

This modified test was clarified in a review of *Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico*, 58 FR 1794, 1795 (January 17, 1991), wherein the Department explicitly stated that the test to be applied for determining sales below cost for perishable agricultural products was a 50–90–10 test, i.e., if between 50 and 90 percent of home market sales consisted of prices below cost, then only the below cost sales were disregarded, while if over 90 percent of sales were below cost then all sales in the home market were disregarded. See *Final Results of Antidumping Duty Review; Certain Fresh Cut Flowers from Mexico*, 56 FR 1795, 1795 (January 17, 1991).

This modified test still remains our current practice and respondent's rationale for the adoption of a straight 50–50 test is an unmerited modification. Were we to adopt respondents' either/or position, i.e., if less than 50 percent are below cost we will use all sales, and if more than 50 percent we will disregard all sales, then we would, in effect, be concluding that 11 percent of widget sales above cost are sufficient to be the basis for FMV but that 49 percent of rose sales above cost are insufficient. This is an illogical result, which we are not prepared to accept.

Comment 16: Duty Deposit Rate—Roses Shipped But Not Sold

Respondents urge the Department to adjust the deposit rate to reflect the fact that many roses imported into the U.S. perish or are destroyed prior to sale. To avoid over collecting duty deposits on roses that never reach the U.S. market, and since there is no way of distinguishing between roses that will be sold and roses that will be destroyed at the time of entry, respondents argue that the duty deposit rate should be adjusted downward to reflect the quantity of roses shipped to the United States, but not sold. This practice is being used in *Flowers*. Respondents suggest the Department multiply any *ad valorem* rates it calculates by the ratio of total quantity sold divided by total quantity shipped, as reported by each respondent.

Petitioner states that all imports at the time of importation are potentially for sale and, therefore, must bear the appropriate cash deposit rate. Because the percentage of roses that will go unsold varies due to season, weather, problems in transportation, etc., petitioner argues that there is no accurate way to adjust for this potential impact.

Additionally, petitioner states that if the Department does adjust the duty

deposit rate to account for roses shipped but not sold, then it is appropriate to adjust the deposit rate to reflect the fact that values entered by Customs are arbitrarily established on consignment entries. Petitioner argues that the use of the calculated USP to derive a cash deposit rate may bear no relation to the value used by Customs for collecting duties. Therefore, petitioner believes that the duty deposit rate should be adjusted upwards so that the duty amount collected reflects the potentially uncollectible duty deposits calculated in the final determination.

DOC Position

We disagree with respondent that the duty deposit rate should be adjusted for roses shipped but not sold. We do, however, agree with respondent, in part, that such adjustment is appropriate for assessment purposes, which are distinct from duty deposit purposes. In the case cited by respondents, *Fresh Cut Flowers from Colombia* 55 FR 20491 (May 17, 1990), the Department indicated that it would make such an adjustment in preparing assessment instructions to the Customs Service. The Department did not make such an adjustment to the duty deposit rates in that case and has not done so in subsequent reviews.

We agree with petitioners that all imports at the time of importation are potentially for sale, and that the percentage of roses which go unsold varies with the seasons. Moreover, this percentage will likely vary with each producer and reseller. Thus, any adjustment contemplated would be speculative. It is preferable to wait until the Department prepares assessment instructions on entries covered by these deposit rates and then make such an adjustment based on the actual experience of the affected companies.

Comment 17: Cash Deposits—The Department's Sampling Technique

Respondents claim that the all others cash deposit rate calculated by the Department is not based on a representative sample of the Colombian rose exporting population—it merely reflects the experience of 16 of the largest exporters. Furthermore, according to respondents, the all others rate disregards the representativeness of such experience. Respondents maintain that this is inconsistent with the Department's statutory requirement that any averages and samples used must be representative of the whole. See 19 U.S.C. 1677f–1(b).

DOC Position

We disagree with respondents. The Department's normal practice, in

accordance with its regulations, is to select that number of the largest exporters of the subject merchandise needed to represent 60 percent of the imports into the United States from the country under investigation. Due to the large number of companies needed to reach 60 percent of imports in this investigation and the administrative burden it would put on the Department's resources to investigate these companies, the Department selected the 16 largest exporters representing over 40 percent of the imports into the United States. See the May 2, 1994, Decision Memorandum from the Team to Barbara Stafford.

The methodology used by the Department maximized its coverage of imports into the United States. The technique of selecting the largest exporters was employed in the *Preliminary Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan*, 55 FR 17779 (April 27, 1990). The other suggested sampling methods, stratified and random, were not selected due to the lack of sufficient industry-wide information on the universe of Colombian and Ecuadorian rose growers (approximately 400 companies in Colombia and 100 companies in Ecuador). The collection and analysis of data to determine an appropriate sampling technique was not reasonably within the power of the Department to undertake. Therefore, we have chosen the most representative sample under the circumstances.

Comment 18: Duty Deposit Rate for Volunteer Companies

Respondents argue that the due process clause of the Fifth Amendment to the U.S. Constitution precludes the Department from requiring cash deposits with respect to companies that the Department refused to investigate. Respondents cite *Kemira Fibres Oy v. United States*, Slip Op. 94–120 (CIT July 26, 1994) to support their argument that due process is required in antidumping proceedings. Such a course, according to respondents, would represent an unconstitutional deprivation of property without due process of law. Respondents maintain that the cash deposit rate must be set at zero, and that all cash deposits paid to date should be refunded, and any bonds posted should be lifted, for all companies ready and willing to participate, but not chosen by the Department.

Petitioner also refers to *Kemira Fibres* to support its argument that procedural due process guarantees do not require trial-type proceedings in all administrative determinations.