Decisions of the United States Court of International Trade

(Slip Op. 02–32)

ILVA LAMIERE E TUBI S.R.L. AND ILVA S.P.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND BETHLEHEM STEEL CORP. AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS

Court No. 00–03–00127

[Plaintiff's Motion for Judgment Upon an Agency Record granted in part and remanded.]

(Dated March 29, 2002)

Hunton & Williams (William Silverman and *Richard P. Ferrin)* for plaintiffs ILVA Lamiere e Tubi S.r.l. and ILVA S.p.A.

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MEMORANDUM OPINION AND ORDER

GOLDBERG, *Senior Judge:* At issue in this case is the method employed by the U.S. Department of Commerce (the "Department") to calculate subsidies in countervailing duty investigations of newly privatized companies. This case is before the Court pursuant to Plaintiffs' USCIT R. 56.2 Motion for Judgment Upon an Agency Record. Plaintiffs challenge the Department's *Final Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.p.A. v. United States,* Court No. 00–03–00127 (December 28, 2000) *("Redetermination"),* which modified the Department's decision in *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From Italy,* 64 Fed. Reg. 73,244 (Dec. 29, 1999) *("Determination"),* and

Notice of Countervailing Duty Orders: Certain Cut-to-Length Carbon-Quality Steel Plate From France, India, Indonesia, Italy and the Republic of Korea, 65 Fed. Reg. 6587 (February 10, 2000).[1] This Court issued a remand order on August 30, 2000, instructing the Department to determine the applicability of the Federal Circuit's opinion in *Delverde SrL v. United States,* 202 F.3d 1360 (Fed. Cir. 2000), *reh'g denied,* Ct. No. 99–1186 (June 20, 2000) *("Delverde III"),* to the *Determination.* Two recent Court of International Trade opinions are directly on point, *Allegheny Ludlum Corp. v. United States,* 26 CIT ____, 182 F. Supp. 2d 1357 (2002) *("Allegheny"),* and *GTS Industries S.A. v. United States,* 26 CIT ____, 182 F. Supp. 2d 1369 (2002) *("GTS").* This Court finds the reasoning of *Allegheny* and *GTS* persuasive, and therefore remands the *Redetermination* to the Department for redetermination consistent with this Opinion. This Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994).

I. Standard of Review

This Court reviews the *Redetermination* to determine if it is supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994). To determine if the Department's interpretation of the statute is in accordance with law this Court "must determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States,* 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dispositive. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 233–237 (1986).

II. Summary of the Facts

Since this Court is only considering whether the Department erred as a matter of law in its *Redetermination,* this Court will only briefly recount the relevant facts as stated in the *Redetermination.* According to the Department, ILVA S.p.A. ("ILVA"), an Italian steel manufacturer, was privatized in 1995 through a sale of shares to a consortium. *Redetermination* at 15. The Department concluded that pre-sale ILVA was subsidized by the Italian government through debt forgiveness, equity infusions, and corporate restructuring from 1984 to 1994, except in 1987. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record* at 10. The pre-sale and postsale ILVA's were both engaged in carbon steel plate operations. *Redetermination* at 17. The Department concluded that the presale and post-sale ILVA's were the same "person," and thus the post-sale ILVA received a financial contribution and benefit from subsidies given to pre-sale ILVA.

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[1] Plaintiffs also challenge the Department's decision to impose countervailing duties on pre-privatization early retirement benefits under Law 451/94. This Court will not address that issue until the Department redetermines the issue of privatization in this remand order.

III. DISCUSSION

Under 19 U.S.C. § 1677(5) of the Tariff Act, a subsidy occurs where an authority "provides a financial contribution * * * to a person and a benefit is thereby conferred," either directly or indirectly. 19 U.S.C. § 1677(5) (1994). Section 1677(5)(F) is the specific provision addressing subsidies when a change in ownership has occurred:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by an administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change of ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F). The Federal Circuit in *Delverde III* determined that Congress's intent under these portions of the Tariff Act was for the Department to "examin[e] the particular facts and circumstances of the sale and determin[e] whether [the purchaser] directly or indirectly received both a financial contribution and benefit from the government." 202 F.3d at 1364. Therefore, under *Delverde III,* the statute's meaning is clear and "[w]e need only determine whether Commerce's methodology is in accordance with the statute." *Id.* at 1367.

In light of *Delverde III,* the Department's *Redetermination* established a two-part test to determine if the post-sale firm received a financial contribution and benefit from the subsidy given to the pre-sale firm. The first part of the test determines whether the pre-sale firm is the same *person* as the post-sale firm. *See Redetermination* at 6–7. If they are the same person, then the post-sale firm received a financial contribution and benefit from the subsidy given the pre-sale firm, and the subsidies are countervailable. *See id.* If they are not the same person, then the second part of the test looks at the facts and circumstances of the sale to determine whether the post-sale firm received a financial contribution and benefit from the subsidy granted to the pre-sale firm. *See id.*

As in *Allegheny* and *GTS,* this Court finds that the methodology of the Department's two-part test is inconsistent with the intent of Congress under the Tariff Act. *See* 182 F. Supp. 2d 1357; 182 F. Supp. 2d 1369. Instead of examining the facts and circumstances of the sale, the Department ignores the sale entirely and conducts a novel analysis of the "person" before and after the sale. *See Redetermination* at 13; *see also Allegheny,* 182 F. Supp. 2d at 1365–66; *GTS,* 182 F. Supp. 2d at 1377–78. The Department summarily concludes that if the "original subsidy recipient and the current producer/exporter are considered to be the same *person,* that *person* benefits from the original subsidies, and its exports are subject to countervailing duties to offset those subsidies." *Redetermination* at 7 (emphasis added).

The Department's "person" test fails to take into account the facts and circumstances of the sale:

> [T]he Department will generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a continuous business entity because it was operated in substantially the same manner before and after the change in ownership.

Redetermination at 12–13. Under the Department's "person" analysis, it is likely that nearly every sale would result in the same post-sale person as the pre-sale person. *See Allegheny,* 182 F. Supp. 2d at 1367; *GTS,* 182 F. Supp. 2d at 1379; *Acciai Speciali Terni S.p.A. v. United States,* 26 CIT ____, 2002 WL 342659, Slip Op. 02–10 at N.10 (February 1, 2002). Thus, the Department continues to use what is essentially the *per se* test that a change in ownership never extinguishes prior subsidies, which was prohibited in *Delverde III,* and avoids the Court's mandate to consider the facts and circumstances of the sale. *See Allegheny,* 182 F. Supp. 2d at 1367; *GTS,* 182 F. Supp. 2d at 1379.

On remand, the Department's methodology shall "examin[e] the particular facts and circumstances of the sale and determin[e] whether [plaintiffs] directly or indirectly received both a financial contribution and benefit from the government." *Delverde III,* 202 F.3d at 1364. This means that Commerce "must look at the facts and circumstances of the TRANSACTION, to determine if the PURCHASER received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION." *Allegheny,* 182 F. Supp. 2d at 1367 (capitals in original); *GTS,* 182 F. Supp. 2d at 1378.

IV. CONCLUSION

Therefore, the Court finds that the *Final Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.p.A. v. United States,* Court No. 00–03–00127 (December 28, 2000), are not in accordance with law, and remands to the Department of Commerce for review and action consistent with this opinion.

So ordered.

(Slip Op. 02–33)

BYUNG WU LEE, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–12–02192

[Plaintiff's motion for judgment on agency record to set aside revocation of customhouse broker's license denied, and action dismissed.]

(Decided March 29, 2002)

Peter S. Herrick for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *Joseph I. Liebman,* Attorney-In-Charge, and *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Aimee Lee* and *Arthur J. Gribbin); David Fleck,* Office of Associate Chief Counsel, U.S. Customs Service, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* Plaintiff Byung Wu Lee ("Mr. Lee") initiated this action pursuant to 19 U.S.C. § 1641(d)(2)(B) to contest the decision of the Secretary of the Treasury ("Secretary") revoking his customhouse broker's license. Mr. Lee has moved for judgment on the agency record under U.S. CIT Rule 56.1 to set aside the Secretary's decision. For the reasons that follow, Mr. Lee's motion is denied, and the Secretary's decision is affirmed.

I. BACKGROUND

The United States Customs Service ("Customs"), a bureau of the Department of the Treasury, issued a broker's license to Mr. Lee on August 12, 1987. Agency Record ("A.R.") 17 at 4. On two separate occasions in the years that followed, Customs assessed monetary penalties against him for various violations of applicable statutes and regulations. On both occasions, he failed to pay the penalties within 60 days of their assessment.

Mr. Lee's failures to make timely payment themselves constituted new breaches of Customs regulations—specifically, 19 C.F.R. §§ 111.29 and 111.94.[1] Invoking 19 C.F.R. § 111.53,[2] Customs sought revocation of Mr. Lee's license based on the new charges. The specific facts underlying the new charges were set forth in two so-called "specifications" in the

[1] The 60-day requirement is set forth in 19 C.F.R. § 111.94, which requires that, where Customs makes a final determination that a broker is liable for a monetary penalty, the broker "must pay the monetary penalty, or make arrangements for payment of the monetary penalty, *within 60 calendar days of the date of the written decision.*" 19 C.F.R. § 111.94 (emphasis added).

19 C.F.R. § 111.29, in turn, requires that a broker "exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter handled by him as a broker. *Payment of duty tax, or other debt or obligation owing to the Government for which the broker is responsible, * * * shall be made to the Government on or before the date that payment is due.*" 19 C.F.R. § 111.29 (emphasis added).

For purposes of this opinion, citations to the Code of Federal Regulations generally refer to the 1991 or 1993 edition, as appropriate, unless otherwise noted. The regulations at issue here are identical in the two editions.

Similarly, except as otherwise noted, statutory citations herein generally are to the 1994 version of the U.S. Code.

[2] 19 C.F.R. § 111.53 authorizes license revocation proceedings in any case where "(c) The broker has violated *any provision of any law enforced by Customs or the rules or regulations issued under any such provision.*" 19 C.F.R. § 111.53 (1995) (emphasis added).

administrative proceedings which ultimately resulted in the decision to revoke Mr. Lee's license, and which are at issue here.

A. SPECIFICATION I

On August 16, 1990, Customs issued to Mr. Lee a Notice of Intent to Issue Monetary Penalty, advising that Customs was considering assessing a $1,000 penalty against him. That "$1,000 Pre-Penalty Notice" charged Mr. Lee with failure to exercise responsible supervision and control over Customs business conducted (a violation of 19 U.S.C. § 1641(b)(4)) and with failure to obtain a power of attorney before transacting Customs business for a principal (a violation of 19 C.F.R. § 141.46). A.R. 17 at 6.

Through counsel, Mr. Lee responded to the $1,000 Pre-Penalty Notice on September 13, 1990, contesting Customs' allegations and urging that the agency take no further action. A.R. 17 at 7–8. Customs considered but rejected Mr. Lee's arguments and, on January 15, 1991, issued a Notice of Penalty for $1,000 (the "$1,000 Penalty Notice"). A.R. 17 at 9. Mr. Lee responded to the notice through counsel on February 8, 1991, requesting "administrative relief" from the penalty. A.R. 17 at 13–14. After consideration of that second response, Customs rendered its final determination on October 10, 1991 ("Final Determination I"), mitigating the penalty to $250. A.R. 17 at 15.

Customs sent demand letters in November 1991 and in January, March, and April 1992. A.R. 17 at 17, 20, 23, 26. However, Mr. Lee failed to respond. Only after the matter had been forwarded to the Department of Justice for collection did Mr. Lee pay the $250—in January 1993, well more than a year after Customs' Final Determination I. A.R. 17 at 27–28.

B. SPECIFICATION II

In the meantime, on December 7, 1992, Customs had issued to Mr. Lee another Notice of Intent to Issue Monetary Penalty. That notice (the "$30,000 Pre-Penalty Notice") advised that Customs was considering assessing a $30,000 penalty against Mr. Lee for a laundry list of violations of applicable statutes and regulations identified in an agency audit of his books and records conducted in March 1992.[3] A.R. 17 at 29–33.

Mr. Lee filed no response to the $30,000 Pre-Penalty Notice. *See* A.R. 9, Recommended Decision and Order of Administrative Law Judge John M. Frysiak, *In the Matter of Customs Broker's License Revocation of Byung Wu Lee* ("ALJ Decision") ¶ 10. After considering the applicable laws and regulations, Customs issued a Notice of Penalty for $30,000 dated January 12, 1993 (the "$30,000 Penalty Notice"). A.R. 17 at 34. In the

[3] Specifically, the $30,000 Pre-Penalty Notice cited Mr. Lee for failure to exercise responsible supervision and control over Customs business conducted (a violation of 19 U.S.C. § 1641(b)(4)); for violation of "any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision" (a violation of 19 U.S.C. § 1641(d)(1)(C)); for failure to maintain records in the prescribed format (a violation of 19 C.F.R. § 111.22); for failure to timely provide employee information (a violation of 19 C.F.R. § 111.28); for failure to exercise due diligence in the conduct of financial affairs and failure to notify clients of responsibilities and liabilities for Customs charges (a violation of 19 C.F.R. § 111.29(a)–(b)); for utilization of a fictitious name without the requisite approval (a violation of 19 C.F.R. § 111.30(c)); and for failure to maintain valid powers of attorney for his principals (a violation of 19 C.F.R. § 141.46). A.R. 17 at 29–30.

absence of any submission or other response from Mr. Lee, that determination was deemed to be the agency's final determination ("Final Determination II"). ALJ Decision ¶¶ 11, 23.

Customs sent demand letters in March, April and May 1993. A.R. 17 at 39, 46, 53. Customs' final demand for payment, dated December 15, 1993, offered to explore settlement possibilities. A.R. 17 at 60. The letter also warned Mr. Lee that, absent a response by December 24, 1993, the matter would be forwarded to the Justice Department for collection and action might be taken against his broker's license. *Id.* Mr. Lee failed to pay the penalty or otherwise respond to Customs' letter. ALJ Decision ¶ 25.

C. The Collection Action and The License Revocation Proceeding

Seeking to collect the $30,000 penalty, the Justice Department brought suit against Mr. Lee in this Court. The collection action, captioned *United States v. Byung Wu Lee,* Court No. 95–08– 01075, was filed August 23, 1995. *See* A.R. 23.

In parallel with the Justice Department's prosecution of the collection action in this forum, Customs took action at the administrative level, commencing preliminary proceedings to revoke Mr. Lee's broker's license, based on his failure to timely pay the assessed penalties. The Commissioner of Customs approved the initiation of those proceedings on December 7, 1995, pursuant to 19 C.F.R. § 111.53(c), which authorizes license suspension or revocation proceedings where a broker has "violated any provision of any law enforced by Customs or the rules or regulations issued under any such provision." A.R. 28; *see also* 19 C.F.R. § 111.53(c) (1995).

Customs issued a Notice of Preliminary Proceedings and a Proposed Notice to Show Cause and Statement of Charges ("Proposed Notice to Show Cause") on December 27, 1995. *See* A.R. 26 at 1; A.R. 27 at 1. The Proposed Notice to Show Cause informed Mr. Lee of the charges against him in two specifications. A.R. 27 at 2. Specification I concerned Mr. Lee's failure to pay the mitigated penalty of $250 within 60 days of Customs' Final Determination I, issued October 10, 1991; Specification II concerned his failure to pay the $30,000 penalty within 60 days of Customs' Final Determination II, issued January 12, 1993. In both instances, the failures to make timely payment were cited as violations of 19 C.F.R. §§ 111.29 and 111.94. The Proposed Notice to Show Cause noted that—almost three years after Customs' Final Determination II—Mr. Lee still had not paid the $30,000 penalty. *Id.*

By letter from counsel dated January 29, 1996, Mr. Lee requested that the license revocation proceeding be held in abeyance pending resolution of the collection action. A.R. 25. Customs denied the request for an abeyance, but granted Mr. Lee additional time to respond to the proposed charges in the revocation proceeding. A.R. 24.

In a March 4, 1996 submission, Mr. Lee argued that the statute of limitations had expired for the violations which are the basis for Specification I, and that Specification II was "covered" by the $30,000 collection

action he was then contesting. A.R. 20. The submission also incorporated by reference Mr. Lee's answer, affirmative defenses, and response to the request for admissions filed in the collection action. A.R. 21–22.

In a supplemental submission dated May 13, 1996, Mr. Lee argued that Customs could not proceed in a revocation action because it was already suing him to collect a penalty based on the same facts. A.R. 19 at 1. The Commissioner of Customs rejected that argument and authorized the institution of formal revocation proceedings on June 14, 1996.[4] A.R. 18.

The formal revocation proceedings commenced on August 13, 1996, with Customs' issuance of a Notice of Revocation Proceedings and a Notice to Show Cause and Statement of Charges ("Notice to Show Cause"). *See* A.R. 16; A.R. 17. Among other things, those documents informed Mr. Lee of his right to file an answer to the charges, his right to be represented by counsel at the formal revocation proceedings, and his right to cross-examine witnesses. A.R. 16 at 1.

D. THE ADMINISTRATIVE HEARING AND THE DECISION OF THE SECRETARY

The license revocation hearing was conducted before an administrative law judge ("ALJ") on September 11, 1996. ALJ Decision ¶ 5. In his Recommended Decision and Order dated December 16, 1996, the ALJ made findings of fact and drew conclusions of law concerning both Specifications I and II, as well as the non-payment of penalties. *See generally* ALJ Decision.

Based on the record developed before him, the ALJ found that Mr. Lee was on notice that he owed the $250 penalty assessed against him on October 10, 1991, but chose not to pay or otherwise resolve it. ALJ Decision ¶ 24. The ALJ further found that Mr. Lee did not resolve the $250 penalty until January 1993—well more than 60 days following Customs' Final Determination I, and only after a number of demands had issued and the case had been forwarded to the Justice Department for collection. *Id.*

Based on the record, the ALJ similarly determined that Mr. Lee was on notice that he owed the $30,000 penalty assessed on January 12, 1993, but again chose not to make timely payment or otherwise respond to Customs or resolve the penalty, which—as the ALJ noted—still remained unpaid. *Id.* ¶ 25.

The ALJ therefore concluded that Customs had met its burden of proof to establish the alleged violations. Specifically, he determined that:

> [Customs] * * * proved by a preponderance of the evidence that Mr. Lee twice violated 19 C.F.R. § 111.29 as set forth in Violation I, Specifications I and II of the Charges; and * * * twice violated 19 C.F.R. § 111.94 as set forth in Violation II, Specifications I and II of the Charges.

Id. ¶ 26. The ALJ further noted:

[4] The Government, in its discretion, dismissed the collection action in May 1997. A.R. 3.

> Warning notices of a variety of deficiencies were issued to Mr. Lee. Although informed in each letter that he could contact the broker compliance unit, Mr. Lee failed to respond in any way to any of these notices. Mr. Lee's continued course of ignoring and disregarding the Customs Service when problems were brought to his attention, as evidenced by the three warning notices and his action regarding the two penalties, demonstrates gross irresponsibility in the performance of his duties. The evidence also demonstrates that he failed to improve his performance despite repeated communications from Customs and the imposition of disciplinary measures including monetary penalties.

Id. ¶ 27 (citation omitted). The ALJ therefore recommended that Mr. Lee's license be revoked. ALJ Decision at ¶ 29.

The Secretary of the Treasury adopted the ALJ's recommendation and revoked Mr. Lee's license on September 16, 1997.[5] The Commissioner of Customs notified Mr. Lee of the Secretary's decision by mailing a Notice of Revocation to Mr. Lee on November 3, 1997. *See* Letter to P. Herrick from Deputy Assistant Secretary of Treasury (Dec. 21, 1997) (advising of mailing of Notice of Revocation), *attached to* Letter from P. Herrick to Court (March 21, 2002) *and* Defendant's Supplemental Submission As Requested By The Court (March 22, 2002) ("Defendant's Supplemental Submission").

Mr. Lee filed this action to appeal the Secretary's decision.[6]

II. JURISDICTION AND STANDARD OF REVIEW

Jurisdiction in this matter is predicated on 28 U.S.C. § 1581(g), which accords the Court exclusive jurisdiction over any action contesting the revocation of a customs broker's license. *See also* 19 U.S.C. § 1641(e).

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[5] The Secretary's decision—entered on his behalf by the Acting Deputy Assistant Secretary for Regulatory, Tariff & Trade Enforcement—is included as an Addendum to the certified list filed with the agency record pursuant to U.S. CIT Rule 72(a).

[6] Under 19 U.S.C. § 1641(e)(1), a decision by the Secretary to revoke a customs broker's license may be appealed by commencing an action in this Court "within 60 days after the issuance of the decision or order." 19 U.S.C. § 1641(e) (1994). *See also* 28 U.S.C. § 2636(g) (barring action to contest denial or revocation of broker's license unless commenced in accordance with CIT Rules within 60 days after date of entry of Secretary's decision or order). However, there are conflicting statutory provisions as to precisely how an action is commenced. *See generally* Defendant's Supplemental Submission at 1–5.

Under 19 U.S.C. § 1641(e)(1), an action is commenced by the filing of "a written petition," a copy of which is to be "transmitted promptly by the clerk of the court to the Secretary or his designee." In contrast, 28 U.S.C. § 2632(a) requires the concurrent filing with the Court of "a summons and complaint," which must then be served upon the Government in accordance with U.S. CIT Rule 4(i). Recognizing the statutory inconsistency, the Practice Comment to U.S. CIT Rule 3 advises that the "preferred procedure to achieve uniformity and consistency and to minimize the ambiguity * * * is to follow the provisions in Title 28."

Under 19 U.S.C. § 1641(e)(1), Mr. Lee had until January 2, 1998—60 days from November 3, 1997—to file a petition appealing the revocation of his license. On December 31, 1997, he filed a "Petition for Review" and a "Summons" with the Court. There is no docket entry to indicate whether the Clerk of the Court transmitted a copy of the petition and summons to the Secretary. On February 3, 1998, counsel for the Government wrote to counsel for Mr. Lee, acknowledging the filing of the petition and summons with the Court but noting that Mr. Lee had failed to serve the United States as required by U.S. CIT Rule 4(i). *See* Letter to P. Herrick from A. Lee (Feb. 3, 1998), attached to Defendant's Supplemental Submission. At some point thereafter, the office of the Clerk of the Court advised Mr. Lee's counsel of the need to file a summons and complaint and to properly serve the United States. However, Mr. Lee's petition (filed on December 31, 1997) was never rejected by the Clerk of the Court. Mr. Lee filed his summons and complaint on March 10, 1998, and served them on the United States two days later. *See* Defendant's Supplemental Submission.

Mr. Lee's petition and summons were timely filed under 19 U.S.C. 1641(e)(1); but the summons and complaint filed on March 10, 1998 were not. In any event, under the circumstances, the Government has not interposed a statute of limitations defense. *Id.* Accordingly, the Court may properly reach the merits of the case.

Mr. Lee seeks to have the decision of the Secretary of the Treasury revoking his license set aside. *See* Complaint.[7] However, in a case such as this, the Court's role is limited. "[T]he Court may not substitute its judgment for that of the agency," but rather is only to "assure itself the decision was rational and based on consideration of relevant factors." *Barnhart v. U.S. Treasury Dep't,* 9 CIT 287, 290, 613 F. Supp. 370, 374 (1985). Thus, the Court may not second-guess the agency's choice of sanctions: "When the penalty chosen by an agency is within the range of sanctions provided by applicable disciplinary regulations, the severity of the sanction imposed is within the discretion of the agency." *Id*. at 291, 613 F. Supp. at 374 (*quoting Tempo Trucking and Transfer Corp. v. Dickson,* 405 F. Supp. 506, 514 (E.D.N.Y. 1975)) (citation omitted).

In short, the Secretary's decision here must be affirmed unless the underlying findings of fact are unsupported by substantial evidence on the record, or unless the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. §§ 706(2)(A), 706(2)(E); *Tarnove v. Bentsen,* 17 CIT 1324 (1993).

III. Analysis

A. Availability of Damages

In addition to the restoration of his broker's license, Mr. Lee also seeks unspecified damages from the Government. *See* Complaint ¶ 63; Plaintiff's Motion on the Agency Record to Set Aside the Secretary of the Treasury's Revocation of His Customs Broker's License at 1; Plaintiff's Brief in Support of His Motion on the Agency Record to Set Aside the Secretary of the Treasury's Revocation of His Customs Broker's License ("Plaintiff's Brief") at 1, 11. However, the claim for damages is beyond the jurisdiction of the Court.

It is axiomatic that "'[t]he United States, as sovereign, is immune from suit save as it consents to be sued * * *, and [that] the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (*quoting United States v. Sherwood,* 312 U.S. 584, 586 (1941)). *Accord United States v. Boe,* 543 F.2d 151, 154–55 (C.C.P.A. 1976). *See also Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475 (1994) ("[s]overeign immunity is jurisdictional in nature"). Moreover, a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Mitchell,* 445 U.S. at 538 (*quoting United States v. King,* 395 U.S. 1, 4 (1969)); *see also Lane v. Pena,* 518 U.S. 187, 192 (1996) (waiver of sovereign immunity "must be unequivocally expressed in statutory text" and will be "strictly construed, in terms of its scope, in favor of the sovereign") (citations omitted).

The Court's jurisdiction in this case rests on 28 U.S.C. § 1581(g) and 19 U.S.C. § 1641(e), which extend only to the review of the Secretary of the Treasury's decision revoking Mr. Lee's license. And Mr. Lee has identified no other statute where the United States has waived its im-

[7] As discussed in section III.A immediately below, Mr. Lee has also asserted a claim for damages.

munity from liability for damages in circumstances such as these.[8] Accordingly, Mr. Lee's claim for damages must be dismissed for want of jurisdiction.

B. Statute of Limitations

As a threshold matter, Mr. Lee contends that the revocation of his license is invalid because the revocation proceeding was initiated more than five years after the asserted violations. Plaintiff's Brief at 4–6. He argues that the proceeding was therefore barred by the statute of limitations. *Id*.

The applicable statute of limitations requires that a revocation proceeding such as the one at issue here be "instituted by the appropriate service of written notice *within 5 years from the date the alleged violation was committed.*" 19 U.S.C. § 1641(d)(4) (emphasis added).

1. Specification I

Mr. Lee posits that the statute of limitations for Specification I was triggered either on December 22, 1989 (the date of the violation that gave rise to the $1,000 penalty, which was later mitigated to $250), or on August 16, 1990 (the date of Customs' $1,000 Pre-Penalty Notice). Plaintiff's Brief at 5. Under Mr. Lee's reasoning, then, the statute of limitations would have expired five years later, either on December 22, 1994 or on August 16, 1995. *Id*. However, his position is at odds with both the facts and the law.

The violations at issue in the revocation proceeding were Mr. Lee's failures to timely pay assessed penalties—*not* the underlying violations which resulted in those penalties (such as the December 22, 1989 violation). Moreover, the 60-day clock for timely payment did not begin to run until Customs issued its "final determination."[9] 19 C.F.R. § 111.94. Thus, the violation detailed in Specification I in the revocation proceeding did not occur until December 9, 1991—when Mr. Lee failed to pay the mitigated penalty within 60 days after Customs' October 10, 1991 issuance of its Final Determination I. Customs therefore had until December 8, 1996 to institute a revocation proceeding. *See generally* Defendant's Brief at 13–14. The Proposed Notice to Show Cause, dated December 27, 1995, issued almost a full year before the statute of limitations expired. *Id*.; *see also* Defendant's Supplemental Submission at 5–6.

2. Specification II

Although he offers no argument on the point, Mr. Lee also makes the conclusory assertion that "[t]he statute of limitations has expired re-

[8] Indeed, since Mr. Lee elected not to file a reply brief, he made no response whatsoever to the Government's jurisdictional argument. *See* Memorandum in Support of Defendant's Response in Opposition to Plaintiff's Motion on the Agency Record to Set Aside the Secretary of the Treasury's Revocation of His Customs Broker's License ("Defendant's Brief") at 11–12 (setting forth Government's jurisdictional argument).

[9] Mr. Lee mistakenly claims that the Government contends that "the statute of limitations did not begin to run until January 13, 1993 when Lee paid the penalty [initially $1,000, mitigated to $250] as part of an offer in compromise." Plaintiff's Brief at 6. The Government does not assert that the statute of limitations was triggered when Mr. Lee finally (belatedly) *paid* the penalty. Rather, as discussed above, the Government's point is that the statute began to run when the violation at issue in the revocation proceeding occurred—that is, *when the payment became overdue*, when the penalty was not paid within 60 days of its assessment. Defendant's Brief at 13–14.

garding Specification II." Plaintiff's Brief at 8. That position too finds no support in the record.

When Mr. Lee failed to respond to Customs' $30,000 Penalty Notice (dated January 12, 1993), that notice became Customs' final determination. ALJ Decision ¶¶ 11, 23. Thus, the violation detailed in Specification II in the revocation proceeding occurred on March 15, 1993—when Mr. Lee failed to pay the $30,000 penalty within 60 days after January 12, 1993. Customs then had five years from March 15, 1993—until March 14, 1998—to institute a revocation proceeding. *See generally* Defendant's Brief at 14–15. The Proposed Notice to Show Cause preceded that date by more than two years. *Id.*; *see also* Defendant's Supplemental Submission at 5–6.

In short, Mr. Lee has no statute of limitations defense.

C. Right to Judicial Review of the Legality of A Penalty

Mr. Lee also contends that Customs' action in seeking revocation of his license for his failure to timely pay assessed penalties effectively deprived him of his right to seek judicial review of those penalties. Plaintiff's Brief at 6–7. Mr. Lee asserts that "[t]he only course of action [open to him] * * * to prove he did not owe the penalty was to be sued by United States in a collection action." *Id.* at 7. But, he claims, the Government's position means that "if a customs broker * * * fails to pay a penalty timely by choosing to be sued for the penalty, such broker is automatically subjecting himself to revocation of his license." *Id.*[10]

Mr. Lee asserts, in essence, that he was confronted by a Hobson's choice: He could either (1) timely tender payment of a penalty he considered unjust and forever waive his right to challenge the legality of the penalty; or (2) put his license on the line by failing to pay within 60 days, in order to preserve his ability to challenge the legality of the penalty when a collection action was brought. But in fact Mr. Lee's options were not nearly so bleak.

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[10] Asserting that "Mr. Lee * * * never raised this issue in the administrative proceedings held below," the Government argues that "this newly introduced argument is not properly considered" by the Court. According to the Government, "Customs, [the ALJ], and the Secretary of Treasury were deprived of the opportunity to consider such argument which in turn prevents this Court from considering Mr. Lee's position." *See* Defendant's Brief at 20, *citing United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952).

Contrary to the Government's assertions, Mr. Lee's counsel in fact did allude to this argument in the course of the administrative hearing. For example, in his opening argument, counsel for Mr. Lee asserted that "[t]he forum that [Mr. Lee] chose to defend himself was in court, not during the administrative proceeding." A.R. 14, Administrative Hearing Transcript ("Tr.") at 10. *See also* Tr. at 37 (Mr. Lee's counsel queried, "Why would that be absurd if somebody wants to choose a judicial forum rather than an administrative forum to contest penalty issues?"). Similarly, Mr. Lee's post-hearing submission argued that he "chose to challenge the Customs penalty decisions by not paying the penalties." A.R. 4. However, Mr. Lee's counsel did not develop the argument in the course of the hearing, the Government did not respond to it, and Mr. Lee gave no testimony to support it.

Indeed, Mr. Lee testified that his failure to pay was for other reasons. For example, when questioned why he did not pay the $1,000 penalty, Mr. Lee replied that he didn't think he owed $1,000. Tr. at 210. When asked why he paid the mitigated penalty of $250, Mr. Lee responded that he "didn't want to go through all the hassles * * * That's the reason why I paid. It's not because I felt I had to pay." *Id.* at 211. When asked why he did not pay the $30,000 penalty, Mr. Lee answered, "First of all, I don't think I owe $30,000. And secondly, I have no [financial] capabilities." *Id.* at 220. In short, nothing in Mr. Lee's testimony suggested that he intentionally failed to pay the penalties to preserve his right to judicial review.

Nor did Mr. Lee make such an argument to Customs at any time prior to the administrative hearing. However, there is no indication in the record of the hearing that the Government objected to the argument on that basis. And Defendant's Brief here does not specifically address whether Mr. Lee was free to raise the argument for the first time at the hearing, and—if not—what the consequences are, particularly where the Government did not object at the time.

In any event, it is not necessary to definitively resolve whether or not Mr. Lee's argument is properly before the Court, because—for all the reasons discussed herein—that argument has no merit.

The gravamen of Mr. Lee's argument is that a customs broker must be able to obtain judicial review of the legality of a penalty without jeopardizing his license. A broker's right to judicial review of a penalty assessed against him is settled law. *See United States v. Ricci,* 21 CIT 1145, 1148, 985 F. Supp. 125, 128 (1997) (while agency decision concerning mitigation of penalty is beyond judicial review, "[t]his does not prevent a broker from challenging the legality of the underlying penalty" in court). However, Mr. Lee has cited no authority to suggest that a broker is entitled to sit on his rights, as Mr. Lee did here.

Indeed, as the Government observes, Mr. Lee's actions at the time belie his present claim "that he intentionally refrained from paying the penalt[ies] in order to obtain judicial review." *See* Defendant's Brief at 22. Certainly nothing in Mr. Lee's correspondence with Customs concerning the $1,000 penalty (eventually mitigated to $250) hinted at such an intent. But most telling was his response when Customs referred the matter to the Justice Department for collection. Rather than seeking to seize on the threatened collection action as an opportunity to argue his case in a judicial forum (his purported objective), Mr. Lee instead chose to pay the penalty to avoid litigation. On those facts, Mr. Lee simply cannot now claim that he was deprived of his rights.

Similarly, Mr. Lee gave Customs no indication that he was intentionally refraining from paying the $30,000 penalty in order to obtain judicial review. As discussed in section I.B above, Mr. Lee "stonewalled" Customs—ignoring the agency for the 60-day period and beyond, even after he was expressly warned that a failure to respond might lead to license revocation proceedings. *See also* A.R. 17 at 60. This case is thus readily distinguished from *Pentax,* on which Mr. Lee relies.[11] *See* Plaintiff's Brief at 3, 7. While Mr. Lee here sat mute, the importer in *Pentax* affirmatively "informed Customs that they would 'not make any written or oral presentation in response to the * * * prepenalty notices.'"

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[11] The *Pentax* cases concerned an importer's liability for duties and penalties for the importation of photographic and optical merchandise which was produced in China but marked "Hong Kong," in violation of the "country of origin marking" requirements of U.S. customs law. *See generally* 19 U.S.C. § 1304(a) (1988). To minimize its liability for penalties, Pentax made a "prior disclosure" to Customs, reporting its misstatements concerning the merchandise's country of origin. To secure "prior disclosure" treatment, an importer must: (1) voluntarily disclose its violation "before, or without knowledge of, the commencement of a formal investigation of such violation," and (2) pay Customs the "actual loss of duties" suffered as a result of the violation. *See* 19 U.S.C. § 1592(c)(4); 19 C.F.R. §§ 162.74(a)(1), 162.74(h). The phrase "actual loss of duties" is defined as "the duties of which the government has been deprived by reason of the violation." 19 C.F.R. § 162.71(a)(1).

Pentax interpreted "actual loss of duties" under these circumstances as meaning the difference between (1) the true duty liability based upon the true country of origin and (2) the duty liability based upon the state country of origin. Since the duty liability for the merchandise at issue was precisely the same whether it was imported from China or Hong Kong, Pentax contended that it was not obligated to advance any additional funds to secure prior disclosure treatment. Customs maintained that "actual loss of duties" included "marking duties," which are imposed for failure to properly mark merchandise with its country of origin. *See* 19 U.S.C. § 1304(f); 19 C.F.R. § 134.2. But Pentax reasoned that unpaid marking duties did not constitute an "actual loss of duties," because a marking duty is a special *ad valorem* duty that is not "lost," but rather arises *as a result of* a country of origin mis-marking.

Pentax sought pre-enforcement review of Customs' position in federal district court. *See Pentax Corp. v. Myhra,* 844 F. Supp. 611 (D. Mont. 1994), *aff'd,* 72 F.3d 708 (9th Cir. 1995). The district court dismissed the case, finding that Congress intended to preclude interlocutory judicial review of such an interim agency decision. However, the district court granted Pentax's motion for a preliminary injunction pending review on appeal, on the condition that Pentax deposit funds in the court's registry sufficient to cover the marking duties until the "actual loss of duties" issue was resolved. Pentax deposited the funds, and filed an appeal in the Ninth Circuit Court of Appeals. *Id.* The Ninth Circuit affirmed the district court's dismissal of the suit, holding that the district court lacked subject matter jurisdiction and that "if judicial review is available at all, [it] is available only in the Court of International Trade." *Pentax,* 72 F.3d 710–11.

Continued

Pentax Corp. v. Robison, 20 CIT 486, 489, 924 F. Supp. 193, 196 (1996), *rev'd,* 125 F.3d 1457 (Fed. Cir. 1997).

In short, the facts of this case do not support Mr. Lee's depiction of himself as a man on the horns of a dilemma. Nor is the asserted dilemma as Mr. Lee suggests.

Implicit in Mr. Lee's argument is the assumption that a broker cannot timely pay a penalty and nevertheless challenge its legality in an action to recover the monies paid. However, by analogy to *Trayco, Inc. v. United States,* 994 F.2d 832 (Fed. Cir. 1993), a broker conceivably could tender timely payment under protest, specifically reserving his right to challenge the legality of the penalty, and then bring an action for a refund, either in federal district court or in the Court of Federal Claims.[12] *See Trayco,* 994 F.2d at 835 (noting that importer's cover letter indicated payment was being made "under protest reserving all rights to judicial review following the exhaustion of the administrative remedies").[13] *See also* 28 U.S.C. § 1346(a)(2) (concurrent jurisdiction of district courts and U.S. Court of Federal Claims under "Little Tucker Act"); 28 U.S.C. § 1491(a)(1) (jurisdiction of U.S. Court of Federal Claims under "Tucker Act").

The other "horn" of the asserted dilemma assumes that any failure to tender timely payment necessarily imperils a broker's license—even if payment is withheld for the purpose of preserving the broker's right to judicial review of the legality of the penalty. However, by analogy to *Pentax* (discussed above), a broker conceivably could withhold payment of a penalty (possibly depositing the funds in escrow), timely notify Customs that he is doing so to ensure that his right to judicial review is preserved, and then challenge the legality of the penalty when a collection action is brought. *See Pentax,* 20 CIT at 489, 924 F. Supp. at 196, *rev'd*, 125 F.3d 1457.

Neither of these paths has yet been definitively established as a proper means of vindicating the settled right of a broker to obtain judicial review of the legality of a penalty. But a Customs Directive has made it clear that a broker's failure to timely pay a penalty will not result in license revocation proceedings where the broker is contesting the penalty

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Pentax's case was then transferred to the Court of International Trade, along with the funds Pentax had deposited in the registry of the district court. Following Customs' issuance of prepenalty and penalty notices (which Pentax declined to answer), the Government initiated an enforcement action in the Court of International Trade, seeking to recover duties and penalties. After consolidating that action with Pentax's suit, the Court of International Trade upheld Customs' determination that the "actual loss of duties" included marking duties. *Pentax v. Robison,* 20 CIT 486, 924 F. Supp. 193 (1996), *rev'd*, 125 F.3d 1457 (Fed. Cir. 1997). The Court of Appeals for the Federal Circuit reversed, holding that the act of mismarking the goods had not deprived the government of marking duties. Thus, payment of mismarking duties was not required for prior disclosure treatment. *Pentax,* 125 F.3d at 1462–63.

[12] Citing *Jose G. Flores, Inc. v. United States,* 11 CIT 948, 676 F. Supp. 1232 (1987), Mr. Lee argues that, had he paid the assessed penalties and then filed for a refund, "this court [the Court of International Trade] would lack jurisdiction to make such a refund." Plaintiff's Brief at 7. However, even assuming that this Court would lack jurisdiction over a broker-initiated suit to recover a penalty imposed on that broker, nothing in *Flores* speaks to the jurisdiction of other federal courts such as the district courts and the Court of Federal Claims.

[13] *See* Defendant's Brief at 21 n.9 (discussing potential availability of *Trayco*-type proceeding, to secure judicial review of penalty imposed on broker). In *Trayco,* an importer filed suit in district court seeking a refund of a mitigated penalty paid under protest to Customs. The Court of Appeals for the Federal Circuit affirmed the district court's decision, which rejected the government's argument that the Court of International Trade had exclusive jurisdiction over such matters, and found that there was no legal basis for the penalty. *Trayco,* 994 F.2d 832 (Fed. Cir. 1993).

in good faith and in a timely fashion.[14] *See* A.R. 29, Customs Directive No. 099 3530–007 (Aug. 11, 1992).

Specifically, that Customs Directive notes that, "[b]ecause of the brokers' integral role in the conduct of Customs business, a high standard of broker performance is critical to the efficiency of the Customs Service and the accomplishment of the customs mission." *Id*. at 1. The Directive continues:

> 8. SUSPENSION/REVOCATION POLICY
>
> Penalties issued to brokers under 19 U.S.C. § 1641 that remain unpaid can be considered the basis of suspension or revocation proceedings against the broker's license. *As a matter of policy, Customs will not institute such proceedings against a broker who actively contests a monetary penalty* by raising legal or factual issues on a timely basis and in the appropriate forum. *However, the license of a broker who simply refuses to pay without raising a substantive legal or factual issue in a supplemental petition concerning the penalty is subject to revocation or suspension.*

Id. at 5–6 (emphasis added).

In sum, there is no truth to Mr. Lee's claim that "if a customs broker * * * fails to pay a penalty timely by choosing to be sued for the penalty, such broker is automatically subjecting himself to revocation of his license." Plaintiff's Brief at 7. The dilemma that he posits does not exist. Ultimately, Mr. Lee's undoing was not his failure to pay, but his silence. Neither the law nor the facts of this case suggests that he was deprived of any of his rights.

D. "Election of Remedies"

Characterizing the Secretary's decision as an attempt to "bootstrap" a penalty into grounds for revoking his license, Mr. Lee contends that—with respect to Specification II—the Government "had a choice between assessing a penalty or to institute a license revocation proceeding." Plaintiff's Brief at 3, 7–8. In essence, he argues that the Government cannot both assess a penalty *and* revoke his license. In support of this variation on an "election of remedies" defense, Mr. Lee cites Appendix C to 19 C.F.R. Part 171. Appendix C provides (in pertinent part): "Assessment of a monetary penalty is an *alternative sanction* to revocation or suspension of the broker's license or permit." *See* Plaintiff's Brief at 8, *quoting* 19 C.F.R. Part 171, App. C (1995) (emphasis added).

Mr. Lee's charges of "bootstrapping" are unfounded. Again, as elsewhere,[15] he fails to recognize "that the reasons for the penalties and the

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[14] *United States v. Ricci,* 21 CIT 1145, 985 F. Supp. 125 (1997)—on which Mr. Lee so heavily relies (*see* Plaintiff's Brief at 1–6, 9, 11)—is illustrative. In *Ricci,* a broker failed to pay a $30,000 penalty, which Customs sought to recover in a collection action in the Court of International Trade. As Mr. Lee emphasizes (*see* Plaintiff's Brief at 1–4), Customs did not there seek to revoke the broker's license. But, in that case, the broker had responded to Customs' notices. *See Ricci,* 21 CIT at 1145, 985 F. Supp. at 126 (noting that broker had responded to Customs' prepenalty notice and had continued communication with agency). The action of the broker in *Ricci* thus stands in stark contrast to Mr. Lee's inaction here, and rendered that broker eligible for more favorable treatment under the Customs Directive.

[15] *See, e.g.*, section III.B, *supra* (addressing defects in Mr. Lee's statute of limitations argument, which similarly fails to differentiate between grounds for imposition of underlying penalties and distinct (albeit related) grounds for revocation of license).

reasons for the revocation of license are different and separable." Defendant's Brief at 16. The $30,000 penalty was imposed for the numerous violations identified in Customs' March 1992 audit. The license revocation proceeding was based on Mr. Lee's failure to timely pay that penalty (and an earlier one).

Mr. Lee's reliance on Appendix C to 19 C.F.R. Part 171 is similarly unavailing. Appendix C's reference to an "alternative sanction" concerns Customs' choice of remedy for a *single* violation. Because Customs in this case sought *different* remedies for *different* violations, Appendix C is simply inapposite. Accordingly, Mr. Lee's "election of remedies" argument must be rejected.

E. PENALTY AS "DEBT" OR "OBLIGATION" OWED TO GOVERNMENT

In yet another attempt to undermine the license revocation determination, Mr. Lee challenges the ALJ's determination that his failure to timely pay penalties constitutes a breach of 19 C.F.R. § 111.29. *See* Plaintiff's Brief at 9–10 (discussing ALJ Decision ¶ 21). As discussed above (*see* n. 1), § 111.29 requires that any "*debt or obligation* owing to the Government for which the broker is responsible" be paid "on or before the date that payment is due." 19 C.F.R. § 111.29 (emphasis added). Specifically, Mr. Lee contends that the penalties assessed against him were not "debt[s] or obligation[s]" within the meaning of § 111.29. Plaintiff's Brief at 9–10.

Neither "debt" nor "obligation" is defined in Customs regulations. Mr. Lee therefore looks to *Black's Law Dictionary* to define the terms, and selects as the "most appropriate" definition:

> An obligation or debt may exist by reason of a judgment as well as an express contract, in either case, there being a legal duty on the part of the one bound to comply with the promise * * * Liabilities created by contract or law (i.e. judgments).

Plaintiff's Brief at 9 (*quoting Black's Law Dictionary* (6th ed. 1990) at 1074). Based on that definition, Mr. Lee reasons that, since he never contracted with Customs to pay either penalty, the penalties can constitute "debt[s] or obligation[s]" only if they constitute judgments—which they do not. Plaintiff's Brief at 9–10.[16]

As the ALJ correctly observed, this argument is simply "specious." *See* ALJ Decision ¶ 21. A penalty assessed against a broker is so plainly a "debt or obligation owing to the Government for which the broker is responsible" that recourse to a dictionary is unnecessary. Indeed, Mr. Lee's selective citation of definitions is affirmatively misleading—and one need look no further than the very authority on which he relies. The sixth edition of *Black's Law Dictionary* begins its definition of "obliga-

[16] Mr. Lee cites two cases in support of his claim that "a civil penalty does not become final, due and owing until such time 'that all available defenses may be presented to a competent tribunal.'" Plaintiff's Brief at 9 (*citing Nickey v. Mississippi,* 292 U.S. 393, 395 (1934) *and United States v. KAB Trade Co.,* 21 CIT 297 (1997)). However, he fails to discuss either case, and both appear to be completely inapposite. *See generally* Defendant's Brief at 18–20. Mr. Lee's continued reliance on *Ricci* is equally unavailing. *See* Plaintiff's Memo at 9 (*citing United States v. Ricci,* 21 CIT 1145, 985 F. Supp. 125 (1997)). Nothing in *Ricci* addressed the definition of "debt" or "obligation," and the case has no relevance here. *See* Defendant's Memo at 18 n.6.

tion" by noting that the term is "[a] generic word, * * * having many wide, and varied meanings, according to the context in which it is used." One example of such a meaning is "[t]hat which a person is bound to do or to forbear; any duty imposed by law, promise, contract relations of society, courtesy, kindness, etc." *See Black's Law Dictionary* (6th ed. 1990) at 1074.

In short, even if it were necessary to consult a dictionary to determine whether a penalty constitutes a "debt or obligation" (which it is not), the same dictionary that Mr. Lee cites actually supports the Government's position. A penalty assessed against a broker qualifies easily as a "duty imposed by law," and thus is a "debt or obligation" for purposes of 19 C.F.R. § 111.29.

F. Failure to Timely Pay Penalty as Basis for License Revocation

Although the argument is not articulated with precision, Mr. Lee also appears to contend that, since 19 C.F.R. § 111.94 authorizes the institution of a collection action for failure to timely pay a penalty, revoking his license for such a failure constitutes an abuse of discretion and is not in accordance with law. Plaintiff's Brief at 10.

In pertinent part, § 111.94 provides:

> If the final determination is that the person is liable for a monetary penalty, the person shall pay, or make arrangements for payment, within 60 days of the date of the final determination. If the monetary penalty is not paid or arrangements made for payment within the time limitations, the Customs Service shall refer the matter to the Department of Justice for institution of appropriate judicial proceedings.

19 C.F.R. § 111.94. As Mr. Lee correctly notes, "[t]here is absolutely no language in this section [to indicate] that if a person does not pay a penalty within 60 days after a final determination that such nonpayment constitutes grounds for revocation." Plaintiff's Brief at 10. However, his observation misses the mark.

The ALJ relied upon § 111.94 only as the basis for his determination that a penalty must be paid within 60 days of its assessment. *See* ALJ Decision ¶ 21. The remedy of license revocation is authorized by a different provision of the regulations—19 C.F.R. § 111.53(c). Indeed, Mr. Lee concedes as much. *See* Plaintiff's Brief at 10 (acknowledging that revocation was "pursuant to 19 C.F.R. § 111.53(c)"). It is thus of no moment that § 111.94 does not mention license revocation. What matters is that revocation is authorized under § 111.53(c) where, as here, a broker "has violated any provision of any law enforced by Customs or the rules or regulations" issued thereunder.[17]

Apparently arguing in the alternative, Mr. Lee further contends that "since [he] did not violate sections 111.29 [requiring payment of debts or

[17] As noted in section II above, "[w]hen the penalty chosen by an agency is within the range of sanctions provided by applicable disciplinary regulations, the severity of the sanction imposed is within the discretion of the agency." *Barnhart v. U.S. Treasury Dep't,* 9 CIT at 287, 291, 613 F. Supp. 370, 374 (1985) (*quoting Tempo Trucking and Transfer Corp. v. Dickson,* 405 F. Supp. 506, 514 (E.D.N.Y. 1975)) (citation omitted). Thus, the Court is not free to second-guess the agency's choice of sanctions.

obligations to the Government "on or before the date that payment is due"] or 111.94 [requiring payment of penalties within 60 days]," it was "an abuse of discretion and not in accordance with the law for the Secretary to rely on section 111.53(c) to revoke [his] license." Plaintiff's Brief at 10.

But the premise of that argument is faulty. Contrary to Mr. Lee's assertion, as discussed above, the ALJ properly concluded that Mr. Lee violated §§ 111.29 and 111.94 by failing to timely pay assessed penalties, and the Secretary properly relied upon the ALJ's conclusion. Accordingly, under § 111.53(c), the Secretary was entitled to revoke Mr. Lee's license.

IV. CONCLUSION

For the foregoing reasons, the decision of the Secretary to revoke Mr. Lee's broker's license is supported by substantial evidence and is otherwise in accordance with law. Accordingly, Mr. Lee's motion is denied, and the Secretary's decision is affirmed.

Judgment will be entered accordingly.

(Slip Op. 02–34)

ELKEM METALS CO. AND GLOBE METALLURGICAL INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA BRASILIERA CARBURETO DE CÁLCIO, INTERVENOR-DEFENDANT

Consolidated Court No. 01–00098

[Motion to dismiss foreign plaintiff from action for lack of standing denied.]

(Dated April 1, 2002)

Baker Botts LLP (Samuel J. Waldon and *Matthew T. West)* for Elkem Metals Company and Globe Metallurgical Inc.

Robert D. McCallum, Jr. Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Reginald T. Blades, Jr.);* and Office of Chief Counsel for Import Administration, U.S. Department of Commerce *(John F. Koeppen),* of counsel, for the defendant.

Dorsey & Whitney LLP (Philippe M. Bruno and *Rosa S. Jeong)* for Eletrosilex S.A.

OPINION AND ORDER

AQUILINO, *Judge:* This action consolidates complaints filed by Companhia Brasileira Carbureto de Cálcio and Eletrosilex S.A., CIT No. 01–00082, and by Elkem Metals Company and Globe Metallurgical Inc., CIT No. 01–00098, each praying for relief from *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part,* 66 Fed.Reg. 11,256 (Feb. 23, 2001), promulgated by the International Trade Administration, U.S. Depart-

ment of Commerce ("ITA"). The plaintiffs in the second action ("Elkem & Globe") were granted leave to intervene as parties defendant in the first matter, from which resultant adverse posture they have filed a motion to dismiss Eletrosilex as a party with any actionable claim herein, alleging lack of standing.

I

This motion takes the position that that Brazilian enterprise does not have standing to proceed under (a) the Tariff Act of 1930, as amended, and (b) the U.S. Constitution.

A

The sum and substance of the motion is that in Brazil Eletrosilex S.A. no longer manufactures, produces or exports silicon metal and that it therefore has lost whatever standing it may have had to participate in judicial review of the kind authorized herein. That is, in

> early 2000, Eletrosilex began experiencing difficulty meeting its debt obligations. Press reports at that time * * * noted that "Eletrosilex, a major silicon metal producer, is looking for a capital partner to pay its debt." * * * These reports also indicated that Rima Industrial S/A ("Rima") was considering taking over Eletrosilex's production capacity. * * *
>
> During the summer of 2000, Rima took over [that] capacity, and Eletrosilex ceased to produce silicon met-Consolidated al. According to the *Tex Report* (a metal industry publication), silicon metal production in Brazil underwent a "reorganization" in July and August 2000. * * * The *Tex Report* specifically notes that "since Eletrosilex has been depressed on their operations for a long period, Rima has leased the equipment held by Eletrosilex and is producing silicon metal by this leased equipment." * * * As a result, Eletrosilex ceased all production and exportation of silicon metal. The last imports of silicon metal produced by Eletrosilex entered the U.S. market in July 2000. Since August 2000, there have been no entries into the U.S. market of silicon metal produced by Eletrosilex.
>
> On February 23, 2001, the [ITA] * * * found that Eletrosilex had made sales at less than fair value during the period of review. Based on Eletrosilex's failure to provide critical information necessary for the [ITA] to calculate a margin, the [agency] properly relied on facts available, and imposed a dumping margin of 93.2% on imports of silicon metal from Eletrosilex during the period of review. * * * Eletrosilex filed an appeal of the determination with this Court pursuant to 28 U.S.C. §1581(c) and 19 U.S.C. §1516a.[1]

On its face, this representation does not advance the relief that the movants seek. To begin with, ITA reviews pursuant to 19 U.S.C. §1675, the final results of one of which is the statutory basis of this consolidated

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[1] Elkem & Globe Motion to Dismiss for Lack of Standing, pp. 3–4 (citations omitted).

Some of those omitted citations are to sources not part of the ITA administrative record filed herein, which absence has caused both Eletrosilex and the defendant to formally object to their reference and reliability.

These objections are well-founded. *See generally McKechnie Brothers (N.Z.) Ltd. v. U.S. Dep't of Commerce,* 10 CIT 707 (1986), and cases cited therein. The court quotes this part of the motion only for the purpose of exposing its innate inadequacy, as discussed hereinafter.

action, invariably cover past periods of importation. Here, that period was July 1, 1998 through June 30, 1999. And there is no showing that Eletrosilex was not doing then the business at issue. In fact, the firm denies that is has

> ceased to exist. Eletrosilex has been significantly reorganized over the past several years. Nonetheless, [it] still exists as a legal entity that leases production equipment to Rima Industrial S/A * * * to produce silicon metal. * * * Because of this arrangement, Eletrosilex remains a participant in the industry and is an interested party.
>
> In addition, Eletrosilex was also an interested party during the course of the initial action and at the time that the appeal was initiated. [It] directly produced silicon metal for import through August 2000, and, as a result, [] received a separate dumping margin from the [ITA] of 93.2% * * *. * * * Eletrosilex continues to be involved, if indirectly, in the sale of silicon metal for import through its leasing agreement with Rima. Thus, [it] maintains a stake in the outcome of this appeal and is an interested party.[2]

Whatever its current role exactly may be, the administrative record at bar does not show that either Elkem & Globe or the ITA itself challenged Eletrosilex's standing to participate in the agency's review of imports during 1998–99. That process was governed by that part of the Tariff Act which defined "interested party", in pertinent part, as "a foreign manufacturer, producer, or exporter * * * of subject merchandise"[3]. And it is that administrative standing which becomes the basis for judicial review of

that process per the Tariff Act and also the Customs Courts Act of 1980. While the former has been enacted in the present tense, to wit,

> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and * * * a complaint, * * * contesting any factual findings or legal conclusions upon which the [ITA] determination is based[,[4]]

the latter is couched in the past tense ***viz.*:**

> A civil action contesting a determination listed in [19 U.S.C. §1516a] may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose.

28 U.S.C. §2631(c). And subsection (k) of that section 2631 adopts the Tariff Act meaning of "interested party", 19 U.S.C. §1677(9)(A), *supra.*

Reading these statutory sections together, and understanding the entire process to which they were enacted to apply, illuminate Eletrosilex as still standing within their ambit. Elkem & Globe read *Brother Industries, Ltd. v. United States,* 16 CIT 150, 787 F.Supp. 1454 (1992), to the

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[2] Eletrosilex Opposition to Defendant-Intervenors' Motion to Dismiss for Lack of Standing, pp. 2–3.

[3] 19 U.S.C. §1677(9)(A) (1999). Subject merchandise, in turn, was defined in part as "the class or kind of merchandise that is within the scope of * * * a review", 19 U.S.C. §1677(25) (1999), like the one at issue herein.

[4] 19 U.S.C. §1516a(a)(2)(A) (1999).

contrary. The court cannot concur. First, the Tariff Act's definition of interested party was different when that case was decided. Section 1677(9)(A) in 1991 defined such a party to be "a foreign manufacturer, producer, or exporter * * * of merchandise which is the subject of an investigation * * *." That is, linguistically at least, the definition was predicated upon a present ***investigation*** within the meaning of the Tariff Act, which in *Brother* meant a material-injury investigation by the International Trade Commission ("ITC"). While that agency did not object to the standing of the companies Brother before it until after it had decided upon its final, affirmative determination, the record showed that the erstwhile Brother producer in Japan of merchandise which was the subject of the underlying investigation had, in fact, transformed itself into a manufacturer of those particular goods exclusively in the United States. Since the focus of such an investigation by the Commission is on current or possible future material injury to a domestic U.S. industry by competing foreign imports, logic and the law coalesced in the Court of International Trade's dismissal of the Brother companies' appeal from the ITC's affirmative determination:

> * * * The use of the present verb tense in the statute suggests that if the merchandise manufactured, exported or imported by the plaintiffs ceases to be the subject of the investigation, then the plaintiffs are no longer interested parties.[5]

Clearly, that circumstance is not analogous to the one posed by Eletrosilex herein.

B

In fact, reference to the constitutional requirement for standing before a federal court buttresses that company's current right to be heard on the merits of its complaint. That requirement has been summarized by the Supreme Court to mean that a party must show that (i) it has suffered an injury in fact that is concrete and is actual or imminent, not conjectural or hypothetical; (ii) the injury is fairly traceable to the challenged action; and (iii) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable federal court decision. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 180–81 (2000). Probable economic injury suffices to establish standing. *E.g., Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998), citing *Investment Company Institute v. Camp,* 401 U.S. 617, 620 (1971). And the party need not establish with a certainty that it

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[5] *Brother Industries, Ltd. v. United States,* 16 CIT 150, 152, 787 F.Supp. 1454, 1456 (1992). In the only other case cited in Elkem & Globe's motion with regard to the statutory standard, *Citrosuco Paulista, S.A. v. United States,* 12 CIT 1196, 1199–1201, 704 F.Supp. 1075, 1081–82 (1988), the court denied a motion for leave to intervene before it in that matter on the part of an association of growers of Florida citrus fruit. While that group was the petitioner before the ITA and the ITC for investigations and relief, the object thereof was frozen concentrated orange juice from Brazil. And since at that time the definition of interested party was tied, in pertinent part, to "a like product", 12 CIT at 1200, 704 F.Supp. at 1081, the court could not equate the domestic growers' fruit with the Brazilian merchandise:

> As with grapes and wine, the Court holds that round oranges and frozen concentrated orange juice are different products for a "like product" determination.

12 CIT at 1201, 704 F.Supp. at 1082.

will take advantage of the economic benefit if it were to prevail. *E.g., Bryant v. Yellen,* 447 U.S. 352, 367 n. 17 (1980).

Moreover, for purposes of resolving herein Elkem & Globe's motion to dismiss, the material allegations of the complaint are to be taken as admitted and liberally construed in favor of Eletrosilex. *E.g., Jenkins v. McKeithen,* 395 U.S.411, 421–22, *reh'g denied,* 396 U.S. 869 (1969), and cases cited therein.

Following that required, traditional approach at bar leaves this court unable to conclude that that Brazilian company has no cognizable stake in the outcome of this action contesting an antidumping duty margin of 93.2 percent for exports in 1998–99. *Cf. Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230–31 n. 4 (1986) (would-be watchers of whales on high seas found to have standing in federal court to pursue U.S. enforcement of the International Convention for the Regulation of Whaling against other nations).

II

In view of the foregoing, the motion of Elkem & Globe to dismiss Eletrosilex S.A. from this consolidated action must be, and it hereby is, denied. And the court will therefore proceed to consider the merits of that company's complaint.

So ordered.

(Slip Op. 02–35)

BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., LTV STEEL CO., INC. AND NATIONAL STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND USINAS SIDERÚRGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERÚRGICA PAULISTA AND COMPANHIA SIDERÚRGICA NACIONAL, DEFENDANT-INTERVENORS

Court No. 99–08–00524

(Dated April 2, 2002)

JUDGMENT

RIDGWAY, *Judge:* Plaintiffs having filed a Motion for Judgment on the Agency Record challenging the determination of the U.S. Department of Commerce ("Commerce") suspending an investigation into the alleged dumping in the United States of certain steel products from Brazil, published at Suspension of Antidumping Duty Investigation, Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 Fed. Reg. 38,792 (July 19, 1999); and further

The Court having granted Plaintiffs' motion in part in Slip Op. 01–65, 25 CIT ____, 146 F. Supp. 2d 927 (2001), and, pursuant thereto, having remanded the matter to Commerce; and further

The Court having stayed its remand order at Defendant's request, and with the consent of all parties, pending the outcome of the then-ongoing administrative review of the suspension agreement at issue; and further

Commerce now having published the final results of the administrative review terminating the suspension agreement, at Final Results of Antidumping Duty Administrative Review and Termination of the Suspension Agreement, Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil, 67 Fed. Reg. 6226 (Feb. 11, 2002); and further

The 30-day period for appeal of the termination of the suspension agreement having expired, with no appeal taken, so that the suspension agreement which was the subject of this action no longer has legal force or effect; and further

Plaintiffs having filed a Stipulation of Dismissal under U.S. CIT Rule 41(a)(1)(B), signed by all parties to the action;

Now, therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that this case be, and it hereby is, dismissed.