Decisions of the United States Court of International Trade

(Slip Op. 01–141)

FORMER EMPLOYEES OF HENDERSON SEWING MACHINES, PLAINTIFFS *v.* CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 01–00883

(Dated December 7, 2001)

ORDER

TSOUCALAS, *Senior Judge:* Upon consideration of the defendant's consent motion for voluntary remand, it is hereby

ORDERED that the consent motion is granted; and it is further

ORDERED that this action is remanded to the Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for worker adjustment assistance benefits; and it is further

ORDERED that remand results shall be filed no later than 60 days after the date of this order; and it is further

ORDERED that the plaintiffs shall file papers with the Court indicating whether they are satisfied with the remand results no later than 30 days after the remand results are filed with the Court; and it is further

ORDERED that the deadline for the filing of: (1) the answer pursuant to Rule 12(a)(1)(A); and (2) the administrative record pursuant to 28 U.S.C. § 2653(d)(1) and Rule 72(a), shall be extended to 30 days after the plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

(Slip Op. 01–144)

SWISHER INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–03–00322

SONY ELECTRONICS, INC. AND ARBON STEEL & SERVICE CO., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 98–07–02438

[Summary judgment for defendant.]

(Dated December 11, 2001)

McKenna & Cuneo, L.L.P. (Peter Buck Feller, Daniel G. Jarcho, and *Joseph F. Dennin)* for plaintiff Swisher.

Galvin & Mlawski (John J. Galvin) for plaintiffs Sony Electronics, Inc., and Arbon Steel & Service Co., Inc.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson, Todd M. Hughes,* and *Jeffrey A. Belkin), Richard McManus* Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

Coudert Brothers (Steven H. Becker and *Paul A. Horowitz)* for amici HMT Plaintiffs' Steering Committee.

Baker & McKenzie (Susan G. Braden, William D. Outman, Kevin M. O'Brien, Teresa A. Gleason, Michael E. Murphy) for amicus IBM.

OPINION

RESTANI, *Judge:* This action is before the court on cross-motions for summary judgment pursuant to USCIT R. 56. The sole issue is whether plaintiffs are entitled to prejudgment interest on fees paid under the export provision of the Harbor Maintenance Tax ("HMT").

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1581(a) for claims based on protest of refund denials. *See Swisher Int'l, Inc. v. United States,* 205 F.3d 1358, 1364 (Fed. Cir. 2000), *cert. denied,* 581 U.S. 1036 (2000). The court has jurisdiction under 28 U.S.C. 1581(i) for claims not arising from administrative proceedings. *See United States Shoe Corp. v. United States,* 114 F.3d 1564, 1570 (Fed. Cir. 1997).

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c).

BACKGROUND

The HMT is an ad valorem tax on commercial cargo involved in "any port use." *See* 26 U.S.C. § 4461(a) (1996). In *United States Shoe Corp. v. United States*, 19 CIT 1284, 1289, 907 F. Supp. 408, 413 (1995), the court

held that the HMT, as applied to exports, violated the Export Clause of the Constitution. *See* U.S. Const., Art. I, § 9, cl. 5. The court later awarded judgment for plaintiffs in the form of a refund of the principal amount paid "together with interest." *See United States Shoe Corp. v. United States,* 19 CIT 1413, 1413, 924 F. Supp. 1191, 1191 (1995).

The court subsequently noted that the question of interest was "not a matter without controversy and it cannot be resolved as a simple clerical matter." *U.S. Shoe,* 20 CIT 206, 207 (1996). Although the court called for additional briefing on the question of whether exporters may recover interest, the U.S. Customs Service ("Customs") filed a notice of appeal from the court's earlier decision on the constitutional issue. As a result, the court's final order awarding interest in *U.S. Shoe* was not addressed on appeal. The CIT's decision holding the HMT unconstitutional was affirmed by the Federal Circuit, 114 F.3d 1564 (Fed. Cir. 1997), and by the U.S. Supreme Court, 523 U.S. 360 (1998).

After the Supreme Court's decision in *U.S. Shoe,* the CIT developed a test case procedure to resolve the remaining issues surrounding the HMT, including the award of prejudgment interest. *See IBM v. United States,* No. 94–10–00625, slip op. 98–78, WL 325156 (Ct. Int'l Trade June 17, 1998), was selected as the test case to determine whether prejudgment interest should be awarded on HMT refunds. In *IBM,* the CIT entered judgment for plaintiff, ordered a refund of the principal paid, and adopted its prior position awarding interest. *See id.* On appeal, the Federal Circuit reversed the CIT's award of interest, holding that the statutory provisions in question did not provide the necessary authorization to award interest. *See IBM v. United States,* 201 F.3d 1367, 1369 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1185 (2001).

Various plaintiffs filed motions seeking additional proceedings on the issue of prejudgment interest. Because the Federal Circuit had only addressed statutory authorization for interest in *IBM,* plaintiffs Sony Electronics, Inc., and Arbon Steel & Service Co. Inc. ("Sony/Arbon") were granted leave to prosecute a complaint asserting various constitutional bases for the award of prejudgment interest.[1] Sony/Arbon argues that plaintiffs are entitled to interest under the Export Clause, the Takings Clause of the Fifth Amendment, the Fifth Amendment Due Process Clause, and under rights guaranteed by the Ninth and Tenth Amendments. Swisher International, Inc. ("Swisher") subsequently filed a motion for entry of judgment in which Swisher asserts similar constitutional claims as well as a statutory claim under 19 U.S.C. § 1505(b),[2] that Swisher argues was not addressed by the Federal Circuit in *IBM*.

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[1] *Sony Electronics, Inc., v. United States* was consolidated with *Arbon Steel & Service Co. Inc., v. United States;* No. 98–10–02987.

[2] The "new" statutory argument is limited to the claims falling under 28 USC § 1581(a), administrative protest denial jurisdiction.

DISCUSSION

The federal government is immune from an award of interest absent an express waiver of sovereign immunity. *See Library of Congress v. Shaw,* 478 U.S. 310, 311 (1986); *see also IBM,* 201 F.3d at 1370. "Apart from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent * * * by Congress,' interest does not run on a claim against the United States." *Shaw,* 478 U.S. at 317 (quoting *United States v. Louisiana,* 446 U.S. 253, 264–265 (1980), quoting *Smyth v. United States,* 302 U.S. 329, 353 (1937)). Swisher first argues that 19 U.S.C. § 1505(b) provides the express consent necessary to award Plaintiffs prejudgment interest here.

A. Section 1505(b)

The Harbor Maintenance Tax does not expressly authorize the payment of interest on HMT refunds. *See IBM,* 201 F.3d at 1371. Express consent may, however, be found "elsewhere." *See id.* (analyzing customs and internal revenue tax provisions to determine whether express consent exists). 26 U.S.C. § 4462(f) requires that all administrative and enforcement provisions of customs laws and regulations apply to the HMT as if it were a customs duty. *See IBM,* 201 F.3d at 1371 ("* * * even though the HMT is codified as an excise tax and is part of the Internal Revenue Code, Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty."). Because the HMT is treated as a customs duty, Swisher argues that the express consent necessary to award interest can be found in 19 U.S.C. § 1505(b), the administrative provision regarding payment and refund of customs duties.

Section 1505(b) provides, in part, for the refund of excess duties, with interest, upon liquidation or reliquidation. 19 U.S.C. § 1505(b).[3] Swisher argues that because § 1505(b) provides for an award of interest on refunds of excess monies deposited to pay duties, it should be construed to allow for an award of interest on refunds of the monies deposited to pay the HMT, which must be treated as duty under § 4462. The principal problem is that § 1505(b) is not designed to apply to the HMT.

The interest provision in §1505(b) applies where a refund has been determined after a liquidation or reliquidation. "It is clear in order for Customs to be liable for interest, a refund must be 'determined on a liquidation or reliquidation.' Indeed, under the statute it is a liquidation or reliquidation which triggers interest liability." *Dal-Tile Corp. v. United States,* 116 F. Supp. 2d 1309, 1314 (Ct. Int'l Trade 2000); *see also Travenol Labs., Inc. v. United States,* 118 F.3d 749 (Fed. Cir. 1997), 753 n. 5 (the "event that gives rise to interest liability is liquidation or reliquidation"); *Novacor Chem. Inc. v. United States,* 171 F.3d 1376, 1382 (Fed.

[3] 19 U.S.C. § 1505(b) reads:

> The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

Cir. 1999) (reliquidation "is the triggering event in a dispute surrounding an award of interest").

Under 19 C.F.R. § 159.1, liquidation is defined as the final computation of the duties or drawback accruing on an entry. "Liquidation (or reliquidation), therefore, determines whether there has been an overpayment or underpayment, and thus defines the basis upon which interest might be due." *Travenol,* 118 F.3d at 753. There has been no liquidation or reliquidation to trigger § 1505(b) here. Swisher argues, however, that Customs' initial denial of its refund request was effectively a liquidation and a new determination is equivalent to a reliquidation, thus triggering the interest provisions of § 1505(b), and distinguishing its procedural posture from that of the *IBM* plaintiffs, who did not seek an administrative decision from Customs.

In *IBM,* the court rejected the argument that language regarding "liquidation" could be interpreted to include other actions by Customs. 201 F.3d 1367. The court looked to the actual purpose of § 1505(c),[4] which describes specifically how interest is determined:

> On its face, the statute contemplates an entirely different factual scenario from the one before us. However, *amici* suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and *Customs' acceptance of the HMT payment for "liquidation,"* we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended, no matter how compelling the case, particularly in light of the Supreme Court's mandate that Congress must expressly consent to an award of interest. *See Shaw,* 478 U.S. at 314. Accordingly, § 1505(c) does not authorize interest on HMT refunds.

IBM, 201 F.3d at 1374 (emphasis added). For precisely the same reason, this court is prohibited from rewriting § 1505(b).

The basic purpose of liquidation and reliquidation is to finalize duties owed, allow parties to protest the classification or valuation of goods and allow a remedy for both underpayment and overpayment. *See Travenol,* 118 F.3d at 753. Swisher wants HMT payments to be equated to customs duties, but does not and could not argue that it overpaid an otherwise valid customs duty because its goods were improperly classified or valued and is, therefore, entitled to a refund of the difference including interest. Such a claim would be properly asserted under § 1505(b). Instead, Swisher argues that any and all HMT payments should be construed as overpayments of an invalid customs duty, and, therefore, it is entitled to a refund of the entire amount with interest, even though

[4] 19 U.S.C. § 1505(c) reads as follows:

> Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation. The Secretary may prescribe an alternative mid-point interest accounting methodology, which may be employed by the importer, based upon aggregate data in lieu of accounting for such interest from each deposit data provided in this subsection.

Customs did not improperly classify or value goods.[5] This statute, like § 1505(c), contemplates an entirely different factual scenario than the one before the court. It seems clear that § 1505(b) was not created to provide recourse for an unconstitutional tax but was merely intended to remedy mistaken customs classifications and valuations. The court would have to stretch the meaning of its language in a way not permitted by the court in *IBM* to provide the remedy that Swisher suggests, and such judicial manipulation was precisely the focus of *IBM*.[6]

Moreover, if the court were to find that HMT refund decisions were the functional equivalent of a liquidation, the court would not only rewrite § 1505(b), but would necessarily alter the meaning of § 1505(c) as well. Section 1505(c) defines the period during which interest runs when a liquidation or reliquidation has determined that a refund is due. The period is between the date of the *duty deposit* until the date of *entry liquidation* or *reliquidation*. Because the two sections work hand in hand, the meaning of § 1505(c) would also change to read that the time of payment of the HMT, like the time of deposit of duties, marks the time at which interest begins to run. The Federal Circuit has plainly rejected such that interpretation of § 1505(c). *See IBM,* 201 F.3d at 1374.[7] Whether or not a refund denial is like an erroneous liquidation, the HMT payment is not a "duty" "deposit" paid on an "entry" by an "importer of record." Because the court is prohibited from rewriting § 1505(c), it is necessarily prohibited from rewriting § 1505(b).

Federal courts are required to strictly construe waivers of sovereign immunity. *Shaw,* 478 U.S. at 318.

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."

United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947). Accordingly, the court must find against awarding interest even where there is a compelling public policy to do so. *Shaw,* 478 U.S. at 318. This principle and the holding in *IBM* compel the court to find that § 1505(b) does not provide the express waiver of sovereign immunity necessary to award prejudgment interest on HMT export payments.

B. Export Clause

In *Shaw*, the Supreme Court acknowledged that "constitutional requirements" may permit the award of interest against the federal government in the absence of an express statutory or contractual waiver.

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[5] While certain "fees" may be a liquidated and refunded under § 1505(b), it is clear that these are not HMT payments but other fees paid by importers in addition to duties that are part of the duty liquidation process. Swisher argues that it is the equivalence of "customs duties" and HMT, not these miscellaneous fees and HMT, that is required by § 4462(f).

[6] In *IBM*, the court recognized that 26 U.S.C. § 4462(f) provided for the HMT payments to be treated as customs duties for administrative and enforcement purposes, but still declined to substitute new terms for the statutory interest language in order to allow interest. *See IBM,* 201 F.2d at 1371–74.

[7] HMT payments are not "deposits" within the meaning of § 1505(c), which become final upon liquidation.

478 U.S. at 317. Plaintiffs argue that because the Export Clause is an "unqualified prohibition" on export taxes, *see U.S. Shoe,* 523 U.S. at 368, the remedy for a violation of the Export Clause necessarily includes a refund with interest. In *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369, 1373 (Fed Cir. 2000), the court recognized that the Export Clause "provides a cause of action with a monetary remedy," without independent statutory authorization. That does not equate, however, to a waiver of sovereign immunity for interest claims.

The Just Compensation Clause of the Fifth Amendment, also referred to as the Takings Clause, is the only provision of the Constitution that the U.S. Supreme Court has found to contain a clear waiver of sovereign immunity authorizing prejudgment interest. *See, e.g., Shaw,* 478 U.S. at 317; *Smyth,* 302 U.S. at 353; *U.S. v. Alcea Band of Tillamooks,* 341 U.S. 48, 49 (1951); *Boston Sand & Gravel v. U.S.,* 278 U.S. 41, 47 (1928); *Tillson v. U.S.,* 100 U.S. 43, 47 (1879). In *Shaw,* the Supreme Court implied that this "constitutional requirement" exception arises only in a taking under the Fifth Amendment. 478 U.S. 310, 317 n.5 (cites omitted). In fact, Plaintiff Sony quotes *Merchants Matrix Cut Syndicate, Inc. v. U.S.,* 284 F.2d 456 (7th Cir. 1960) for the proposition that *"with the exception of just compensation claims under the Fifth Amendment,* interest is not recoverable against the United States in the absence of an express provision to the contrary." As a matter of first impression, Plaintiffs ask the court to recognize a new waiver of sovereign immunity under the Export Clause.

Plaintiffs cite to *Hatter v. United States,* 38 Fed. Cl. 166, 182 (1997) *("Hatter VI"),* for the proposition that the court may look beyond the Just Compensation Clause to find a constitutional waiver of sovereign immunity. In *Hatter v. United States,* 64 F.3d 647 (Fed. Cir.1995) *("Hatter IV"),* the Federal Circuit held that assessing a social security tax for the first time on sitting federal judges gave rise to an action under the Compensation Clause of Article III. The Federal Circuit remanded the matter to the Court of Federal Claims to calculate damages. On remand, the Court of Federal Claims held that the remedy included interest because Article III, much like the Just Compensation Clause of the Fifth Amendment, created an affirmative requirement to pay and, therefore, the traditional rule against interest did not apply. *See Hatter VI,* 38 Fed. Cl. at 182–83. Plaintiffs argue that because Swisher's claim, like *Hatter VI,* arises directly under the Constitution, the Export Clause requires an award of interest. The Federal Circuit, however, never addressed on appeal whether the Compensation Clause contained the necessary waiver of sovereign immunity and, therefore, there is no binding precedent be-

fore this court expanding the traditional rule.[8] Even if the court were to accept *Hatter VI's* view of the Compensation Clause of Article III, *Hatter VI* does not provide the answer here.

Interest does not attach merely because a claim arises under the Constitution. It is the unique language of the Just Compensation Clause of the Fifth Amendment which requires prejudgment interest. *See, e.g., Monangahela Navigation Co. v. United States,* 148 U.S. 312, 325–26 (1893). While the Export Clause may be interpreted as money-mandating, *see Cyprus Amax,* 205 F.3d at 1373, it does not contain express language which requires that the government provide "just" compensation. It is the meaning embodied in the term "just compensation" which creates the requirement that the government provide a "full and exact equivalent" in the form of interest. *See Olson v. United States,* 292 U.S. 246, 254–55 (1934). If the compensation clause of Article III of the Constitution requires payment of interest, it is because that particular clause contains an affirmative requirement for undiminished and timely paid compensation. The Export Clause merely contains a prohibition against government action. The remedy for the prohibition may take various forms; it is not an absolute and affirmative requirement to restore Plaintiffs to their prior position. It is this affirmative requirement that fully waives sovereign immunity under the Just Compensation Clause of the Fifth Amendment and perhaps under Article III. Because the Export Clause does not contain that affirmative requirement, the court cannot construe the clause as the full and express waiver of sovereign immunity necessary to allow prejudgment interest.

C. Fifth Amendment Taking

Plaintiffs argue that the imposition of the HMT on exports was a taking under the Fifth Amendment and, therefore, the traditional rule against interest does not apply. The Takings Clause of the Fifth Amendment guarantees that private property shall not be taken for public use without just compensation. *See* U.S. Const. amend. V. A Fifth Amendment takings claim requires a two-step analysis. First, Plaintiff must establish that it possesses a compensable property interest. *See, e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992); *Kaiser Aetna v. U.S.,* 444 U.S. 164, 179–180 (1979). Plaintiff must then show that the United States, through a valid act of Congress, took that private property interest for public use without just compensation. *See Short v. U.S.,* 50 F.3d 994, 1000 (Fed. Cir. 1995).

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[8] The 1997 Court of Federal Claims' decision in *Hatter* was one of many. *See Hatter v. United States,* 21 Cl.Ct. 786 (1990) *("Hatter I"), rev'd,* 953 F.2d 626 (Fed.Cir.1992) *("Hatter II"), on remand,* 31 Fed.Cl. 436 (1994) *("Hatter III"), rev'd,* 64 F.3d 647 (Fed.Cir.1995) *("Hatter IV"), aff'd,* 519 U.S. 801 (1996) *("Hatter V"), on remand,* 38 Fed.Cl. 166 (1997) *("Hatter VI").* After the Court of Federal Claims awarded interest in *Hatter VI,* the Federal Circuit reversed and remanded the matter on a different issue. *See Hatter v. U.S.,* 85 F.3d 1356 (Fed Cir. 1999) *("Hatter VII").* The *Hatter VII* court did not address interest. That decision was later vacated and the opinion withdrawn so that the court could hear the matter *en banc. See Hatter v. United States,* 199 F.3d 1316 (Fed. Cir. 1999) *("Hatter VIII").* The Federal Circuit, without addressing the award of interest, again reversed the Court of Federal Claims on other grounds. *See Hatter v. United States,* 203 F.3d 795 (Fed. Cir. 2000) *("Hatter IX"), aff'd in relevant part,* 532 U.S. 557 (2001) *("Hatter X").* In the course of *Hatter's* complicated history, the issue of interest was never addressed beyond *Hatter VI* and, therefore, was never the subject of any substantive appellate discussion.

To satisfy the first requirement, Plaintiffs argue that its invalidly extracted money is a property interest protected under the Fifth Amendment citing *Board of Regents v. Roth,* 408 U.S. 564, 571–72 (1972) ("[T]he property interests protected by procedural due process extend beyond actual ownership of real estate, chattels, or money."). Generally, taxation is not considered to be a taking because the monies paid are not a recognizable protected property interest. *See, e.g., United States v. Sperry Corp.,* 493 U.S. 52, 53 (1989) (holding that a deduction of a tribunal user fee from a settlement award is not a taking); *Commercial Builders v. Sacramento,* 941 F.2d 872, 876 (9th Cir. 1991) (holding that a purely financial exaction does not constitute a taking); *Coleman v. C.I.R.*, 791 F.2d 68, 70 (7th Cir. 1986) (holding that taxes are not takings, unless the Government tries to "achieve through special taxes what the Takings Clause of the Fifth Amendment forbids if done directly."); *Atlas Corp. v. United States,* 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property"); *Commonwealth Edison Co. v. United States,* 46 Fed. Cl. 29, 40 (2000) (same); *Branch v. United States,* 69 F.3d 1571, 1576 (Fed. Cir. 1995) (rejecting the argument that a federal statute constituted a taking, "because the property allegedly taken was money).

A limited number of courts have suggested that a tax may be a taking, but only if the tax is confiscatory. "Levying of taxes does not constitute a Fifth Amendment taking unless the taxation is so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property.'" *Quarty v. United States,* 170 F.3d 961, 969 (9th Cir. 1999) (quoting *Brushaber v. Union Pac. R.R. Co.,* 240 U.S. 1, 24 (1916)). To prove that the tax HMT is confiscatory, Plaintiffs must establish that the tax was not reasonably related to a substantial public purpose. *See Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 127 (1978). An act intended to fund the maintenance of this country's harbors is clearly related to a substantial public purpose and, therefore, the HMT on exports was not confiscatory.

Plaintiffs argue that an unconstitutional tax is an *ipso facto* taking. Plaintiffs quote the concurring opinion of Justice Scalia in *Reynoldsville Casket Co. v. Hyde:* "if a plaintiff seeks the return of *money* taken by the government in reliance on an unconstitutional *tax* law, the court ignores the tax law, finds the *taking* of the *property* wrongful, and provides a remedy." 514 U.S. 749, 760 (1995). (Emphasis in Plaintiff's Brief.). Plaintiffs reliance on *Reynoldsville Casket* is misplaced. The majority opinion recognized that the remedy for an unconstitutional tax is not, as Plaintiffs would argue, the same as if a taking had occurred but depends upon the underlying factor that rendered the tax unconstitutional. *See id.* at 755 (citing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)). In *McKesson,* 496 U.S. at 51–52, the Supreme Court recognized that the remedy for an unconstitutional tax may not even be the repayment of the tax, but in the case of a discriminatory tax may involve the levying of an additional, offsetting tax. If, as Plaintiffs

suggest, an unconstitutional tax is an *ipso facto* taking, the remedy would be limited to just compensation, and could not in some cases be cured by the levy of additional taxes. While it is clear that a remedy involving an additional tax is inapplicable here, it is equally clear that the remedy for an unconstitutional tax is not necessarily the remedy for a taking. The flexibility of remedy supports the argument that payment of a tax, unconstitutional or not, is not a property interest protected under the Takings Clause of the Fifth Amendment.

Even if Plaintiffs' unconstitutionally exacted money was a recognized protected property interest, Plaintiffs fail to satisfy the second step of the takings analysis. The HMT does not constitute a taking because the HMT was not a valid exercise of Congress' power of eminent domain. The HMT on exports was an unauthorized use of Congress' otherwise valid power to tax under Article I of the Constitution, not a valid exercise of the government's power of eminent domain. *See U.S. Shoe,* 523 U.S. 360. "[T]he power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles." *Houck v. Little River Drainage Dist.,* 239 U.S. 254, 264 (1915). Because Congress was not exercising its power of eminent domain in passing the HMT, a takings analysis is inappropriate.

Moreover, the HMT was not a valid act of Congress. "[A] taking claim must be premised upon a government action that is either expressly or impliedly authorized by a valid enactment of Congress." *Dureiko v. United States,* 209 F.3d 1345, 1359 (Fed. Cir. 2000). Plaintiff's entire argument is premised on the notion that the HMT was an invalid, unconstitutional act. Plaintiff cannot now argue that the HMT was simultaneously a valid exercise of the federal government's power of eminent domain. Because the HMT was not a valid exercise of Congress' power of eminent domain and because the monies paid are not a property interest protected under the Fifth Amendment, the HMT is not subject to a takings analysis. Consequently, Plaintiffs are not entitled to interest under the Takings Clause of the Fifth Amendment.

D. Fifth Amendment Due Process

Sony/Arbon argues that imposition of the HMT on exports was a violation of Plaintiffs' substantive due process rights. The Fifth Amendment of the U.S. Constitution states that no person shall be deprived of life, liberty or property without due process of law. *See* U.S. Const. amend. V. The standard of review governing a due process challenge to a taxing statute is "whether the taxing statute is so arbitrary and capricious as to amount to a denial of due process." *Pledger v. C.I.R.,* 641 F.2d 287, 292 (5th Cir. 1981). A tax will not constitute a deprivation of property under the Due Process Clause unless it is so arbitrary as to be confiscatory. *See Quarty,* 170 F.3d at 969 (quoting *Brushaber,* 240 U.S. at 24). Plaintiffs argue that an unconstitutional tax is *per se* confiscatory.

In *Sperry,* 493 U.S. at 65, the Court held that a Congressional act is not a violation of the Due Process Clause if it is rationally related to a legitimate public purpose. The HMT was intended to finance the general

maintenance of U.S. ports. S. Rep. No. 99–126, at 9–10 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6646–47. Funding the maintenance of U.S. ports by charging those parties that use the ports is an otherwise valid exercise of Congress' power to tax for a legitimate public purpose. While one provision of the HMT was found unconstitutional, that is insufficient to render the tax so arbitrary and capricious as to violate Plaintiffs' rights under the Due Process Clause of the Fifth Amendment.

Even if the HMT did violate the Due Process Clause, Plaintiffs fail to provide any support for their claim that an award of interest is constitutionally required to remedy such a violation. "[N]o language in the [Fifth Amendment Due Process Clause] itself requires the payment of money damages for its violation." *Murray v. U.S.,* 817 F.2d 1580, 1583 (Fed. Cir. 1987). Even though a tax is declared unconstitutional pursuant to the Due Process Clause, the remedy does not necessarily include a refund, *McKesson*, 496 U.S. at 51, much less interest. As a result, Plaintiffs' Due Process claims fail.

E. Ninth and Tenth Amendments

Plaintiffs Sony/Arbon lastly argue that the HMT need not contain a waiver of sovereign immunity because the doctrine of sovereign immunity does not apply here. Citing *North Am. Co. v. SEC,* 327 U.S. 686, 704–05 (1946), Plaintiffs argue that the United States is not an "absolute sovereign" and, more importantly, that Congress was acting outside of its sovereign role when it passed the unconstitutional HMT on exports. Plaintiffs argue that Congress' passage of the HMT on exports was, in fact, an exercise of "a different and forbidden power" that infringed upon rights protected under the 9th and 10th Amendments.

The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. In *United States v. Choate,* 576 F.2d 165, 181 (9th Cir. 1978), the court held that the rights protected by the Ninth Amendment are those that are so basic and fundamental and deeply rooted in our society as to be "essential rights" but which, nevertheless cannot find direct support elsewhere in the Constitution (quoting *Griswold v. Connecticut,* 381 U.S. 479, 488–89 (1965)). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively or to the people." U.S. Const. amend. X. Plaintiffs cite to *Kansas v. Colorado,* 206 U.S. 46, 90 (1907), for the proposition that the principal purpose of the Tenth Amendment was to reserve to the people all power not granted to the federal government or to the states. Plaintiffs reason that "the sovereign power to tax exports remains the *exclusive* province of the *'sovereign People'* of this Nation under the Ninth and Tenth Amendments," Plaintiff Sony's Brief at 15. (emphasis in original), and therefore, the HMT on exports was not imposed by the federal government in its capacity as a sovereign.

Taken to its logical conclusion, Plaintiffs argue that any act passed by Congress which is later declared unconstitutional would automatically

be a violation of the Ninth and Tenth Amendments because it was beyond Congress' power to pass in the first place. Plaintiffs cite no support for this proposition. In addition, Plaintiffs fail to identify any case that provides for prejudgment interest as a remedy for a Ninth or Tenth Amendment violation. Accordingly, the court finds that Plaintiffs are not entitled to interest under the Ninth or Tenth Amendment.

CONCLUSION

The court finds that Plaintiffs are not entitled to prejudgment interest under § 1505(b), the Export Clause, the Takings Clause, the Due Process Clause of the Fifth Amendment, or the Ninth and Tenth Amendments. The court grants summary judgment for Defendant.

(Slip Op. 01–145)

GENERAL ELECTRIC CO.—MEDICAL SYSTEMS GROUP, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–11–00750

(Dated December 11, 2001)

ORDER

WALLACH, *Judge:* In accordance with the decision and mandate of the United States Court of Appeals for the Federal Circuit, Appeal No. 00–1263, reversing this Court's decision in *GE-Med. Sys. Group. v. United States,* 86 F. Supp. 2d 1291, Slip Op. 2000–4 (January 6, 2000) ("General Electric"), it is hereby

ORDERED that the portion of this Court's Opinion and Order in General Electric, holding that Customs properly classified the 98 imported multiformat cameras ("MFC's") under HTSUS subheading 9006.59.40 is vacated; and it is further

ORDERED that Customs shall reliquidate the 97 MFC's for use with computerized tomography systems under subheading 9022.90.60 and the remaining MFC dedicated for use in magnetic resonance imaging systems under subheading 9018.90.80 in accordance with the Federal Circuit's decision and mandate. Customs shall refund all excess duties paid with interest as provided by law.

(Slip Op. 01–146)

UNITED TECHNOLOGIES CORP., PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Consolidated Court No. 96–02–00635

[Plaintiff's motion for summary judgment denied and Defendant's cross-motion for summary judgment granted.]

(Decided December 13, 2001)

Phelan & Mitri (Michael F. Mitri) for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis); Beth C. Brotman,* Office of Assistant Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

MUSGRAVE, *Judge:* This matter is before the Court on cross-motions for summary judgment pursuant to CIT Rule 56. At issue is whether Defendant, the United States Customs Service ("Customs"), was correct in denying duty-free treatment to certain entries of aircraft engine parts by Pratt & Whitney, a division of Plaintiff, United Technologies Corporation ("UTC"). UTC contends that the merchandise should have been afforded duty-free treatment pursuant to the Agreement on Trade in Civil Aircraft, Apr. 12, 1979, 31 U.S.T. 619, T.I.A.S. No. 9620, a multilateral trade agreement codified under U.S. law as the Civil Aircraft Agreement, Title VI of the Trade Agreements Act of 1979, Pub. L. No. 96–39, § 601, 93 Stat. 144, 267 (1979). For the reasons that follow, the Court concludes that Customs was correct in denying duty-free treatment to the subject entries.[1] Therefore, UTC's motion is denied and Customs' motion is granted.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate if "there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). Although 28 U.S.C. § 2639(a)(1) extends a presumption of correctness to Customs' classification decisions, this presumption "is irrelevant where there is no factual dispute between the parties." *Rollerblade Inc. v. United States*, 112 F.3d 481, 484 (Fed Cir. 1997) (citing *Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995)); *accord Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492–93 (Fed. Cir. 1997). Where, as here, Customs'

[1] UTC avers that 51 entries are at issue in this action, but Customs contends that only 48 entries are at issue since, it alleges, entry no. 943–0231279–1 was liquidated free of duty; entry no. 943–0231954–9 was liquidated, as entered, under tariff subheading 7508.00.50; and entry no. 943–0230457–4 was entered under tariff subheading 8414.80.20. *See* Def.'s Resp. to Pl.'s Statement of Material Facts to Which There is No Genuine Dispute at ¶¶ 6, 8.

decision is articulated in a classification ruling, the Court does not afford it the degree of deference set forth in *Chevron U.S.A. v. Natural Resources Defense* Counsel, 467 U.S. 837, 843–45 (1984). *United States v. Mead Corp.,* 533 U.S. ____, 121 S. Ct. 2164, 2175–76 (2001) (holding that classification rulings are "beyond the *Chevron* pale"). Instead, the Court gives the ruling respect "to the extent that [it has] the power to persuade." *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)). *See Mead, supra*, at 2175–76; *Heartland By-Products, Inc. v. United States,* 264 F.3d 1126, 1134–35 (Fed. Cir. 2001).

BACKGROUND

UTC develops and manufactures jet engines and engine components for civilian and military applications. During the relevant time period, it was a party to several collaboration agreements with foreign aerospace corporations. In conjunction with those agreements, UTC imported engine parts that were manufactured or supplied by foreign corporations "for use in the development, manufacture, testing, repair, maintenance, rebuilding, modification and/or conversion of engines and engine subassemblies in the United States." Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Br.") at 3. The engine parts at issue in this action were imported for use in either "commercial developmental or test engines" which were not installed on an aircraft. *Id*. at 4.

UTC imported the subject merchandise between October 1991 and November 1995, and asserted classification under subheading 8411.91.9080 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides for "[p]arts of aircraft turbines." The general duty rate for this subheading was 3.7% *ad valorem* from 1991 to 1994 and 3% *ad valorem* in 1995, but duty-free entry was available for merchandise covered by the Agreement on Trade in Civil Aircraft. HTSUS General Note 3(c)(iv) (1991)[2] explains the requirements for this provision:

> *Articles Eligible for Duty-Free Treatment Pursuant to the Agreement on Trade in Civil Aircraft.* Whenever a product is entered under a provision for which the rate of duty "Free (C)" appears in the "Special" subcolumn, the importer shall file a written statement, accompanied by such supporting documentation as the Secretary of the Treasury may require, with the appropriate customs officer stating that the imported article has been imported for use in civil aircraft, that it will be so used and that the article has been approved for such use by the Administrator of the Federal Aviation Authority (FAA) or by the airworthiness authority in the country of exportation, if such approval is recognized by the FAA as an acceptable substitute for FAA certification, or that an application for approval for such use has been submitted to, and accepted by, the Administrator of the FAA. For purposes of the tariff schedule, the term *"civil aircraft"* means all aircraft other than aircraft pur-

[2] In 1994 General Note 3(c)(iv) was renumbered General Note 6, but the wording remained the same. The Court will refer to it as General Note 3(c)(iv) throughout this Opinion.

> chased for use by the Department of Defense or the United States Coast Guard.

UTC sought duty-free treatment as provided by General Note 3(c)(iv), but Customs denied this claim on the ground that the engine parts were "developmental material" to be used "for test engines only" and thus they were "not being used in [c]ivil [a]ircraft." Pl.'s Br. at 6. Customs classified the merchandise under HTSUS subheading 8411.91.9080 and assessed duties at the general rate. *Id*. at 6–7.

UTC timely filed a total of seven protests in conjunction with these entries, and also requested further administrative review from Customs Headquarters. In Headquarters Ruling ("HQ") 954058 (Apr. 14, 1995), Customs held that the parts were not "imported for use in civil aircraft nor so used in civil aircraft" because they "were installed in test engines which are fired and run in a test cell" and "usually are not placed in service on commercial aircraft." HQ 954058 at 3. Following this ruling, the seven protests were denied, and UTC brought the present action.

DISCUSSION

UTC contends that Customs used too narrow a definition of "aircraft" in determining that the imported engine parts did not qualify for duty-free treatment pursuant to General Note 3(c)(iv). It argues that the Court should instead look to the Agreement on Trade in Civil Aircraft ("ATCA"), which provides that:

> 1.1 This Agreement applies to the following products:
>
> *(a)* all civil aircraft,
> *(b)* all civil aircraft engines and their parts and components,
> *(c)* all other parts, components, and sub-assemblies of civil aircraft,
> *(d)* all ground flight simulators and their parts and components,
>
> whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification or conversion of civil aircraft.
>
> 1.2 For the purposes of this Agreement "civil aircraft" means *(a)* all aircraft other than military aircraft and *(b)* all other products set out in Article 1.1 above.

ATCA articles 1.1, 1.2. UTC explains that Customs' definition defeats the purpose of the ATCA, which was "to achieve maximum freedom of world trade in civil aircraft, parts, and related equipment, including the elimination of duties, and to the fullest extent possible, the reduction or elimination of trade restricting or distorting effects." *Id*. at 31 (citing ATCA preamble). Thus it concludes that "the ATCA and its implementing U.S. legislation, the Civil Aircraft Agreement, should be read to provide the greatest possible trade and commerce benefits to the international commercial aircraft industry." Pl.'s Br. at 30–31.

"[T]ariff terms are to be construed in accordance with their common and popular meaning, in the absence of contrary legislative intent."

E.M. Chemicals v. United States, 920 F.2d 910, 913 (Fed. Cir. 1990) (citations omitted). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988) (citations omitted). "Absent a clearly expressed legislative intention to the contrary, [the language of the statute] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).

The Civil Aircraft Agreement, Pub. L. No. 96–39, § 601, 93 Stat. 144, 267, and HTSUS General Note 3(c)(iv), *supra*, define "civil aircraft" as "all aircraft other than aircraft purchased for use by the Department of Defense or the United States Coast Guard." This definition distinguishes civil aircraft from military aircraft, but leaves the term "aircraft" undefined. As UTC acknowledges in its brief, "the common meaning of 'aircraft' is * * * airplanes, helicopters and the like." Pl.'s Br. at 28. UTC also notes that Webster's Third New International Dictionary (1986) defines "aircraft" as "a weight-carrying machine or structure for flight in or navigation of the air that is designed to be supported by the air either by the buoyancy of the structure or by the dynamic action of the air against its surfaces—used of airplanes, balloons, helicopters, kites, kite balloons, orthopters, and gliders but chiefly of airplanes or aerostats." *Id*. at 28 n.4. Since the engine parts at issue were not imported for installation on an aircraft, the Court concludes that Customs was correct in determining that engine parts were not imported for use in "aircraft" as that term is commonly understood.

Although, as UTC observes, the Civil Aircraft Agreement and HTSUS conflict with the ATCA to the extent they are narrower in scope, this court has previously held that "[e]ven if U.S. law contradicts the agreement, U.S. law must be followed." *Northwest Airlines, Inc. v. United States,* 22 C.I.T. 797, 805, 17 F. Supp. 2d 1008, 1015 (1998) (citing *Suramerica de Aleaciones Laminades, C.A. v. United States,* 966 F.2d 660, 667–68 (Fed Cir. 1992); *Algoma Steel Corp. v. United States,* 865 F.2d 240, 242 (Fed. Cir. 1989)). UTC also notes that the definition of "civil aircraft" in the HTSUS General Notes was amended in 1996 to encompass "any aircraft, aircraft engine, or ground flight simulator (including parts, components, and subassemblies thereof)." Pl.'s Br. at 33. UTC argues that "this Court should regard the weight of the statutory amendment as determinative of the construction of the HTSUS General Note [3(c)(iv)] term "civil aircraft" to include engine parts." *Id*. at 34. Nevertheless, the legislative history reflects that this amendment was made to "facilitate the importation of these products by *broadening* the definition of 'civil aircraft' in the [HTSUS]." S. Rep. No. 104–393 at 10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4044, 4045 (emphasis added). Thus during 1991–1995, when the subject entries were made, the term "civil air-

craft" was to be construed more narrowly, in accordance with its common meaning.

CONCLUSION

For the foregoing reasons, UTC's motion for summary judgment is denied and Customs' cross-motion for summary judgment is granted. Judgment will enter accordingly.

(Slip Op. 01–147)

AVENUES IN LEATHER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 99–09–00603

[On classification of "Presentation Calcu-Folios," judgment for defendant.]

(Decided December 13, 2001)

Fitch, King and Caffentzis, New York, New York *(James Caffentzis),* for the plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Amy M. Rubin); Yelena Slepak,* Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel, for the defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff Avenues in Leather, Inc. ("Avenues") invokes this Court's jurisdiction under 28 U.S.C. § 1581(a) to determine the correct classification of style numbers 3532 and 3533 "Presentation Calcu-Folios" entered at the Port of New York in 1997. The defendant United States Customs Service ("Customs") moves for summary judgment, arguing that the merchandise at bar is substantially identical to that considered in *Avenues in Leather, Inc. v. United States*, 22 CIT 404, 11 F. Supp.2d 719 (1998) ("*Avenues I*"), *aff'd* 178 F.3d 1241 (Fed. Cir. 1999) ("*Avenues II*"). For the reasons set forth herein judgment is awarded in favor of Customs.

I

The imported articles are : (1) zippered on three sides; (2) measure 13½ inches in height by 11½ inches in width by 1½ inches in depth when closed; (3) have one exterior open flat pocket; (4) have a single padded carrying handle fitted to the exterior spine; (5) are constructed of paperboard covered plastic foam and a vinyl/plastic exterior and interior; (6) contain a three-ring metal binder in the interior that is permanently affixed to the spine; (7) have a horizontal sleeve in the interior right side, into which has been placed a cardboard backed 3-hole lined pad of paper measuring 8½ inches by 11 inches; and (8) contain in the interior left

side an open flap pocket on top of which are a zippered pocket, one large slot of approximately 11¾ inches in length by 4¼ inches in height, two smaller slots sized to hold computer disks, two loops for writing instruments, and a permanently attached calculator measuring 3 inches in width by 5½ inches in height. *See* Def.'s Statement of Material Facts As To Which There Are no Genuine Issues To Be Tried ¶ 4 ("Def.'s Statement"). Counsel for Customs state they have not reviewed a sample of style 3532 or the packaging or tags with which the merchandise was imported, however counsel argues that according to the complaint in this action, all of the merchandise in issue possess the same features. *See* Def.'s Mem. in Supp. of Mot. for Summ. J. ("Def.'s Mem.") Exhibit A (sample style 3533).

The entries were classified by Customs under subheading 4202.12.20, Harmonized Tariff Schedules of the United States ("HTSUS"), which provides as follows:

4202:	Trunks suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instruments cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition material, of sheeting of plastics, of textile materials, of vulcanized fiber or of paper board, or wholly or mainly covered with such materials or with paper:
	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers
4202.12	With outer surface of plastics or of textile materials
4202.12.20	With outer surface plastics 20%

Avenues claims that its merchandise is properly classifiable as binders under subheading 4820.30.00, HTSUS, which provides as follows:

4820:	Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (looseleaf and other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationary, of paper or paperboard, albums for samples or for collections, and book covers (including cover boards and book jackets) of paper or paperboard):
4820.30.00	binders (other than book covers), folders and file covers . . . . 4.2%[1]

[1] In *Avenues I*, the claim was that imported merchandise was classifiable under 4820.10.20, HTSUS, which provides for "Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles: * * * Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles * * * 3.2%."

See Pl.'s Mem. in Opp'n to Def.'s Mot for Summ. J. ("Pl.'s Mem").

Customs argues summary adjudication of this matter is appropriate because there are no factual disputes regarding the construction, features, or general purpose of the subject imported articles, and only legal issues remain, *i.e.* determining the scope of any potentially relevant tariff provisions. Except for the calculator, Customs notes that the dimensions and features of the Presentation Calcu-Folios at bar are "very similar" to three of the four styles of importations previously considered in *Avenues I*. *See* 22 CIT at 406–407, 11 F. Supp.2d at 722.

Rule 1 of the General Rules of Interpretation, HTSUS ("GRI"), states that "for legal purposes, classification shall be determined according to the terms of the headings and any relevant section or chapter notes" and therefore Customs argues that before subheadings may be examined, GRI 1 requires an initial determination on which heading encompasses the article. In heading 4820 the drafters used the general terms "similar articles" and "other articles of stationary" to group the various exemplars into three distinct categories: (1) "articles" such as registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, and diaries; (2) "articles of stationary" such as exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets; and (3) albums and book covers. Since the claimed classification is for "binders," Customs argues Avenues is necessarily contending that the Presentation Calcu-Folios are "articles of stationary." Customs argues that the "many other features" of the imported articles "do not immediately suggest a connection to writing" and therefore when viewed in their entirety do not constitute articles of stationary. Def.'s Mem at 16. By contrast, classification under heading 4202 was correct, Customs argues, because heading 4202 encompasses attache or brief cases and "similar containers" designed to carry business or other documents together with additional items such as pens, compact or floppy discs, an address book, and so forth. Therefore, Customs argues headnote 4202 best describes the articles at bar. Furthermore, Customs notes that Note 1(h) to Chapter 48, HTSUS, states: "this chapter does not cover: Articles of heading 4202 (for example travel goods)." According to Customs, neither Chapter 42 nor Heading 4202 elucidates similar exclusions for articles described under Chapter 48 so therefore Avenues' claimed classification must fail because the doctrine of relative specificity is inapplicable. Customs lastly argues that even if the Court determines that heading 4202 does not encompass the merchandise at issue, this matter may be resolved simply by determining the meaning and scope of the term "binders" in the claimed provision, a matter of legal construction, and trial is therefore unnecessary.

Avenues opposes summary judgment on the ground that it is conclusory to assume the imported merchandise is "very similar" to that considered in *Avenues I*. Avenues argues it can prove at trial that the primary purpose of the subject merchandise is different from the "con-

tainers" described by heading 4202, and in support of its opposition Avenues submits the affidavit of Otniel Shor, the designer of the imported Presentation Calcu-Folios and also of "containers" of the type covered by heading 4202. Mr. Shor avers the following:

* * * * * * *

> 6. Each of the subject articles is designed as a DIRECT office assistant. That is to say, the user utilizes the feature in the article by indirect interaction with such features in the article—for example, by writing on the note-pad, by using the built-in calculator and by inserting papers in the spring loaded 3-ring binder.
>
> 7. The subject articles are not designed to hold small books, newspapers or similar items. Placing such items in Zippered Ring Binder/Pad Holders would be completely out of the norm and would diminish the articles intended utility and purpose. It would certainly cause strain on their structure and eventually ruin and render them useless.
>
> 8. Avenues * * * distributes the imported subject articles to national office supply retailers such as Staples, OfficeMax and Office Depot.
>
> 9. Avenues * * * also imports and distributes carrying cases that belong to the industry product class known as Attache Cases, Briefcases, and similar cases (hereinafter "Cases") all of which I also design.
>
> 10. Cases are designed with a distinctive holding capacity to carry and transport miscellaneous personal and office paraphernalia. The holding capacity of Cases is made in such a way to also permit the carrying of Executive Accessories such as the Zippered Ring Binder/Pad Holders in issue within them. Therefore, the designated use of Cases is fundamentally different from the articles in issue.
>
> 11. In my 25 years of experience in this industry, I have yet to come across a Case that has *any* of the following: a bound spring loaded 3-ring binder, a built-in calculator, or a slip-in note pad.
>
> 12. The inclusion of a bound 3-ring binder, a built-in calculator, or a slip-in note-pad in Cases would be inconsistent with the purpose and design of Cases, which is to organize, store, protect or carry various and sundry articles, for business and/or travel.
>
> 13. Cases are not dedicated to the organization and carrying of business and personal papers such as loose-leaf papers
>
> 14. Avenues * * * distributes Cases to national office supply retailers such as Staples, OfficeMax and Office Depot.
>
> 15. In such retail stores, Cases are sold in an area specifically designated only for Cases. Likewise, the articles in issue are merchandised in a separate area in the stores specifically designated for such articles.
>
> 16. Cases do not compete with the articles in issue
>
> 17. I am familiar with the articles provided for in Heading 4202 of the [HTSUS] and am prepared to testify that the essential character or purpose of the articles in issue is different from that of the articles described therein.

* * * * * * *

Pl.'s Mem. (attachment).

Avenues argues that the use of the Presentation Calcu-Folios is analogous to the use of the loose-leaf day planners considered in *Mead Corporation v. United States*, 185 F.3d 1304 (Fed. Cir. 1999) *vacated and remanded*, 533 U.S. 218 (2001), which the Court of Appeals for the Federal Circuit ("CAFC") opined were neither "diaries" nor "bound" within the meaning of the tariff item 4820.10.20.[2] Pl.'s Resp. at 3–4. Avenues contends it should be afforded the opportunity to present evidence to establish that Presentation Calcu-Folios, like the "containers" in *Mead*, are not "similar to" the containers of Heading 4202. Avenues submits that if the Court were to accept this proposition, Note 1(h) to Chapter 48 would not preclude consideration of its claim, and it further contends that to the extent the *Avenues* courts relied on the "more than" doctrine, *JVC Company of America, Division of US JVC Corp. v. United States,* 234 F.3d 1348 (Fed. Cir. 2000) now controls.

Customs replies that Avenues offers no proof that the merchandise at bar is not very similar to the merchandise at issue in *Avenues I*, the government's statement of undisputed facts here, and Avenues admission as to each element thereof. As additional support, attached to Customs' reply are certain portions of Otniel Shor's deposition relating to *Avenues I* and certain other declarations. *See* Def.'s Statement; Pl.'s Resp. to Def's Statement. Avenues moves to strike the attachments, arguing that Shor's prior deposition would only be admissible for impeachment and that the other declarations do not relate to the merchandise at bar.

II

Summary judgment is appropriate if "there is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as a matter of law." CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). All reasonable inferences are to be resolved against the party whose motion is under consideration. *McKay v. United States,* 199 F.3d 1376, 1380 (Fed.Cir.1999).

The motion to strike the attachments to Customs' reply is denied since they were submitted as part of the public record of *Avenues I*. The Court also finds the merchandise at bar substantially the same as that considered therein. Avenues is not estopped from presenting evidence and relitigating a prior decision upholding the identical classification of similar merchandise, *United States v. Stone & Downer,* 274 U.S. 225 (1927), but judgment for the government is required unless it can be shown that *Avenues I* was "clearly erroneous." *Schott Optical Glass Inc. v. United States*, 750 F.2d 62 (Fed. Cir. 1984). Examining Defendant's Exhibit A and all relevant papers in a light most favorable to the non-moving party, the Court concludes that Avenues has not overcome its

[2] *Mead Corporation v. United States*, 22 CIT 707, 17 F.Supp.2d 1004 (1998), affirmed Customs' classification of certain imported day planners as bound diaries under 4820.10.40. The CAFC found the day planners properly classifiable under 4820.10.40 as other diaries and similar articles. The Supreme Court granted certiorari to the CAFC's reversal of that decision, and vacated and remanded to the CAFC, albeit in order to afford the CAFC the opportunity to apply *Skidmore* deference to the specific ruling letter at issue. Briefing has just begun on that matter on remand, but vacatur effects judgments, *see* 28 U.S.C. § 2106, therefore the appellate rationale is of some moment.

burden. The factual observation in *Mead* to which counsel directs attention does not compel the conclusion that the imported articles are not "similar to" the broad *eo nomine* heading of 4202, and Avenues does not offer additional evidence beyond the assertion that Mr. Shor's testimony would offer "facts[ ] additional to or different than those found by the [CIT] in *Avenues I*." Pl.'s Mem at 2. If the extent of Avenues' case-in-chief is testimony that Presentation Calcu-Folios are designed for a specific use, are capable of "containing" just so much, and are sold in distinct areas of retail stores apart from "Cases" (as defined by Avenues), that is an insufficient basis for concluding that *Avenues I* does not control, was clearly erroneous, or that *JVC, supra,* overturns.

CONCLUSION

For the foregoing reasons, the Court concludes that entry of summary judgment in favor of the government is appropriate. Judgment will enter accordingly.