 (1974); see also *Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductor of One Megabit and Above From the Republic of Korea*, 58 FR 15467, 15476 (March 23,

1993). It is possible to verify whether merchandise claimed to be obsolete or end-of-model year actually falls within the exception. The exception does not include seconds, however, which tend to occur more frequently and which a party would be more inclined to "systematically" sell at prices which will not permit recovery of all costs. See S. Rep. 1298 at 173. It would also be more difficult to verify whether a product was properly classified as a "second."

In past cases, the Department has considered prime and secondary merchandise to be separate models for matching purposes. "To do otherwise would distort the margins, since sales prices are dependent on the quality of the merchandise." *Porcelain-on-Steel Cooking Ware From Mexico; Final Results of Antidumping Duty Administrative Review*, 58 FR 43327, 43328 (August 16, 1993). In *IPSCO*, the Court of Appeals upheld the Department's approach of applying the same cost to prime and secondary merchandise. See *IPSCO*, 965 F.2d at 1061. In this case, we computed the cost of Thyssen's secondary merchandise using a methodology consistent with that applied in the *IPSCO* case. Based on these cost figures, we found insufficient quantities of above cost sales and, accordingly used CV as FMV.

**Comment 12:** Thyssen argues that the Department improperly combined sales of prime and secondary merchandise in its arm's length test. According to Thyssen, the Department should conduct separate arm's length tests and calculate separate customer-specific weighted-average price ratios for prime and secondary merchandise. In support of its argument, Thyssen asserts that such treatment would be consistent with the Department's April 19, 1995, memorandum on the treatment of non-prime merchandise.

Petitioners respond that Thyssen misrepresents the Department's statements on this matter, indicating a serious misunderstanding on Thyssen's part as to how the arm's length test was applied in the present case. Petitioners describe the Department's arm's length test as first comparing the net price of sales of a CONNUM sold to a related customer with the net price of sales of a CONNUM sold to unrelated customers. Only then, petitioners argue, is the related customer-specific weighted-average price ratio calculated, by combining all CONNUMs, consisting of all prime and non-prime merchandise sold to both related and unrelated customers. The Department's test separates prime and non-prime merchandise in making the initial

comparison of related and unrelated prices on a CONNUM-specific basis. It is this initial comparison to which the Department refers in its memorandum when it states that "prime and seconds should be separated." Prime and non-prime merchandise are necessarily separated for this initial CONNUM-specific comparison because prime and non-prime merchandise do not share the same CONNUM. The separation of products on a CONNUM-specific basis for the initial price comparison is necessary because there are understandable differences in prices among CONNUMs, irrespective of whether the different CONNUMs consist of prime or non-prime merchandise. Petitioners argue that the objective of the Department's arm's length test is to determine whether sales to individual related customers are made at the same or greater prices than those at which sales of the same products are made to unrelated customers. To make this customer-specific determination, all sales of all CONNUMs, both prime and non-prime, must be combined, and, so, the Department combined all CONNUMs sold to related customers which are also sold to unrelated customers to determine the customer-specific weighted average price ratios.

**Department's Position:** We disagree with Thyssen. The Department's April 19, 1995, seconds memorandum, states that "if sales of seconds to related parties are compared to sales of prime (or prime and seconds combined) to unrelated parties, the results of the arm's length test could be distorted." The memorandum concludes that, consequently, "prime and seconds should be separated for purposes of conducting the arm's length test. . . ." The recommendation section of the memorandum goes on to clarify, however, that the separation of prime and secondary merchandise is done on what amounts to a CONNUM-specific basis. In cases where sales of prime and secondary merchandise were reported together in the same CONNUM, the Department treated them as separate CONNUMs for purposes of the arm's length test. As petitioners point out, the Department would ordinarily follow this approach in the initial steps of conducting the arm's length test because there are understandable differences in prices among CONNUMs, irrespective of whether the different CONNUMs consist of prime or secondary merchandise. See April 19, 1995, memorandum at 2-3. In this specific case, Thyssen's seconds were already classified in separate CONNUMs distinct from sales of prime merchandise, meaning that the