Slip Op. 06–143

MITTAL CANADA, INC., Plaintiff, v. UNITED STATES, Defendant, and GERDAU AMERISTEEL CORP., and KEYSTONE CONSOLIDATED INDUSTRIES, INC., Defendant-Intervenors.

Before: Richard W. Goldberg,
Senior Judge
Court No. 05–00689

[Plaintiff's motion for summary judgment denied.]

Dated: September 22, 2006

Cameron & Hornbostel LLP (*Dennis James, Jr.* and *Alexandra E.A. Minoff*) for Plaintiff Mittal Canada, Inc.

Peter D. Keisler, Assistant Attorney General; *Marisa Beth Goldstein*, U.S. Department of Commerce, Office of Chief Counselfor Import Administration; Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*), for Defendant United States.

Kelley Drye Collier Shannon (*Mary Tuck Staley, Paul Charles Rosenthal,* and *Robin H. Gilbert*) for Defendant-Intervenors Gerdau Ameristeel Corp. and Keystone Consolidated Industries, Inc.

OPINION

GOLDBERG, Senior Judge: This case presents the Court with plaintiff Mittal Canada, Inc.'s (**"Mittal"**) challenge to liquidation instructions that the United States Department of Commerce (**"Commerce"**) issued to United States Customs and Border Protection (**"Customs"**) on December 15, 2005. The events leading to this dispute are described in the Court's opinion of February 10, 2006 that denied Mittal's request for preliminary injunctive relief enjoining Customs from liquidating the entries at issue. *See Mittal Can., Inc. v. United States*, 30 CIT ___, ___–___, 414 F. Supp. 2d 1347, 1348–50 (2006) (**"Mittal-PI"**).

Since the denial of the preliminary injunction motion, Customs has liquidated the entries at issue consistent with the liquidation instructions that Mittal's case calls into question. Mittal has moved for

summary judgment on its underlying claim, requesting that the Court enter judgment in its favor and remand to Commerce with instructions to order Customs to reliquidate the entries at 3.86 percent and refund the difference between that amount and the 8.11 percent at which they were already liquidated. *See* Pl.'s Br. at 36. For the reasons stated in *Mittal-PI,* and because in this case liquidation does not operate to divest the United States Court of International Trade (**"CIT"**) of jurisdiction, *see Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004), the Court has jurisdiction over this case under 28 U.S.C. § 1581(i).

I. *BACKGROUND*

Because the parties are familiar with the background of this case, and because all relevant facts have already been recited at *Mittal-PI*, 30 CIT at ___ , 414 F. Supp. 2d at 1348–50, a lengthy description of the facts is not necessary at this stage. It suffices for the moment to note that Mittal requested and received a changed circumstances review[1] of *Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 65944 (Dep't Commerce Oct. 29, 2002) (notice of amended final determination and antidumping duty order). That antidumping duty order had provided for a weighted average dumping margin of 3.86 percent for Ispat Sidbec Inc. (**"Ispat"**). The "all others" rate was 8.11 percent. The final results of the changed circumstances review acknowledged that Mittal was the successor-in-interest to Ispat, and directed Customs to require a cash deposit rate of 3.86 percent for Mittal entries occurring in the future. Commerce then instructed Customs to assess duties at the cash deposit rate in effect at the time of entry for all merchandise that had entered between October 1, 2004 and September 30, 2005 – a period that included the pendency of the changed circumstances review. Mittal's entries were accordingly liquidated at the 8.11 percent "all others" rate that was in effect at the time of those entries.

At the preliminary injunction stage in the proceedings, Mittal's argument could be characterized as broadly alleging that Commerce's instructions, by failing to order assessment at the lower rate of 3.86 percent, were contrary to the legal conclusion, articulated in the final results of the changed circumstances review, that Mittal was the successor-in-interest of Ispat. Since then, Mittal has refined its argument.

On June 19, 2006, Mittal filed a motion for judgment upon the agency record. In its motion, Mittal made two arguments: (1) that in this case the "automatic liquidation" regulation under which Commerce ordered liquidation, 19 C.F.R. § 351.212, does not require that

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[1] Commerce published the final results of the changed circumstances review in the *Federal Register* at *Carbon and Certain Alloy Steel Wire Rod from Canada*, 70 Fed. Reg. 39484 (Dep't Commerce July 8, 2005) (notice of final results of changed circumstances review).

duties be automatically liquidated at the deposit rate in effect at the time of entry; and (2) that the regulation, if it is construed to contain such a requirement, is itself arbitrary and capricious.

II. *STANDARD OF REVIEW*

Mittal has filed a motion for judgment on the agency record under USCIT Rule 56.1. Rule 56.1 outlines the procedures for adjudicating a motion for judgment on an agency record in "an action other than that described in 28 U.S.C. § 1581(c)." USCIT R. 56.1. Since this case invokes the CIT's residual jurisdiction under 28 U.S.C. § 1581(i), a Rule 56.1 motion is the appropriate vehicle under which to proceed.

Courts review 28 U.S.C. § 1581(i) actions as provided in 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e) (2000). Section 706 of Title 5 requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A) (2000). In this case, the administrative action challenged by Mittal is the issuance of liquidation instructions directing Customs to assess antidumping duties at the deposit rate in effect at the time of entry, which was 8.11 percent for the entries at issue.

Normally, "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), but when Congress has cloaked an administrative agency with interpretive authority, the federal courts' authority is concomitantly reduced. The threshold question a court must answer is how much, if any, deference Congress has granted to the agency.

This case involves judicial review of two separate types of agency activity. First, Mittal challenges Commerce's promulgation of the automatic liquidation regulation, codified at 19 C.F.R. § 351.212. Second, Mittal challenges Commerce's interpretation of language in the automatic liquidation regulation. These questions present different problems, and merit distinct treatment by a reviewing court.

III. *DISCUSSION*

A. Commerce's Regulation 19 C.F.R. § 351.212 Is in Accordance with Law

Mittal contends that Commerce's automatic liquidation regulation 19 C.F.R. § 351.212 is not in accordance with law. Specifically, Mittal claims that the regulation is internally inconsistent and that the failure to provide an exemption from automatic liquidation for changed circumstances reviews is arbitrary and capricious.

1. Commerce's Promulgation of 19 C.F.R. § 351.212 Is Entitled to Chevron *Deference*

As noted above, the Court must determine how much, if any, deference is due to Commerce's automatic liquidation regulation. Congress delegates interpretive authority to agencies both expressly and impliedly. Where Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). In other circumstances, Congress may impliedly authorize an agency to pronounce its judgment on an issue with the force of law. *See id.* at 844; *see also Cathedral Candle Co. v. United States*, 400 F.3d 1352, 1361 (Fed. Cir. 2005). An agency has implicit authority when it is

> apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result.

United States v. Mead Corp., 533 U.S. 218, 229 (2001) (*quoting Chevron*, 467 U.S. at 845). Where *Chevron* deference is applicable, the court must give effect to the agency's statutory interpretation provided that the interpretation is reasonable and not arbitrary. *See Lacavera v. Dudas*, 441 F.3d 1380, 1383 (Fed. Cir. 2006).

As a general matter, Commerce is the "master" of antidumping law, and where its rules and regulations implement a statutory provision or scheme, it is entitled to considerable deference. *See Daewoo Elecs. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried & Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993); *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983). Therefore, the Court's inquiry must commence by examining the statutory provisions and scheme that purportedly authorized the regulation.

If an antidumping duty investigation determines that dumping is occurring, Commerce publishes an antidumping duty order which directs Customs to assess antidumping duties "equal to the amount by which the normal value [of the merchandise] exceeds the export price (or the constructed export price) for the merchandise. . . ." 19 U.S.C. § 1673 (2000). The method by which Customs is to assess the duties, however, is not specified in section 1673.

Prior to 1984, Commerce conducted yearly administrative reviews for all antidumping duty orders.[2] *See* 19 U.S.C. § 1675(a)(1) (1982);

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[2] For purposes of this opinion, the term "administrative review" refers to a "periodic review" under 19 U.S.C. § 1675(a), as distinguished from a "changed circumstances review"

19 C.F.R. § 353.53(a) (1983). Commerce promulgated regulations that governed the assessment of antidumping duties for merchandise subsequent to these administrative reviews. *See* 19 C.F.R. § 353.53(d) (1983) (requiring the publication of a revised antidumping duty order subsequent to each administrative review); *id.* § 353.48(a)(1) (requiring Commerce to instruct Customs to assess duties as soon as Commerce "has received satisfactory information upon which such assessment may be based"). In 1984, Congress amended the statute to remove automatic yearly administrative reviews, and instead made administrative reviews available only on request. *See* Pub. L. No. 98–573, § 611, 98 Stat. 3031 (1984). After the amendment, then, there was a gap in the statute whereby entries that were not subject to administrative reviews would not be subject to the assessment regulation 19 C.F.R. § 353.48(a)(1) (1983). Congress was aware of this gap, and contemplated a regulatory solution: "the administering authority [i.e., Commerce] should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested. . . ." H.R. Rep. No. 98–1156, at 181 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5298.[3]

In 1985, Commerce filled this lacuna by promulgating 19 C.F.R. § 353.53a(d), which was the precursor to the current automatic liquidation regulation 19 C.F.R. § 351.212(c). *See Antidumping and Countervailing Duties; Administrative Reviews on Request; Transition Provisions*, 50 Fed. Reg. 32556, 32557–58 (Dep't Commerce Aug. 13, 1985) (notice of rulemaking). In creating 19 C.F.R. § 351.212, Commerce has put in place procedures designed to effectuate Congress' imprecise command for Commerce to assess duties, *see* 19 U.S.C. § 1673. Because the statute leaves a gap for the agency to fill, and because 19 C.F.R. § 351.212 fills that gap, the Court owes *Chevron* deference to the agency, and will overturn its regulation only if it is unreasonable, arbitrary, or capricious.

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under 19 U.S.C. § 1675(b). Although it may perhaps be more faithful to the statutory text to refer to "changed circumstances reviews" and "periodic reviews" as subcategories of "administrative reviews," the Court adopts the customary agency vocabulary by equating "administrative reviews" with 19 U.S.C. § 1675(a) "periodic reviews."

[3] *See also Torrington Co. v. United States*, 19 CIT 1189, 1198, 903 F. Supp. 79, 87 (1995) ("The legislative history of this provision, however, clearly required Commerce to promulgate a regulation for the assessment of antidumping duties on entries for which no review is requested.").

2. Commerce's Automatic Liquidation Regulation 19 C.F.R. § 351.212 Is Neither Internally Inconsistent Nor Unreasonable on Account of the Lack of Exception for Changed Circumstances Reviews

Mittal contends that 19 C.F.R. § 351.212 is arbitrary and therefore void.[4] First, Mittal argues that the regulation is internally inconsistent because subsection (a) conflicts with subsection (c). Second, Mittal claims Commerce's failure to create an exception to automatic liquidation that takes account of findings in changed circumstances reviews is arbitrary and capricious. *See* Pl.'s Br. at 34–36.

Where an agency's interpretation of a statute is internally inconsistent, its claim to reasonableness is obviously compromised. *Cf. Taylor v. Vt. Dept. of Educ.*, 313 F.3d 768, 779 (2d Cir. 2002) (refusing to approve interpretation of a regulation that would create internal inconsistencies); *but see IAL Aircraft Holding, Inc. v. FAA*, 206 F.3d 1042, 1050 (11th Cir. 2000) (Cox, J., dissenting) (noting that internal inconsistency is not problematic unless it renders an agency interpretation unreasonable). Subsection (a) introduces how Customs is to assess duties on entries:

> Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no [administrative] review has been completed, the cash deposit rate applicable at the time merchandise was entered.

19 C.F.R. § 351.212(a) (2005). Later, subsection (c) describes the process as follows:

> If the Secretary does not receive a timely request for an administrative review of an order . . . the Secretary, without additional notice, will instruct the Customs Service to . . . [a]ssess

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[4] Mittal also makes a broad claim that Commerce's "regulations" are arbitrary because "there is no specific provision in the regulations for changed circumstances reviews that do not involve revocation of an order." Pl.'s Br. at 34. Notably, Mittal has adduced no argument as to why the regulations *ought to involve* anything more than a revocation of an order, and the Court cannot discern Mittal's argument even in the context of the rest of its brief. As such, the terms of the contention do not lend themselves to judicial examination. *Cf. Seay v. TVA*, 339 F.3d 454, 478 (6th Cir. 2003) ("Because we cannot discern from the vague reference to 'MSPB standards' what Plaintiff's argument is, we affirm the district court's dismissal of this count."). It is possible that Mittal is claiming that Commerce acted illegally by conducting a changed circumstances review and ordering relief other than revocation. However, this dispute is not the occasion to bring that question before the CIT; after all, in this case, Mittal not only brought the changed circumstances review itself, but it also is insisting that relief other than revocation be imputed to the final changed circumstances determination.

> antidumping duties or countervailing duties, as the case may be, on the subject merchandise . . . at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry. . . .

Id. § 351.212(c)(1).

Mittal notes that subsection (a) contemplates two possible assessment rates for entries as to which no administrative review is requested: (1) the rate established in the completed review covering the most recent prior period and (2) the cash deposit rate applicable at the time merchandise was entered. On the other hand, subsection (c) mandates assessment at the "rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry. . . ." *Id*. On Mittal's reading, the inclusion of "the rate established in the completed review covering the most recent prior period" in subsection (a) contradicts the plain language of subsection (c), which appears to require assessment at the deposit rates in all cases where a review is not requested for the current period. *See* Pl.'s Br. at 34 (*citing id*. at 26 n.4). Mittal believes that this alleged inconsistency is "a remnant of a proposed change in section 351.212(c) that should not be in the final version of the regulation." *Id*. at 26 n.4; *see also* Def. Int.'s Br. at 8 n.2 (agreeing with Mittal's assessment of the inconsistency).

Mittal's inconsistency argument is not properly before the Court because Mittal lacks standing. After all, Mittal did not merely decline to request a review for the current period: it never requested a review for any prior period either.[5] If an inconsistency exists, it did not in any way affect the treatment of Mittal in this case. Both subsections require the same result as to Mittal's entries, and Mittal accordingly stands to gain nothing from a determination that the inclusion of a separate treatment for past administrative reviews in subsection (a) is unreasonable. There is no line of causation between the agency action and Mittal's injury. *See Warth v. Seldin*, 422 U.S. 490, 504 (1975). Because the U.S. Constitution prevents federal courts from adjudicating hypothetical disputes, *see Steel Co. v. Citizens for a Better Envm't*, 523 U.S. 83, 101–02 (1998), Mittal's inconsistency argument must be disregarded.

Mittal certainly has standing to pursue its second argument, which merits more attention. As discussed earlier, automatic liquidation applies only "[i]f [Commerce] does not receive a timely request for an administrative review of an order." 19 C.F.R. § 351.212(c)(1) (2005). The regulation also exempts entries subject to new shipper reviews and expedited antidumping reviews from automatic liquida-

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[5] Of course, the lack of administrative reviews from prior periods is explained by the fact that Mittal was only recently constituted.

tion. *See id*. 351.212(c)(3). Mittal questions why Commerce may provide for these exemptions, but not provide an exemption for changed circumstances reviews. Mittal's argument relies on an assumption that a changed circumstances review is identical in all relevant aspects to the new shipper review and the expedited antidumping review. If the reviews are indeed identical, the distinction is arbitrary and even under *Chevron* deference the Court must invalidate the regulation. If, however, Commerce has a reasonable basis for not exempting changed circumstances reviews from automatic liquidation, the distinction is not arbitrary and the Court will defer to the agency's construction of the statutes it is charged with implementing. *See Chevron*, 467 U.S. at 844.

Commerce argues that the distinction can be attributed to the different consequences flowing from the two sets of reviews. It points out, correctly, that when Commerce conducts a new shipper review or an expedited antidumping review, it calculates the normal value and export price of specific entries and determines an actual dumping margin that serves as the basis for assessment of duties. *See* 19 U.S.C. § 1673e(c) (2000) (allowing Commerce to permit posting bond or other security in lieu of depositing duties, provided an expedited review of the normal value and export price is possible); *id*. § 1675(a)(2)(B) (requiring Commerce to "conduct a review . . . to establish an individual weighted average dumping margin" during a new shipper review).[6] In this respect, these reviews are identical to the administrative reviews that are exempted outright from automatic liquidation.

Changed circumstances reviews, however, do not *necessarily* calculate the normal value and export price, and do not *necessarily* relate to specific entries. Commerce emphasizes the broad range of matters to which changed circumstances reviews may relate.[7] Commerce contends that 19 C.F.R. § 351.212 seeks to halt automatic liquidation at the deposit rates when there is an ongoing review of the as-

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[6] The "weighted average dumping margin" mentioned in 19 U.S.C. § 1675(a)(2)(B) signifies "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter of producer." 19 U.S.C. § 1677(35)(B) (2000). The term "dumping margin" means "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id*. § 1677(35)(A).

[7] Commerce may initiate a changed circumstances review to examine several factors wholly unrelated to assessment rates. The scope of Commerce's authority to initiate changed circumstances reviews under 19 U.S.C. § 1675(b) is delimited only by the general requirement that there be "changed circumstances sufficient to warrant a review" of the antidumping order. *See* 19 U.S.C. § 1675(b)(1) (2000). Commerce's discretion is broad, and the range of matters subject to changed circumstances reviews is wide. *See, e.g., Or. Steel Mills, Inc. v. United States*, 862 F.2d 1541, 1545 (Fed. Cir. 1988) (review of amount of domestic industry support of antidumping duty order); *Jia Farn Mfg Co., Ltd. v. United States*, 17 CIT 187,193, 817 F. Supp. 969, 974 (1993) (review of importer's resales of other producer's merchandise); *Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 71 Fed. Reg. 37906 (Dep't Commerce July 3, 2006) (final results of changed circumstances review)

sessment rate. On this view, the agency declined to similarly exempt changed circumstances reviews because many, if not most, of those reviews do not result in modified assessment rates. The Court finds that Commerce's distinction, implicit in 19 C.F.R. § 351.212, between changed circumstances reviews and reviews which necessarily determine assessment rates, is reasonable and the regulation is therefore in accordance with law.

B. Commerce's Interpretation of 19 C.F.R. § 351.212 Is in Accordance with Law

1. Commerce's Interpretation of 19 C.F.R. § 351.212 Is Entitled to Seminole Rock/Auer *Deference*

Here, Commerce interprets 19 C.F.R. § 351.212 as requiring automatic liquidation at the cash deposit rate in effect at the time of entry. Courts will defer to an agency's fair and considered interpretation of its own ambiguous regulation, unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). The United States Court of Appeals for the Federal Circuit (**"Federal Circuit"**) has recently distilled the various factors affecting deference to agencies' regulatory interpretations into a tripartite test. In *Gose v. United States Postal Service*, the Federal Circuit observed that "in order to merit *Seminole Rock* deference, the agency's interpretation (1) must have been directed to regulatory language that is unclear; (2) must have been actually applied in the present agency action; and (3) must not be plainly erroneous or inconsistent with the regulation." *Gose v. U.S. Postal Svc.*, 451 F.3d 831, 839 (Fed. Cir. 2006). "In addition," that court added, "we consider the consistency *vel non* with which the agency has applied that interpretation." *Id.*; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.") (quotation marks omitted).[8]

Turning to the first of the *Gose* test factors, the regulation is ambiguous in that the interpretation urged by Mittal is not compelled

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(successor-in-interest review); *Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 70 Fed. Reg. 21396 (Dep't Commerce Apr. 26, 2005) (notice of initiation of changed circumstances review) (reviewing non-market economy status).

[8] An agency's consistency over time in interpreting its regulations eliminates the danger that the agency is attempting a post hoc rationalization of its actions. Where an agency has maintained a steady interpretive position over time, it is obvious that that position has not been adopted as a litigation tool to defend its past conduct. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

by the plain language of the text of the regulation.[9] Second, Mittal does not dispute that Commerce applied its interpretation to the liquidation instructions at issue.

Moreover, this case does not present an interpretation of an agency regulation conflicting with a prior interpretation. As will be discussed below, the interpretive stance taken by Commerce in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23954 (Dept' Commerce May 6, 2003) (notice of policy) (**"Reseller Policy"**) applies to a different set of circumstances, and is in no way inconsistent with Commerce's interpretation of the issue presented in this case. It is true, as Mittal points out, that Commerce argued before the CIT in 1993 that automatic liquidation applied only to entries of companies that were subject to a specific cash deposit rate and not to those entries subject to the "all others" rate. *See Federal-Mogul Corp. v. United States*, 17 CIT 442, 447, 822 F. Supp. 782, 787 (1993). In that case, however, the CIT refused Commerce's interpretation, holding that

> the statutory framework for administrative reviews clearly anticipates that in cases where a company makes cash deposits on entries of merchandise subject to antidumping duties, and no administrative review of these entries is requested, the cash deposit rate automatically becomes that company's assessment rate for those entries. . . . In a situation where a company's entries are unreviewed, the prior cash deposit rate from the [less than fair value] investigation becomes the assessment rate. . . .

Federal-Mogul, 17 CIT at 448, 822 F. Supp. at 787–88. Since then, Mittal has provided no example of Commerce interpreting the automatic liquidation instruction in a way that contravenes the *Federal-Mogul* holding. On the other hand, Commerce has reiterated its commitment to liquidate at the cash deposit rate in effect at the time of entry where automatic liquidation applies. *See, e.g., Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27313 (Dep't Commerce May 19, 1997) (notice of rulemaking) (Commerce declaring its intention "instruct the Customs Service to liquidate that entry and assess duties at the rate *in effect at the time of entry*") (emphasis added).

Therefore, Commerce's reading of the regulation constitutes a consistent interpretation of an ambiguous regulation that was actually applied in the issuance of the liquidation instructions. As such, the Court will apply a highly deferential review to Commerce's interpretation of 19 C.F.R. § 351.212, and will set aside the agency action

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[9] In this case, it is more likely that Commerce's interpretation, and not Mittal's, represents the unambiguous import of the regulation at issue. However, the Court will assume that there is some substantial interpretive question to resolve in light of the *Reseller Policy*, discussed below.

only if Commerce's action was "plainly erroneous or inconsistent with the regulation." *Gose*, 451 F.3d at 839.

2. Commerce's Interpretation that the "Rate Applicable" Mentioned in 19 C.F.R. § 351.212(a) and the "Required Rate" in 19 C.F.R. § 351.212(c)(1) Refer to the Deposit Rate in Effect at the Time of Entry Is Neither "Plainly Erroneous" Nor "Inconsistent with the Regulation" and Therefore Is in Accordance with Law

As discussed in some detail at *Mittal-PI*, 30 CIT at ___, 414 F. Supp. 2d at 1355–56, the United States uses a "retrospective" system for the assessment of antidumping duties and countervailing duties. The system is "retrospective" because importers or their brokers are required to deposit estimated duties prior to imports entering the stream of commerce in the United States. *See* 19 U.S.C. § 1673e(a)(3) (2000). These deposits are merely estimates, however, of a final amount due at a later date when the entries are *liquidated* and the duties are *assessed*.

19 C.F.R. § 351.212 regulates the assessment of antidumping and countervailing duties. The regulation, as noted above, contains two provisions relating to the automatic liquidation of merchandise not subject to an administrative review. Subsection (a) provides that where no administrative review has been requested, "duties are assessed at . . . the cash deposit rate applicable at the time merchandise was entered." 19 C.F.R. § 351.212(a) (2005). Later, subsection (c) requires that Commerce instruct Customs to liquidate entries as to which no review has been requested "at rates equal to the cash deposit of . . . estimated antidumping duties or countervailing duties required on that merchandise at the time of entry . . . ." *Id.* § 351.212(c)(1). Commerce interprets both these provisions to constitute a requirement for Commerce to instruct Customs to liquidate the entries and assess duties equal to the deposit rate *in effect at the time of entry*.

Mittal contends that Commerce's interpretation of subsections (a) and (c)(1) are outside the bounds of reasonableness. Specifically, Mittal maintains that the "cash deposit rate applicable at the time the merchandise was entered" (subsection (a)) and "the rate equal to the cash deposit of estimated antidumping duties required on that merchandise at the time of entry" (subsection (c)(1)) are the cash deposit rate found to be appropriate following a changed circumstances review. *See* Pl.'s Br. at 27.

a. Subsection (a): "The Cash Deposit Rate Applicable at the Time the Merchandise Was Entered"

Mittal argues that "applicable," as used in 19 C.F.R. § 351.212(a), means "able of being applied" or "appropriate." *See id.* at 26. While Mittal admits that the "applied" cash deposit rate was 8.11 percent,

it insists that after the publication of the changed circumstances review results, the "applicable" cash deposit rate was 3.86 percent. *See id*. at 27.

The Court does not dispute Mittal's flexible reading of the word "applicable." The term appears countless times in modern statutory language, and in multifarious contexts. Neither does the Court dispute the numerous court decisions and dictionary definitions of "applicable" that Mittal cites in support of its interpretation. *See* Pl.'s Br. at 26 (citing two dictionaries, state appellate court cases from Florida, Indiana, and Washington, and two federal district court cases). Mittal's argument nevertheless fails because the rate "applicable at the time merchandise was entered" was, in this case, the rate that was actually "applied." The additional language "at the time merchandise was entered" introduces a backward-looking temporality, elided by Mittal's interpretation, that informs any reasonable interpretation of the term "applicable" as used in subsection (a).

The regulation does not refer simply to the "applicable" rate, but to the rate "applicable at the time merchandise was entered." 19 C.F.R. § 351.212(a) (2005). Had Commerce intended to provide for automatic liquidation to take into account new information communicated to Commerce post-entry, its regulation would have ordered its personnel to instruct Customs to liquidate at the rate "applicable at the time of liquidation" or something to that effect. Even leaving the "applicable" unmodified would have at least created more ambiguity than the regulation before the Court in this instance. Instead, the rate applicable at the time of entry is the rate that a correct application of the U.S. antidumping laws and regulations would yield, *at that moment*.

Mittal's interpretation of "applicable at the time merchandise was entered" would gloss over the regulation's obvious temporality. In this case, the rate "applicable at the time the merchandise was entered" must be the "all others" cash deposit rate of 8.11 percent for one simple reason: *at the time of entry*, it was impossible for Commerce to know that the former Ispat was operating as Mittal, and that Mittal entries were potentially entitled to a lower rate. As discussed in *Mittal-PI*, 30 CIT at ___ , 414 F. Supp. 2d at 1355, the retrospective duty assessment system relies on an efficient transfer of information. It anticipates and contemplates that at the time of entry, Customs will not possess sufficient information to assess with finality the duty amount owed. By introducing the backward-looking language, the regulation links the assessment rate to Commerce's "state of mind," or the allocation of information, at the moment of entry. Mittal's interpretation amounts to reading the regulation as referring to "the rate applicable at the time of entry, as determined by a later review"; such an interpretation is nearly unintelligible, and in no way could such a reading be countenanced as required by the statute. Instead, the rate "applicable at the time merchandise was

entered" is the rate that a correct application of the U.S. antidumping laws and regulations would yield at the moment of entry. It would be absurd to hold Commerce to a standard of omniscience such that the rate "applicable at the time merchandise was entered" refers to the correct rate in light of information that was not in Commerce's possession.

Of course, it is entirely possible that Commerce's regulation does not achieve Congress' purposes in the most efficient manner, but that is a question for the political branches to discuss. More importantly, it is Commerce's interpretation of the phrase "applicable at the time merchandise was entered" that is here at issue. For a federal court reviewing that interpretation, it suffices to point out its obvious reasonableness, and move on. Commerce acted in accordance with law by holding the 8.11 percent rate to be the applicable rate at the time of entry under 19 C.F.R. § 351.212(a).

b. Subsection (c)(1): "Rates Equal to the Cash Deposit of, or Bond for, Estimated Antidumping Duties or Countervailing Duties Required on That Merchandise at the Time of Entry"

Regarding subsection (c)(1), Mittal similarly argues that "required" means "to call for as obligatory or appropriate." *See* Pl.'s Br. at 28. Mittal cites numerous cases that have associated "required" with "need" or "necessity." *See id*. Thus, according to Mittal, the "required" rate referred to in subsection (c)(1) is the "appropriate rate" and not the rate "in effect" at the time of entry. *See id*. Mittal points out that the words "in effect" appear nowhere in the relevant regulations. *Id*. at 31. Thus, Mittal argues the "rate required at the time of entry" should be the "appropriate" rate, even in cases where the "appropriate" rate is determined well after "the time of entry." *See id*. at 28. Commerce interprets subsection (c)(1) in the same manner as it interprets subsection (a): as a requirement that duties be assessed at the cash deposit rate in effect at the time of entry.

This argument is indistinguishable in all relevant aspects from Mittal's erroneous interpretation of subsection (a). For the reasons articulated above, Commerce's alternative reading is sustained as reasonable.

Before moving on, the Court addresses Commerce's *Reseller Policy*, in which Mittal contends Commerce has articulated a contrary interpretation of subsection (c)(1). *See id*. at 28–31. The relevance of the putatively divergent interpretation is twofold: first, a novel interpretation breaking with past practice may strip Commerce's actions of *Seminole Rock* deference, *see Cardoza-Fonseca*, 480 U.S. at 446 n.30; and second, a prior and well-reasoned inconsistent interpretation may undercut the interpretation that Commerce advocates in this case.

It was and is uncontroversial that, when a dumping producer has knowledge that goods it sells are destined for the U.S. market, imported purchases of dumped goods are dutiable as if the entries were made by the producer itself. *See Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1374 (Fed. Cir. 2004). Commerce, in the *Reseller Policy*, clarified that automatic liquidation would not apply to entries of merchandise sold by resellers that entered the merchandise at the deposit rate of a producer currently the subject of an administrative review: "If [Commerce] conducts a review of a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales." 68 Fed. Reg. at 23954. Commerce insisted the clarification was necessary to address an ambiguity in the earlier system that allowed resellers to benefit from automatic liquidation by depositing duties at the lower of the producer's rate or the "all others" rate. *Id.* at 23960. If a reseller entered the goods at the deposit rate applicable for the dumping producer's domestic sales, the automatic liquidation process would assess those duties. However, only certain resellers were entitled to the producer's rate: those to whom the producer sold for resale in the U.S. market.

During the notice-and-comment period, the Canadian government objected to the proposed clarification on the grounds that it would violate 19 C.F.R. § 351.212(c)'s provision of automatic liquidation for all entries as to which an administrative review was not requested. *See id.* Commerce explained that the clarification did not conflict with 19 C.F.R. § 351.212(c) because that regulation required automatic liquidation at the rate "required on that merchandise at the time of entry," not the rate actually deposited:

> This [declared cash deposit] rate may or may not be the proper cash-deposit rate required for those imports because the proper rate depends on the identity of the seller. Where the cash deposit is not the cash-deposit rate of the seller (the price discriminator), it is not the proper cash deposit "required at the time of entry" under U.S. law or [Commerce's] regulations.

Id.

Mittal claims this language suggests that in the *Reseller Policy*, Commerce articulated the position that the rate " 'required at the time of entry' means not what was actually deposited, but, rather, what *should have been deposited*." Pl.'s Br. at 29. On Mittal's reading, the *Reseller Policy* proves that "Commerce itself has recognized that the term 'required' in the 'automatic assessment' provision language does not, in fact, mean that only the duty 'in effect at the time of entry' will be assessed." *Id.*

Mittal's argument conflates the "rate that was in effect" with the "rate that was applied." However, those two rates are different in crucial respects; Commerce has never read 19 C.F.R. § 351.212(c)'s

mention of the rates "required at the time of entry" as referring to the amounts that the importer actually deposited (i.e., the rates "applied").[10] For instance, an importer may enter merchandise at a rate inferior to the rate that corresponds to its entries. In fact, the clarification in the *Reseller Policy* was aimed at curtailing precisely this abuse. In such a case, the amount and rate of duties deposited is lower than the amount and rate of duties that a proper application of U.S. antidumping duty law would have yielded for those entries. The *Reseller Policy* interprets 19 C.F.R. § 351.212(c) to mandate automatic liquidation at the proper antidumping duty rates as determined by Commerce in an administrative review of the producer. These rates, then, are the rates "required on . . . merchandise at the time of entry," 19 C.F.R. § 351.212(c).

At the time of entry, there is a determinable and quantifiable amount of duty that must be deposited for each entry of merchandise into the United States that is subject to an antidumping or countervailing duty order. Most of the time, upon entry importers will deposit estimated duties as required by the duty law. In the case of resellers, this means that most resellers will accurately report which of their entries are dutiable at the rate of the producer based on the producer's knowledge of the merchandise's eventual sale in the United States. However, it no doubt transpires that on occasion resellers deposit a lower rate than the required rate. In many such cases, the misreporting importer will go undetected and Commerce will instruct Customs to liquidate automatically at the underreported deposit rate. Other times, Customs will detect the error,

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[10] In an attempt to justify a proposed (though ultimately rejected) rule change in 1997, Commerce observed that when it "did not receive a request for the review of particular entries of subject merchandise, [Commerce] would instruct [Customs] to liquidate those entries and assess duties at the cash deposit rate *applied* to those entries at the time of entry." Antidumping Duties, Countervailing Duties, 62 Fed. Reg. 27296, 27313 (Dep't Commerce May 19, 1997) (final rule) (emphasis added). However, later in the notice Commerce articulated its definitive ruling, which indicated that its practice was to liquidate automatically at the *rate in effect:*

> In light of the comments received, [Commerce] has decided to continue its current practice with respect to automatic assessment; i.e., if an entry is not subject to a request for a review, [Commerce] will instruct [Customs] to liquidate that entry and assess duties at *the rate in effect at the time of entry*.

Id. at 27314 (emphasis added). The distinction between the rate in effect and the rate applied was not relevant to the proposed rule change. It is more reasonable to read the reference to the "rate applied" as a description of Commerce's general practice. That is to say, Commerce was merely observing that in nearly all cases, 19 C.F.R. § 351.212(c) operates to require liquidation at the rate applied. This is because in nearly all cases, the rate applied is the rate in effect at the time of entry. Indeed, the *Reseller Policy* example presents an exceedingly rare, perhaps anomalous, case where the importer does not request a review but Commerce learns of information prior to liquidation that sheds light on the rate that was in effect at the time of the reseller's entries.

and order the collection of any deficiency under 19 U.S.C. §§ 1484–85. And yet there is still a peculiar subset of entries, as described by the *Reseller Policy*, where a collateral administrative review of a *producer* will shed light on the accuracy of the rates deposited by the *reseller*.

During the producer's review, Commerce is able to inquire into the proper deposit rates for the reseller's entries as well. Recalling that deposit rates are merely *estimated* duties, it would be strange indeed to prefer assessment at the deposit rate when the producer's administrative review will determine what the appropriate assessment rate is based on the producer's testimony relating to the dispositive factor: i.e., whether the producer knew that the merchandise sold to the reseller was destined for the U.S. market. The *Reseller Policy* points out that since the producer's administrative review will elucidate the actual deposit rates in effect at the time of entry, it would be premature to proceed with automatic liquidation. In essence, the *Reseller Policy* imposed a stay on Commerce's automatic liquidation process, which aims at a rough approximation of duties owed, when an ongoing administrative review offered the possibility of a more precise approximation of duties owed.

Most importantly, the new information regarding the producer's knowledge of the merchandise's destination did not purport to change the "applicable" rate; instead, it simply shed light on what that rate was. By investigating the producers' intentions at the time of the original sale, Commerce determines the resellers' applicable rates at the time on entry. This backward-looking evidentiary investigation is fundamentally different than the changed circumstances review at issue in this case. Since in the case of a reseller the rate in effect at the time of entry depends entirely on the producer's knowledge, testimony relating to that dispositive factor impacts significantly on the question of which rate was applicable at the time of entry. Conversely, a changed circumstances review examining a successor-in-interest determination in no way impacts the cash deposit rate in effect at the time of entry.

Until the name change is formally recognized (usually in a changed circumstances review) and Commerce establishes a new cash deposit rate, the deposit rate in effect at the time of entry is the rate that appeared in the *Federal Register* on the date of entry. In the case of Mittal (at the time, still not the successor-in-interest to Ispat as far as Commerce was aware), that rate was the "all others" rate of 8.11 percent.

Commerce's actions in the events leading to this case do not contradict any agency interpretations in the *Reseller Policy*, and its interpretation of both subsections (a) and (c)(1) are entitled to full *Seminole Rock* deference. Because both interpretations are reasonable, Commerce's actions were in accordance with law.

IV. *CONCLUSIONS*

Commerce's regulation 19 C.F.R. § 351.212 is a reasonable accommodation of Congress' delegated authority for Commerce to instruct Customs to assess antidumping duties. Commerce's interpretation of subsections (a) and (c)(1) of that regulation are similarly reasonable, and well within the bounds of its discretion. Accordingly, Plaintiff's motion for judgment on the agency record is denied. An order will be issued dismissing the case, *see* USCIT R. 56.1(f).

Slip Op. 06 – 144

VWP OF AMERICA, INC., Plaintiff, v. THE UNITED STATES, Defendant.

Before: MUSGRAVE, JUDGE
Court No. 96–05–01309

[Plaintiff's motion to amend summons and defendant's motion to sever and dismiss as to one entry held in abeyance]

Dated: September 26, 2006

Barnes, Richardson & Colburn (*James S. O'Kelly* and *Alan Goggins*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*), for defendant.

MEMORANDUM & ORDER

As one of a series of similar matters, this action was initiated by VWP of America, Inc. ("VWPA") to contest the denial of protests on the valuation of textile imports from Canada by the U.S. Customs Service ("Customs"), as Customs was then titled. The summons, filed on May 2, 1996, lists two protest numbers, 0101–95–100117 and 0101–95–100128, and associates twenty and eighteen different entry numbers respectively therewith. The first five digits of every entry number except one begins "551–35. . . ." The exception is "551–2518786–6."

After initiation, the matter was promptly suspended, along with sixteen others filed before and after it, under a chosen test case. Following the conclusion of the test case, *VWP of America, Inc. v. United States*, 30 CIT ___ , 431 F. Supp. 2d 1322 (2006), a suspension disposition calendar was established on June 7, 2006 pursuant to USCIT

Rule 85(a) for administration by the Clerk of the Court, and the suspended actions, including this matter, were moved onto it.[1]

A week later, on June 12, 2006, VWPA filed a motion to amend the summons. The motion requests that "entry number 551–2518786–6 covered by protest number 0101–95–100117 [be] corrected to read 551–3518786–6." On June 27, 2006, counsel for the government filed a consent motion for an extension of time to file a response until August 2, 2006. The motion explained that counsel for the government had yet to receive the advice and recommendation of Customs and could not properly respond without them.

On August 28, 2006, counsel for the government filed an opposition to the plaintiff's motion along with a motion for leave to file the opposition out of time. The government's motion explains the delay as due to overwork and the demands of other matters and additionally asserts that at some unspecified point counsel for the government contacted counsel for VWPA to explain Customs' efforts to that point at locating entry 551–3518786–6, or other like it, and that VWPA counsel reported that they would investigate the matter further and advise as to "the proper entry, if it could be found." Def.'s Resp. at 3.[2] Thinking "there was a strong possibility that Plaintiff's motion and Defendant's opposition would be mooted" if the entry documentation pertaining to the correct entry could be located, counsel for the government assumed it was "in the interests of all parties and the Court[ ] to delay the filing of the opposition in order to [e]nsure that Defendant would not file an opposition that had been mooted." *Id*.

I

The government now takes the position that dismissal for lack of jurisdiction is appropriate at this time, arguing that VWPA was on notice ten or eleven years ago that the protest and summons included an entry that was non-existent. VWPA's response is one of annoyance at this latest delay by the government to file out of time, which should be viewed in the context of the resolution of the test case. The Court is sympathetic to VWPA's argument, but it is prefer-

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[1] Two additional actions, Court Nos. 93–06–00313 and 93–06–00314, were resolved prior to establishment of the suspension disposition calendar. *See* Slip Op. 06–87 (June 7, 2006) and Slip Op. 06–82 (May 30, 2006).

[2] Counsel asserts that Customs made an effort to locate entry number 551–3518786–6 on its data base, the electronic records stored on Customs Automated Commercial Systems ("ACS"), but could not locate that precise record. Apparently, entries with no further activity are eventually purged from the ACS several years after liquidation, although Customs is presently, allegedly, attempting to locate the entry in the purged archives. Def.'s Resp. n.2 (referencing Maurer Decl. at ¶ 10). Customs did, however, locate entry number 551–3518786–7, however that entry is associated with a different importer. Def'.s Resp. at 2 (referencing Maurer Decl. at ¶¶ 5–6, 10).

able to resolve this issue on the merits, since a court must always be assured that subject matter jurisdiction is proper.

The terms of the government's consent to be sued in a particular court define the court's jurisdiction to entertain the suit, must be strictly observed, and are not subject to implied exceptions. *NEC Corp. v. United States*, 806 F.2d 247, 249 (Fed. Cir. 1986) (citations omitted). Under 28 U.S.C. § 1581(a), this court possesses exclusive jurisdiction over any civil action commenced to contest the denial of a protest under 19 U.S.C. § 1515, which provides for the review of protests filed in accordance with 19 U.S.C. § 1514 concerning decisions of the U.S. Customs and Border Protection (and its predecessor organizations). The burden of establishing jurisdiction lies with the party seeking to invoke a court's jurisdiction. *E.g. Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570, 1573 (1990). The plaintiff must meet its burden by showing the sufficiency of its evidence. If, after a review of the pleadings and extrinsic evidence, any reasonable doubt remains whether this court has jurisdiction to hear this action, it is appropriate to refrain from granting the defendant's motion to dismiss. *See, e.g., Takashima U.S.A., Inc. v. United States*, 19 CIT 673, 886 F. Supp. 858 (1995).

According to the entry documents, the Port of Portland, Maine denied protest 0101–95–100117 "per HQ letters 544658 and 544745" and due to "1 wrong entry number" (uppercasing omitted). On the "attached claim" listing a schedule of entries being protested, next to entry number "551–2518786–6" VWPA provided the date of entry as "3/08/95" and the date of liquidation as "6/16/95", next to which is a notation, presumably in the hand of a Customs officer properly considering the matter, that reads "wrong entry # . . . Partial denial . . . 1 wrong # [.]" On the customs form transmitting to the Court the entry documents relating to protest 0101–95–100117 is written "Invalid entry number." Summons Documentation Transmittal, CF 322 (May 20, 1996).

The government argues the summons cannot now be amended to include entry number 551–3518786–6 because the protest of that entry is now time-barred under 28 U.S.C. § 2636(a)(1). Def.'s Resp. at 3–6 (referencing *Autoalliance International, Inc. v. United States*, 357 F.3d 1290, 1292–93 (Fed. Cir. 2004); *Grover Piston Ring Co. v. United States*, 752 F.2d 626 (Fed. Cir. 1985); *Lykes Pasco, Inc. v. United States*, 22 CIT 614,14 F. Supp. 2d 748 (1998)). According to 28 U.S.C. § 2636(a)(1), a civil action challenging the denial of a protest is barred unless commenced within 180 days of the date the denial of the protest was mailed. 28 U.S.C. § 2636(a)(1). As a waiver of sovereign immunity, the statute provides a "hard and fast" deadline that, if not met, leaves the Court without jurisdiction to hear a case. *Neptune Microfloc, Inc. v. United States*, 8 CIT 353, 355 (1984) (noting that the time for initiating judicial action after denial of a protest is an "inflexible jurisdictional requirement"). Thus, in both *Grover* and

Lykes, dismissals were granted with respect to judicial challenges to entries that had not been validly protested. The protests originally summonsed omitted any reference to the entry numbers that the plaintiffs sought to include in their respective actions. *See also Border Brokerage Co. v. United States*, 72 Cust. Ct. 93, C.D. 4508 (1974) (denial of protest covering thirteen entries, summons filed listing only seven entries, amendment as to other five denied).

Although those cases are not directly on point, other cases have intimated that transcription error itself could obviate jurisdiction. In *Block Handbags, Inc. v. United States*, 82 Cust. Ct. 75, C.D. 4791 (1979), for example, the plaintiff moved to amend the summons to cover entry number K383327 rather than K387327, asserting that the error had been typographical in nature. The government opposed the motion, and also moved to sever and dismiss as to entry number K387327. The government argued that it would be prejudiced if the relief sought were granted because entry number K383327 appeared not only on the original summons but on the protest as well, and the proposed amendment would encompass an entry of merchandise that was never covered by the protest. The court found the government's argument persuasive. "Amending the summons in the manner sought by plaintiff in its motion would have the effect of placing the entry covered by the summons at variance with the entry covered by the administrative protest . . . [a]nd there is no indication in the record that such amendment was sought by plaintiff at the administrative level as provided for in 19 U.S.C. § 1514(b)(1) and 19 C.F.R. § 174.14 (1977)." *Id*. Also, *Neptune Microfloc, Inc. v. United States*, 8 CIT 353 (1984), observed that the proper remedy for a transcription error, such as that argued in *Block*, lay in 19 U.S.C. 1520(c)(1), which provided for reliquidations, notwithstanding that a protest was not filed, to correct for error, mistake of fact, or other inadvertence brought to Customs' attention within one year of liquidation.

But, section 1520(c)(1) no longer operates, since that provision's repeal on December 3, 2004, *see* Pub. L. No. 108–429, § 2105, 118 Stat. 2598 (2004), and in the absence of language in the repealing statute itself or some other general statute making a different rule, the effect was "to restore the law as it was" before the passage of the statute being repealed. *United States v. Philbrick*, 120 U.S. 52, 7 S.Ct. 413 (1887). In any event, the reasoning of *Block, Neptune, Grover, Lykes, etc.* is less persuasive in light of *Pollak* and other decisions to the contrary. *See, e.g., Pollak Import-Export Corp. v. United States*, 18 CIT 111, 846 F. Supp. 66 (1994) ("*Pollak I*"), *rev'd*, 52 F.3d 303 (Fed. Cir. 1995) ("*Pollak II*"). *Pollak I* granted the government's post-judgment motion to dismiss certain entries that had been omitted from the summons and denied the importer's motion to amend. 18 CIT at 115, 846 F. Supp. at 9. The appellate court reversed, holding that the failure to list the entries on the summons was not a ju-

risdictional bar to granting relief as to those entries, since the entries had been indisputably listed on the protest that was properly summonsed and the inclusion of the entry number on the summons was basically a "housekeeping" matter, not to be construed as a jurisdictional predicate. 52 F.3d at 307. *Accord, Bradley Time Div. Elgin National Time Watch Co. v. United States*, 9 CIT 613 (1985).

The government argues for limiting the applicability of *Pollak II* on the ground that it "does not permit the relief sought by VWPA with regard to entries that were never included in any protest, particularly because the actual jurisdictional provisions of 19 U.S.C. § 1514(c) require that the summons be filed in accordance with the regulations prescribed by the Secretary of the Treasury." Def.'s Resp. at 4–5. It is true that *Pollak II* does not precisely answer whether jurisdiction will fail due to an incorrectly transcribed entry number on the protest that was summonsed, but neither does the decision preclude the type of relief VWPA seeks. Each protest need only be "sufficiently" identified in the summons, and the failure to list individual entries on the summons is not a jurisdictional defect depriving this court of jurisdiction over those entries. *See* 52 F.3d at 307.

Recent appellate authority reiterates that it is the sufficiency of the summons as to the protest(s) that controls the jurisdictional inquiry. In *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313 (Fed. Cir. 2006), the appellate court affirmed the decision of this court to reject a proposed amendment of a summons to include seven protests that the plaintiff had "failed to identify" on the summons, once again observing that the statutory framework governing summons and protests does not specifically require the listing of entry numbers on the summons. 442 F.3d at 1316. "Because the importer may omit particular protests in a summons in order to preserve the right to relitigate the issue, the government has no reason to assume that all related protests are intended to be included in a given suit. Under these circumstances, a summons can provide fair notice only if the contested protests are identified with particularity." *Id* at 1321. Since each protest denial forms the basis of a separate claim or cause of action, the summons must establish jurisdiction as to each protest being summonsed. *See* 442 F.3d at 1318. As the initial pleading, the summons must set forth sufficient facts to establish the Court's jurisdiction as to each protest denial being challenged , as these are treated as separate causes of action. *Id.* (citations omitted). "The essential jurisdictional fact—the denial of the protest—simply cannot be affirmatively alleged without specifically identifying each protest involved in the suit." *Id.*

Thus, the inquiry for purposes of subject matter jurisdiction is whether the summons constituted fair notice to the government. That implicates the protest, and what indicia or implicit circumstances surround it as would clarify to the mind of Customs the in-

tent of the importer and the matter of the protest. In this regard, the type of amendment sought should speak volumes regarding the protest's sufficiency.

In the appeal of *Grover*, the government correctly "pointed out that if an importer omits an entry number from a protest[,] the appropriate Customs officer has no objective way of knowing that such entry should be reviewed for possible reclassification." *Grover*, 752 F.2d at 627. Strictly speaking, the government is here correct in taking the position that the failure in cases such as *Grover* to include, *inter alia*, entry numbers and ports of entry in the protests resulted in noncompliance with 19 C.F.R. § 174.13(a). But, the complete omission of *any* information regarding the entry intended to be protested is not this matter, and the government is therefore incorrect in asserting that "Customs did not have *any* notice, let alone timely notice, that the liquidation of the correct entry was being contested." Def.'s Resp. at 4 (emphasis in original). *Cf., e.g., Grover Piston Ring Co., Inc. v. United States*, 7 CIT 286, 286 (1984) ("defendant contends the lack of jurisdiction is the result of the protest, which was timely filed, containing only two entries and not the 101 entries plaintiff alleges were intended to be covered"), *aff'd*, 752 F.2d at 627 ("[m]oreover, appellant's attempt to make all categories of merchandise (nine in this action) the subject of a single protest clearly falls outside the scope of 19 U.S.C. § 1514(c)(1), which provides that, where an entry covers merchandise of different categories, a separate protest may be filed for *each* category") (emphasis in original).

Both *Pollak* and *DaimlerChrysler* considered critical the fact that the statutes governing this court's jurisdiction do not specifically require identification on the summons of the entry numbers that are subject to the protest in order to invoke jurisdiction. Similarly, the statute governing the form of protest does not specifically require that the entry number of the matter being protested be listed on the protest documents. *See* 19 U.S.C. § 1514(c)(1) (requiring that the importer's protest of Customs' decision merely "set forth distinctly and specifically—(A) each decision described in subsection (a) of this section as to which protest is made; (B) each category of merchandise affected by each decision set forth under paragraph (1); (C) the nature of each objection and the reasons therefor; and (D) any other matter required by the Secretary by regulation").[3] Although 19 C.F.R. § 174.13(a) states that the contents of a protest "shall" contain the entry number of the matter being protested and may well

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[3] *Cf.* 19 U.S.C. § 1484(a)(1)(A)(i) (requiring entry to consist only of "such documentation or, pursuant to an electronic data interchange system, such information as is necessary to enable the Customs Service to determine whether the merchandise may be released from customs custody"). The North American Free Trade Agreement Implementation Act, Public Law 103–182, § 645(3), effective Dec. 8, 1993, amended 19 U.S.C. § 1514(c)(1) to substantially its present form.

constitute "other matter required by the Secretary by regulation" for purposes of 19 U.S.C. § 1514(c)(1), administrative and judicial precedent has not, generally speaking, required "perfect" compliance with formality in order to create a valid protest with respect to a particular entry. *See, e.g.*, *D. Stone Industries, Inc. v. United States*, 9 CIT 51 (1985) (granting amendment of protest purporting to cover entry number 84–748767–8 as actually covering entry number 84–848767–8). *Cf. Pollak I*, 18 CIT at 114, 846 F. Supp. at 69 (acknowledging "that an amendment of a summons may be appropriate where entry numbers are listed, but the numbers are transposed. . . . In such cases, the entry numbers are identifiable despite any error in listing the entry numbers, and the government would have notice of each entry being judicially disputed") (referencing *Bradley*, *supra*, 9 CIT at 615).

"[H]owever cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest . . . if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974). Compliance with regulation 174.13(a) may be demonstrated, albeit in a manner that is substantial and not perfect. *Cf.*, *e.g.*, *Lykes*, 22 CIT at 616 ("the reading of the plaintiff's intentions would not merely have required the Customs Service to realize that 21 additional entries belonged in the protest"). The minimal requirement has long been whether the importer has sufficiently conveyed to Customs an impression of the injury it believes it suffered by Customs' decision or action. *E.g.*, *Schell v. Fauche*, 138 U.S. 562, 11 S.Ct. 376 (1891); *Arthur v. Morgan*, 112 U.S. 495, 5 S.Ct. 241 (1884); *Davies v. Arthur*, 96 U.S. 148, 151, 6 Otto 148 (1877); *Converse v. Burgess*, 59 U.S. 413, 18 How. 413 (1855). An administrative protest is not ordinarily to be invalidated or denied on the basis of clerical error or inadvertence alone. *See, e.g.*, *Aviall of Texas, Inc. v. United States*, 70 F.3d 1248 (Fed. Cir. 1995); *H.H. Elder Co. v. United States*, 20 Cust. Ct. 61, C.D. 1084 (1948); *Goto v. United States*, 7 Cust. Ct. 189, C.D. 565 (1941); *Morimura Bros. v. United States*, 160 Fed. 280, T. D. 28866 (1908). In *International Forwarding Co. v. United States*, 36 Treas. Dec. 294, T.D. 37972 (1919), for example, the importer protested the ascertainment and liquidation of duties on entries of tulip bulbs but referenced the entry number incorrectly. At first denied due to the "gratuitous" entry number, the protest was ultimately sustained because its claim "is a plain and simple question as to how tulip bulbs should be classified." 36 Treas. Dec. at 296. Although the importer did reference other indicia that perhaps should have apprized the customs officer as to the proper entry that was being protested, including *inter alia* the date of entry and the date of liquidation, in the opinion of the board of appraisers "it would not have been necessary to refer to date, or entry, or liquidation, or even the vessel." *Id*.

In this instance, VWPA's error in transcription is manifest: all of the other entry numbers in protest 0101–95–100117 begin with "551–35" except for the one VWPA would now amend, and it was certainly apparent to the port officer(s) considering the protest, because the use of "*wrong* entry #" in the protest's denial connotes that there must have been a *right* entry number. The Court is therefore not persuaded that VWPA's protest was invalid as to the certain entry it obviously intended to protest or that the government lacked notice as to that certain entry for which there was a manifest error in transcribing its entry number. Although VWPA did have notice of the incorrect entry number in the denial of its protest over a decade ago, to require it to have gone through the formality of then protesting the *correct* entry number would have been futile, given Customs' well-known position on the issue of valuation with respect to VWPA's other entries.

II

Nonetheless, although VWPA's explanation as to the error in transcription is logical, at this point there remains, for the time being, some doubt as to the actual intended entry number. Obviously, proof of an actual entry that the protest intended to encompass is a prerequisite of subject matter jurisdiction, so it is therefore appropriate to hold both parties' motions in abeyance, pending exhaustion of due diligence on this issue. The parties shall provide a status report of their efforts to locate the correct entry documents before the close of business on November 26, 2006.

SO ORDERED.