Decisions of the United States
Court of International Trade

Slip Op. 04–112

ABB, INC. Plaintiff, v. UNITED STATES, Defendant.

Court No. 03–00183

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

Dated: September 2, 2004

Simons & Wiskin, (*Philip Yale Simons* and *Jerry P. Wiskin*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Graves Walser*), *Michael W. Heydrich*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, Chief Judge:

INTRODUCTION

Plaintiff ABB, Inc. imported three underwater cables into the United States in connection with the Cross Sound Project, which links the New England power grid with the Long Island power grid along the bottom of the Long Island Sound. The United States Customs Service[1] classified two of the cables, both high voltage electrical cables, under subheading 8544.60.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1201 (2000), and classified the other, a fiber optic cable, under subheading 8544.70.00. ABB challenges these classifications on the grounds that, because the three cables were bound together with steel straps

[1] Effective March 1, 2003, the U.S. Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32, at 4 (2003). For ease of discussion, this opinion refers to both incarnations as "Customs."

after importation, the cables were imported as unassembled parts of a single fiber optic cable "assembled with electrical conductors." Such a cable would be classified under 8544.70.00, duty free.

ABB's administrative protest was denied pursuant to 19 U.S.C. § 1515(a). The court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1581(a). Both ABB and the Government move for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CIT R. 56. The court finds that no genuine issues of material fact remain. Because the three fully-manufactured, functioning cables were fastened together after importation through a project-specific bundling process, they cannot be classified as the unassembled parts of a single fiber optic cable or composite machine. Accordingly, the Government's motion for summary judgment is granted and ABB's motion is denied.

BACKGROUND

I. THE HARMONIZED TARIFF SCHEDULE PROVISIONS IN ISSUE

The relevant HTSUS provisions are Heading 8544 and certain of its subheadings:

8544	Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors:
. . .	
8544.60	Other electric conductors, for a voltage exceeding 1,000 V:
. . .	
8544.60.40	Other:
	Of copper
. . .	
8544.70.00	Optical fiber cables

Heading 8544, HTSUS.

II. THE MERCHANDISE IN ISSUE

The three articles in issue consist of two high voltage direct current ("HVDC") submarine cables and one fiber optic submarine cable. ABB entered the cables as three separate articles, with each HVDC cable entering under subheading 8544.60.40 at a duty rate of 3.5% of the cable's value and the fiber optic cable entering under

subheading 8544.70.00, duty free. Customs classified the articles as entered. After final liquidation, ABB protested the classification, alleging that the three cables were unassembled parts of a single article properly classified under 8544.70.00. Customs denied this protest on April 14, 2003.

A. The HVDC Cables

The HVDC cables are manufactured by ABB High Voltage Cables AB, in Karlskrona, Sweden. Def.'s Stmt. of Facts at ¶2; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶11. Each HVDC cable consists of a copper conductor surrounded, in succeeding order, by plastic insulation, water sealing tape, a metallic shield, an inner jacket, tensile armoring, and an outer jacket. Def.'s Stmt. of Facts at ¶9; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶9; Aff. of Jan Lindhe, ABB Project Installation Manager for the Cross Sound Project, at ¶8 [hereinafter Lindhe Aff.]. The HVDC cables have no other use except to transmit direct current electricity. Lindhe Aff. at ¶10. The HVDC cables were entered and classified under HTSUS subheading 8544.60.40 at duty rate of 3.5% of their value. Pl.'s Stmt. of Facts at ¶6; Def.'s Stmt. of Facts at ¶26.

B. The Fiber Optic Cable

The fiber optic cable was manufactured by Ericsson Network Technologies AB, Hudiksvall, Sweden. Lindhe Aff. at ¶9. At the center of the cable are optical fibers individually sheathed with acrylate and arranged around a slotted polyethylene core. *Id.*; Ericsson Fiber Optic Cable Product and Order Information, Def.'s Resp. Br., Ex. C [hereinafter Ericsson Fiber Optic Cable Information]. The arrangement of optical fibers is protected by an inner polyethylene jacket, a water-proof copper tube, a double layer of steel wire armor, and an outer polyethylene jacket. Def.'s Stmt. of Facts at ¶16; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶16; Ericsson Fiber Optic Cable Information, Def.'s Resp. Br., Ex. C. The fiber optic cable was classified under subheading 8544.70.00, HTSUS, duty free. Pl.'s Stmt. of Facts at ¶5; Def.'s Stmt. of Facts at ¶27.

C. The Cross Sound Project

The submarine cables were imported for the Cross Sound Project, which links the New England power grid with the Long Island power grid to provide electricity to Long Island and improve the reliability of the power supply in Connecticut and New England. Def.'s Stmt. of Facts at ¶4. The cables connect HVDC substations in New Haven, Connecticut and Brookhaven, New York.

1. The State of the Cables Upon Entry

Each cable was fully-manufactured and functional upon leaving its manufacturing plant. Pl.'s Resp. to Def.'s Stmt. of Facts at ¶¶12,

13, & 15 (HVDC cables); *id.*, at ¶¶18, 19, 20, 21 (fiber optic cable). After manufacture, the three cables were loaded in Sweden onto a special cable laying vessel, the Sea Spider. Def.'s Stmt. of Facts at ¶23; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶23. The two HVDC cables were loaded simultaneously in individual compartments in a rotating turntable on the deck of the ship. Lindhe Aff. at ¶7. The fiber optic cable was then loaded onto the ship into a circular container known as a "static coil." *Id.*; VDS Cable bv Project Quality Manual, Sec. 6.4.3.6, Pl.'s Op. Br., Ex. 1. The cables did not undergo further processing prior to the arrival of Sea Spider in the Long Island Sound. Lindhe Aff. at ¶14. The Sea Spider crossed the Atlantic Ocean and made its first port of call in New Haven, where the United States Coast Guard inspected the vessel and Customs cleared the cargo. After the ship received clearance from Customs, the Cross Sound Project's installation team arrived on the vessel and made preparations to lay the cables.

3. The Bundling and Laying of the Cables

As the cables were laid in the Long Island Sound, they were bundled together with metal straps. Def.'s Stmt. of Facts at ¶33; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶33. Laying the cables in a bundle was more efficient and convenient than laying each separately, and the bundle also provided a more accurate means of laying the cables along a predetermined route. Lindhe Aff. at ¶17. The size of the three cables would have made it difficult to combine their contents within a single cable at the time of manufacture. *Id.* The use of separate electrical cables also allows them to cool more efficiently. *Id.*

The bundling operation was a continuous operation consisting of three stages. *Id.* First, the two HVDC cables were removed from the turntables on which they were stored during transit. *Id.* Next, the fiber optic cable was taken from its static coil position. *Id.* The three cables were then secured together with metal straps at the bundling station on the deck of the ship. *Id.* Each strap was approximately 10 millimeters wide. The straps were manually placed and tightened around the three cables at intervals ranging from two to five meters. *Id.*; Def.'s Stmt. of Facts at ¶33; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶33; *see also* VDS Cable bv Project Quality Manual, Sec. 6.6.1 ("The strapping interval will be 2 to 5 [meters] and can be changed according to the visual confirmation of the straps during touch down monitoring done by the [remote operating vehicle]"). This spacing interval between the steel bands was specific to the Cross Sound Project, and depended on various factors such as the speed of the cable laying vessel, the use of chafing gear to protect the cables, the depth of the water, and whether the cables were "floated" as they approached the shoreline. Def.'s Stmt. of Facts at ¶34; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶34. The strapping interval was monitored visually and

subject to alteration. The bound portions of the cables descended through the water into a trench dug along a predetermined route by a remote operating vehicle.

DISCUSSION

The issue before the court is whether a finished fiber optic cable and two finished high-voltage, direct current copper cables are properly classified as a single article if, after importation, they are bound together with steel bands before they are laid on the sea floor. Customs refused to classify the cables in such a manner, treating them as three separate articles. ABB challenges the classification on the ground that HTSUS subheading 8544.70.00, which Customs applied to the fiber optic cable only, instead should have covered all three cables as unassembled pieces of a single fiber optic cable "assembled with electric conductors." In the alternative, ABB contends that the cable bundle is a composite machine classifiable under 8544.70.00 as well. Because the bundling of the finished cables constitutes neither an assembly operation nor the creation of a composite machine, Customs classified the merchandise properly.

I. THE SUBMARINE CABLES ARE NOT UNASSEMBLED PARTS OF A SINGLE ARTICLE

A court analyzes Customs' classification of merchandise in two steps: (1) ascertaining the proper meaning of the relevant tariff provisions, and (2) determining whether the subject imports fall within the relevant headings. *Universal Elec. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997).

In the first step, the court must determine de novo "the correct meaning of a tariff provision so that all future importers will know what the tariff provision means." *Id.* at 492 n.3; *see also id.* at 492 ("the importer has no duty to produce evidence as to what the law means because evidence is irrelevant to that legal inquiry").

A. HTSUS 8544.70.00, "optical fiber cables . . . whether or not assembled with electric conductors"

The relevant HTSUS heading in this case is 8544, which covers, among other things, "optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors." HTSUS 8544. The relevant subheading within 8544 is 8544.70.00, which lists "optical fiber cables."[2] The *Explanatory Notes* elaborate on what is covered by Heading 8544: "[t]elecommunications wires and cables (including submarine cables and data transmission wires and cables)," which "are generally made up of a pair, a quad or a

[2] There is no dispute as to the meaning of HTSUS 8544.60.40, which applies to the electrical cables if they are treated as separate articles.

cable core, the whole usually covered with a sheath." *Harmonized Commodity Description and Coding System Explanatory Notes*, 85.44 (2d ed. 2002) [hereinafter *Explanatory Notes*].[3]

Related to 8544 and 8544.70.00 is heading 9001, which covers, in relevant part, "[o]ptical fibers and optical fiber bundles; optical fiber cables other than those of heading 8544." HTSUS 9001. Thus, optical fiber cables made up of individually sheathed fibers are classified under heading 8544 and subheading 8544.70.00, while optical fiber cables not made up of individually sheathed fibers, as well as optical fibers and optical fiber bundles, are classified under heading 9001 and certain of its subheadings.

According to ABB, HTSUS subheading 8544.70.00 covers the submarine cables as a single article assembled after importation. Although it is a general principle of customs law that "imported merchandise is dutiable in its condition as imported," *Simod America Corp. v. United States*, 872 F.2d 1572, 1577 (Fed Cir. 1989), GRI 2(a) commands that headings be interpreted to include an article that enters unassembled or disassembled. GRI 2(a), HTSUS. GRI 6 states that "classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related notes and, [with the necessary changes], to the above rules." GRI 6. Thus, ABB's claim—that the three cables it imported are the unassembled parts of a single fiber optic cable "assembled with electrical conductors"—is plausibly consistent with the rules for interpreting the HTSUS.

1. "Optical fiber cables"

The plain meaning of "optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors" is that the heading includes both optical fiber cables made up of individually sheathed fibers that were assembled with electric conductors and optical fiber cables made up of individually sheathed fibers that were not assembled with electric conductors. Customs illustrated the meaning of the provision by applying it to five types of cables that were "composite cables" because they contained both optical fibers and electrical conductors within single-sheath cable assemblies. Cust. HQ Rul. 084958, 1989 U.S. Cust. HQ Lexis 2505, at *3–*4. Although that 1989 Customs headquarters ruling made clear that optical fibers and electrical conductors manufactured to share a common sheath constituted a fiber optic cable "assembled with electrical conductors," it must be determined whether the meaning of "assembled" encompasses a broader set of facts.[4]

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[3] Although the Explanatory Notes are not binding on the court, they are recognized as instructive in clarifying legislative intent regarding the scope of HTSUS provisions. *EM Industries, Inc. v. United States*, 22 CIT 156, 162, 999 F. Supp. 1473, 1478 (1998).

[4] ABB contends that, because of the persuasiveness of HQ Ruling 084958, its cables war-

2. "Whether or not assembled with electric conductors"

The term "assembled" is not defined by the HTSUS.[5] A term not defined by the HTSUS receives its "common and popular meaning," which is presumed to be the same as its commercial meaning. *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002). In ascertaining a term's common meaning, a court may consult "dictionaries, scientific authorities, and other reliable information sources." *Id.* (quoting *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 673 F.2d 1268, 1271 (C.C.P.A. 1982)).

Dictionaries provide a common understanding of the verb "assemble," and, by extension, "assembled": "2 : to fit together the parts of," *Merriam-Webster Online Dictionary at* http://www.m-w.com/cgi-bin/dictionary?book = Dictionary&va = assemble; "2. To fit together the parts or pieces of: *assemble a machine*; *assemble data*," *The American Heritage Dictionary* 110 (3d. ed. 1996); "2. b. To put together (the separately manufactured parts of a composite machine or mechanical appliance); also with the machine as obj." *The Oxford English Dictionary* vol.I, 705 (2d ed. 1989); "2 [. . .] b: to fit together various parts of so as to make into an operative whole [e.g., a radio set] [e.g, airplanes being assembled];" *Webster's Third New International Dictionary* 131 (1981). Thus, in lexicographical terms, to assemble something is "to fit together the parts or pieces of" that thing.

This definition accords with a line of customs cases beginning with *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 62 Cust. Ct. 643, 304 F. Supp. 1187 (Cust. Ct. 1969), which defined "assemble" as "the joining or coming together of solids" within the meaning of item

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rant similar treatment as "composite cables." *See* Pl.'s Op. Br. at 22–23 (discussing *United States v. Mead Corp.*, 533 U.S. 218 (2001), which held that, depending on several factors, certain Customs rulings warrant some deference pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

In Headquarters Ruling 084958, there was no question that the optical fibers and electrical conductors were assembled together into individual cables. Each of the subject cables was manufactured by Siemans Corporation to contain optical fibers and electrical conductors within a single outer sheath, which in most cases was a lead-cured neoprene jacket. *See* Siemans Coproration Submissions to Customs (June 7, 1989), *Wiskin Aff.*, Ex. B. While it may not be necessary in all cases that the optical fiber and electrical parts of a fiber optic cable be assembled within a common sheath on a factory assembly line in order to be "assembled with electrical conductors," that is certainly a distinguishing feature from the product at hand. To directly apply HQ Ruling 084958 here would be to ignore the principal issue in this case: whether three individual, fully-manufactured, functional cables should be considered as the unassembled parts of a single article if, after importation, they are bound together with metal straps as they are laid. *Cf. Rainin Instrument Co. v. United States*, 288 F. Supp. 2d 1360 (Ct. Int'l Trade 2003) (citing a Customs ruling letter issued to an entity other than the importer where the merchandise was identical).

[5] The Explanatory Notes to GRI 2(a) discuss how unassembled or disassembled articles might be assembled, but do not directly define "assembled": " 'articles presented unassembled or disassembled' means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, *provided* only assembly operations are involved." Explanatory Notes GRI 2(a)(VII).

807.00 of the now-repealed Tariff Schedule of the United States ("TSUS"). *Id.* at 646–47, 304 F. Supp. 1189–90; *see also Sigma Instruments, Inc. v. United States*, 724 F.2d 930, 931 (Fed. Cir. 1983) (citing *C.J. Tower* and defining an "assembly" as "the joining or coming together of solids" for the purposes of TSUS 807.00); *E. Dillingham, Inc. v. United States*, 470 F.2d 629, 633 (C.C.P.A. 1972) (same); *United States v. Baylis Bros. Co.*, 451 F.2d 643, 645 (C.C.P.A. 1971) (same).

C.J. Tower provided the original, authoritative construction of "assembled" in the context of TSUS item 807.00, a provision "dealing with the subject of reimportation of American made products." 62 Cust. Ct. at 646–47, 304 F. Supp. at 1189–90. In arriving at a common meaning for "assembled," *C.J. Tower* relied in part on dictionary definitions nearly identical to those quoted above. *Id.* at 646, 304 F. Supp. at 1189 (quoting two dictionaries to show that assemble is defined by lexicographers as "[t]o fit or join together"). That *C.J. Tower* replaced "to fit together" with "joining or coming together" and "parts" with "solids" is attributable to the influence of the relevant tariff provision's Explanatory Notes and to the fact that a liquid/solid dichotomy was at issue. *See id.* at 646–47. Regardless, *C.J. Tower* concluded that the "framers" of item 807.00 used "assemble" with "the same understanding of its scope as that imparted by contemporary lexicographers." *Id.* Those same lexicographical understandings are reflected in the dictionary definitions quoted above. *See supra* at 11. Considering the meaning consistently assigned to "assembled" by courts and lexicographers, and with no relevant legislative history to the contrary,[6] the court concludes that the meaning of "assembled" in Heading 8544 is "to have fit together the parts or pieces of." This definition consists of two key terms: "fit together" and "parts."

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[6] Optical fiber cables receive duty free treatment in Subheading 8544.70 as a result of *Presidential Proclamation 7011*, which implemented the World Trade Organization Ministerial Declaration on Trade in Information Technology Products and the Agreement on Distilled Spirits ("ITA"). *Proclamation No. 7011*, 62 Fed. Reg. 35,909 (June 30, 1997). This proclamation does not provide insight into what constitutes an assembly, but it at least demonstrates that the favorable tariff treatment sought by ABB for its electrical cables was targeted specifically at telecommunications equipment.

In the *ITA*, WTO members agreed to eliminate duties on information technology products, including telecommunications equipment. *Id.* In accordance with the agreements made by the parties to the *ITA*, *Presidential Proclamation 7011* provided for the staged reduction of the duty rates on optical fiber cables culminating in duty free treatment effective January 1, 2000. *Id.* at 35,939. While the implementation of the *ITA* into the HTSUS does not provide great insight into the meaning of "assembled," it indicates that fiber optic cables in Subheading 8544.70.00 are given duty free treatment because the United States—acting with congressional authorization—sought to expand trade in these and other information technology products. Likewise, *Presidential Proclamation 7011* provided for tariff reductions on three subheadings of electric conductors, for a voltage not exceeding 1,000 volts, of a kind used for telecommunications. Neither the *ITA* nor *Presidential Proclamation 7011* provided such treatment for the high-voltage electrical cables at issue here. Accordingly, they are not indicative of legislative intent to provide duty free treatment for HVDC cables.

The term "fit together" indicates that the manner in which the parts are conjoined is readily apparent and, consequently, little or no discretion is required of the assembler during the fitting operation. *Cf. Baylis Bros. Co. v. United States*, 64 Cust. Ct. 256, 260 (1970) (finding an assembly operation where garment workers did not exercise "any independent judgment" in following a "pre-determined stenciled design"), *aff'd*, *Baylis Bros.*, 451 F.2d at 11 (noting the Customs Court's "independent judgment" rationale and concluding that the operation was "well within the common meaning of 'assembly,' since the operation merely consists in joining the two components together according to the stenciled designs"). In other words, the parts have a predetermined manner of fitting together, and all that is left is to fit them together. To have a predetermined manner of fitting together, the assembly process must be more standardized than unique. *Webster's* examples of usage confirm this by referring to products—a radio set and airplanes—which are generally produced in significant quantities according to predetermined instructions. *See Webster's Third New International Dictionary* 131.

The second term, "parts," requires, at a basic level, that there exists a whole to which the parts pertain. *See, e.g.*, *The American Heritage Dictionary* 1319 (defining "part" as "1. A portion, division, piece, or segment of a whole."); *Webster's Third New International Dictionary* 131 (defining "assemble" as that which occurs when parts are fit together to make "an operative whole"). The Federal Circuit and its predecessor are more specific: a "part" is either (1) "an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article," or (2) "dedicated solely for use with an article." *Bauerhin Tech. Ltd. P'ship v. United States*, 110 F.3d 774, 778–89 (Fed. Cir. 1997) (quoting *United States v. Willoughby Camera Stores, Inc*, 21 C.C.P.A. 322, 324 (1933), and reconciling it with *United States v. Pompeo*, 43 C.C.P.A. 9 (1955)). *But see Ludwig Svensson Inc. v. United States*, 23 CIT 573, 62 F. Supp. 2d 1171 (1999) (characterizing *Bauerhin* as requiring an item to meet both definitions of "part"). A putative part fails to meet either definition if, whether separately or joined to the putative whole, it is "a distinct and separate commercial entity." *Willoughby Camera*, 21 C.C.P.A. at 325; *Bauerhin*, 110 F.3d at 779 (applying the *Willoughby Camera* "distinct and separate commercial entity" criteria to the second definition of parts, which derives from *Pompeo*, 43 C.C.P.A. at 13).

B. The Application of HTSUS 8544.70.00 to the Cable Bundle

In the second step of the classification analysis—the application of the tariff provision to the merchandise in issue—a court presumes that Customs applied the provision correctly, which means that the plaintiff is left with the burden of showing by a preponderance of the

evidence that Customs' decision was incorrect. *See Rollerblade*, 282 F.3d at 1352 (citing 28 U.S.C. § 2639(a)(1)); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1365 (Fed. Cir. 1999). In weighing the evidence adduced by the importer and the government, the court must decide "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Marubeni America Corp. v. United States*, 35 F.3d 530, 536 (Fed. Cir. 1994) (internal citations omitted). Here, the undisputed evidence supports the Government's classification, as ABB's three-cable bundle fails to conform to the meaning of "assembled" in heading 8544 in both substantive terms (i.e., the physical features of the cables and the circumstances of the bundling process) and in terms of nomenclature (i.e., the terminology used by ABB and the industry to describe the cables and the bundling process).

1. The Substantive Features of ABB's Cable Bundle

As noted above, the meaning of "assembled" in heading 8544 includes two components: (a) to have fit together (b) parts. *See supra* Part I(A)(2).

The first component, "to have fit together" requires a relatively standardized procedure in which a minimum of discretion is exercised by the assembler. The process by which ABB's cables were bound into a cable bundle was, in contrast, project-specific and subject to the discretion of those who oversaw the operation. The intervals between each metal binding strap were project-specific because they depended upon factors such as the speed of the cable laying vessel, the depth of the water, and whether the cables were "floated" as they reached the shore. Def.'s Stmt. of Facts at ¶34; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶34. Discretion was exercised in the bundling operation in that the strap intervals were determined on-site, Lindhe Dep., p. 88:L. 19 through p. 89:L. 7, were monitored visually, and were subject to alteration as conditions warranted. *See* VDS Cable bv Project Quality Manual, Sec. 6.6.1, Def.'s Resp. Br., Ex. D ("The strapping interval will be 2 to 5 [meters] and can be changed according to the visual confirmation of the straps during touch down monitoring done by the [remote operating vehicle]").

The second component, "parts," does not include objects that are distinct and separate commercial entities. *Bauerhin*, 110 F.3d at 779; *Willoughby Camera*, 21 C.C.P.A. at 325. ABB's cables fail this test. Each of ABB's cables entered the country fully-manufactured, complete with external armoring to protect it from conditions on the sea floor. Pl.'s Resp. to Def.'s Stmt. of Facts at ¶¶9, 12, 13, & 15 (HVDC cables); id., at ¶¶16, 18, 19, 21 (fiber optic cable). Each also entered in a functional condition. Pl.'s Resp. to Def.'s Stmt. of Facts at ¶13 (HVDC cables); id., at ¶17, 19, 20 (fiber optic cable). As fully-manufactured, functional articles, the three cables could have been used in separate projects and still have been able to fulfill their re-

spective functions. Def.'s Stmt. of Facts at ¶36; Pl.'s Resp. to Def.'s Stmt. of Facts at ¶36 (admitting that it would be possible for any one or all three of the cables to be unbound and used on other projects without further re-working at a manufacturing plant). ABB laid them in the trench together because it was more efficient, convenient, and accurate to lay them in a bundle. Lindhe Aff. ¶17.[7] Each cable, therefore, bears the hallmarks of a distinct, separate commercial entity rather than a part of a whole.

ABB claims that, despite the fact that it imported three fully-manufactured, functional articles, its intent was to assemble the three cables into a submarine cable for burial under the Long Island Sound. Lindhe Aff., ¶12. Even if the bundling procedure constituted an assembly, an importer's intent, by itself, is an insufficient basis for classification:

> It is well settled law that merchandise is classified according to its condition when imported. United States v. Citroen, 223 U.S. 407, 414–15, 56 L. Ed. 486, 32 S. Ct. 259 (1911). If the rule were otherwise, not only could the same product be subject to different duty rates depending on its intended end use, but Customs would be flooded with affidavits or other evidence of differing intended uses . Moreover, Customs would have no way of determining whether the merchandise was actually used for its alleged intended purpose after importation.

Mita Copystar America v. United States, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (emphasis added).

More importantly—and contrary to ABB's contentions—fastening articles together for efficient handling does not, by itself, constitute an assembly. To confuse this point is to miss the distinction between "bundled" and "assembled." The verb "bundle"is defined as "[t]o tie, wrap, fold, or gather together." *The American Heritage Dictionary*, 254 (3d ed. 1996). The term does not require that "parts" be "fit together." Objects are commonly bundled together for more efficient handling, but a person who gathers sticks in a forest does not "assemble" the sticks merely by tying them together with rope so that they can be carried more easily.

The HTSUS does not miss this distinction: heading 9001 lists both "optical fiber *bundles*" as well as "optical fiber cables other than

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[7] "Bundling is a more cost effective manner in which to bury undersea cables because it eliminates multiple cable laying and trenching operations. . . . If the cables are not bundled, and the Sea Spider attempted to lay three individual unbundled cables at the same time, there would be no way to control where the cables would fall on the seabed of Long Island Sound. Moreover, the individual cables would spread out such they would not lay side-by-side on the sea floor. Since the [remote operating vehicle] can not [sic] move the cables once they are deposited on the sea floor by the Sea Spider, it would be necessary to dig separate trenches for each cable which would result in three trips across Long Island Sound rather than one." Lindhe Aff. ¶17

those of heading 8544." HTSUS 9001 (emphasis added). By using the term "bundles" in heading 9001 but not in heading 8544, the statute displays a mastery of terminology that belies any suggestion that subheading 8544.70.00 encompasses "optical fiber cable bundles" as well as "optical fiber cables." The court is unwilling to presume that, despite the absence of a reference to cable bundles in subheading 8544.70.00 and the use of the term "bundles" in a separate provision, Congress nevertheless intended to include cable bundles in subheading 8544.70.00. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992) ("if Congress had intended to include [the poultry feed preparation] or other preparations under subheading 3203.00.10, Congress could easily have done so. . . . Congress did not do so and we decline to act where Congress has not.").

2. The Nomenclature of Submarine Cable Bundles

That ABB's cables are separate articles rather than three parts of a single article is confirmed by the terminology used in the Cross Sound Project and the industry as a whole. The Cross-Sound project literature, including several items produced by ABB, repeatedly refers to several cables in a bundle—rather than a single cable—when discussing the project. *See, e.g.*, "Cross Sound Cable Project, Connecticut-Long Island," Def.'s Resp. Br., Ex. F at 2 ("The two HDVC Light power cables and the fiber optic cable were laid bundled together to minimize the impact on the sea bottom"); "Cross Sound Cable Interconnector, Connecticut and Long Island, USA," Def.'s Resp. Br., Ex. E at 2 ("The cables were buried up to six feet into the sea floor"); "Project Quality Manual," Def.'s Resp. Br., Ex. D, Sec. 1.1 & 1.2 ("VDS Cable bv . . . has been awarded the contract for the installation of 2 HVDC power cables and 1 fiber optic (FO) cable by ABB High Voltage Cables between the locations Shoreham, NY and New Haven, CT"). The contract between ABB Power T&D Company, Inc. and TransEnergie U.S. Ltd. uses the term "cable system," not "cable assembly," and refers to two cable systems rather than one: "The Fiber Optic Cable System shall be routed and installed in the same trench as the HVDC Cable System." Def.'s Resp. Br., Ex. G, at I–60, Sec. 4.4, I–70, Sec. 4.10.2. The contract's technical specifications provide that the fiber optic cable will be "handled" and "installed" with the HVDC cables. Def.'s Resp. Br., Ex. G, at I–63, Sec. 4.8.1. The specifications do not provide that the three cables will be "assembled." *See id*. The Cross Sound Project's quality manual also speaks in terms of multiple cables: "All 3 cables, 2 HVDC + 1 FO, will be bundled by means of strapping the cables." VDS Cable bv Project Quality Manual, Sec. 4.1.2, Def.'s Resp. Br., Ex. D. The language used by the contracting parties involved in the Cross Sound Project refutes the proposition that they considered the cable bundle to be a single cable.

At a more general level, the submarine cable industry also conceives of a metal strapping operation as the "bundling" of multiple cables rather than the "assembly" of a single cable, as ABB's Project Installation Manager for the Cross Sound Project attests: "The process of combining the electric and fiber optic cables is called bundling, which is a standard industry practice world-wide. It is used on almost all cable laying operations where two or more cables are to be buried with the use of an undersea remote operating vehicle." Lindhe Aff. ¶13. An industry publication describing a submarine cable project at the Strait of Gibraltar exemplifies this conception of multiple cables as individual articles rather than something conceptually identical to a single-sheath composite cable:

> Two submarine optical fiber cables . . . were also installed along the route. . . . These cables were bundled to two of the four power cables. Separate fiber-optic cables were used, as the technology to include the fiber optics within the cable armor was not fully developed.

Ramon Granadino, Bridging the Strait of Gibraltar, Transmission & Distribution World, July 1, 1999, at 2, Pl.'s Op. Br., Ex. 5 (emphasis added). A technological or economic inability to assemble a single, suitable composite cable does not mean that alternative measures, such as bundling, constitute an assembly. Sources from the project and the industry confirm this by referring to cable bundles as a collection of individual, fully-assembled articles.

Given the substantive aspects of the bundling operation, as well as the extensive terminological references to the bundling of multiple individual cables, Customs properly treated the HVDC cables and fiber optic cable as separate articles under subheadings 8544.60.40 and 8544.70.00, respectively.

II. THE SUBMARINE CABLES ARE NOT A COMPOSITE MACHINE

In an alternative argument, ABB contends that the cable bundle constitutes a composite machine within the meaning of Note 3 of Section XVI, HTSUS, which provides that such machines are classified "as if consisting only of that component or as being that machine which performs the principal function." Note 3 of Section XVI, HTSUS. ABB asserts that the cable bundle is a composite machine which "has no principal function." Pl.'s Op. Br. at 18. Where the principal function of a composite machine cannot be determined, the *Explanatory Notes* indicate that recourse should be made to GRI 3(c), which provides that the article be "classified under the heading which occurs last in numerical order among those which equally merit consideration." GRI 3(c), HTSUS. Assuming application of GRI 3(c) were appropriate, this would lead to classification of the cable bundle under subheading 8544.70.00. Assuming that the HVDC cables no not provide the principal function, this argument hinges on

whether the cable bundle is a composite machine.[8] For reasons similar to those stated in the previous section, it is not.

Composite machines "consist[ ] of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions." Note 3 of Section XVI, HTSUS. The *Explanatory Notes* elaborate, describing composite machines as "consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions which are generally complementary and are described in different headings of Section XVI." *Explanatory Notes* at 1387. The phrase "fitted together to form a whole" is nearly identical to the meaning of "assembled" in heading 8544. *See supra* Part I(A)(2). The *Explanatory Notes* to Note 3 go even further, providing that two or more machines "should not be taken together to form a whole unless the machines are designed to be permanently attached either to each other or to a common base, frame housing, etc." *Explanatory Notes* at 1388. Because each of the cables is fully-manufactured and capable of functioning independently, the cables are not "designed to be permanently attached . . . to each other." *Id.* Thus, just as ABB's cables are not "fitted together to form a whole" within the meaning of 8544, they do not meet the requirements of the phrase within the context of composite machines within the meaning of Note 3 to Section XVI.

CONCLUSION

Because the three fully-manufactured, functional cables were fastened together after importation through a project-specific bundling process, they cannot be classified as the unassembled parts of a single fiber optic cable or composite machine. Customs classified the cables properly as three separate articles. Accordingly, ABB's motion for summary judgment is DENIED, and the Government's cross-motion is GRANTED.

JUDGMENT WILL ENTER ACCORDINGLY.

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[8] Because the three cables are not a composite machine, the Government's counterclaim classification for such a machine, HTSUS 8544.60.40, does not apply.

Slip Op. 04–113

Before: Judge Judith M. Barzilay

XEROX CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 99–02–00086

[Judgment for Plaintiff.]

Decided: September 8, 2004

Neville Peterson LLP, (*John M. Peterson, Curtis W. Knauss*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice; *Barbara S. Williams*, Assistant Branch Director, International Trade Field Office; (*Amy M. Rubin*), Civil Division, United States Department of Justice, Commercial Litigation Branch; *Beth C. Brotman*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, of Counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

I. INTRODUCTION

This matter is before the court for decision following a bench trial held on March 2 and 4, 2004. Plaintiff Xerox Corporation ("Plaintiff" or "Xerox") challenges Defendant the United States Bureau of Customs and Border Protection's ("Defendant" or "Customs")[1] refusal to reliquidate certain entries of electrostatic multifunction color photocopier/printers pursuant to 19 U.S.C. § 1520(c).[2] Granting Defendant's Motion for Summary Judgment in part and denying it in part and denying Plaintiff's Motion for Summary Judgment, the court previously opined in *Xerox Corp. v. United States*, 26 CIT ___ , 219 F. Supp. 2d 1345 (2002), ("*Xerox I*")[3] that there were material facts at issue regarding the entry procedures used by Plaintiff's customs broker. The court in *Xerox I* framed the issue for trial as follows: Plaintiff "needs to show by a preponderance of the evidence at trial that the entry writer at Fritz mistakenly relied on the inaccurate description provided on the invoice for the Regal and MajestiK printers." *Xerox I*, 219 F. Supp. 2d at 1353. Accordingly, a bench trial was held in March 2004. Xerox presented two witnesses at trial:

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[1] Effective March 1, 2003, the United States Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32 at 4 (2003).

[2] *See* Conclusions of Law number 3, *infra*.

[3] Familiarity with the court's decision in *Xerox I* is presumed.

Graham Cassano, Xerox's Director of Customs and Tariff Administration, and Jared Hirata, a former Fritz employee, who appeared via live video transmission. The parties stipulated to the admission of the deposition testimony of two other witnesses, Reina Cabatana, a former Xerox employee, and Nathan Reep, a former Fritz supervisor.[4] Pursuant to the following findings of fact and conclusions of law, and in accordance with USCIT R. 52(a), the court enters a final judgment in favor of Plaintiff and against Defendant.

II. JURISDICTION AND STANDARD OF REVIEW

Jurisdiction of the Court is found in 28 U.S.C. § 1581(a). Even though Customs' factual determinations enjoy a presumption of correctness, the presumption does not extend to questions of law. *See, e.g., Toy Biz, Inc. v. United States*, 27 CIT ___ , 248 F. Supp. 2d 1234 (2003). Moreover, "the Court makes its determinations upon the basis of the record made before the Court, rather than that developed by Customs." *G&R Produce Co. v. United States*, 27 CIT ___ , 281 F. Supp. 2d 1323, 1326 (2003), *aff'd* No. 04–1082 (Fed. Cir. Aug. 27, 2004) (citing *United States v. Mead Corp.*, 533 U.S. 218, 233 n.16 (2001)). Accordingly, the court makes the following findings of fact and draws the following conclusions of law after holding a *de novo* bench trial in this case.

III. FINDINGS OF FACT

A. Facts Uncontested by the Parties and Agreed to in the Pretrial Order.

1. Plaintiff Xerox Corporation entered the merchandise in question into the United States for consumption at Los Angeles/Long Beach, California, during the period of May 1995 to September 1995. The entries were liquidated during the period of September 1995 to January 1996 "as entered."

2. The imported merchandise in question consists of various models of "Regal" and "MajestiK" image output terminals.

3. The entry numbers in question are as follows: 110–0060198–7, 110–0060292–8, 110–0060359–5, 110–0060362–9, 110–0060534–3, 110–0060611–9, 110–0060704–2, 110–0060765–3, 110–0060778–6, 110–0060808–1, and 110–0060865–1. There were originally twelve entries in the case, but the parties have agreed that the entry number 110–0060152–4 should be severed and dis-

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[4] The trial lasted two days. In this opinion, the transcript of the first day of the trial is denoted "*Trial Tr. 1*," and the second day, "*Trial Tr. 2*."

missed from the action because the request for reliquidation was outside the one-year window and therefore untimely for this entry. *See* Pretrial Order Section B – Jurisdiction.

4. The merchandise was entered under subheading 9009.12.00 of the Harmonized Tariff Schedule of the United States (1995) ("HTSUS") as photocopying apparatus. The duties were assessed on the merchandise at the rate of 3.7% *ad valorem*.

5. According to Customs N.Y. Ruling No. A80061 of February 14, 1996, the MajestiK 5760 model was determined properly classifiable as laser printer units under subheading 8471.60.6100, HTSUS. Goods so classified are duty-free.

6. According to Customs N.Y. Ruling No. 817475 of December 22, 1995, the Regal 5790 model was determined properly classifiable as laser printer units under subheading 8471.92.5400, HTSUS, in 1995 and under subheading 8471.60.6100, HTSUS, in 1996. Goods so classified are duty-free.

7. The merchandise was entered by A.J. Fritz Companies ("Fritz"), one of Xerox's customs brokers.

8. Xerox failed to timely protest the classification of its merchandise pursuant to 19 U.S.C. § 1514 within ninety days of the liquidation of the entries in question. Instead, Xerox's petition for reliquidation filed on September 9, 1996 asserts that the entries should be reliquidated duty-free pursuant to 19 U.S.C. § 1520(c) based on the contention that Fritz committed a "mistake of fact" and/or "inadvertence."

B. Facts Established at Trial.

1. Jared Hirata was the employee at Fritz who entered most of the merchandise in question.

2. Mr. Hirata would look at the invoice, packing list, and airway bill to determine how to enter merchandise. If a part number was listed with no commercial description, he would contact Fritz's contact at Xerox, Reina Cabatana, after notifying his supervisor or manager. *See Trial Tr. 2* at 5–9, 14–18. Mr. Reep's stipulated deposition testimony established that this practice was followed by other Fritz entry writers during the time period in question.

3. Mr. Hirata does not remember whether he talked with anyone at Xerox regarding the entries in question. *See Trial Tr. 2* at 9.

4. The merchandise was listed as copiers or color copiers on com-

mercial invoices generated by the foreign manufacturer. *See Trial Tr. 1* at 39.[5]

5. Ms. Cabatana at Xerox, who would have been typically contacted by the customs broker regarding classification, stated in her deposition testimony that she had no recollection of having been contacted by Mr. Hirata or any other Fritz employee with respect to the merchandise in question. *See Cabatana Dep.* at 37, 58.

6. Mr. Cassano at Xerox, a credible witness, indicated that if he or his department had been contacted by Fritz seeking classification advice, he would have remembered it because Xerox at the time was not aware that Fritz was the broker responsible for entering the line of merchandise that included the printers at issue. He had no such memory. *See Trial Tr. 1* at 31–32 ("bells and whistles would have gone off"). On the other hand, Mr. Cassano was aware that Fritz had entered such merchandise by July 25, 1995. *See id.* at 36. He thought that it was "a random entry." *Id.* at 37.

7. Mr. Hirata worked for Fritz from 1993 to 1998. *See Trial Tr.* 2 at 4.

8. Mr. Hirata kept a list for his personal use of Xerox part numbers that he entered and their corresponding tariff numbers. The classification information on the list came from Xerox. *See* Pretrial Order Section C–1 – Uncontested Facts ¶38. He no longer has this list.

9. Mr. Hirata asserts that entries numbered 110–0060534–3 and 110–0060808–1 did not contain any documents bearing his handwriting. Mr. Hirata filed all the other entries. Thus, there are two categories of entries for the purposes of the resolution of this case: Mr. Hirata's and those of an unidentified entry writer at Fritz.

10. At the time Mr. Hirata entered the merchandise, he was not aware that the merchandise could be connected to a computer, receive data, and print it out and that it could not make a photocopy. *See Trial Tr. 2* at 4–5, 9.[6]

11. By July 6, 1995, Xerox's counsel knew that the imported merchandise in question was properly classifiable under HTSUS subheadings 8471.92 or 8473.30.60.

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[5] Trial testimony also established that Xerox owned 50% of the foreign supplier, Fuji Xerox Corporation. *Trial Tr. 1* at 40.

[6] This fact is essential to the classification of the goods under Note 5 of HTSUS Chapter 84.

12. By letter dated July 17, 1995, Xerox informed its principal customs broker Associated Customhouse Brokers, Inc. ("ACB") of its intent to apply for a ruling on the merchandise to be classified as electronic printers. A similar letter was not sent to Fritz because Xerox did not know Fritz was entering the merchandise in question.

13. Fritz was informed of the alternative classifications of MajestiK on March 20, 1996 and of Regal on April 15, 1996.

14. If any of these Findings of Fact shall more properly be Conclusions of Law, they shall be deemed to be so.

IV. CONCLUSIONS OF LAW

1. Plaintiff maintains that the errors in classifications constitute "mistake[s] of fact" under 19 U.S.C. § 1520(c)(1) and that Customs should refund Xerox for the excess duty it collected. To that effect, Plaintiff argues that "evidence presented at trial demonstrates that the goods were entered as 'photocopiers' by a Customhouse broker who did not know the actual nature [of] the merchandise, and who relied upon invoice and other descriptions which incorrectly described the goods as 'copiers.' " *Pl.'s Post-Trial Br.* at 3.

   Section 1520(c)(1) states that

   > Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct–
   >
   > (1) a clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction. . . .

   19 U.S.C. § 1520(c). To successfully obtain a reliquidation under this statute for a mistake of fact, "(1) there must be a mistake of fact; (2) the mistake must not amount to an error in the construction of the law; (3) the mistake is adverse to the importer; and (4) the mistake is established by documentary evidence." *Brother Int'l Corp. v. United States*, 28 CIT ___ , Slip Op. 04–67, at *5 (June 10, 2004) (quotations and internal quotes omitted); 19 U.S.C. § 1520(c)(1); 19 C.F.R. § 173.4(b).

2. "[T]he purpose of section 1520(c)(1) as a means for refunding money erroneously collected suggests that it should be interpreted liberally." *G&R Produce Co. v. United States*, No. 04–

1082, at * 7 (Fed. Cir. Aug. 27, 2004) (citing *Aviall of Tex., Inc. v. United States*, 70 F.3d 1248, 1250 (Fed. Cir. 1995) and *ITT Corp. v. United States*, 24 F.3d 1384, 1388–89 (Fed. Cir. 1994)). *But see Fujitsu Compound Semiconductor v. United States*, 363 F.3d 1230, 1235 (Fed. Cir. 2004) (referring to section 1520(c)(1) as a "limited exception").

3. "The Government has no interest in retaining duties which were improperly collected as a result of clerical error, mistake of fact or inadvertence." *Chrysler Corp. v. United States*, 24 CIT 75, 87 F. Supp. 2d 1339, 1348 (2000) (quoting *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 336 F. Supp. 1395, 1399 (Cust. Ct. 1972), *aff'd* 61 C.C.P.A. 90, 499 F.2d 1277 (1974) (quoting Hearings on H.R. 5505 before the Senate Committee on Finance, 82nd Cong., 2d Sess., 30 (1952))).

4. In maintaining that Plaintiff failed to meet its burden at trial, Defendant first argues that the classification of the merchandise in question was not settled at the time of entry or liquidation. *Def.'s Post-Trial Br.* at 7. Because the issue was not settled, according to Defendant, there could not have been a classification error, as required by section 1520(c). *Id.* at 8. "[A]ll but one of the entries in issue were liquidated, as entered, before the relevant ruling was issued." *Id.* at 9. Along similar lines, Defendant also argues that the classification was "not incontrovertible" at the relevant time. *Id.* at 12. Plaintiff does not directly address this argument, but points out that the proper classification of the merchandise was never in dispute because the classification of similar merchandise (that of "multifunction printers") was already established in previous rulings of Customs. *Pl.'s Post-Trial Br.* at 4 & n.4 (listing N.Y. Customs Rulings 897228, 804496, 811776, and 805805, issued in 1994 and the first part of 1995). Moreover, Plaintiff elicited testimony at trial that during the 1995–96 period the Customs officer in charge of Xerox's account, without furnishing a written opinion, fully agreed with Xerox that the merchandise was properly classifiable as printers. *See Trial Tr. 1* at 59–61. Accordingly, the court finds that the proper classification of the merchandise was not in dispute in this case and that Defendant's argument regarding the "unsettled" nature of law is without merit.[7]

5. Plaintiff has met its burden in proving that the entry writer at Fritz mistakenly relied on the inaccurate description on the invoices to classify the merchandise in question and that this mis-

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[7] Moreover, Defendant has not fully demonstrated to this court why this issue is relevant to the viability of a section 1520(c) claim. Frankly, the court is compelled to note that the multiple "red herrings" raised by counsel in this case were unhelpful in resolving it.

take is one of fact. Accordingly, Plaintiff is entitled to a refund of its overpayment of duties to Customs on the eleven entries listed above.

6. Plaintiff must first show that it made a mistake of fact and must do so by testimonial and documentary evidence. *See Pl.'s Post-Trial Br.* at 9.

7. A mistake of fact "occur[s] in instances where either (1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to." *Chrysler Corp.*, 87 F. Supp. 2d at 1343 (citations omitted); *G&R Produce Co. v. United States*, No. 04–1082, at * 5 (Fed. Cir. Aug. 27, 2004) (citing *Hambro Auto. Corp. v. United States*, 603 F.2d 850, 855 (CCPA 1979)); *see also C.J. Tower*, 336 F. Supp. at 1400 (finding a mistake of fact existed where neither the importer nor the Customs officer was aware that the merchandise was emergency war materials entitled to duty-free treatment until after the liquidations became final). More specifically, a "mistake of fact . . . is a factual error that, if the correct fact had been known, would have resulted in a different classification." *Degussa Can. Ltd. v. United States*, 87 F.3d 1301, 1304 (Fed. Cir. 1996) (quotation marks omitted). Notably, to meet its burden of proof,

> [the] importer need[not] demonstrate the underlying cause of the factual misunderstanding. Rather, courts have required a plaintiff to demonstrate, from the entry documents or other evidence, only two points in order to substantiate its "mistake of fact": (a) the correct state of facts; and (b) that either the importer or Customs had a mistaken belief as to the correct state of facts.

Chrysler Corp., 87 F. Supp. 2d at 1352.

8. The following evidence points to a mistake of fact in the mistaken classification of entries in question. There are two categories of entries implicated in this case: those that can be identified as written by Mr. Hirata and those that cannot. With regard to the former, it was established at trial that at the time Mr. Hirata classified the merchandise he was unaware of what the goods were. *See Trial Tr. 2* at 4–5, 9–10. He did not know that the merchandise could be attached to a computer, receive data, and print it out; and he did not know that the merchandise could not make a photocopy. He did not know that the merchandise consisted of printers and not of copiers. Mr. Hirata never saw the merchandise and relied on the invoice descriptions. He classified merchandise based on the invoice description and part number and consulted a list of tariff classifications that he prepared. If he classified an item that was not on his list, he would contact Xerox for classification advice after notifying his super-

visor. The invoices carried incorrect descriptions of the merchandise. Nobody (including Mr. Hirata) remembers Mr. Hirata (or any other Fritz employee) contacting Xerox regarding the merchandise at issue to seek further advice on classification. As Mr. Hirata had the mistaken belief that the merchandise was other than what it was, it is clear that Mr. Hirata's reliance on inaccurate merchandise descriptions on the invoices constitutes a mistake of fact. *Cf. Zaki Corp. v. United States*, 21 CIT 263, 960 F. Supp. 350, 359 (1997) (finding that plaintiff's broker made a mistake of fact when she entered the merchandise believing the entries to be radiobroadcast receivers instead of combination articles).

9. With regard to the second category of entries, stipulated deposition testimony established that it was a general business practice at Fritz to first look at the airway bill, the packing slip, and the invoice description to classify merchandise. "[I]f it said copier, [Fritz] inputted it as copier. If there was any indication that it was anything other than a copier," Fritz would have contacted Xerox. *Reep Dep.* at 23, 70–71; *see also Xerox I*, 219 F. Supp. 2d at 1352. This testimony is unchallenged and supports Mr. Hirata's testimony. The invoices describe the merchandise as copiers. There is no indication on the invoices that the merchandise was other than copiers. It is undisputed that all of the entries were made by Fritz. There is nothing in the record to show that Fritz ever contacted Xerox regarding these entries. Accordingly, the court finds that the remaining entries made by an unidentified entry writer at Fritz were also misclassified as the result of a mistake of fact.

10. In opposition, Defendant first relies on Mr. Cassano's testimony that he had nothing to do with merchandise in question. *See Def.'s Post-Trial Br.* at 17. Defendant also indicates a number of inconsistencies in the record. For example, Mr. Cassano's testimony revealed that Carla Cutler, who assisted ACB with classification issues, might not have always identified herself as an ACB employee and once used the letterhead of Xerox when communicating with Fritz. *See id.* at 18; *see also Trial Tr. 1* at 28–29. Although not entirely clear,[8] Defendant's argument seems to imply that Mr. Hirata might have received classification advice from Ms. Cutler, who in turn might have gotten such advice from Xerox itself and therefore the mistake could have been one

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[8] Mr. Cassano also added that Carla Cutler would not have typically provided classification advice to Fritz employees because ACB and Fritz are competitors and that it would have been "noteworthy" to call a competitor on classification of goods the other broker should have been importing. *Trial Tr. 1* at 47. He did, however, instruct her to contact Fritz in March 1996. *See Trial Tr. 1* at 64.

of law. *See Def.'s Post-Trial Br.* at 21; *see also Trial Tr. 2* at 26 (counsel on summation explaining her belief that Mr. Hirata communicated with Ms. Cutler). Moreover, with respect to notations on the documentation for one entry, Mr. Hirata testified that he must have made the notations at Xerox's direction undermining the theory that Xerox was not contacted in regard to the entries in question. *See Trial Tr. 2* at 19–22. Defendant also maintains that Xerox failed to show any business "'practice' at Fritz that would have obviated the need for Xerox to provide entry-specific evidence supporting its claim." *Def.'s Post-Trial Br.* at 23.

11. The court finds that inconsistencies in the record, if any, are not sufficient to undermine other evidence that supports Xerox's contention. The Federal Circuit has "defined preponderance of the evidence in civil actions to mean 'the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it.' " *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993) (quoting *Hale v. Dep't of Transp., Fed. Aviation Admin.*, 772 F.2d 882, 885 (Fed. Cir. 1985)). Accordingly, the court finds the greater weight of the evidence supports Xerox's version of events that the mistake made was one of fact.

12. Plaintiff next must show that the mistake was adverse to it. *See Pl.'s Post-Trial Br.* at 14. As correctly observed by Xerox, the parties agree that the correct classification of printers is HTSUS heading 8471, which entitles the merchandise to duty-free treatment. Xerox mistakenly paid Customs duties at a rate of 3.7% applied to the price paid on the transactions at issue. The mistake made in this case is material and to the detriment of Plaintiff.

13. Plaintiff must also show that the mistake was not made in the construction of law. *See Pl.'s Post-Trial Br.* at 17. In contrast with mistakes of fact, "[m]istakes of law . . . occur where the facts are known, but their legal consequences are not known or are believed to be different than they really are." *Executone Info. Sys. v. United States*, 96 F.3d 1383, 1386 (Fed. Cir. 1996) (quotation and emphasis omitted) (also suggesting that determination of the existence of a mistake of law lies with the court). For example, misinterpreting Customs' instructions would constitute a mistake of law. *See Ford Motor Co. v. United States*, 157 F.3d 849, 859 (Fed. Cir. 1998). Likewise, intentional or negligent acts or inaction fall within the scope of mistakes of law.[9] *See Century*

[9] Even though Defendant alluded to a possible negligent inaction by Plaintiff, this theory remains undeveloped.

Imps., Inc. v. United States, 205 F.3d 1308, 1313 (Fed. Cir. 2000). Mr. Hirata (or Fritz) did not know the true nature of the merchandise he mistakenly classified. There is no evidence that the mistake involved the construction of the HTSUS provisions or any other law. The mistaken reliance on inaccurate invoice descriptions in classification does not constitute a mistake of law. It is true that Xerox became aware of the incorrect classifications earlier. However, it failed to notify Fritz as it did not know that Fritz was entering the merchandise. There is no indication that any communication took place between Fritz and Xerox regarding the classification of the entries at issue. Therefore, the court cannot say that a mistake of legal consequence, if any, extends from Xerox to Fritz. In fact, it is clear from the record that had Fritz contacted Xerox regarding the merchandise, Fritz would have become aware that they were printers and classify them correctly.[10] Fritz made the classifications comparing the invoice descriptions with tariff classifications provided by Xerox. If the invoice said copier (as here), Fritz classified it as copier. There was no need to suspect that the merchandise was other than a copier from the documents. Fritz mistakenly relied on the invoice and misclassified the merchandise. The mistake was as to the nature of the merchandise and not as to whether the merchandise fell under a specific provision of the HTSUS. *Cf. Degussa*, 87 F.3d at 1304. There is no dispute that the merchandise is properly classifiable under HTSUS heading 8471. Accordingly, the court finds that any mistake made was not one of law.

14. For all the foregoing reasons, Plaintiff has met its burden articulated in *Xerox I* to prove that Fritz mistakenly relied on incorrect invoice descriptions for its merchandise in classifying them. Therefore, Plaintiff shall receive the refund of duties it seeks on its entries. A separate judgment will be entered accordingly. .

15. If any of these Conclusions of Law shall more properly be Findings of Fact, they shall be deemed to be so.

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[10] Even though the importer need not "demonstrate the underlying cause of the factual misunderstanding," *Chrysler Corp.*, 87 F. Supp. 2d at 1352, it is fairly clear that it was this disconnect between Fritz and Xerox that caused the mistake. There is testimony to suggest that the company "was transitioning from photocopiers to printers," and subsequently sought a ruling from Customs regarding the multifunction machines. *Trial Tr. 1* at 24, 32. The particular entries in question arrived during this transition period when Xerox's customs broker was not yet aware of what they were.