Department was not required to make such an initial separation.

The purpose of the Department's arm's length test is to determine if total sales to a related party are at arm's length. To make this determination, we calculate, by CONNUM, prices to each related party as a percentage of prices of sales to unrelated parties. We then take a weighted average of this ratio for all CONNUMs sold to a given related party, including seconds and prime, to determine if sales to that related party are at arm's length. Thyssen has not demonstrated that the approach resulted in a distortion of the arm's length test. *See Usinor Sacilor* v. *United States,* 872 F.Supp. 1000, 1004 (CIT 1994).

Comment 13: Thyssen contends that the Department improperly calculated the VAT adjustment. Thyssen argues that in *Zenith Electronics Corporation* v. *United States,* 988 F.2d 1573 (Fed. Cir. 1993), the Federal Circuit held that the Department's practice of making a circumstance of sale adjustment to FMV to achieve tax neutrality was contrary to law, reasoning that ''Section 1677a(d)(1)(C), the section dealing with tax adjustments, does not provide for any adjustment to FMV to correct for tax-related distortion of the dumping margin,'' and that ''the specific provision of Title 19 for tax adjustments does not permit changes to FMV.'' *Id.* at 1580. Thyssen adds that in *Daewoo Electronics* v. *International Union,* 6 F.3d 1511, 1519–20 (Fed. Cir. 1993), the Federal Circuit held that the tax should be applied at the sale price at which the tax was actually assessed.

Thyssen argues that, in *Federal Mogul Corp.* v. *United States,* CAFC No. 94–1097 (Fed. Cir. August 28, 1995), the Federal Circuit expressly held that the Department had the authority to calculate the adjustment by taking the paid tax *amount* in the home market for the same merchandise, and adding ''that amount to the price actually paid in the United States.'' Slip Op. at 9. According to Thyssen, the Court reasoned that the tax neutral methodology which results from adding the identical tax amount to both the home market and the United States sides of the dumping equation ''clearly accords with international understandings, negotiated by this country regarding unfair trade policy,'' whereas any alternative methodology which artificially increases dumping margins may ''read a GATT violation into the statute.'' *Id.* at 22–23.

Thyssen argues that the Department's preliminary results are contrary to *Zenith* in that it adjusted FMV by the tax relating to expenses that were deducted from FMV. Thyssen argues that the Department's preliminary results are contrary to *Daewoo* in that its calculation methodology resulted in the tax being applied to an ex-factory price, rather than the sales price at which the tax was actually assessed. Thyssen argues that both *Zenith* and *Daewoo* prevent the Department from making any secondary adjustments in calculating the tax pursuant to section 772(d)(1)(C), and even if the Department had this authority, it must be limited to those isolated instances in which the primary tax adjustment created margins where none had previously existed. Thyssen argues that in the case of Thyssen a secondary adjustment could never be authorized, since Thyssen's deductible U.S. expenses exceed its deductible home market expenses, and since the Department's secondary adjustment artificially and significantly inflates dumping margins, in direct contravention to *Federal Mogul.*

Thyssen concludes that the Department's preliminary results methodology, which applies the VAT to a different point in the chain of commerce than the point at which the tax is assessed, and which creates a secondary tax adjustment to FMV, is directly contrary to *Federal Mogul, Zenith,* and *Daewoo.* Thyssen argues that the Department should add to USP the exact amount of the tax added to FMV, as authorized by *Federal Mogul,* or, alternatively, calculate the tax added to FMV in the manner reported by Thyssen (gross price less discounts, times 0.15) and calculate the tax added to USP by multiplying TINC's net sales price (gross price less cash discount, where applicable) times the tax rate.

Petitioners assert that the Department properly calculated the VAT adjustment in accordance with its statutory mandate and existing legal authority, which requires that an adjustment be made to USP to account for any VAT that may have been charged on the corresponding home market sale. To do this, the Department applied the rate from the home market to the U.S. sale and added this amount to USP.

Petitioners argue that, because *Federal Mogul* does not require that any particular methodology be used, the Department's methodology in this case is not precluded by the Court's decision. While Thyssen is correct in pointing out that the Court of Appeals did rule on the issue of the VAT adjustment methodology, and clearly upheld the Department's previous methodology of calculating the amount of tax paid on the home market sale and adding the amount of the tax to USP, the opinion does not indicate that this is the only methodology that the Department may use. To the contrary, petitioners argue, the Court does not state that use of this methodology is required by the statute, but rather that it is not precluded by the statute. Furthermore, petitioners argue, as demonstrated by its use in several earlier determinations by the Department, the methodology used in this review is entirely reasonable. *See, e.g., Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review,* 59 FR 13700, 13701 (March 23, 1994); *Certain Internal-Combustion Industrial Forklift Trucks from Japan; Final Results of Antidumping Duty Administrative Review,* 59 FR 1374, 1376 (January 10, 1994).

Department's Position: In light of the Federal Circuit's decision in *Federal Mogul,* the Department has changed its treatment of home market consumption taxes. Where merchandise exported to the United States is exempt from the consumption tax, the Department will add to the U.S. price the absolute amount of such taxes charged on the comparison sales in the home market. This is the same methodology that the Department adopted following the decision of the Federal Circuit in *Zenith,* 988 F. 2d at 1582, and which was suggested by that Court in footnote 4 of its decision. The CIT overturned this methodology in *Federal Mogul* v. *United States,* 834 F. Supp. 1391 (1993), and the Department acquiesced in the CIT's decision. The Department then followed the CIT's preferred methodology, which was to calculate the tax to be added to U.S. price by multiplying the adjusted U.S. price by the foreign market tax rate; the Department made adjustments to this amount so that the tax adjustment would not alter a ''zero'' pre-tax dumping assessment.

The foreign exporters in the *Federal Mogul* case, however, appealed that decision to the Federal Circuit, which reversed the CIT and held that the statute did not preclude the Department from using the ''*Zenith* footnote 4'' methodology to calculate tax-neutral dumping assessments (*i.e.,* assessments that are unaffected by the existence or amount of home market consumption taxes). Moreover, the Federal Circuit recognized that certain international agreements of the United States, in particular the General Agreement on Tariffs and Trade (GATT) and the Tokyo Round Antidumping Code, required the calculation of tax-neutral dumping assessments. The Federal Circuit remanded the case to the CIT with instructions to direct Commerce to determine which tax methodology it will employ.