Decisions of the United States
Court of International Trade

Slip Op. 06–126

SAMUEL AARON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 03–00053

[For want of jurisdiction, this case is dismissed.]

Serko & Simon LLP (*Joel K. Simon*, *Christopher M. Kane*, *Jerome L. Hanifin*) New York, NY, for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Barbara S. Williams*, Attorney in Charge; *Jack S. Rockafellow*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Edward N. Maurer*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs & Border Protection, for Defendant.

Dated: August 17, 2006

OPINION

CARMAN, JUDGE: This Court heard oral argument on August 10, 2006, in this matter. Plaintiff Samuel Aaron, Inc. ("Plaintiff" or "Samuel Aaron") brings this action under 19 U.S.C. § 1514(a)(5) (2000),[1] challenging the validity of the United States Customs Service's, now Bureau of Customs and Border Protection ("Customs" or "Defendant"), reliquidation of subject entries. Before this Court are

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[1] 19 U.S.C. § 1514(a)(5) provides, in relevant part:

> [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to –
> . . .
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
> . . .
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . . within the time prescribed by [statute].

parties' cross-motions for summary judgment. In its cross-motion, Defendant challenges this Court's jurisdiction. For the reasons stated herein, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted for lack of jurisdiction.

BACKGROUND

This action involves jewelry from Thailand. Certain merchandise from Thailand was eligible for duty-free treatment under the Generalized System of Preferences[2] ("GSP"). On June 30, 1998, GSP expired. Stipulated Facts ¶ 1. On the same day, the Executive Office of the President, Office of the United States Trade Representative, published a notice in the Federal Register restoring GSP eligibility for subject entries effective as of July 15, 1998. Stipulated Facts ¶ 2; *see Restoration of Preferential Tariff Treatment Under the Generalized System of Preferences for Certain Articles from Thailand*, 63 Fed. Reg. 35,632 (USTR June 30, 1998) ("Restoration Notice"). GSP, however, was not statutorily reinstated until four months later. On October 21, 1998, Congress passed legislation providing for a one-year renewal of GSP to any entry "of an article to which duty-free treatment . . . would have applied if such entry had been made on July 1, 1998." Stipulated Facts ¶ 5. By law, retroactive refunds applied to entries that were eligible for GSP on July 1, 1998. HQ 228645 (Feb. 1, 2002). However, the subject merchandise at issue in this case was not accorded GSP eligibility until July 15, 1998. *Restoration Notice*, 63 Fed. Reg. at 35,632. Because subject merchandise did not obtain GSP eligibility until July 15, 1998, such merchandise was not eligible for the retroactive GSP refunds provided by statute. Customs acknowledged this discrepancy:

> We do recognize that the [*Restoration Notice*] is contrary to the statutory language on retroactivity. However, we cannot allow retroactivity, for the subject merchandise, as we are bound by the language of statute. Furthermore, there is no indication that the [*Restoration Notice*] was ever modified in any way, in order for the subject merchandise to be eligible for retroactive GSP treatment.

HQ 228645.

Plaintiff filed sixty-six paperless entries at the port of New York between August 10, 1998, and October 22, 1998. Stipulated Facts

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[2] Pursuant to 19 U.S.C. § 2461 (2000), the President of the United States "may provide duty-free treatment for any eligible article from any beneficiary developing country in accordance with the provisions of this subchapter." For more information on the inception of GSP, see Thomas Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 Am. J. Int'l L. 513 (1978).

¶ 4. On November 13, 1998, and December 11, 1998, Customs liquidated the subject entries duty-free pursuant to GSP. Stipulated Facts ¶ 6–7.

On January 29, 1999,[3] the Customs Director of Trade Agreements issued a memorandum to the Port Director directing reliquidation of erroneous refunds issued for the subject entries. Stipulated Facts ¶ 8; Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem.") at Ex. 3. On February 8, 1998, "Customs placed a document in a notebook or binder in the room used by Customs at the Port of New York for making its bulletin notices of liquidation or reliquidation available to the public." Stipulated Facts ¶ 9. For simplicity's sake, parties have deemed this document the "offline" bulletin notice. Pl.'s Revised Statement of Material Facts ("Pl.'s Facts") ¶ 12; Def.'s Revised Statement of Undisputed Material Facts ("Def.'s Facts") ¶ 16.

Pursuant to 19 U.S.C. § 1501 (2000),[4] Customs may voluntarily reliquidate an entry. This ninety-day reliquidation period applicable to subject entries ended on February 11, 1999, and March 11, 1999, depending on the date of original liquidation. Stipulated Facts ¶¶ 10, 12. On March 2, 1999, Customs issued a memorandum to "Importers, Broker and Other Interested Parties" stating that "refunds had been erroneously issued with respect to jewelry from Thailand entered between July 1 and October 20, 1998. The memorandum states that importers 'will be billed for the appropriate Customs duties and interest.' " Stipulated Facts ¶ 11. During the week of April 12, 1999, Customs ran a computer script on the subject entries in its Automated Commercial System ("ACS"). Stipulated Facts ¶ 13. On April 30, 1999, "ACS generated bills to plaintiff for increased duties for the entries at issue." Stipulated Facts ¶ 15.

Furthermore:

> ACS generated bulletin notice of liquidation that included the entries at issue. On this date, Customs put the bulletin notice of liquidation in a binder that was marked to indicate that it contained April 30, 1999 bulletin notices of liquidation. The binder was placed by Customs in the room used by the Port of New York for making its bulletin notices of liquidation or

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[3] Although this document does not reflect a date, this Court accepts parties' stipulation as to this fact.

[4] 19 U.S.C. § 1501 states:

> A liquidation made in accordance with section 1500 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by the Customs Service, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent. Notice of reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

> reliquidation available to public. No red-line or other notation was made on the April 30, 1999 bulletin notice of liquidation for the entries at issue to indicate that (re)liquidation had been made on another date.

Stipulated Facts ¶ 14. On July 29, 1999, Plaintiff filed a protest to dispute the increased duties on the subject entries. Stipulated Facts ¶ 16. The actual bulletin notices posted in the Port of New York Customhouse were destroyed on September 11, 2001. Pl.'s Facts ¶ 26; Def.'s Facts ¶ 27. On August 23, 2002, Customs denied this protest. Stipulated Facts ¶ 17. On February 10, 2003, Plaintiff commenced this action. Stipulated Facts ¶ 18.

PARTIES' CONTENTIONS

Plaintiff's Contentions

Plaintiff claims this Court has jurisdiction under 28 U.S.C. § 1581(a) (2000).[5] Compl. ¶ 1; Pl.'s Facts ¶ 1. Plaintiff contends its protest was timely filed. Pl.'s Facts ¶ 3. Plaintiff admits that "[a]t some time after December 11, 1998, the Port of New York posted an 'off-line bulletin notice of reliquidation' of the entries at issue." Pl.'s Facts ¶ 12. Plaintiff asserts, however, that the February 8, 1999, offline bulletin notice "had no legal impact as it was neither on the official bulletin notice of liquidation Customs Form 4333, nor was it the result of a calculation to determine the amount of duties owing on the goods on the entries at issue." Pl.'s Resp. to Def.'s Revised Statement of Undisputed Material Facts ("Pl.'s Resp. to Def.'s Facts") ¶ 12. Although conceding that even the ACS-generated bulletin notices are not printed on Customs Form 4333, Plaintiff asserts that the April 30, 1999, ACS-generated bulletin notice has the requisite identification of "CF 4333." Oral Argument Tr. 30:1–24, Aug. 10, 2006. In further support of its position, Plaintiff urges that the February 8, 1999, offline bulletin notice was not posted in a "conspicuous place" as required by 19 C.F.R. § 159.9(b) (1999).[6] Pl.'s Mem. at 25–27.

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[5] 28 U.S.C. § 1581(a) provides:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

[6] 19 C.F.R. § 159.9(b) requires:

> *Posting of bulletin notice.* The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customshouse at the port of entry . . . or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

Plaintiff also posits that Customs failed to follow its own procedure of redlining the April 30, 1999, ACS-generated bulletin notice to indicate that the subject entries had been previously reliquidated. Pl.'s Resp. to Def.'s Facts ¶ 28. Plaintiff offers that the final computation or ascertainment necessary for liquidation occurred the week of April 12, 1999, when the "script" was run in the ACS. Pl.'s Resp. to Def.'s Facts ¶ 21. Accordingly, Plaintiff insists that the April 30, 1999, ACS-generated bulletin notice was the legal reliquidation date. *Id*. Because the original liquidations occurred on November 13, 1999, and December 11, 1999, Plaintiff surmises that Customs' attempt to reliquidate subject entries was outside the scope of the ninety-day limit for voluntary reliquidation. *See* 19 U.S.C. § 1501; 19 C.F.R. § 173.3 (1999).[7] Therefore, Plaintiff advances that this Court has jurisdiction to hear this matter, pleads for favorable judgment by determining that Customs' April 30, 1999, reliquidation of the subject entries was statutorily void, and prays for duty-free reliquidation of said entries.

Defendant's Contentions

Defendant contends that this Court does not have jurisdiction to hear this matter because "the protest was filed more than 90 days after reliquidation of the subject entries on February 8, 1999." Def.'s Facts ¶ 1. Because the protest was not timely filed, Customs maintains that it was properly denied. Def.'s Facts ¶ 3. Defendant claims that the offline reliquidation of February 8, 1999, was valid. Mem. in Supp. of Def.'s Cross-Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Mem.") at 3. Defendant asserts that it had "ascertained the duties on each entry prior to posting the off-line bulletin notice of liquidation." Ryan Decl. ¶¶ 7–8; Def.'s Facts ¶ 19. Furthermore, Defendant declares that "a procedure already existed in 1974 to reliquidate an entry 'off-line' if necessary, and to post an 'off-line' bulletin notice, in order to complete a reliquidation within a statutory time period. . . . Off-line bulletin notices thus have been posted at New York going back well over 30 years." Ryan Supplemental Decl. ¶¶ 2, 3. Defendant explains that offline bulletin notices are "maintained in the same room used by the Port of New York for mak-

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[7] 19 C.F.R. § 173.3 states:

> (a) *Authority to reliquidate.* The port director within 90 days from the date of notice of original liquidation is given to the importer, consignee, or agent, may reliquidate on his own initiative a liquidation or a reliquidation to correct errors in appraisement, classification, or any other element entering into the liquidation or reliquidation, including errors based on misconstruction of applicable law. A voluntary reliquidation may be made even though a protest has been filed, and whether the error is discovered by the port director or is brought to his attention by an interested party.
>
> (b) *Notice of reliquidation*. Notice of a voluntary reliquidation shall be given in accordance with the requirements for giving notice of the original liquidation.

ing its bulletin notices of liquidation or reliquidation available to the public." Def.'s Facts ¶ 14; *see also* Chmura Decl. ¶¶ 3–4.

Although conceding that the February 8, 1999, offline bulletin notice lacks the identification "CF 4333" as noted on the April 30, 1999, ACS-generated bulletin notice, Defendant argues that the offline bulletin notice contains all the substantive information required on Customs Form 4333. Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. ("Def.'s Reply") at 7. Defendant reasons that the offline bulletin notice "bears the same title and each and every one of [the] six data elements of the form. . . . [I]t is clear, that the February 8, 1999, Bulletin Notice of Liquidation is, in fact, a form which contains all the required Form 4333 information." *Id.*

In addition, Defendant concedes that it failed to redline the April 30, 1999, ACS-generated bulletin notice but stresses "this concession is not material and does not impact our position, as the entries had already been liquidated on February 8, 1999." *Id.* at 10. Defendant contends that the April 30, 1999, ACS-generated notice "reflected the issuance of bills on that date on the entries reliquidated on February 8, 1999." *Id.* Therefore, Defendant submits that this Court lacks jurisdiction because Plaintiff's protests were untimely and insists this case should be dismissed.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). On a motion for summary judgment, the moving party bears the burden of proving that there is no genuine issue of material fact that would preclude judgment in its favor. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). However, the party opposing the motion for summary judgment may not rest on its pleadings. *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848 (1993). Rather, the nonmovant must present "specific facts" that establish a genuine issue of triable fact. *Id.* Further, "[t]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), and the court "must resolve all doubt over factual issues in favor of the party opposing summary judgment" *SRI*, 775 F.2d at 1116. The threshold issue for any court, however, begins with jurisdiction.

JURISDICTION

Statute dictates this Court's jurisdiction. Defendant challenges this Court's jurisdiction over this matter. Upon challenge, the plaintiff bears the burden of demonstrating that jurisdiction exists. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995). Plaintiff claims this Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Defendant counters that Plaintiff's claim was not timely protested. A prerequisite for an importer to challenge the denial of a protest in this court is that the importer must have filed a timely protest. *Juice Farms*, 68 F.3d at 1345; *see also* 19 U.S.C. § 1514(a). For the reasons stated herein, this Court holds that the February 8, 1999, offline bulletin notice of liquidation was valid, and accordingly, this Court does not have jurisdiction to hear this matter.

DISCUSSION

This case is rife with unfortunate facts. The lapse and retroactivity of GSP initiated the original confusion and the terrorist attacks of September 11, 2001, further fueled the irregularities. Upon examination of the motion papers and further elaboration during oral argument, the facts were presented to this Court. The linchpin issue, which also decides the issue of jurisdiction, is whether there was a valid reliquidation of the subject entries on February 8, 1999.[8]

"Liquidation means the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1999) (emphasis omitted). Customs asserts that "[a]t the time of reliquidation, the Customs officers knew that the entries were being reliquidated for the purpose of assessing the duty that had been erroneously refunded for the merchandise entered under subheading 7113.19.5000 [Harmonized Tariff Schedule of the United States]." HQ 228645. Defendant provided the reliquidation amount in a Customs official's declaration:

> [T]he only change was that the applicable duty rate was reverting from 0% as liquidated back to the entered rate and amount of duties at 16.3% *ad val.* under Subheading 7113.11.20 or at 5.7% *ad val.* under Subheading 7113.19.50. . . . Customs had ascertained the duties on each entry prior to posting the off-line bulletin notice of liquidation.

Ryan Decl. ¶¶ 7–8. Furthermore, this Court notes that two memoranda concerning erroneous refunds are part of the record – the

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[8] At issue in this case is the notice of reliquidation, not the notice of original liquidation. However, reliquidation notice has the same requirements as liquidation notice pursuant to 19 U.S.C. § 1501 and 19 C.F.R. § 173.3(b). Throughout this opinion, bulletin notice of liquidation is used as it follows the statutory and regulatory language, but it shall be understood to mean bulletin notice of reliquidation in this case.

January 29, 1999, memorandum from the Customs Director of Trade Agreements to the Port Director, and the March 2, 1999, memorandum to "Importers, Brokers and Other Interested Parties" – that provide evidence of the reliquidated amount as the refund reversion. Stipulated Facts ¶¶ 8, 11. This Court finds that the Customs officials' knowledge of the reliquidated amount is sufficient to satisfy 19 C.F.R. § 159.1. Furthermore, Customs gave notice of the reliquidation action because the February 8, 1999, offline bulletin notice contained the words "RELIQUIDATION – INCREASE" applicable to all entries. Pl.'s Mem. at Ex. 9.

The next element to effect a valid liquidation is posting of the bulletin notice of liquidation. It is well-established that the posting of a legally sufficient notice serves as the date of the liquidation. *Tropicana Prod., Inc. v. United States*, 909 F.2d 504, 506 (Fed. Cir. 1990). Sufficient posting is accomplished "by posting the bulletin notice in a conspicuous place in the Customhouse or by lodging it in some other suitable place in the Customhouse where it can be readily located by interested persons directed to that place by a notice maintained in a conspicuous place that states where notices of liquidation can be found." *Frederick Wholesale Corp. v. United States*, 6 CIT 306, 309, 585 F. Supp. 640 (1983) (citing 19 C.F.R. § 159.9), *aff'd*, 754 F.2d 349 (Fed. Cir. 1985). If the importer could not have reasonably been misled or confused by the posted bulletin notice of liquidation, then notice is legally sufficient. *Goldhofer Fahrzeugwerk GMBH & Co. v. United States*, 13 CIT 55, 56, 706 F. Supp. 892 (1989) (citation and quotation omitted). Because the February 8, 1999, offline document was titled "Bulletin Notice of Liquidation," contained the words "RELIQUIDATION – INCREASE" applicable to each entry, and lodged in the customhouse room where all bulletin notices were kept, this Court finds that it was a legally sufficient posting.

Customs promulgated a regulation to govern the procedure for liquidation, 19 C.F.R. § 159.9.[9] This regulation includes the form to be used and information to be supplied to effect a valid liquidation. Section 159.9(a) includes the words "Customs Form 4333." This Court notes that both parties concede that neither the ACS-generated nor offline bulletin notices are printed on Customs Form 4333. Def.'s Re-

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[9] 19 C.F.R. § 159.9 provides, in relevant part:

(a) *Bulletin notice of liquidation*. Notice of liquidation of formal entries shall be made on a bulletin notice of liquidation, Customs Form 4333.

. . .

(c) *Date of liquidation* – (1) *Generally.* The bulletin notice of liquidation shall be dated with the date it is posted or lodged in the customhouse for the information of importers. This posting or lodging shall be deemed the legal evidence of liquidation. For electronic entry summaries, the date of liquidation will be the date of posting of the bulletin notice of liquidation. Customs will endeavor to provide the filer with electronic notification of this date as an informal, courtesy notice of liquidation.

ply at 6–7; Oral Argument Tr. 30:14–15. This Court compared Customs Form 4333, the February 8th offline bulletin notice, and the April 30th ACS-generated bulletin notice. This Court finds that both notices contain substantially the same information that is required on Customs Form 4333 – a title indicating bulletin notice of liquidation with columns for entry type, entry number, entry date and importer. *Compare* Ryan Supplemental Decl. Attach. *with* Pl.'s Mem. at Ex. 9. Furthermore, the February 8th offline bulletin notice and April 30th ACS-generated bulletin notice have strikingly similar computer-generated formats with a title at the top of the document and the entry information listed in columns. An importer looking at the February 8th offline bulletin notice "could [not] have reasonably been misled or confused by the bulletin notice of liquidation, as posted," (bracketing original), and therefore such "[n]otice is legally sufficient." *Goldhofer Fahrzeugwerk*, 13 CIT at 56.

This Court acknowledges that the April 30th ACS-generated bulletin notice includes "CF 4333" in the top left-hand corner and that such identification is missing from the February 8th offline bulletin notice. Although this is administratively sloppy,[10] this Court cannot say that the February 8, 1999, offline bulletin notice of liquidation was a legally insufficient or fatally defective notice. This Court notes that there is no evidence that Plaintiff attempted to examine any postings in the customhouse during the relevant time. Def.'s Reply at 6. It is an established principle in customs law that the importer bears the burden of examining notices and protesting within the statutory time limit. *Juice Farms*, 68 F.3d at 1346. Based upon the facts at hand, this Court finds that Customs' facial error of the missing term "CF 4333 "on the February 8, 1999, offline bulletin notice was harmless.

Defendant points out Customs' offline bulletin notice procedure dates back well over thirty years. Ryan Supplemental Decl. ¶¶ 2–3; *see also* DiSalvo Decl. ¶ 4. There is no dispute that on February 8, 1999, "Customs placed a document in a notebook or binder in a room used by Customs at the Port of New York for making its bulletin notices of liquidation or reliquidation available to the public." Stipulated Facts ¶ 9. Upon examination of the February 8, 1999, document, this Court finds that this document is a sufficient bulletin notice of liquidation because it substantially complies with 19 C.F.R.

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[10] This Court also notes that Customs Standard Operating Procedure RL&P 91–1 states:

> Where it is necessary to post an offline bulletin, CF 4333 will be used. The form will be dated with the date of posting and will contain the importer's name, entry number and liquidation action – Increase, Refund, No Change, Reliquidation (with action, e.g., Increase).

Pl.'s Mem. at Ex. 6. This Court reminds Customs that it has the duty to follow its own regulations and procedures. If an agency cannot adhere to its existing regulations and procedures, it is incumbent upon such agency to effect legal revision.

§ 159.9. "Brokers, importers, counsel, sureties, and other interested parties have had the same access to off-line bulletin notices as they have had to the 'regular' bulletin notices." Ryan Supplemental Decl. ¶ 3. The onus of diligence, thus, rests upon the importer. *See Juice Farms*, 68 F.3d at 1346. Consequently, the posting of the offline bulletin notice deems the date of reliquidation of the subject entries as February 8, 1999.

Because the reliquidation date occurred on February 8, 1999, this Court finds that Customs was within the statutory time limit for voluntary reliquidation pursuant to 19 U.S.C. § 1501. Notwithstanding the irregularities riddling this case, this court has traditionally refused to elevate form over substance. *See, e.g., UST, Inc. v. United States*, 11 CIT 111, 114 (1987); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 6 CIT 187, 188, 573 F. Supp. 122 (1983). Because Plaintiff's protest date of July 29, 1999, was beyond the statutory limit to file a timely protest, this Court does not have jurisdiction to entertain this matter.

CONCLUSION

For the reasons stated herein, this Court holds that Customs' February 8, 1999, offline bulletin notice of liquidation was valid and that Plaintiff failed to timely protest. Therefore, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted for lack of jurisdiction. Henceforth, this case is dismissed. Judgment will be entered accordingly.

ERRATUM

Samuel Aaron, Inc. v. United States, Court No. 03–00053, Slip-Op. 06–126, dated August 17, 2006:

Page 3, last line, change "1998 " to "1999"

August 18, 2006

Slip Op. 06–127

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

Court No. 98–05–01598

Opinion

[Upon classification of certain synthetic silicon dioxide powders, judgment for the plaintiff.]

Decided: August 18, 2006

Barnes, Richardson & Colburn (*Rufus E. Jarman* and *Kevin J. Sullivan*) 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 ofJustice (*Bruce N. Stratvert*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs andBorder Protection (*Chi S. Choy*), of counsel, for the defendant.

AQUILINO, Senior Judge: This action, which has been designated a test case within the meaning of CIT Rule 84(b), causes the court to decide whether the Harmonized Tariff Schedule of the United States ("HTSUS") requires consideration of the surface chemistry of silicon dioxide in order to be classifiable as such under HTSUS heading 2811 ("Other inorganic acids and other inorganic compounds of nonmetals"), in particular, subheading 2811.22.50 ("Silicon dioxide: . . . Other"), which substance enters free of duty.

In this test case, the U.S. Customs Service, as it was then still known, may have attempted to take that chemistry into account[1] in determining to classify plaintiff's goods under HTSUS heading 3824, to wit,

> Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included [. . . ,]

subject to duty of 5 percent *ad valorem* per subheading 3824.90.90 (1997) thereunder. Whatever the Service's initial reasoning, a clear preponderance of the evidence adduced at trial confirmed that the merchandise is in fact silicon dioxide . . . other, produced synthetically, which defendant's expert witness characterized on direct examination as "marvelous products"[2].

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[1] *Cf.* Defendant United States' Proposed Findings of Fact and Conclusions of Law, Exhibit 1.

[2] Transcript of trial ("Tr."), p. 396. *Cf. id.* at 370.

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Any doubt post trial herein is thus engendered by the law that governed their classification upon import. The gist of plaintiff's position is that HTSUS subheading 2811.22.50 is an *eo nomine* provision and that it is

> well established that [such] a . . . provision includes all forms of the named article unless limited by its terms, or contrary to legislative intent, judicial decisions, long standing administrative practice, or demonstrated commercial designation. . . . Neither the tariff, the legislative history nor judicial decision limit the application of Subheading 2811.22. As the tariff does not define the term "silicon dioxide", this Court should interpret such term to incorporate all forms of silicon dioxide that fall within the term's common and commercial meaning. . . . [T]he articles involved herein are forms of synthetic silicon dioxide and fall within both the common and commercial meaning of such term. . . .

Plaintiff's Post Trial Brief, pp. 6–7 (citations omitted).

HTSUS General Rule of Interpretation 1 is that classification shall be determined according to the terms of the chapter headings and any relative section or chapter notes. Note 1(a) provides that Chapter 28 applies only to separate chemical elements and separate chemically defined compounds, whether or not containing impurities. The general note to this chapter adds:

> A separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a crystal lattice, the molecular species corresponds to the repeating unit cell.
>
> The elements of a separate chemically defined compound combine in a specific characteristic proportion determined by the valency and the bonding requirements of the individual atoms. The proportion of each element is constant and specific to each compound and it is therefore said to be stoichiometric.
>
> Small deviations in the stoichiometric ratios can occur because of gaps or insertions in the crystal lattice. These compounds are described as quasi-stoichiometric and are permitted as separate chemically defined compounds provided that the deviations have not been intentionally created.

Moreover, there are explanatory notes to the HTSUS which are not legally binding but which may be consulted for guidance and are generally indicative of the proper interpretation of its various provisions. *See, e.g., Motorola, Inc. v. United States*, 436 F.3d 1357, 1361

(Fed.Cir. 2006); *Arbor Foods, Inc. v. United States*, 30 CIT ___, ___, Slip Op. 06–74, p. 5 (May 17, 2006); *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1334 (Fed.Cir. 2005); *Simon Marketing, Inc. v. United States*, 29 CIT ___, ___, 395 F.Supp.2d 1280, 1287 (2005); *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250 (Fed.Cir. 2004); *ABB, Inc. v. United States*, 28 CIT ___, ___ and 346 F.Supp.2d 1357, 1361 n. 3 (2004); *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 n. 3 (Fed.Cir. 2003); *Filmtec Corp. v. United States*, 27 CIT ___, ___, 293 F.Supp.2d 1364, 1369 (2003); *Jewelpak Corp. v. United States*, 297 F.3d 1326, 1338 (Fed.Cir. 2002); *Boen Hardwood Flooring, Inc. v. United States*, 26 CIT 253, 257, 196 F.Supp.2d 1331, 1337 (2002); *General Elec. Company-Medical Systems Group v. United States*, 247 F.3d 1231, 1236 (Fed.Cir. 2001); *Carrini, Inc. v. United States*, 25 CIT 857, 860 (2001); *JVC Co. of America v. United States*, 234 F.3d 1348, 1352–53 (Fed.Cir. 2000); *Ero Industries, Inc. v. United States*, 24 CIT 1175, 1180, 118 F.Supp.2d 1356, 1360 (2000); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n. 1 (Fed.Cir. 1999); *North American Processing Co. v. United States*, 23 CIT 385, 2387 and 56 F.Supp.2d 1174, 1176 n. 5 (1999); *EM Industries, Inc. v. United States*, 22 CIT 156, 162, 999 F.Supp. 1473, 1478 (1998); *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1428 (Fed.Cir. 1997); *H.I.M./Fathom, Inc. v. United States*, 21 CIT 776, 779, 981 F.Supp. 610, 613 (1997); *Verosol USA, Inc. v. United States*, 20 CIT 1251, 1252 and 941 F.Supp. 139, 140 n. 5 (1996); *Totes, Inc. v. United States*, 69 F.3d 495, 500 (Fed.Cir. 1995); *Marubeni America Corp. v. United States*, 35 F.3d 530, 535 n. 3 (Fed.Cir. 1994); *Beloit Corp. v. United States*, 18 CIT 67, 80, 843 F.Supp. 1489, 1499 (1994); *THK America, Inc. v. United States*, 17 CIT 1169, 1175, 837 F.Supp. 427, 433 (1993); *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed.Cir. 1992).

The explanatory notes to chapter 28, HTSUS confirm that silicon dioxide is an inorganic oxygen compound of a nonmetal and state further:

> (M) **SILICON COMPOUNDS**
>
> **Silicon dioxide** (pure silica, silicic anhydride, etc.)(SiO_2). Obtained by treating silicate solutions with acids, or by decomposing silicon halides by the action of water and heat.
>
> It can be either in amorphous form (as a white powder "silica white", "flowers of silica", "calcined silica"; as vitreous granules - "vitreous silica"; in gelatinous condition - "silica frost", "hydratedsilica"), or in crystals (tridymite and cristobalite forms).
>
> Silica resists the action of acids; fused silica is therefore used to make laboratory apparatus and industrial equipment which can be suddenly heated or cooled without breaking (see General

Explanatory Note to Chapter 70). Finely powdered silica is used as an extender in the manufacture of paints and as a filler for lakes. Activated silica gel is employed to dry gases.

The heading **excludes:**

(a) Natural silica (**Chapter 25**, except varieties constituting precious or semi-precious stones - see the Explanatory Notes to **headings 71.03** and **71.05**).

(b) Colloidal suspensions of silica are generally classified in **heading 38.24** unless specially prepared for specific purposes (e.g., as textile dressings of **heading 38.09**).

(c) Silica gel with added cobalt salts (used as a humidity indicator)(**heading 38.24**).

Boldface in original.

A

The court's jurisdiction in this matter is based upon 28 U.S.C. §§ 1581(a), 2631(a), and the trial proceeded pursuant to a pretrial order that set forth the following as uncontested facts:

1. The word "silica" denotes the compound silicon dioxide, SiO_2, and encompasses various forms, including crystalline silicas, vitreous silicas and amorphous silicas.

2. The basic structural unit of silica is a tetrahedral arrangement of four oxygen atoms surrounding a central silicon atom. The SiO_2 stoichiometry requires that on average each oxygen must be shared by silicons in two tetrahedra.

3. Amorphous silicas include precipitated silicas, silica gels, and pyrogenic silicas.

4. Pyrogenic silicas, also known as fumed silicas, are fluffy white powders consisting of approximately spherically shaped particles.

5. Fumed silica is produced by flame hydrolysis of silicon tetrachloride ($SiCl_4$) in an oxygen-hydrogen gas flame. The result is an extremely fine particle of silicon dioxide. The by-product of this process is predominantly hydrogen chloride plus some water vapor.

6. Alternatively, the fumed silica can be produced by flame hydrolysis of organosilanes in an oxygen-hydrogen gas flame. In this case, carbon dioxide is a by-product.

7. Fumed silica particles form aggregates and larger, loose, network structures known as agglomerates.

8. The products at issue in this case are AEROSIL® R202, AEROSIL® R805, AEROSIL® R812, AEROSIL® R812S, AEROSIL® R972, AEROSIL® US202, AEROSIL® US204, AEROSIL® R104, and AEROSIL® R976.

9. The surface of silica contains two functional groups: siloxane groups and silanol groups (Si-OH) where the silanol groups arise from the interaction with water vapor.

10. Siloxane groups are largely inert chemically and have a mild hydrophobic nature in terms of being able to disperse in either water or organic solvents.

11. Silanol groups are "water attractive" and adsorb water vapor well. Thus, they are hydrophilic in nature.

12. Immediately after production of AEROSIL®, the silanol groups on the surface of the silica particle are mainly isolated. Upon exposure to water vapor, adsorbed water groups from the air react with strained siloxane groups and form bridged silanol groups.

13. Due to the presence of the silanol groups on the surface of silica particles, the standard AEROSIL® silica is hydrophilic.

14. To produce surface-treated silica, some of the silanol groups on the surface of the silica particle are reacted with silanes such as dimethyldichlorosilane, hexamethyldisilazane, trimethylozyoctylsilane or with silicone oil as part of the continuous, manufacturing process.

15. Surface treatment reduces the silanol groups to about 30% of the initial value, the exact amount depending on the surface treatment.

16. The products at issue are not separate chemical elements.

17. The compounds in issue are not quasi-stoichiometric.

What was confirmed or added at trial to these stipulated facts is that each AEROSIL® at issue is hydrophobic. *See, e.g.*, Tr. at 63; Plaintiff's Exhibit 6, p. 40. *Cf.* Tr. at 137–39. Each is manufactured by flame hydrolysis of silicon tetrachloride in an oxygen-hydrogen gas flame. *See id.* at 19, 125; Plaintiff's Exhibit 6, p. 11 and Exhibit 20, p. 4. Each is at least 99.8 percent amorphous silicon dioxide. *See* Plaintiff's Exhibit 6, p. 79; Exhibit 19, second page; Exhibits 32, 33, 34, 35, 36, 37, 38, 39, 40. *Compare* Tr. at 82 *with id.* at 153–54 *and* at 284–88 *and* at 371. Each product is a white, fluffy powder consisting of spherically-shaped particles. *See* Plaintiff's Exhibit 20, pp. 4–5. Each primary particle encompasses some 10,000 SiO_2 units. *See*

Plaintiff's Exhibit 6, p. 24. Those particles form the aggregates and the agglomerates. *See* Tr. at 46.

The fumed silica has a basic structure of silicon and oxygen atoms in a tetrahedral arrangement where four oxygen atoms surround a central silicon atom. *See id*. at 160–61; Plaintiff's Exhibit 6, p. 17. As initially produced, at the surface of each silica particle are silicon and oxygen atoms with unfilled chemical bonds and valences capable of reaction in their ambient environment. *See* Tr. at 28, 252, 417. That reaction can be with water vapor engendered by the oxygen-hydrogen gas flame. *See id*. at 28, 269. When that is the reaction, the result is a product surface that contains inert siloxane groups (Si-O-Si) and active silanol groups (SiOH).[3] When that is the reaction, the result is hydrophilic.

The plaintiff produces the AEROSIL® at issue herein via reactions with the substances set forth in stipulated paragraph 14, *supra*. *See id*. at 31; Plaintiff's Exhibit 18, second page. They block the formation of additional silanol groups on the silica surface which would otherwise result from exposure to the ambient environment. *See* Tr. at 27–28, 31, 240. Depending on the silane used, the residual silanol groups can range from 30 to 70 percent of the original number on an untreated surface. *See id*. at 30, 34, 85, 259; Plaintiff's Exhibit 6, p. 55. They are needed for the particular product's intended performance. *See* Tr. at 35. Whatever the precise treatment, however, does not affect the bulk of the silica, which retains its regular SiO_2 structure. *See id*. at 32, 269, 283. *Cf.* Plaintiff's Exhibit 6, p. 55, fig. 58.

In the end, the record shows and the court finds that the hydrophobic silica has lower moisture adsorption (or wettability) that allows it to be incorporated into certain organic solvents and polymers faster and easier than hydrophilic.

B

Given this evidence, the defendant points out, among other things, that

> the number of silo groups on the surface of the products in issue may vary from particle to particle, or even from batch to batch. Moreover, the products in issue do not contain permissible "impurities," in the form of the hydrocarbon moieties, within the meaning of Chapter 28, Note 1(a). The Explanatory Notes for Chapter 28, Chapter Note 1, provide guidance as to the meaning of "impurities" in Note 1(a). . . . Significantly, here,

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[3] *See* Tr. at 28, 251; Plaintiff's Exhibit 8, p. 2. Silanol is a "member of the family of compounds whose structure contains a silicon atom that is bound directly to one or more hydroxyl groups." McGraw Hill Dictionary of Scientific and Technical Terms, p. 1824 (5th ed. 1994). A hydroxyl group is an oxygen atom bonded to an atom of hydrogen. *See id*. at 972–73.

> the[y] . . . state that substances (from the manufacturing process) are not in all cases to be regarded as "impurities" permitted under Note 1(a). "When such substances are deliberately left in the product with a view to rendering it particularly suitable for specific use rather than for general use, they are **not** regarded as permissible impurities. . . ."[4]
>
> [ ] Here, the carbon containing moieties in the products in issue are deliberately incorporated in, and left in, the products, with a view toward rendering them particularly suitable for specific use.[5]

The court concurs. But the above-quoted law, on its face, does not foreclose classification of plaintiff's products under HTSUS subheading 2811.22.50. They are fumed silicon dioxide with surface silanol groups, albeit intentionally reduced in number. That reduction has not left any of them within the purview of the three specific exclusions of the foregoing explanatory note, neither (a) natural silica nor (b) colloidal suspensions of silica nor (c) silica gel. There is no exclusion of the carbon-containing moieties added to their respective surfaces. Moreover, while it can be argued, as the defendant does, that the "products in issue are reaction products of silicon dioxide with other materials"[6], counsel have stipulated in the pretrial order, paragraph 17, that the compounds in issue are not quasi-stoichiometric. Hence, they are not within the meaning of the precluded "deviations [that] have . . . been intentionally created" per general note 1 to HTSUS chapter 28, *supra*.

The defendant refers to explanatory notes regarding titanium oxides, number 28.23, and calcium carbonates, number 28.36. The first indicates that when titanium oxide is surface-treated it falls under HTSUS heading 3206, not within chapter 28. Note 28.36 advises that, when the particles of calcium carbonate powder are coated with a water-repellant film, classification should be under heading 3824, not 2836. Whatever the merit of these attempted analogies, there is no such note for silicon dioxide, the absence of which tends to support plaintiff's position.

II

Courts continuously remind parties to classification-of-chemicals cases such as this that determination of the nature of a good, in order to place it in the proper tariff category, is an issue of fact. *E.g.*, *Metchem, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–105, p. 2 (July 14, 2006), and cases cited therein. Here, the plaintiff has

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[4] *Supra* note 1, p. 20, para. 5 (citation omitted, emphasis in original).

[5] *Ibid.*, para. 6.

[6] *Id.* at 21, para. 7.

borne its burden of proving that the bulk and the essence of each of its powders at issue are silicon dioxide, a separate chemically-defined compound. To find otherwise would clearly run contrary to the weight of the evidence on the record and convolute their correct classification:

> You would have to torture something in chemistry totry and make surfaces stoichiometric or to encompass themtotally in the definition of a bulk. . . .

Tr. at 45. *See also id.* at 108, 190–91, 194, 201, 202, 220, 229–30, 237, 239, 240, 241, 253, 258, 262, 284–85, 322, 358, 411, 419, 420, 423–24, 426, 434–35, 437–38.

Judgment must therefore enter on behalf of the prevailing party plaintiff.