Decisions of the United States Court of International Trade

Slip Op. 05–158

GUANGZHOU MARIA YEE FURNISHINGS, LTD., *et al.* Plaintiffs, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, *et al.* Defendant-Intervenors.

Before: Pogue, Judge
Court No. 05–00065

[Department of Commerce's determination remanded.]

Dated: December 14, 2005

Arent Fox Kintner Plotkin & Kahn, PLLC (*Nancy A. Noonan* and *Patricia P. Yeh*) for the Plaintiff;

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division U.S. Department of Justice (*Michael D. Panzera*), Rachel Wenthold, International Attorney-Advisor, Of Counsel, Office of Chief Counsel for Import Amdinistration, Office of the General Commerce, U.S. Department of Commerce, for the Defendant;

King & Spalding LLP (*Joseph W. Dorn*, *Stephen A. Jones*, and *Jeffrey M. Telep*) for Defendant-Intervenor.

OPINION

POGUE, Judge: This case involves a challenge by Guangzhou Maria Yee Furnishings, Ltd., et.al. ("Maria Yee") to the Department of Commerce's ("Commerce" or "Defendant") determination in *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313, 67,317 (Dept. Commerce Nov. 17, 2004) (final determination of sales at less than fair value) ("*Final Determination*"). Plaintiff asserts that Commerce denied it separate rate status because Commerce improperly rejected as untimely evidence of Maria Yee's independence from the Chinese government's control.

In light of the court's decision in *Decca Hospitality Furnishings LLC, v. United States*, 29 CIT ___ , 391 F. Supp. 2d 1298 (2005) ("*Decca*"), and the principles examined therein, the court remands this case for further consideration consistent with this opinion.

BACKGROUND

The procedural history of this matter is detailed in the court's decision in *Decca*. For ease of reference, the court summarizes the key facts here.

As in *Decca*, this case arises from the Department of Commerce's antidumping investigation of wooden bedroom furniture exporters/producers from the People's Republic of China ("PRC"). *See Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228, 70,228 (Dept. Commerce Dec. 17, 2003) (initiation of antidumping duty investigation) ("*Notice of Initiation*").

Because the PRC is a non-market economy ("NME"), in investigations of PRC exporters/producers, Commerce presumes that all companies operating in the PRC are state-controlled. Based on this presumption, in this investigation, Commerce applied the PRC antidumping rate of 198.08% to all companies that did not sufficiently demonstrate their independence from the Chinese government. *Final Determination*, 69 Fed. Reg. at 67,317. Those companies that were able to demonstrate both *de facto* and *de jure* independence from government control, *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 35,312, 35,319–20 (Dept. Commerce June 24, 2004) (notice of preliminary determination and postponement of final determination) ("*Preliminary Determination*") were assigned an antidumping margin of 6.65%. *Wooden Bedroom Furniture from the People's Republic of China*, 70 Fed. Reg. 329, 330 (Dept. Commerce Jan. 4, 2005)(notice of amended final determination of sales at less than fair value and antidumping duty order). Commerce evaluated a company's independence from government control on the basis of information timely submitted by companies in response to Commerce's Section A Questionnaire. *Final Determination*, 69 Fed. Reg at 67,315; *Preliminary Determination*, 69 Fed. Reg. at 35,319–20; Section A Questionnaire, P.R. Doc 297 at A–1 ("Section A Questionnaire"). Commerce solicited responses to its Section A Questionnaire by sending the Section A Questionnaire to "mandatory respondents"[1] and to the Chinese Ministry of Commerce ("MOFCOM") on February 2, 2004, accompanied by a cover letter. Letter from Robert Bolling, Program Manager AD/CVD Enforcement III to Liu Danyang, Director Bureau of Fair Trade for Imports and Exports, Pl.'s Exh. 12, P.R. Doc. No. 297; *see also Decision Memoran-*

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[1] In large investigations, Commerce identifies certain participants as those required to respond during the investigation. 19 U.S.C. § 1677f–1(c)(2) (2000); 19 C.F.R. § 351.204(c) (2004), *see also* Department of Commerce Mem. from Deputy Assistant Sec'y, Imp. Admin., to James J. Jochum, Assistant Sec'y for Imp. Admin., *Re: Issues and Decision Memorandum for the Less-Than-Fair-Value Investigation of Wooden Bedroom Furniture from the People's Republic of China* (Dept. Commerce Nov. 8, 2004), P.R. Doc 1933 ("*Decision Memorandum*") at 337; *Final Determination*, 69 Fed. Reg. at 67,313.

dum, P.R. Doc 1933 at 345. Pursuant to 19 C.F.R. § 351.301(c)(2),[2] the February 2 letter established February 23, 2004 as the deadline for responses to the Section A Questionnaire from "all parties" and the mandatory respondents. February 2 Letter, P.R. Doc. No. 297 at 2.

Like the plaintiff in *Decca*, Maria Yee was not selected as a mandatory respondent and asserts that it did not receive any requests for information from Commerce. Pl.'s Mem. Supp. Mot. J. Agency R. Pursuant to Rule 56.2 at 6 ("Pl. Br"); Pl. Reply Def.'s and Def. Int.'s Mem. Opp. Pl.'s Rule 56.2 Mot. J. Agency R. at 2; *Decision Memorandum*, P.R. Doc 1933 at 321. Because Maria Yee did not timely respond to the Section A Questionnaire, Commerce found that Maria Yee was state-controlled and therefore applied the PRCwide antidumping rate of 198.08% to Maria Yee.

On June 24, 2004, the Department of Commerce published its *Preliminary Determination* and therein made explicit its reliance on responses to the Section A Questionnaire for the determination of separate rates for non-mandatory respondents. *Preliminary Determination*, 69 Fed. Reg. at 35,319–20. Maria Yee asserts that this was the first public statement by Commerce about the use of Section A Questionnaires for separate rate applications in this investigation. Pl. Br. at 15. After the publication of the *Preliminary Determination*, on July 2, 2004, Maria Yee filed its response to the Section A Questionnaire. Pl. Br. at 9; *see also* Maria Yee's Section A Response in Wooden Bedroom Furniture from the People's Republic of China, Letter from Jerome J. Zaucha & Nancy A. Noonan, Arent Fox, to Donald L. Evans, Sec'y of Commerce, Attn: Imp. Admin, Int'l Trade Admin, *Re: Submission of Section A Response by Maria Yee in Wooden Bedroom Furniture from the People's Republic of China* (July 2, 2004), Pl.'s Exh. 9.

Commerce rejected Maria Yee's Section A submission asserting that it was untimely because it was received after the February 23, 2004 deadline. *Decision Memorandum*, P.R. Doc. 1933 at 324. Commerce based its rejection of the information on the fact that its "consistent past practice has been to require companies to respond to the Department's Section A questionnaire, regardless of whether wholly owned by a market-economy entity." *Decision Memorandum*, P.R. Doc. 1933 at 337. Moreover, Commerce reasoned that its February 2,

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[2] Pursuant to 19 C.F.R. § 351.301(c)(2):

(i) Notwithstanding paragraph (b)[see infra n.3] of this section, the Secretary may request any person to submit factual information at any time during a proceeding.
(ii) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and § 351.308.

2004 letter to MOFCOM and the mandatory respondents provided "sufficient notice and opportunity to respond to the Department's Section A questionnaire." *Id.* at 345.

Maria Yee contends that it is a Hong Kong-based producer of wooden bedroom furniture that is independent from the Chinese government, and further contends that it had no notice from Commerce of the Section A Questionnaire, or of any deadlines associated with the Questionnaire. Maria Yee brings this action under USCIT R. 56.2 seeking a restoration of its July 2, 2004 submissions to the record, and asking the court to order the Department of Commerce to grant Maria Yee the 6.65% separate rate.

Commerce asserts that Maria Yee was unknown to Commerce. Moreover, Commerce argues that Maria Yee was not entitled to rely on or expect that Commerce would provide it with notice of the Section A filing deadline. Rather, Commerce argues that because it did not have knowledge of Maria Yee's status as a producer of wooden bedroom furniture, it was appropriate for Commerce to provide notice by means of its letter to MOFCOM, as Commerce could not have provided personal service.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c). The court must sustain Commerce's determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

To act in accordance with law, an agency, may not refuse to recognize its own rules or regulations where it may prejudice a party. *Steen v. United States*, 29 CIT ____ , Slip Op. 05–131 (Oct. 3, 2005) at 4–5 (citing *Ariz. Grocery Co. v. Atchison, Topeka & Sante Fe Ry. Co.*, 284 U.S. 370, 389 (1932)); *but cf. Kemira Fibres Oy v. United States* 61 F. 3d 866, 875–76 (Fed. Cir. 1995) (as a general rule an agency is required to comply with its own regulations, however, if no prejudice is shown by such default, a plaintiff cannot benefit from failure to adhere to its own regulations, when Commerce has missed its own deadline). At the same time, an agency's interpretation of its governing statute is due deference, and must be upheld unless it is unreasonable. *United States v. Haggar Apparel Co*, 526 U.S. 380, 386–90 (1999) (discussing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Here, if Commerce, contrary to its own regulations, improperly rejected Maria Yee's submissions it thereby improperly presumed Maria Yee's place of incorporation (not to be Hong Kong), in which case Commerce's findings are unsupported by substantial evidence and the case must be remanded for Commerce to enter a factual finding. *Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

DISCUSSION

A.

The timelines set out in Commerce's regulations provide a final deadline, as established by 19 C.F.R. § 351.301(b)(2)[3], and a deadline for specific submissions, established by 19 C.F.R § 351.301(c)(2)(ii). *See* n. 2 *supra*. Commerce rejected Maria Yee's information as untimely even though it was submitted before the deadline established by § 351.301(b)(2),[4] claiming the controlling deadline was established by § 351.301(c)(2)(ii). Accordingly, to sustain Commerce's determination the court must find that Commerce properly invoked Section 351.301(c)(2)(ii).

Section 351.301(c)(2)(ii) provides the time limits and deadlines for "[q]uestionnaire responses and other submissions on request." It states that in a written request "*to* an interested party for a response to a questionnaire or for other factual information" the Secretary will specify:

> the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested manner by the date specified may result in use of the facts available under section 776 of the Tariff Act and § 351.308.

19 C.F.R. § 351.301(c)(2)(ii).

The purpose of this regulation is to allow Commerce to obtain the information it needs in its antidumping investigations. 19 C.F.R. § 351.301(a). Commerce promulgated these regulations so as to clarify filing requirements and deadlines for parties because in the "past there ha[d] been some confusion over the deadline of submis-

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[3] Section 351.301(b)(1) states that for a final determination in an antidumping investigation, submission of factual information is due no later than "seven days before the date on which the verification of any person is scheduled to commence." This provision establishes a deadline, in this matter, of July 6, 2004 (the verification process was due to commence on July 12th, and the 5th was a federal holiday).

[4] Specifically, Commerce claims that § 351.301(b)(2) provides time limits for the verification of information previously submitted, and not for the submission of new information. The court, of course, defers to Commerce's reasonable interpretation of its own regulations. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). However, 301(b)(1) does provide a definitive deadline and, by its terms, it is not specifically limited to previously submitted information. Additionally, the section can be read so as to provide a deadline for which Commerce can proceed to the verification of all information provided previous to this deadline.

sion of factual information." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,331 (Dept. Commerce May 19, 1997)("*Preamble*"). Given that Commerce exercises considerable discretion in what information it seeks from interested parties to the investigation, and the timelines for their submissions, in instances of requiring additional information through the use of questionnaires, Commerce, through its regulation, provided for individual notice. 19 C.F.R. § 351.301(c)(2)(ii); *Decca*, 391 F. Supp. 2 at 1316 ("Commerce has traded convenience for flexibility – it must take the bitter with the sweet in this trade-off."). Additionally, Commerce, was well aware of the burden that such information gathering might place on smaller, less informed, foreign parties. *See Preamble*, 62 Fed. Reg. at 27,334 ("[S]ection 782(c)(2) of the Act provides that the Department will take into account difficulties experienced by interested parties, particularly small companies, in supplying information, and will provide any assistance that is practicable.").

Commerce claims that when Maria Yee submitted information on July 2, 2004, it missed the February 23, 2004 deadline for submitting information established by the MOFCOM letter pursuant to Section 351.301(c)(2)(ii). Accepting that the deadline is established by Section 351.301(c)(2)(ii), the inquiry becomes, did Commerce send acceptable notice "to" the parties as required by its own regulations? 19 C.F.R. § 351.301 (c)(2)(ii); *see also Preamble*, 62 Fed. Reg. at 27,333, ("Section 351.301)(c)(2)(ii) provides that the Department *must* give notice of certain requirements to *each* interested party from whom the Department requests information.")(emphasis added).

In Decca, this court held that where Commerce knows of a party's existence, Commerce may not rely on a "method of notice . . . not reasonably calculated to provide parties with actual notice of the filing requirements." Decca, 391 F. Supp. 2d at 1310. In Decca this holding was based on the regulation, 19 C.F.R. § 351.301, in which "Commerce has voluntarily assumed the obligation to send questionnaires to all parties." Decca, 391 F. Supp. 2d. at 1316.

Maria Yee represents the next step of the analysis. To what extent is Commerce obligated to provide notice to unknown parties as to information requirements and deadlines? The court here finds that Commerce should have at least provided notice by publication.

Commerce claims that it could not give actual notice to an interested party of which it was unaware, and the court agrees that to the extent the parties were not known to Commerce, Commerce is circumscribed in providing actual notice.[5] Conceding this point, the

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[5] The court does not address here the issue of which parties were known and which parties were unknown to Commerce and why. It appears from the record that Commerce knew of 211 producers of wooden bedroom furniture. *Preliminary Determination*, 69 Fed. Reg. at 35,313. Commerce has not indicated how it came to know of these producers, and what pro-

question then becomes what form of notice would be reasonable and viable to apprise parties that they would need to fill out the Section A Questionnaire by February 23, 2004 in order to be considered for a separate rate?

B.

Commerce's main contention is that it provided notice *through* MOFCOM, and that providing notice to interested parties in such a manner was reasonable. Def.'s Mem. Opp. Pl.'s Rule 56.2 Mot. J. Agency R. at 19 ("Def. Br."). Commerce's argument, therefore, hinges on its claim that notice to MOFCOM was "reasonably calculated" to apprise unknown parties of the Section A filing requirement and the February 23 filing deadline applied here.[6]

Commerce's contention is both qualitative and quantitative. Commerce's quantitative contention is based on the number of completed Section A Questionnaire submissions received. Commerce's qualitative analysis is that MOFCOM is in the best position to know of and contact interested parties and therefore it is reasonable and preferable for Commerce to rely on MOFCOM to provide notice to the parties.[7] The court considers each argument in turn.

In its quantitative argument, Commerce attempts to show, by citing the number of responses to the Section A Questionnaire, that notice through MOFCOM was reasonably calculated to alert interested parties. *Id.* Commerce points to the fact that 120 producers of wooden bedroom furniture producers timely responded to the Section A Questionnaire, four of whom were parties unknown to Commerce, as supporting the reasonableness of this method of notice. Def. Suppl. Brief at 3–5. This court has addressed the fact that the number of responses is in no way indicative of the reasonableness of this method of notice. *Decca*, 391 F. Supp. 2d at 1310 n.17. However,

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cedures it follows in order to ascertain producers, other than sending a letter to MOFCOM. If Maria Yee were "reasonably ascertainable," that is could be identified through "reasonably diligent efforts" it might have been necessary to send Maria Yee "[n]otice by mail or other means as certain to ensure actual notice." *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 491 (1988) (quoting *Mennonite Bd. of Missions v. Adams* 462 U.S. 791, 798 n.4 & 800 (1983); *but cf. Dusenbury v. United States*, 534 U.S. 161 (2002)(providing notice by sending a certified letter to a prison inmate satisfied the requirements of notice, even though the inmate did not receive the notice). Unknown parties, on the other hand, are those parties whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge. . . ." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *see also Chemetron Corp. v. Jones*, 72 F. 3d 341,345–46 (3rd Cir. 1995); *In re U.S.H. Corp of NY v. U.S. Home Corp.*, 223 B.R. 654, 659–60 (Bankr. S.D.N.Y. 1998). As we do not know the extent to which Commerce searched for wooden bedroom furniture manufacturers in China, we are proceeding under the assumption that Maria Yee is properly classified as an unknown party.

[6] For a more detailed consideration of this issue see *Decca*, 391 F. Supp. 2d at 1310–11.

[7] *See Decca*, 391 F. Supp. 2d at 1307–09 for a more detailed discussion of the unreasonableness of relying on MOFCOM to help parties rebut a presumption of state control.

Commerce continues to cite to raw numbers as a means of indicating the reasonableness of its method. Commerce has advanced no new support or arguments as to how sending MOFCOM a questionnaire, that included a statement of the deadline for submission, is a reasonably calculated means of providing notice to parties.

Neither Commerce nor the Defendant-Intervenors demonstrate that the number of responses is in any way related to the letter to MOFCOM, or that MOFCOM is in a better position to know of interested parties. If anything, Commerce has indicated that it received fewer responses by sending a Section A Questionnaire to MOFCOM, 126 including mandatory respondents, *Final Determination*, 69 Fed. Reg. at 35,313, than it did by sending the Quantity and Value ("Q & V") Questionnaire directly to the parties, 137, *id.* at 35,320. Moreover, the Section A Questionnaire was sent later in the investigation, the parties were provided with more time to answer the Section A Questionnaires than the Q & V Questionnaire, and the Section A Questionnaire was the questionnaire that was determinative of a party's eligibility for a separate rate. In sum, Commerce's numbers do not prove reasonableness.

Qualitatively, Commerce claims MOFCOM was in the best position to know of interested parties. The fundamental problem with this method of claiming reasonableness is that even if MOFCOM is best situated for this task, MOFCOM was not required to forward the Questionnaires to the parties; indeed Commerce did not even request MOFCOM to forward the Section A Questionnaire to third parties, February 2 Letter, P.R. Doc. No. 297; *Decca*, 391 F. Supp. 2d at 1311. To rely on a government instrumentality to forward a letter in order to provide notice, when this instrumentality is under no obligation to do so, is in contravention of settled case law. *See Wuchter v. Pizzutti* 276 U.S. 13, 24–25 (1928) (a statute designating the Secretary of State as the person to receive process must contain a provision that makes it reasonably probable that the service be communicated to the party to be sued); *Koster v. Automark Indus., Inc.*, 640 F. 2d 77, 81 n. 3 (7th Cir. 1981) ("a statutory provision is not reasonably calculated to provide notice unless its terms relating to the sending of notice are mandatory."); *Howard v. Jenny's Country Kitchen, Inc.*, 223 F.R.D. 559, 564–66 (D. Kan. 2004) (service not proper when made on the Kansas Secretary of State who mailed summons to the wrong place).

Contrary to Commerce's assertions that MOFCOM is better placed to ascertain interested parties and their addresses, Commerce has not demonstrated that MOFCOM is an appropriate partner in notifying parties. Indeed, Commerce's own experience has been that MOFCOM does not respond to Commerce's inquiries. *See Preliminary Determination*, 69 Fed. Reg at 35,321 (noting the failure of the Government of the PRC to respond to the Section A Questionnaire). In the Preliminary Results in *Certain Cased Pencils*, the PRC Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), the predecessor to MOFCOM, did not respond to requests from Commerce requesting that MOFTEC forward questionnaires to unlocatable parties. Finally, the China Chamber of Commerce for Import & Export of Light Industrial Products and Arts-Crafts responded stating that it managed to forward the questionnaire to only two of the seventeen parties for which Commerce did not have a correct address. *Certain Cased Pencils From the People's Republic of China*, 67 Fed. Reg. 2402, 2403 n.1 (Dept. Commerce Jan. 17, 2002) (preliminary results and recission in part of antidumping duty administrative review). (Commerce ultimately never received responses from any of the seventeen parties for which it solicited aid from MOFTEC. *Id*.)

That Commerce's approach was not reasonable is underscored here by an entirely feasible and customary alternative: notice by publication in the Federal Register. *Mullane*, 339 U.S. at 315 (stating that reasonableness of the form of notice chosen may be defended if the "form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."); *Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 885 F. 2d 858, 861 (Fed. Cir. 1989)("the reasonableness of the notice provided must be tested with reference to the existence of feasible and customary alternatives and supplements to the form of notice chosen.") (quoting *Greene v. Lindsey*, 456 U.S. 444, 454) (1982)(internal citations omitted).

It is well-established that the "Federal Register is a publication in which the public can find the details of the administrative operations of Federal agencies." H. R. Rep. No. 89–1497 (1966) reprinted in 1966 U.S.C.C.A.N. 2418, 2424 (1966) (discussing the Freedom of Information Act).[8] Moreover, that notice by publication is a feasible and customary substitute for unknown parties is uncontroverted. *See Mullane* 339 U.S. at 317 (notice by publication to unknown parties is sufficient); *Tulsa,* 485 U.S. 478, 490 ("For creditors who are not 'reasonably ascertainable' publication notice can suffice."); *Rodway v. U. S. Dep't of Agric.*, 514 F. 2d 809, 815 (D.C. Cir. 1975) ("Absent actual notice, the public should be held accountable only for notice plainly set forth in the *Federal Register*."); *Chemetron*, 72 F. 3d 341 (notice by publication sufficient for unknown parties); *Friedman v. N.Y. City Dep't of Hous. and Dev. Admin.*, 688 F. Supp. 897, 901 (S.D.N.Y. 1988) ("As notice by publication, the usual form of con-

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[8] The report continues "[t]hey would be able to find out where and by whom decisions are made in each Federal agency and how to make submittals or requests." The legislative history makes clear that the Act seeks to provide "incentive for agencies to publish "the necessary details about their official activities in the Federal Register" through the "provision that no person shall be 'adversely affected' by material required to be published – or incorporated by reference – in the Federal Register but not so published." H. R. Rep. No. 89–1497, 1966 U.S.C.C.A.N. at 2424 (1966).

structive notice was not undertaken in this case, the court must consider whether the individual plaintiffs were constructively notified in any other suitable manner."); *In re U.S.H. Corp.*, 223 B.R. at 6660 (unknown creditors, who would have only been found by conjecture, received constructive notice through publication).

In the case at bar, Commerce's attempt to provide notice through MOFCOM is not one that is supported by reliability, obligation, regulation, or statute. Particularly in comparison to a more traditional form of providing notice, notice by publication, Commerce's method of providing notice here was not reasonable.

D.

Commerce and Defendant-Intervenors state that after being put on notice of the investigation, Maria Yee had a duty to inquire as to the further steps, if any, they were required to take. Commerce's argument essentially rests on the proposition that all forms of constructive notice are equal; therefore, so long as notice to MOFCOM was "constructive notice," Commerce's method of notice was proper.

The problem with this view is that it is in contradiction to the announced regulation. Commerce does not point to any publication where it announces that parties interested in being evaluated for a separate rate need to inquire of either MOFCOM or the Department of Commerce, or search on the internet for additional forms and deadlines. Nor does Commerce assert that the form of notice provided was in accordance with its own regulations. Rather, Commerce asks the court to read a regulation that states affirmatively that Commerce will contact parties directly, as one that somehow puts parties on notice that they are required to contact Commerce or the Chinese Government to determine the steps they are required to take. Commerce's request is not reasonable.

As directed by the *Notice of Initiation*, the parties looked to the announced policy and regulations of the Commerce Department, in order to ascertain how Commerce would be conducting the investigation and the time limits that would be employed. *Notice of Initiation*, 68 Fed. Reg. at 70,229, 70,231. As noted previously, the regulations state that when additional information is needed from the parties, Commerce will send a written request to the parties. 19 C.F.R. § 351.301(c)(2)(ii); *Preamble*, 62 Fed. Reg. at 27,333. The regulations do not make parties aware that they need to contact other bodies, or search the internet, in order to ascertain what additional material is required of them.

Commerce also argues that Maria Yee had actual notice of the deadline for the Section A Questionnaire, as Annex III of 19 C.F.R pt. 351 provides that "the general deadline for Section A of the questionnaire in investigations is 51 days after initiation, . . . and further indicates that all parts of the questionnaire need to be completed prior to Commerce's preliminary determination." Def. Br. at 27. Annex III, in the form of a table, does state the general deadline for the submission of the Section A Questionnaire is 51 days after the *Notice of Initiation*. 19 C.F.R. pt. 351, Annex III; *see also Decca* 391 F. Supp. 2d at 1306 n. 13. However, this information cannot constitute notice to the parties of the need to fill out a Section A Questionnaire. A party would only become aware of the applicability of the general deadline, were they put on notice of the need to fill out the Section A Questionnaire. Commerce cannot claim that its prior practice or decisions provide such notice. *See Decca*, 391 F. Supp. 2d at 1311–14. Moreover, footnote 1 to Annex III indicates the discretionary nature of these deadlines by emphasizing that the deadlines are approximate, and can be established by the Secretary. 19 C.F.R. pt. 351, Annex III. This underscores the point that notice of the applicable deadlines was to be provided by reliance on § 351.301(c)(2)(ii) through written request by the Secretary to interested parties.

Commerce also argues that Maria Yee had actual notice of the Section A Questionnaire because Maria Yee obtained the Respondent Selection Memorandum. Commerce's claim is, at least, uncertain as the Respondent Selection Memorandum does not provide any notice as to the requirement for non-mandatory respondents to submit Section A Questionnaires, nor of a deadline for filing; but, even more importantly, this is a question of fact which Commerce has not found. Therefore, this court may not find it for them. If Commerce wishes to argue that Maria Yee had actual notice of the Section A Questionnaire and its attendant deadlines through the Respondent Selection Memorandum, it must make a factual determination that Maria Yee received this Memorandum prior to the February 23, 2004 deadline.

As noted in *Decca*, the court understands the difficulties that Commerce faces in identifying multiple parties in China, and sending direct notification to their addresses. *Decca*, 391 F. Supp. 2d at 1316. However, as Commerce has itself assumed a duty of providing notice to parties, 19 C.F.R § 351.301(c)(2), *Preamble*, 62 Fed. Reg. at 27,333, Commerce's means of providing notice must be "reasonably calculated" to provide notice and more than that of a "mere gesture," *Mullane*, 399 U.S. at 315, and cannot be relying on "chance alone" to reach the interested party, *Goldhofer*, 885 F. 2d at 861.

CONCLUSION

For the foregoing reasons the court remands this case to Commerce for reconsideration consistent with this decision. Commerce's remand determination shall be filed by January 30, 2006, and Parties' comments due by February 13, 2006. Rebuttal comments shall be filed by February 27, 2006.

IT IS SO ORDERED.

Slip Op. 05–159

DECKERS CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Court No. 02–00674

[Defendant's motion for summary judgment as to classification of sandals from China denied.]

Dated: December 15, 2005

Rode & Qualey (*Patrick D. Gill, Michael S. O'Rourke* and *William J. Maloney*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); and Office of Assistant Chief Counsel, U.S. Customs and Border Protection (*Michael W. Heydrich*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: In Hebrew, Teva means Nature. In American, it can mean sandals under patent that have been produced in Hong Kong for import here, the tariff classification of three models of which, the *Pretty Rugged Sport Sandal*, the *Terradactyl Sport Sandal*, and the *Aquadactyl Sport Sandal*, is the basis of this test case within the meaning of USCIT Rule 84(b). Upon entry of those particular *Teva*®s through the port of Los Angeles, California, the U.S. Customs Service, as it was then still known, classified them under heading 6404 (footwear with outer soles of rubber or plastics and uppers of textile materials) of the Harmonized Tariff Schedule of the United States ("HTSUS") (1998), in particular subheading 6404.19.35 at a rate of duty of 37.5 percent *ad valorem*. The plaintiff protested that classification, taking the position that those sandals should have been classified under subheading 6404.11.80, which prescribed a duty of 20 percent *ad valorem* plus 90¢ per pair valued over $6.50 but not over $12. Customs denied the protest, and this case commenced.

I

The court's jurisdiction is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). The gravamen of plaintiff's complaint is that its merchandise is "athletic footwear", which is sold as such "for sporting and athletic purposes including, but not limited to, whitewater river rafting". Complaint, para. SEVENTEENTH. Following the filing of defendant's answer and the completion of discovery, counsel for the plaintiff filed a formal request for trial in the federal courthouse in Santa Barbara, California[1], which apparently is located near its corporate headquarters and possible witnesses. The defendant objected to that request, in part upon the stated ground that

> [w]hether Customs correctly interpreted subheading 6404.11.80, HTSUS, to require that the imported sandals be *ejusdem generis* with the named exemplars is a question of law. As such, there is no genuine issue of material fact in dispute as to that question, which can be decided on summary judgment. Moreover, the thrust of the plaintiff's complaint rests on the meaning of the competing tariff provisions. . . . If the Court decides on summary judgment that the imported sandals are not *ejusdem generis* with the named exemplars, then there is no need for a trial.

Defendant's Opposition to the Plaintiff's Request for Trial, pp. 4–5 (citation and footnote omitted).

Upon hearing both sides with regard to this opposition, the court granted the defendant leave first to interpose a motion for summary judgment on the issues that it claims are dispositive of this test case. As posited in such motion subsequently filed, they are:

> 1. Whether . . . Customs . . . correctly classified the imported sandals under subheading 6404.19.35, HTSUS, as "footwear with open toes or open heels," etc.
>
> 2. Whether the imported sandals should have been classified under subheading 6404.11.80, HTSUS, as "tennis shoes, basketball shoes, gym shoes, training shoes and the like" *etc.*, as contended by the plaintiff.

Defendant's Brief, p. 1. Plaintiff's papers in opposition formulate the questions as follows:

> 1. Whether the term "tennis shoes, basketball shoes, gym shoes, training shoes and the like" in subheading 6404.11 covers all athletic footwear (other than sports footwear as defined in subheading Note 1 to Chapter 64).
>
> 2. Whether the term "athletic footwear" in Additional U.S. Note 2 to Chapter 64 is an *eo nomine* provision which includes all forms of athletic footwear.

[1] *Cf.* USCIT Rule 77(c)(2).

> 3. Whether there are genuine issues of material fact as to whether the imported merchandise is within the common meaning of the term "athletic footwear."

Plaintiff's Brief, p. 2. The last question presented is a reflection of plaintiff's continuing opposition to resolution of this action without trial *viz*.:

> . . . In this instance defendant "bears the burden of demonstrating the absence of all genuine issues of material fact." *Avia Group Int'l. Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed.Cir. 1988). Plaintiff has identified . . . numerous material issues concerning "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Because this action puts into issue the use, characteristics or properties of the merchandise being classified, summary judgment is not warranted. *See*, *Brother Int'l. Corp. v. United States*, 248 F.Supp.2d 1224, 1226 (CIT 2002).

Id. at 1–2.

II

As required by USCIT Rule 56(h), defendant's motion includes a separate, short and concise statement of the material facts as to which it contends there is no genuine issue to be tried, to wit:

> 1. The plaintiff imported sandals . . . in Entry No. 275–0139524–1 . . . [, which] was liquidated . . . under subheading 6404.19.35, . . . HTSUS. . . . The plaintiff filed Protest No. 2704–99–100787 with . . . Customs . . . , claiming that the entry should have been classified under subheading 6404.11.80, HTSUS. . . .
>
> 2. . . . Customs denied that part of Protest No. 2704–99–100787 directed to the plaintiff's claim to classification of the imported sandals under subheading 6404.11.80 HTSUS . . . based on HQ 963395 ruling, which issued on April 2, 2002. . . .
>
> 3. The imported merchandise in issue consists of three styles . . . [that] are shown in the plaintiff's catalog, which is entitled "Teva Footwear and Apparel Spring 2000." The Pretty Rugged sandal is shown on page 9 . . . , the Terradactyl sandal is shown on pages 8 and 9 . . . , and the Aquadactyl sandal is shown on page 6. . . . Copies of these pages . . . are included in Defendant's Exhibit A. . . .

> 4. The sandals in issue[ ] have uppers composed of textile materials and soles composed of rubber or plastics. . . . The front or toe end of each sandal's upper consists of two flat, looped, textile straps that are joined together by a plastic ring. The longer of the two looped straps is adjustable and secures with a hook and loop fabric closure. The straps are attached to the sandal's foot bed to anchor the strap at two points. The rear or heel end of each upper consists of two flat, looped, textile side posts which are attached to the sandal's foot bed. Each post is joined by a plastic ring to adjustable ankle straps which secure with hook and loop fabric closures at the front and back of the ankle. The front straps are connected to the rear straps by a flat looped strap of textile material. The sandals are open at the toe, heel, top and sides. . . .
>
> 5. The sandals in issue do not have, or have provision for, the attachment of spikes, sprigs, cleats, stops, clips, bars or the like. . . .

Citations omitted. That Rule 56(h) provides that all material facts in the statement required to be served by the moving party will be deemed admitted unless controverted by the statement required to be served by the opposing party. Plaintiff's response is set forth in Section III B of its brief under the heading: "Plaintiff Does Not Agree that Most of Defendant's Numbered Statements of Material Facts Are Not At Issue." It makes no reference to defendant's paragraph 5, which is thus deemed admitted. *Cf.* Plaintiff's Brief, p. 11; Subheading Note 1, ch. 64, HTSUS. As for the four other paragraphs, plaintiff's response is not in keeping with the expectation of that rule or of this court.

Be that as it is, plaintiff's position is and has been clear: it desires a trial in order to attempt to prove its own Statement of Genuine Material Facts Which Are at Issue[2], to wit:

> 1. The merchandise in question is "athletic footwear" as provided for in Additional U.S. Note 2 to Chapter 64.
> 2. The imported merchandise is sold as athletic footwear.
> 3. Merchandise in issue is used for sporting and athletic purposes including, but not limited to, whitewater rafting.

[2] Complete capitalization deleted.

4. The imported merchandise is sold under the registered trademark Teva® and is patented in the United States Patent Office (Patent #4,793,075), described as "SPORT SANDAL FOR ACTIVE WEAR."

5. Teva® sport sandals are conducive to fast footwork associated with athletic activities.

6. The imported footwear is the type commonly referred to by the footwear industry and consumers as sport sandals or athletic sandals.

7. Sport sandals are recognized as athletic footwear by the footwear industry.

See also Plaintiff's Brief, pp. 17–24.

Defendant's Response to Plaintiff's Statement of Material Facts at Issue, attached to its reply brief[3], denies these averments. *See also* Defendant's Brief in Reply, pp. 15–19. That brief argues that, even assuming *arguendo* that the allegations in paragraphs 2–7 are true, the sandals at bar still are not athletic footwear for tariff purposes because they are not tennis shoes, basketball shoes, gym shoes, training shoes, or like those shoes. *See id.* at 17–19. Whatever the precise formulation of the issue(s), the court cannot conclude that resolution thereof can be achieved without trial of any of plaintiff's averments of fact.

A

The physical appearance of the merchandise cannot be disputed. In its complaint, the plaintiff points to U.S. Patent Number 4,793,075, an abstract of which states:

> A sandal with an elongated sole configured to the profile of a human footprint with a toe end and a heel end, employs a toe strap connected at two anchor points to grip the forward part of [a] user's foot and a heel strap connected at two anchor points to grip the ankle of a user's foot with a lateral strap connected between the toe strap and the heel strap which is located on the outside of the sole and parallel to its surface so it is operable to stabilize the other straps and to maintain essentially constant tension in the individual straps as the sole flexes, with the toe and heel straps being infinitely adjustable so the wearer can cinch the sandal to his foot by adjusting said straps in a manner that it will not be dislodged during rigorous activity.

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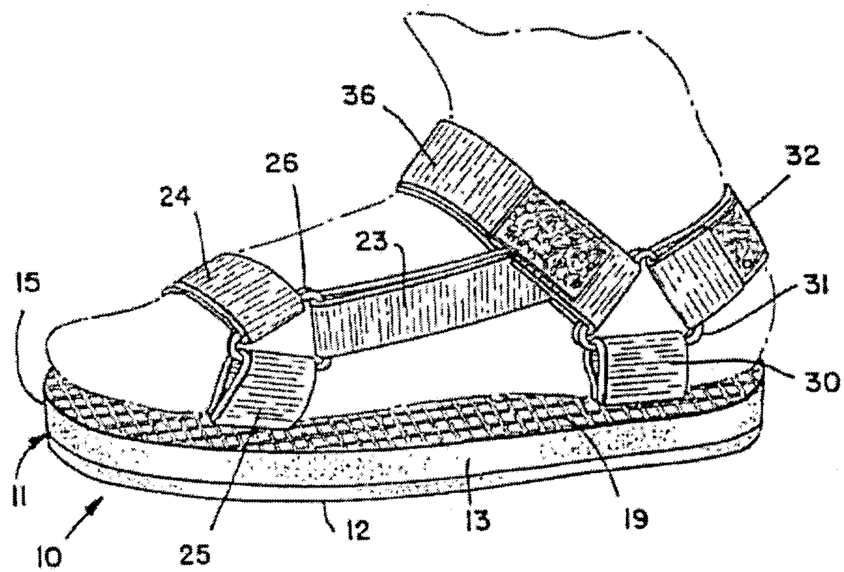
[3] *Id.* Defendant's motion for leave to file this "oversized" presentation can be, and it hereby is, granted.

Indeed, the quality of the written submissions on both sides obviates the need to grant plaintiff's motion for oral argument, which is thus hereby denied.

Plaintiff's Exhibit 2, p. 1. FIG _ 2 of that patent provides a schematic representation that is reproduced below:



As indicated, this product has both an open toe and open heel which place it within the ambit of subheading 6404.19.35, HTSUS[4], to wit:

6404	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:
	Footwear with outer soles of rubber or plastics:
6404.19	Other:
	Footwear with open toes or open heels; . . .
6404.19.35	Other: . . . .

Nonetheless, the plaintiff argues that General Rule of Interpretation ("GRI") 3(a) calls for classification under a more specific description. That rule states, in part:

> When . . . goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

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[4] The sandals do not land under subheading 6404.19.25, HTSUS, because they are more than ten percent by weight of rubber or plastics. *See* Defendant's Motion for Summary Judgment, Declaration of Richard G. Foley, para. 5.

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. . . .

And since GRI 6 allows for application of the rule to subheadings, the plaintiff contends that the more specific classification lies in 6404.11.80[5], *viz*:

6404.11	Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like:
	Other:
6404.11.80	Valued over $6.50 but not over $12/ pair . . . .

The defendant does not agree.

III

To determine whether the merchandise at bar should have been classified under this subheading, the court must first ascertain the meaning of the relevant tariff terms. *See, e.g., Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994); *Warner-Lambert Co. v. United States*, 28 CIT ___ , ___ , 341 F.Supp.2d 1272, 1276 (2004), *aff'd*, 425 F.3d 1381 (Fed.Cir. 2005). This, of course, is fundamentally a question of law. *E.g., Universal Electronics Inc. v. United States*, 112 F.3d 488, 491 (Fed.Cir. 1997); *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed.Cir. 1995).

A

The plaintiff is of the view that the term "tennis shoes, basketball shoes, gym shoes, training shoes and the like" is "*defined* by Additional U.S. Note 2 to Chapter 64 as all 'athletic footwear' subject to certain exceptions which the parties agree do not apply to the Teva® sport sandals". Plaintiff's Brief, pp. 2–3 (emphasis in original). It postulates that

> Congress eliminated the need to make subjective determinations as to whether shoes other than the named exemplars are "like" the named exemplars. It laid this issue to rest by putting the named exemplars and any shoes like them in one defining basket: "athletic footwear." Hence, there is no need to make the subjective and contentious determinations of what is "like" as

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[5] *See* Complaint, para. NINTH:

> If the imported merchandise is described in both subheading 6404.19.35, HTSUS, and subheading 6404.11.80, HTSUS, classification under subheading 6404.11.80, HTSUS, is required since that is the provision which contains the most specific description of the merchandise under G[RI] 3(a), HTSUS.

> suggested by defendant since Congress has defined the entire term including the exemplars and the term "and the like" as meaning athletic footwear.

Id. at 7. On its face, however, the language of that additional note is not so convincing, stating only that, for

> the purposes of this chapter [64], the term "*tennis shoes, basketball shoes, gym shoes, training shoes and the like*" covers athletic footwear other than sports footwear (as defined in subheading note 1 . . .), whether or not principally used for such athletic games or purposes.

Emphasis in original. Thus, to attempt to extrapolate therefrom congressional intent to substitute, for purposes of interpreting subheading 6404.11.80, "athletic footwear" for the list of exemplars and their like is tenuous. *Cf.* Defendant's Brief, pp. 16–17:

> The plaintiff's interpretation of Note 2 [ ] is incorrect because it gives no effect to the language, "tennis shoes, basketball shoes, gym shoes, training shoes and the like." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)("In construing a statute we are obliged to give effect, if possible, to every word Congress used"); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). If Congress had intended the meaning urged here by the plaintiff, it would not have included the named exemplars - and surely would not have included the language "and the like" - in Note 2 and subheading 6404.19.35, HTSUS. Instead, Congress would have provided simply for "athletic footwear other than sports footwear (as defined in subheading Note 1 above). . . ."[6]

Moreover, the additional note does not purport to cover all athletic footwear[7], a point that arguably finds contextual support in that the

> antecedent basis for "such athletic games or purposes" is the game or purpose for which a tennis shoe, basketball shoe, gym shoe, training shoe and the like is worn.

Id. at 17.

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[6] The plaintiff correctly points out on page 7 of its brief that

> the defined statutory phrase in issue and its "exemplars," which are found in subheading 6404.11, were not creations of Congress, but rather were part of the six-digit International Harmonized Schedule language which the United States agreed to adopt subject to the right to make changes beyond the 6 digit level as was done in this case. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed.Cir. 1999).

[7] *See* Defendant's Brief, p. 16.

B

Although this court has been unable to locate legislative light on the intended practical impact of the additional U.S. note on subheading 6404.11, the changes engendered by the enactment of the HTSUS, effective January 1, 1989 [8], do provide a background therefor.

(1)

Prior to harmonization, footwear was classified in accordance with the headings of U.S. Tariff Schedule 7, Part 1. And, although "athletic footwear" does not now appear in any heading or subheading of HTSUS chapter 64, it did appear in that schedule for the year 1987, for example. Moreover, Subpart A statistical headnote 1(a) explained that

> the term "*athletic footwear*" covers footwear of special construction for baseball, football, soccer, track, skating, skiing, and other athletic games, or sports[.]

Unlike the harmonized system of today, however, its predecessor did not, by name, provide for "sports footwear". Yet, the juxtaposition of that schedule's description of athletic footwear, quoted above, with the current description of sports footwear in Subheading Note 1 to chapter 64, quoted below, at least evokes some sense of continuity:

> For the purposes of subheading[ ] . . . 6404.11, the expression "*sports footwear*" applies only to:
>
> (a) Footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, sprigs, cleats, stops, clips, bars or the like;
>
> (b) Skating boots, ski-boots and cross-country ski footwear, snowboard boots, wrestling boots, boxing boots and cycling shoes.

In a general sense, what was once seemingly considered athletic footwear is now considered sports footwear.

(2)

Amidst such re-organization and -characterization, the HTSUS introduced "tennis shoes, basketball shoes, gym shoes, training shoes and the like". As stated, it is plaintiff's interpretation of Additional U.S. Note 2 in connection therewith, and specifically the casual use of the term "athletic footwear", that gives it cause to end its inquiry

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[8] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, §§ 1201–17, 102 Stat. 1107, 1147–65.

as to the scope of its preferred subheading. Without more convincing support that such rote substitution was the intent of Congress, however, this court cannot, and therefore does not, do the same.

C

Instead, this court opts for a more deliberate construction of subheading 6404.11 in accordance with the rule of *ejusdem generis*.[9]

> Under th[at] rule . . . , which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.
>
> *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed.Cir. 1994) . . . ; *see generally* 2A Norman J. Singer, *Statutes and Statutory Construction*, § 47.17, at 273 (6th ed. 2000) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.").

Micron Technology, Inc. v. United States, 243 F.3d 1301, 1308 (Fed.Cir. 2001). Such construction

> requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms. *Nissho-Iwai Am. Corp. v. United States*, 10 Ct.Int'l Trade 154, 157, 641 F.Supp. 808, 810 (1986).

Sports Graphics, Inc. v. United States, 24 F.3d 1390, 1392 (Fed. Cir. 1994).

Resorting to various dictionary definitions, the defendant maintains that appearance is of paramount importance for determining whether the subject merchandise is like the exemplars:

> Each of the exemplars listed in subheading 6404.11.80, HTSUS, namely tennis shoes, basketball shoes, gym shoes and training shoes, along with sneakers, jogging shoes and running shoes, as defined in general lexicons or the *Footwear Dictionary* (1994), fully enclose the wearer's foot to provide a secure and

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[9] *See, e.g., Economy Cover Corp. v. United States*, 76 Cust. Ct. 130, C.D. 4645, 411 F.Supp. 783 (1976). Though the defendant argued for the application of *ejusdem generis* in its motion opposing trial, it has since decided that the rule "is not applicable here because the statutory language, 'tennis shoes . . . and the like,' is not in doubt, and has a plain meaning". Defendant's Brief in Reply, p. 11 (citation omitted). *But see* Plaintiff's Brief, p. 15. *See also* HQ 081746 (Dec. 1, 1998) ("The wading boots at issue would not be considered athletic shoes under the HTSUS as they are not ejusdem generis to the shoes listed in Additional U.S. Note 2 to Chapter 64").

> supportive enclosure that is not open at the toe, heel, top or sides.[10]
>
> * * *
>
> Because the sandals in issue are open at the toe, heel, top and sides, and do not fully enclose the wearer's foot, they differ from the exemplars of subheading 6404.11.80, HTSUS.[11]

That the sandals do not resemble, at least in appearance, the exemplars is not challenged by the plaintiff, which instead focuses on the use thereof. *See* Plaintiff's Brief, p. 10:

> Teva® sport sandals may not look like tennis shoes, etc., but plaintiff will demonstrate that they are used in place of tennis shoes, etc. for athletic purposes and in many instances outperform these other types of athletic footwear.

Furthermore:

> . . . Plaintiff will demonstrate at trial that Teva® sport sandals are used in athletic activities, where in the past wearers used tennis shoes, sneakers, etc. For certain athletic activities, Teva® sport sandals are preferred.

Id. at 10–11.

> . . . The common characteristic or purpose of the named exemplars in the subject tariff provision is that they are athletic footwear and are within the same class or kind of merchandise, i.e., athletic footwear.

Id. at 15.

And while a likeness in either of the two categories might well satisfy the rule (in the light of its disjunctive formulation), Customs Ruling HQ 963395 (April 2, 2002) explains the significance of physical disparities in terms of their effect on use:

> . . . We find that the sandals are not . . . "like" the named exemplars, each of which provides, at a minimum, a secure and supportive enclosure for the foot. None of the named exemplars is generally considered to be footwear that is open at the toes or the heel, while the sandals are open in both areas. Unlike the sandals, none of the named exemplars is generally touted for use in the sporting activities of swimming or surfing. Although many types of sandals can be, and in fact are, used in running, the features of open toes, heels, sides, and tops would appear to

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[10] Defendant's Brief, pp. 12–13, citing Foley Declaration, para. 8 and Defendant's Exhibit B.

[11] *Id*. at 15, citing Foley Declaration, paras. 5, 9.

> have significant drawbacks. Without the enclosure and support offered by a shoe like a tennis, basketball, gym, or training shoe, the foot is freer to slide in various directions. Depending on weather, terrain, etc., the open nature of the sandals also permits relatively easy entry of moisture, soil, pebbles, twigs, etc., into spaces between the foot and the footwear. While such factors may amount to mere nuisance, they may also require erratic changes in gait or occasional stops to remove foreign matter, adjust straps, or rest, in order to avoid injury, none of which is conducive to the fast footwork of a sporting activity.[12]

Such consideration is appropriate when *eo nomine* exemplars indicate use and possess an appearance that is dictated by that use. In *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed.Cir. 1999), for example, the court stated that "a use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use", citing *Pistorino & Co. v. United States*, 66 CCPA 95, C.A.D. 1227, 599 F.2d 444 (1979), and *United States v. Quon Quon Co.*, 46 CCPA 70, C.A.D. 699 (1959). To quote from *Quon*,

> use is an important factor in determining classification though an eo nomine designation is involved.
>
> * * *
>
> . . . We are not so trusting of our own notions of what things are as to be willing to ignore the purpose for which they were designed and made and the use to which they were actually put. Of all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance. To hold otherwise would logically require the trial court to rule out evidence of what things actually are every time the collector thinks an article, as he sees it, is specifically named in the tariff act.

46 CCPA at 72–73. *See also Myers v. United States*, 21 CIT 654, 660–61, 969 F.Supp. 66, 72 (1997).

To determine common meaning, "the court may consult dictionaries, lexicons, scientific authorities, and other such reliable sources". *Lonza, Inc. v. United States*, 46 F.3d 1098, 1106 (Fed.Cir. 1995), citing *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 133–34, 673 F.2d 1268, 1271 (1982). The *Complete* Footwear Dictionary (Rossi ed. 1994), a lexicon used by the industry, defines "gym

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[12] Defendant's Exhibit E, pp. 3–4. In T.D. 92–32 (*Tariff Classsification of Protective Footwear*), 26 Cust.B.& Dec. 98 (1992), Customs declined to find that hiking/backpacking boots fit the term "tennis shoes, basketball shoes, gym shoes, training shoes and the like". It reasoned that the boots were too heavy to qualify, noting that "[a]ll the exemplars are used in sports which require fast footwork or extensive running". 26 Cust.B.& Dec. at 112.

shoe" on page 55 as "[s]neaker-type[13] footwear used for gymnasium activities or sports". On pages 134–35, it also provides the following definitions:

> **sports shoe.**[14] An athletic shoe designed for any particular kind of active sport. Each sport usually has its own shoe design requirements. Many sports shoes are variations of others, usually with one or more additional features to adapt to the
>
> special needs of the particular sport. Also known as an "athletic shoe." The main types of sports shoes are as follows:
>
> * * *
>
> **basketball.** The shoe may be either hightop or lowcut, with upper of canvas, nylon/canvas, or leather/canvas, laced to toe, reinforced toe tip, padded collar, cushioned insoles, or sometimes a removable orthotic insole insert. The traction sole is either rubber or polyurethane. Air holes are in the upper for added ventilation.
>
> * * *
>
> **tennis.** Canvas or leather/nylon mesh upper with ventilation holes, upper cut a bit higher than ordinary low-cut shoe; firm counter, underfoot cushioning, padded collar and tongue, lace-to-toe, protective toe tip. Sole design depends on playing surface (grass, clay) and can vary from moderate to high traction.[15]

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[13] Sneaker is defined therein on page 132 as "[f]ootwear with a rubber sole and upper of canvas or other materials, constructed on the vulcanized process". The term "vulcanized" therein refers to a process whereby

> a rubber tape, about ¾ inch wide and 1⁄16 inch thick, is attached to the side or the top of the edge of the rubber outsole and over the bottom ½ inch or so of the upper, which could be made of any material. After the curing in the vulcanizing oven, it is virtually impossible to separate the rubber components which have been joined since they have basically been fused together. In addition to being extremely strong, a rubber-to-rubber "vulcanized" joint will not be weakened by immersion in water.

Footwear Definitions, T.D. 93–88, 27 Cust.B.& Dec. 312, 322 (1993).

[14] In addition to introducing basketball and tennis shoes, "sports shoe" is also referenced as the object of a "see" signal (on page 148) where the definition of "training shoe" would otherwise be found. It is also worth noting that, according to defendant's brief, page 11, note 4, a later edition of The *Complete* Footwear Dictionary (2d ed. 2000) does indeed define training shoe on page 174 as follows:

> . . . Also known as cross-trainer. A sports shoe similar in design and construction to a professional shoe used in a given sport, such as track or basketball, but can also be used for casual wear.

[15] Boldface in original. Excerpts from this dictionary have been provided by the defendant as Exhibit D. Counsel state that the

Tennis shoe is also defined in Webster's Third New International Dictionary Unabridged (1981), page 2356, as

> *n* : a light shoe worn esp. in playing tennis and generally made of canvas with a rubber sole — compare SNEAKER[.]

And although that lexicon does not define "gym shoe" *per se*, it also refers the reader to "SNEAKER" which it defines on page 2156 as

> **3:** a shoe usu. of canvas with a pliable rubber sole worn esp. for sports or hiking[.]

IV

This court cannot grant defendant's motion for summary judgment. While factual determinations by Customs are entitled to a presumption of correctness, it is a rebuttable one. *See, e.g., Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed.Cir. 2002). To preclude an attempt at rebuttal herein by the plaintiff would run contrary to the foundation of disposition by summary judgment, namely, that there be "no genuine issue as to any material fact". USCIT Rule 56(c). Although Customs may prevail upon its opinion that the openness of plaintiff's sandals prevents their use in activities implied by the statutory exemplars, that is a material element of the disagreement at bar. In other words, while the reasoning in the ruling letter deserves deference, the conclusion derived therefrom is founded on a factual premise that the plaintiff does not concede — in the absence of evidence adduced in open court.

Ergo, defendant's motion for summary judgment must be, and it hereby is, denied. Counsel are to confer and propose to the court on or before January 20, 2006 a schedule for trial.

So ordered.

> *Footwear Dictionary* (1994) has been used as a reference by the Customs' National Import Specialist on footwear and by testing laboratories in the United States, and is often cited by legal representatives of importers in administrative matters before Customs.

Defendant's Brief, p. 10 n. 3, citing Foley Declaration, para. 7.

Slip Op. 05–160

UNITED STATES, Plaintiff, v. OPTREX AMERICA, INC., Defendant.

Court No. 02–00646
Before: Judge Judith M. Barzilay

MEMORANDUM OPINION AND ORDER

[Plaintiff's motion requesting leave to amend its complaint to add new counts is denied.]

Dated: December 15, 2005

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, (*Patricia M. McCarthy*), Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Frederick B. Smith*, Assistant Chief Counsel, Bureau of Customs and Border Protection, of counsel, for the plaintiff.
Sonnenberg & Anderson (*Steven P. Sonnenberg* and *Michael Jason Cunningham*) for the defendant.

Barzilay, Judge: In this 19 U.S.C. § 1592 penalty action, Plaintiff, the United States Bureau of Customs and Border Protection ("Customs" or "government"), moved for leave to amend its complaint pursuant to USCIT Rule 15(a). Plaintiff seeks to add two additional claims against Defendant, Optrex America, Inc. ("Optrex"). Specifically, the government wants to charge Optrex with higher levels of culpability than initially claimed - gross negligence and fraud. In connection with these new claims, the government also seeks to add new entries. For the reasons outlined below, the court DENIES Plaintiff's motion.

BACKGROUND

Customs initiated its penalty proceedings against Optrex in May 2002, issuing a prepenalty notice pursuant to 19 U.S.C. § 1592(b)(A), which alleged that Optrex's negligence resulted in a violation. The pre-penalty notice charged Optrex with providing insufficient information in the entry documents to enable Customs to determine the correct classification of its imported liquid crystal display ("LCD") products. In response to the pre-penalty notice, Optrex claimed that it had exercised reasonable care by consulting its counsel, its broker, and Customs about the correct classification. *Ex. H10* at 5–9, 12. Optrex furnished Customs with a "decision tree," a classification scheme that reflected the company's classification policies. *Ex. H10* at 7. Customs rejected Optrex's reasonable care defense on the basis "that reliance on a broker or exporter alone may not be sufficient to show that an importer exercised reasonable care." *Ex. H12* at 5 (citing *United States v. Golden Ship*, 25 CIT 40 (2001)). Customs noted that it did not have "persuasive evidence that during the subject time period the petitioner sought or received expert advice from any of the outside sources it identified." *Ex. H12* at 6. Customs was also "unaware of any persuasive evidence establishing what specific advice these sources allegedly provided the petitioner." *Ex. H12* at 6–7. It concluded that the alleged misclassification amounted to more than a professional disagreement given the "[n]umerous customs rulings, courts decisions, and informed compliance publications issued regarding the classification of LCDs." *Ex. H12* at 6. It also believed that Optrex developed the decision tree after filing the entries and only for the purpose of satisfying Customs, since "the petitioner has not produced any evidence that the decision tree method was ever used by anyone at Optrex to determine a classification." *Ex. H12* at 6–7. The final penalty claim against Optrex was based on negligence.

The government initiated this action in October 2002, claiming that between October 12, 1997, and June 29, 1999, Optrex introduced into the commerce of the United States certain LCD products by means of negligent material false statements in violation of 19 U.S.C. § 1592. Plaintiff's original complaint was premised on the theory of negligent misclassification of the LCD products under HTSUS heading 8513, instead of HTSUS heading 9013, in violation of the Federal Circuit's decision in *Sharp Microelecs. Tech., Inc. v. United States*, 122 F.3d 1446 (Fed. Cir. 1997). *See Compl.* ¶¶ 10–12.

In this motion, Plaintiff avers that it unearthed evidence establishing a basis for fraud and gross negligence claims under section 1592 following this court's order compelling Optrex to reveal certain of its attorney-client communications. *See United States v. Optrex*, Slip Op. 04–79 (CIT July 1, 2004) ("July 2004 order"); *Pl.'s Mot. Requesting Leave Amend Compl.* at 3. Based on the discovery of this new evidence, the government now seeks leave to amend its complaint to plead penalties for fraud and gross negligence and to reach back to capture entries made by Optrex starting in January 1997. The government argues that prior to this discovery, it attempted to obtain information concerning the substance of the legal advice that Optrex received from its counsel in order to evaluate Optrex's reasonable care defense.[1] Optrex apparently withheld such information until the court's July 2004 order.

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[1] For its reasonable care defense, Optrex claimed that it consulted with an attorney having expertise about the subject merchandise. The legislative history to the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993), noted that in seeking advice for a classification issue, an importer is expected to consult with an attorney having technical expertise, provide the expert with full and complete information sufficient for the expert to make entry or to provide advice as to how to make entry. H. Rep. No. 103–361(I) at 120 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2670. The Ways and Means Committee noted that "an honest, good faith professional disagreement as to correct classification of a technical matter shall not be lack of reasonable care unless such disagreement has no reasonable basis." *Id.*

At an evidentiary hearing held on February 17, 2005, the government proffered three letters from Optrex's counsel to Optrex containing legal advice on the LCD products classification and the deposition of a former Optrex employee stating that Optrex consistently chose to classify its products under lower tariffs. *See Ex. H1, Ex. H2, Ex. H3*. The government avers that this evidence forms a basis for its belief that 1) Optrex disregarded its counsel's advice, 2) Optrex had knowingly misclassified the subject entries of LCD products and kept a separate account upon its books and records based on the amount of duties that it should have paid, 3) the "decision tree" was created as a cover up. The government claims that Customs did not have sufficient basis to pursue the claims of gross negligence and fraud during the administrative proceedings because this information was not discoverable in the administrative proceedings, and, therefore, it should be allowed to add two additional counts for gross negligence and fraud against Optrex.

DISCUSSION

USCIT Rule 15(a) provides that the court should grant a party's motion for leave to amend its complaint "freely . . . when justice so requires." USCIT R. 15(a). The court decides such motions on a case-by-case basis, considering a variety of factors, including "(1) the timeliness of the motion to amend the pleadings; (2) the potential prejudice to the opposing party; (3) whether additional discovery will be necessary; [and] (4) the procedural posture of the litigation." *Budd Co. v. Travelers Indem. Co.*, 109 F.R.D. 561, 563 (E.D. Mich. 1986) (citation omitted). In this case, Plaintiff is seeking to amend its complaint to add two additional claims against Defendant, maintaining that it did not have a basis to pursue higher levels of culpability at the administrative level. In this case, the threshold issue turns on whether the Department of Justice can bring a "civil penalty" action pursuant to 19 U.S.C. § 1592(e) to recover a penalty claim for a type of violation - namely, gross negligence or fraud - not made before the agency. *See* 19 U.S.C. § 1592 (2004). Because section 1592 provides for specific administrative proceedings prior to the commencement of a recovery action before the court, this inquiry directly concerns the court's exercise of jurisdiction over penalty claims that were not pursued at the administrative level. The court has "exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under [19 U.S.C. § 1592]." 28 U.S.C. § 1582. In a section 1592 action, the court must, "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637.

The government claims that section 1592 does not prevent it from bringing claims before this Court for increased culpability levels because the relevant provisions of the law provide for a *de novo* standard of review in penalty actions.[2] "[S]o long as the United States *commences* a section 1592 action, there is no limitation upon the "issues" addressed or the "amount of the penalty." *Pl. Br.* 11–12 (emphasis in original). Plaintiff thus maintains that the level of culpability is one of the issues that this Court decides independent of the administrative proceedings underlying each penalty action. The court, however, disagrees with the government's reading of section 1592 with respect to its definition of a "penalty claim."

1. *Section 1592*

Section 1592 delineates the administrative procedural requirements for Customs' penalty proceedings. *See* 19 U.S.C. § 1592(b) (2004). When it has "reasonable cause to believe that there has been a violation," Customs has to first issue a pre-penalty notice "of its intention to issue a claim for a monetary penalty." *Id.* The pre-penalty notice must:

> (i) describe the merchandise;
> (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction;
> (iii) *specify all laws* and regulations allegedly violated;
> (iv) disclose all the material facts which establish the alleged violation;
> (v) state *whether the alleged violation occurred as a result of fraud, gross negligence, or negligence*;
> (vi) state the estimated loss of lawful duties, taxes, and fees if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and
> (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

§ 1592(b)(1)(A) (emphasis added). "After considering representations, if any" made by the importer, upon Customs' determination

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[2] 19 U.S.C. § 1592(e) states:
Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—
(1) all issues, including the amount of the penalty, shall be tried de novo;
(2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
(3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
(4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

that a violation has occurred, Customs has to issue a "penalty claim," which "specif[ies] all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A)." § 1592(b)(2)

Following the mandatory issuance of a "written penalty claim," the importer is afforded an opportunity to "make representations . . . seeking remission or mitigation of the monetary penalty" under 19 U.S.C. § 1618. *Id.* Finally, Customs provides the importer with a written statement "which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." 19 U.S.C. § 1592. If the liable importer fails to petition for relief or to pay the penalty, Customs can then refer the case to the Department of Justice. *See* 19 C.F.R. § 162.32.

The language of section 1592 evidences that the level of culpability forms the core around which the government must construct each penalty claim it wishes to bring: Each level of culpability generates a new separate claim. Subsection 1592(b) makes the level of culpability an essential element of the "violation" for which a "penalty" is claimed. *See* § 1592(b)(1)(A)(v). Subsection 1592(c) sets out the maximum monetary penalty for each type of violation - negligence, gross negligence, and fraud - treating each as a different "civil penalty." *See* 19 U.S.C. § 1592(c). In addition, reading section 1592(e) *in pari materia*[3] with section 1592(b), the language "any monetary penalty claimed" before this Court refers back to the "written penalty claim" issued in the administrative proceedings, suggesting that it is the same claim. The term "recovery" underscores that a 1592 action before this Court is an enforcement suit allowing the government to recover on a claim that it perfected in the administrative proceedings.[4] *See* 19 U.S.C. § 1592.

The government argues that the "notwithstanding any other provision of law" clause combined with the *de novo* review provision en-

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[3] *Cf. Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995) (explaining application of this rule of construction in interpreting two subsections of statute). "This [i*n pari materia*] principle of statutory construction provides that legislative intent 'is to be deduced from the whole statute and every material part of the same.' " *Dal-Tile Corp. v. United States*, 17 C.I.T. 764, 768, 829 F. Supp. 394, 397 (1993) (citations omitted).

[4] Such interpretation views section 1592(e) as creating a cause of action for the United States to enforce a penalty claim before this Court. Customs' own regulations do not shed light on how to interpret the statute, but refer to the proceedings before this Court as "civil enforcement" of section 1592 claims:

> A monetary penalty incurred under section 592 . . . may be remitted or mitigated under section [19 U.S.C. § 1618] . . ., if it is determined that there are mitigating circumstances to justify remission or mitigation. . . . The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities arising under section 592 within the stated limitations. . . . The assessed penalty or penalty amount set forth in Customs administrative disposition determined in accordance with these guidelines does not limit the penalty amount *which the Government may seek in bringing a civil enforcement* action pursuant to section 592(e).

19 C.F.R. Pt. 171, App. B (emphasis added).

forces its argument that "as long as the United States *commences* a section 1592 action, there is no limitation upon the 'issues' addressed or the 'amount of the penalty.' " *Pl. Br.* 11–12. The "notwithstanding any other provision of law" clause generally "connotes a legislative intent to displace any other provision of law that is contrary to the [statute]." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (2004). The "notwithstanding any other provision of law" clause in section 1592 modifies each of the four subparagraphs that follow the clause: subparagraph (1) addresses *de novo* review; subparagraphs (2) to (4) address the burden of proof for each type of violation. For example, the modification of the *de novo* standard of review by the "notwithstanding" clause emphasizes lack of deference to Customs' final determination, including its findings of fact under section 1592(b)(2).[5] The court's power to review penalty claims *de novo* under 19 U.S.C. § 1592(e) ensures that the defendant receives a hearing without any deference to the agency's findings, placing the burden of proof on the government. However, the *de novo* standard refers to the issues in the context of a specific claim based on one of three types of section 1592 violations and does not allow the court to review entirely new penalty claims.

Finally, a meaningful interpretation of a statute must take into account the statute's basic purpose. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003). The statute was designed to give an importer an opportunity to fully resolve a penalty proceeding before Customs, before any action in this Court:

> If the customs officer issues a penalty claim and the importer petitions for mitigation under [19 U.S.C. § 1618], then the importer would have the opportunity to make written and oral representations to the service. Notice of the final decision in a mitigation proceeding, including findings of fact and conclusions of law, would be required to be sent to the importer. This provision would enact into law existing practice with several changes: (1) the importer would have the right to make representations in a mitigation proceeding before any decision on mitigation is made, and (2) the service would be required to

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[5] Section 1592(b)(2) provides for a mitigation procedure following the agency's written penalty claim and then final determination:

> The written penalty claim shall specify all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A). Such person shall have a reasonable opportunity under section 1618 of this title to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under such section 1618, the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

19 U.S.C. § 1592(b)(2).

> supply the importer with a detailed explanation of the factual and legal basis for its mitigation decision.
>
> If an importer refuses to pay a section 592 monetary penalty and is sued by the United States in a district court[6], all issues, including the appropriateness of the penalty amount, would be considered by the court.

S. Rep. 95–778, at 19–20 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2230–31. Thus, the legislative history supports the analysis that the administrative penalty claim underlies the suit brought by the United States under section 1592(e).

2. *Exhaustion of Administrative Remedies*

The government alternatively argues that the Court should waive the exhaustion of administrative remedies in this case and allow it to add its claims of gross negligence and fraud. At the hearing, by way of testimonial and documentary evidence, and through its submission of supplemental documents, the government demonstrated that Customs did not have sufficient bases to pursue fraud on the administrative level because it could not have discovered relevant evidence prior to the court's July 2004 order. After careful examination of the law, however, the court declines to waive the exhaustion of administrative remedies because the remedies involved in this case are mandated by the statute.

The relevant statute provides that "[i]n any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637. The government argues that by excluding section 1592 actions from the mandatory exhaustion requirement, Congress intended that the Court not be constrained by the penalty notice issued by Customs. Indeed, in some penalty actions, where "sufficient compliance with the statutory procedures was found," the courts have waived certain aspects of administrative procedures under section 1592(b). *United States v. Aegis Sec. Ins. Co.*, Slip Op. 05–278, at 3, 2005 WL 2740876 (CIT Oct. 24, 2005) (denying defendant's motion to dismiss duty collection suit despite pending administrative proceedings with respect to penalty claims, finding that collection of duties may proceed whether or not penalties are assessed). Importantly, with one exception, the exhaustion of administrative remedies has been waived regarding procedural requirements under Customs' regulations, not the statutory requirements of section 1592. *See, e.g., United States v. Maxi Switch, Inc.*, 22 CIT 778, 785,

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[6] The Customs Courts Act of 1980 substituted the text "proceedings commenced by the United States in the Court of International Trade" for "proceedings in a United States district court commenced by the United States pursuant to section 1604 of this title" in section 1952(e). *See* Pub. L. 96–417

18 F. Supp. 2d 1040 (1998) (finding that Customs' premature referral of case to Department of Justice was harmless because of importer's untimely filing of its supplemental petition); *United States v. Obron Atl. Corp.*, 18 CIT 771, 775–76, 862 F. Supp. 378, 382 (CIT 1994) (finding jurisdiction where Customs improperly imposed seven-day response period because defendant was not deprived of opportunity to be heard as it submitted materials and made oral representations following both pre-penalty and penalty notices); *United States v. Modes, Inc.*, 13 CIT 780, 785, 723 F. Supp. 811, 815 (1989) (finding jurisdiction where Customs did not respond to supplemental petition because defendant was not deprived of opportunity to be heard as it made oral presentation and was provided with written determination stating findings of fact and conclusions of law supporting decision to mitigate).

In one case, the Federal Circuit waived a statutorily prescribed administrative requirement. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 299 (Fed. Cir. 1986). In *Priority Products*, the Federal Circuit found that, although the penalty claim in that case was originally assessed against the company and not its shareholders personally, the shareholders were on notice of the penalty assessed against their company and could be directly sued in the penalty action. *Id.* The Federal Circuit concluded that "nothing in [§ 1592] or its legislative history demonstrate [sic] that Congress intended to narrowly circumscribe the subject matter jurisdiction of [this Court] to encompass only those suits brought by the Government against parties expressly named in the administrative proceedings." *Id.* Specifically, the Court of Appeals stated that "so long as some 'civil penalty exists' the Court of International Trade can assume jurisdiction over any complaint to recover that penalty, and the issue of who is ultimately responsible for payment of the penalty is subject to *de novo* consideration." *Id.* This case is distinguishable, however, because the Federal Circuit considered how Customs could "preserve its right to sue all possible parties" when pursuing a penalty action against a corporation. *Id.* at 300.

In the pending case, the court declines the government's invitation to waive statutorily prescribed administrative procedures because no precedent supports waiving all statutory requirements for a particular claim. Such a waiver would require the court to consider a claim that did not go through administrative proceedings, vitiating the entire statutory framework.[7] Additionally, bringing a new gross

[7] In connection with its fraud claim, the government's proposed amended complaint also seeks to add new entries of subject merchandise that were made in the first half of 1997. These new entries were not part of the pre-penalty or penalty notices. As the court finds that section 1592 does not permit the government to add different levels of culpability not pursued on the administrative level, addition of new entries in connection with the government's fraud claim is not an issue in this case. However, as with the level of culpability, the identity of each entry is a central element of any penalty claim. *See* 19 U.S.C. § 1592(b) (re-

negligence or fraud claim would require more than just an exhaustion of administrative remedies; it would result in denial of the protections afforded by the statute of limitations.

3. *Statute of Limitations*

The government suggests that due to Defendant's concealment of information on the administrative level, it was unable to obtain information to pursue a gross negligence claim. At the evidentiary hearing, Customs demonstrated that it could not have discovered evidence of gross negligence during the five-year window. However, this argument is not relevant in this case because Congress specifically established a statute of limitations of five years from the date of entry of subject merchandise for negligence and gross negligence claims. *See* 19 U.S.C. § 1621(1). The statute of limitations is designed to ensure that penalty proceedings are conducted with reasonable dispatch and that penalty claims have finality after a certain date. This five-year statute of limitations for bringing a penalty action enables the government to complete full administrative proceedings: conduct investigation, issue a pre-penalty notice, a notice of penalty claims, and 19 U.S.C. § 1618 mitigation procedures. In this case, the importer refused to waive the relevant statute of limitations of five years from the date of entry for negligence and gross negligence claims in response to Customs' request, and Customs was on notice that it would not be able to pursue gross negligence after five years for all entries it investigated.

Congress specifically has addressed cases where importers act in bad faith and conceal information that is later discovered by providing that the statute of limitations for fraud claims begins to run from the date of discovery of fraud. *See* 19 U.S.C. § 1621(2). *Cf. US JVC Corp. v. United States*, 22 CIT 687, 691, 15 F. Supp. 2d 906, 911 (1998) ("The doctrine of equitable tolling permits a plaintiff to avoid the bar of a statute of limitations, if 'despite all due diligence, [the plaintiff] is unable to obtain essential information concerning the existence of [his] claim.' " (quoting *Weddel v. Sec'y of Health and Human Servs.*, 100 F.3d 929, 931 (Fed. Cir. 1996)). Thus, even if the government proves that it did not have access to certain information that led to its discovery of a basis to pursue gross negligence until five years from the date of the last entry at issue in this case, waiving the statute of limitations for gross negligence is not appropriate

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quiring that Customs "set forth the details of the entry or introduction" of subject merchandise in pre-penalty notice). The government cannot bypass this unambiguous statutory provision as it ensures that an importer is on notice of which entries it is responsible for in a section 1592 penalty enforcement action. *Cf. United States v. Rotek, Inc.*, 22 C.I.T. 503, 508, 509–10 (1998) (not reported in F. Supp.) (retaining jurisdiction where importer claimed "shifting, inconsistent claims" in pre-penalty notice, penalty notice, and mitigation decision, noting that items included in complaint were "the exact items described in the penalty notice and the mitigation decision").

where allegedly fraudulent concealment is involved and pursuing a fraud claim remains an option. The discovery of fraud rule ensures that the government will not lose out on revenue when fraud is involved. In this case, the government would have five years from the date it discovered the alleged fraud to sue Optrex on that claim. However, prior to that it must perfect its fraud claim by conducting the statutorily required procedures.

CONCLUSION

Section 1592 provides for a mandatory issuance of a "written penalty claim," which underlies a recovery action before this Court. The level of culpability is an inextricable part of a particular penalty claim issued pursuant to section 1592(b)(2), and allowing the government to amend its complaint to include penalty claims that have not been perfected through the administrative process would be contrary to the statutory scheme and the statute of limitations. Furthermore, despite the timing of the discovery of new evidence, this case does not merit a waiver of administrative remedies. Therefore, it is hereby

ORDERED that Plaintiff's motion for leave to amend its complaint to add the culpability levels of fraud and gross negligence and new entries is DENIED.

SLIP OP 05–161

DECCA HOSPITALITY FURNISHINGS, LLC, Plaintiff, MARIA YEE INC., *ET AL*., Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, *ET AL*., Defendant-Intervenors.

Before: Pogue, Judge
Court No. 05–00002

JUDGMENT

In *Wooden Bedroom Furniture from China*, 70 Fed. Reg. 329, 330 (Dep't Commerce Jan. 4, 2005) (notice of amended final determination of sales at less than fair market value and antidumping duty order) the Department of Commerce ("Commerce") rejected as untimely certain submissions from Decca Hospitality Furnishings, LLC ("Decca") and, therefore, assessed Decca the People's Republic of China ("PRC")-wide cash deposit rate of 198.08%. Decca timely appealed that determination averring that it was improperly denied the separate rate of 6.65%. On August 23, 2005, this court found unlawful Commerce's assessment of the PRC-wide cash deposit rate and remanded to Commerce the question of whether Decca had received actual notice of the separate-rate filing requirements, and if it had not, to consider whether Decca was entitled to a separate rate. *Decca Hospitality Furnishings, LLC v. United States*, 29 CIT ___ , ___ , 391 F. Supp. 2d 1298, 1317 (2005).

Pursuant to that remand order, Commerce issued a remand determination on November 7, 2005 finding that Decca had not received actual notice of the filing requirements and, therefore, Decca did qualify for separate-rate treatment in accordance with the court's decision.

This court, having received and reviewed Commerce's Remand Results, comments and rebuttals thereto, finds that Commerce duly complied with the court's remand order. Therefore, it is hereby

ORDERED that the Department of Commerce's remand determination is supported by substantial evidence, and otherwise in accordance with law; and it is further

ORDERED that the Remand Results filed by Commerce on November 7, 2005 are affirmed in their entirety.