Decisions of the United States
Court of International Trade

Slip Op. 07–40

GLEASON INDUSTRIAL PRODUCTS, INC. and PRECISION PRODUCTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and CENTRAL PURCHASING, LLC, Defendant-Intervenor.

Before: Richard W. Goldberg,
Senior Judge

Court No. 06–00089

OPINION

[Commerce's motion for voluntary remand is granted. Plaintiff's USCIT Rule 56.2 motion denied as moot.]

Dated: March 16, 2007

Crowell & Moring, LLP (*Matthew P. Jaffe*) for Plaintiffs Gleason Industrial Products, Inc. and Precision Products, Inc.

Adduci, Mastriani & Schaumberg, LLP (*Louis S. Mastriani, William C. Sjoberg*) for Defendant-Intervenor Central Purchasing, LLC.

Peter D. Keisler, Assistant Attorney General; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); Office of the Chief Counsel, U.S. Department of Commerce (*Carrie Lee Owens*), of counsel, for Defendant United States.

GOLDBERG, Senior Judge: Plaintiffs Gleason Industrial Products, Inc. and Precision Products, Inc. (collectively "Gleason") move the Court to enter judgment on the agency record pursuant to USCIT Rule 56.2. Defendant U.S. Department of Commerce ("Commerce") moves the Court on its own accord to remand the matter back to the agency. Defendant-Intervenor Central Purchasing, LLC ("CP") opposes both motions. For the reasons that follow, the Court grants Commerce's request for a voluntary remand.

I. *BACKGROUND*

On December 2, 2004, Commerce entered an antidumping duty order relating to hand trucks produced in China. *See Hand Trucks and*

Certain Parts Thereof from the People's Republic of China, 69 Fed. Reg. 70122 (Dep't Commerce Dec. 2, 2004) (Notice of Antidumping Duty Order) ("*Antidumping Duty Order*"). The notice defined the scope of the antidumping duty order as follows:

> The merchandise subject to this antidumping duty orderconsists of hand trucks manufactured from any material, whether assembled or unassembled, complete or incomplete, suitable for any use, and certain parts thereof, namely the vertical frame, the handling area,and the projecting edges or toe plate, and any combination thereof.
>
> A complete or fully assembled hand truck is a hand-propelled barrow consisting of a vertically disposed frame having a handle or more than one handle at or near the upper section of the vertical frame; at least two wheels at or near the lower section of the vertical frame; and a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or near the lower section of the vertical frame. The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load.
>
> That the vertical frame can be converted from a vertical setting to a horizontal setting, then operated in that horizontal setting as a platform, is not a basis for exclusion of the hand truck from the scope of this petition. That the vertical frame, handling area, wheels, projecting edges or other parts of the hand truck can be collapsed or folded is not a basis for exclusion of the hand truck from the scope of the petition. That other wheels may be connected to the vertical frame, handling area, projecting edges, or other parts of the hand truck, in addition to the two or more wheels located at or near the lower section of the vertical frame, is not a basis for exclusion of the hand truck from the scope of the petition. Finally, that the hand truck may exhibit physical characteristics in addition to the vertical frame, the handling area, the projecting edges or toe plate, and the two wheels at or near the lower sectionof the vertical frame, is not a basis for exclusion ofthe hand truck from the scope of the petition.
>
> Examples of names commonly used to reference handtrucks are hand truck, convertible hand truck, appliance hand truck, cylinder hand truck, bag truck, dolly, or hand trolley. They are typically imported under heading 8716.80.50.10 of the *Harmonized Tariff Schedule of the United States* ("HTSUS") although they may also be imported under heading 8716.80.50.90. Specific parts of a hand truck, namely the vertical frame, the handling area and the projecting edges or toe plate, or any combination thereof, are typically imported under heading

> 8716.90.50.60 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, [Commerce's] written description of the scope is dispositive.
>
> Excluded from the scope are small two-wheel or four-wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular material measuringless than 5/8 inch in diameter; hand trucks that use motorized operations either to move the hand truck from one location to the next or to assist in the lifting of items placed on the hand truck; vertical carriers designed specifically to transport golf bags; and wheels and tires used in the manufacture of hand trucks.

Id. On December 19, 2005, CP sent a letter to Commerce seeking a scope ruling that excluded its welding carts from the scope of the antidumping duty order. The letter provided the following description of the two models at issue here:

> Both carts are made in China, don't have projected edges and are designed to carry welding machines only. . . . Please consider in your ruling that both have a specialized purpose which can not be utilized as astandard hand truck for which the original order is written and neither cart has projecting edges.

Letter from Heidar Nuristani, Compliance Specialist, Central Purchasing, LLC, to Secretary of Commerce at 1, 3 (Dec. 19, 2005). CP included several photographs of the welding carts at issue with their letter.

Gleason opposed CP's request on three grounds. First, Gleason argued the CP welding carts fell squarely within the description of hand carts contained in the antidumping duty order. *See* Letter from Matthew P. Jaffe, Counsel for Gleason, to Secretary of Commerce at 2 (Jan. 4, 2006) ("Gleason Letter"). Second, Gleason claimed CP's functional argument (i.e., the carts are not covered because they are "designed to carry welding machines only") lacked any relevance to the legal question of the applicability *vel non* of the antidumping duty order to the CP carts. *See id*. at 3. Lastly, Gleason posited that because its original antidumping petition included pictorial representations of "cylinder hand trucks" similar to the CP welding carts, such trucks were, in effect, incorporated into the scope of the antidumping order. *See id*. at 3–4.

Commerce responded by granting CP's request. *See* Final Scope Ruling for Central Purchasing, LLC's Two Models of Welding Carts (Feb. 15, 2006). In its scope ruling, Commerce explained its rationale:

> From the description and pictures Central Purchasing provided, the welding carts do not have a toe plate that could slide under a load, an essential characteristic as described in the

> scope of this order. Generally, a toe plate is positioned on the hand truck perpendicular to the vertical frame and flush with the ground to facilitate movement of an object onto the cart. The projected edges on the welding carts rise at least a half inch above the ground. At this height the projected edges on these welding carts are not able to slide under a load. In addition, the toe plates are supported by two bars that restrict the width of objects that can be loaded and carried on the carts. Thus, the welding carts possess only two of the three key physicalcharacteristics as the subject hand trucks defined in the scope of the order. Therefore, we determine that the welding carts do not possess all of the characteristics of a hand truck as described in the scope of this order.

Id. at 5 (citation omitted). In response to Gleason's third argument, Commerce found that "the written description, not the pictures, is dispositive of what is included in the scope of the order." *Id*. Though it acknowledged the importance of pictorial representations during the administrative investigation, Commerce claimed that they were ultimately assistive and illustrative, and that the verbal description controlled. *See id*. at 5–6.

Gleason then timely commenced an action pursuant to 19 U.S.C. § 1516a, seeking to challenge Commerce's scope ruling. Gleason filed a motion for judgment on the agency record on August 25, 2006. Three months later, Commerce shifted gears, and requested a voluntary remand so as to "reconsider its previous position in light of arguments made by plaintiffs. . . . " Def.'s Resp. Pl.'s Mot. J. Agency R. and Req. Vol. Remand 1 ("Def.'s Mot."). In its reply brief, Gleason has consented to the voluntary remand. CP, however, objects not only to Gleason's motion for judgment on the agency record, but also to Commerce's remand request.

II. *STANDARD OF REVIEW*

Where an agency requests remand without confessing error in order to reconsider its previous position, "the reviewing court has discretion over whether to remand." *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *see also Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT ___ , ___ , 412 F. Supp. 2d 1330, 1335 (2005). "The *SKF* court further noted that remand is generally appropriate 'if the agency's concern is substantial and legitimate[,]' but may be refused 'if the agency's request is frivolous or in bad faith.' " *Shakeproof*, 29 CIT at ___ , 412 F. Supp. 2d at 1335 (*quoting SKF*, 254 F.3d at 1029). A reviewing court's function is to screen out those frivolous and bad faith remand requests that compromise litigants' legitimate concerns for finality. *See Corus Staal, BV v. U.S. Dep't of Commerce*, 27 CIT 388, 391, 259 F. Supp. 2d 1253, 1257 (2003) (suggesting that "merely

a change in policy" will not justify a voluntary remand over an interested party's objection). When, however, the agency requests remand to correct a mistake or address some other substantial and legitimate concern, it is far more sensible for a court to defer to the agency whose expertise, after all, consists of administering the statute.

III. *DISCUSSION*

It is first necessary to establish why Commerce is acquiescing to remand. In its motion seeking voluntary remand, Commerce "respectfully request[s] that the Court issue the attached order granting Commerce a voluntary remand to allow it to reconsider its determination." Def.'s Mot. 4. According to Commerce, such reconsideration is necessary because "Gleason has elaborated upon certain arguments and raises issues that should be further reviewed by the agency." *Id.* Specifically, Commerce claims that two issues require reconsideration: (1) whether the CP welding carts have a projecting edge that easily slides under a load; and (2) whether CP's welding carts are "cylinder hand trucks," which are specifically included within the scope of the order. *Id.* 5–6.

As for the projecting edge of the CP welding carts, Commerce was impressed by Gleason's explanation in its scope request of how the carts' projecting edges can slide under a load despite not being flush with the ground. *Id.* 5. In particular, Commerce cited Gleason's claim that the half-inch elevation of the toe plate "can actually 'assist individuals as they slide the toe plate of a hand truck under a cylinder especially where the bottom surface of the cylinder is curved.' " Def.'s Mot. 6 (*quoting* Pl.'s Mot. J. Agency R. 12). Thus, Commerce's first reason is to engage in a more searching examination of the role played by the elevated toe plate.

Regarding the inclusion of the pictorial representation of cylinder hand trucks, Commerce seeks leave to explore further Gleason's argument that the carts represented in the pictorial exhibits are examples of "cylinder hand trucks," which are specifically referenced in the scope description of the underlying antidumping duty order. *Id.* 7 (*citing Antidumping Duty Order*, 69 Fed. Reg. at 70122).

In response to Commerce's first reason, CP contends that the *Vertex International, Inc. v. United States* decision forecloses any further consideration of the applicability *vel non* of the antidumping duty order to the CP welding carts. *See* Def.-Int.'s Mem. Opp. Def.'s Req. Vol. Remand and Pl.'s Mot. J. Agency R. 12–14. In response to Commerce's second reason, CP argues that the inclusion of "cylinder hand trucks" as an example of a hand truck within the scope of the antidumping order is "meaningless," and that the Court should focus exclusively on the "three essential elements" of a hand truck. *Id.* 15.

Commerce is entitled to a remand on both grounds because the concerns raised are substantial and legitimate, and free from any semblance of bad faith. The *Vertex International* court was faced

with a similar question to that posed in this litigation: whether a variety of cart could slide under a load. *See Vertex Int'l, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–10 at 10–12 (Jan. 19, 2006). The *Vertex International* court found that the *Antidumping Duty Order* did not apply to a specific variety of garden carts. *Id.* at 12. The projecting edge of that garden cart was made of round steel wire. *Id.* Significantly, the operation instructions for the garden carts warned that pushing the cart could damage the product or even cause bodily injury to the operator. *Id.* at 11. Since the toe plates of the hand trucks covered by the antidumping duty order had to be pushed in order to slide under a load, *see Antidumping Duty Order*, 69 Fed. Reg. at 70122, the garden carts fell outside the order's scope. *See Vertex Int'l*, 30 CIT at ___ , Slip Op. 06–10 at 12–14.

CP's reliance on *Vertex International* is misplaced. CP's welding carts are drastically different than the *Vertex International* plaintiff's garden carts. *Vertex International* does focus the attention of the agency and reviewing courts on the requirement that a hand truck must be able to slide under a load in order to fall within the purview of the *Antidumping Duty Order*, but it does not purport to answer that question for any product other than the garden cart at issue in the case. *Vertex International* frames the issue for this Court, but it hardly decides it. In this case, Commerce seeks remand to conduct a more searching factual examination of whether the elevated toe plates of the CP welding carts help to slide the carts under loads. In other words, Commerce is seeking leave to conduct precisely the sort of inquiry that the *Vertex International* decision demands.

CP's second argument is equally unavailing. It is of course true that the explicit terms of the *Antidumping Duty Order* must control the agency's subsequent decisions in scope rulings. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002). Commerce's remand request in no way controverts that plain principle. Instead, Commerce is seeking to determine if the CP welding carts are "cylinder hand trucks." The designation is crucial to a complete and correct resolution to the scope litigation in this case because the *Antidumping Duty Order* specifically lists "cylinder hand truck" as a name "commonly used to reference hand trucks." *Antidumping Duty Order*, 69 Fed. Reg. at 70122. As such, if Commerce makes the factual finding that the CP welding carts are cylinder hand trucks, then the *Antidumping Duty Order's* express terms may require an assessment of antidumping duties on those carts. Gleason itself did not clearly express this argument at the administrative level, and it persuaded Commerce only after presenting a more compelling argument in its Rule 56.2 brief. *Compare* Gleason Letter at 3–4 (arguing pictorial exhibits to petition necessarily formed part of the order's scope) *with* Pl.'s Mot. J. Agency R. 14–16 (arguing that "the pictorial exhibits that form part of the petition impart material substance to

the written scope description, specifically what is meant by the term 'cylinder hand truck' "). Reconsidering that designation is a substantial and legitimate concern that the agency should be permitted to make on its own before the judiciary passes its judgment on the matter.

IV. *CONCLUSION*

Because Commerce's request for a voluntary remand aims to address substantial and legitimate concerns, and because there are no indicia of bad faith, the Court will grant Commerce's motion. In light of the remand, Gleason's motion for judgment on the agency record is denied as moot.

GLEASON INDUSTRIAL PRODUCTS, INC., and PRECISION PRODUCTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and CENTRAL PURCHASING, LLC, Defendant-Intervenor.

Before: Richard W. Goldberg,
Senior Judge

Court No. 06–00089

ORDER

Upon consideration of defendant's partial consent motion for voluntary remand and all other pertinent papers, and upon due deliberation, it is hereby

ORDERED that defendant's motion is GRANTED; and it is further

ORDERED that plaintiff's motion for judgment on the agency record is DENIED as moot; and it is further

ORDERED that this case is remanded to defendant for reconsideration of (1) whether CP's welding carts have a projecting edge that easily slides under a load and (2) whetherwelding carts are specifically included within the scope of the order due to the mention of "cylinder hand trucks"; and it is further

ORDERED that defendant shall file its remand results with the Court by June 14, 2007; and it is further

ORDERED that parties shall have until July 16, 2007 to file comments on the remand results; and it is further

ORDERED that parties shall have until July 31, 2007 to file any responses to the comments.

SO ORDERED.

Slip Op 07−41

AVECIA, INC. Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: **MUSGRAVE, Judge**
Consol. Court No. 05−00183 and Court No. 06−0014

[Defendant's motion for "rehearing, modification, clarification, and/or reconsideration" granted as to severance of three entries, otherwise denied.]

Decided: March 19, 2007

Buchanan Ingersoll PC (*Steven E. Bizar, Jill W. Rogers*); *Crowell & Moring LLP* (*Alexander Schaefer*), 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*); Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Beth C. Brotman*), of counsel, for the defendant.

OPINION

As discussed in Slip Opinion 06−184, a certain protest sent to the director for the Port of Philadelphia challenged three entry classifications for products imported through the ports of Newark and Baltimore, in addition to the classification of several other entries through that port. *See Avecia, Inc. v. United States*, 30 CIT ___ , Slip Op. 06−184 at 23−25 (Dec. 19, 2006).[1] After the protest's denial, Avecia included it in this suit. 28 U.S.C. § 1581(a) provides that this Court has "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." The referenced section is codified at 19 U.S.C. § 1514. Subsection (c)(1) requires that "[a] protest of a decision under subsection (a) of this section shall be filed . . . in accordance with regulations prescribed by the Secretary." 19 U.S.C. § 1514(c)(1). One of those regulations, 19 C.F.R. § 174.12(d), provides that "[p]rotests shall be filed with the port director whose decision is protested." The government thus challenged the Court's subject matter jurisdiction over the three entries. After examining the law of this area, the court concluded that no statute or regulation precluded the director for the Port of Philadelphia from rendering a substantive decision with respect to entries from another port, that the director denied the protest "in full" per the rationale of HQ 967005 (May 18, 2004), and since the decision of Customs had apparently been to relax the place-of-filing regulation with respect to those three entries, the court concluded that it possessed jurisdiction over

[1] Available at http://www.cit.uscourts.gov/slip_op/Slip_op06/06−184.pdf (last visited the date of this decision).

the subject matter. Slip Op. 06−184 at 25.

The government now moves for "rehearing, modification, clarification, and/or reconsideration" of that finding. Disposition of such a motion is within the Court's discretion. *See* USCIT Rule 59(a). *See, e.g., Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990); *Union Camp Corp. v. United States*, 21 CIT 371, 372, 963 F. Supp. 1212, 1213 (1997). The purpose of reconsideration is to rectify "a significant flaw in the conduct of the original proceeding." *W.J. Byrnes & Co. v. United States*, 68 Cust. Ct. 358, 358 (1972) (footnote omitted). However, a court should not disturb its prior decision unless it is "manifestly erroneous." *See, e.g., Starkey Labs, Inc. v. United States*, 24 CIT 504, 505, 110 F. Supp. 2d 945, 946−47 (2000); *Volkswagen of Am., Inc. v. United States*, 22 CIT 280, 282, 4 F. Supp. 2d 1259, 1261 (1998). To the extent the government's motion raises a colorable "significant flaw" or "manifest error" in Slip Opinion 06−184, the matter merits further discussion. *See Starkey Labs*.

Substantively, the government interprets Slip Opinion 06−184 as apparently agreeing "that the combination of the statute and the pertinent regulations mandated, as a jurisdictional prerequisite, the filing of the protest at the port at which the decision was made," Def.'s Reply at 3, and it argues that in addition to the requirements governing form and content under 19 U.S.C. § 1514(c), the place of filing a protest is clearly apparent from 19 U.S.C. § 1515(a), which requires a protest's review within two years by "the appropriate customs officer." The government argues that this "can only be the officer designated for such review pursuant to § 1514(c) and the regulations" and that therefore compliance with 19 C.F.R. § 174.12(d) is a mandatory condition of jurisdiction which the director for the Port of Philadelphia had no authority to waive. Def.'s Mot. at 5−9 (referencing *Grover Piston Ring Co. v. United States*, 752 F.2d 626 (Fed. Cir. 1985), *Noury Chem. Corp. v. United States*, 4 CIT 68 (1982), *Po Chien, Inc. v. United States*, 3 CIT 17 (1982), and *United States v. Reliable Chem. Co.*, 66 CCPA 123, 605 F.2d 1179 (1979)); Def.'s Reply at 7−8 (referencing *inter alia DaimlerChrysler Corp. v. United States*, 442 F.3d, 1313, 1319 (Fed. Cir. 2006), *Autoalliance Int'l, Inc. v. United States*, 357 F.3d 1290, 1293−94 (Fed. Cir. 2004), and *Ford Motor Co. v. United States*, 425 F. Supp. 2d 1324, 1332, n.12 (2006), *reh'g den*. 30 CIT ___ , Slip Op. 06−145 (Sep. 29, 2006)).

Avecia apparently disputes whether Slip Opinion 06−184 even addressed whether compliance with 19 C.F.R. § 174.12(d) amounts to an unwaivable condition of subject matter jurisdiction. *See* Pl.'s Resp. at 2 & n.1 (referencing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, ___ , 126 S.Ct. 1235, 1237 (2006) ("when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character")). *See also* Def.'s Br. *passim*; Def.'s Reply *passim* (distinguishing *Arbaugh* on the authority of *Federal Nat'l Mortg. Ass'n v. United States*, 469

F.3d 968 (2006)). Avecia is correct, but whether it arguably did, the conclusion must again be that compliance with the regulation is not such as may not be waived by Customs.

The government elaborates in its motion that the proper interpretation of "the appropriate customs officer" in 19 U.S.C. § 1515(a) mandates that protests only be decided by the port director who made the original decisions affecting the entry or entries, and yet subsection 1515(a) simply mandates that review of a protest be completed within two years from the date of filing by "the appropriate customs officer." It is a deadline for Customs. It also provides for *further* review by "*another* appropriate customs officer." *Cf.* 19 U.S.C. § 1515(a) (italics added). To the extent the provision imposes a filing condition directed to the protestant, the phrase "the appropriate customs officer" is vague. As implied by Slip Opinion 06−184, one cannot definitely conclude that the port director of Philadelphia was an "inappropriate" customs officer to act with respect to entries incorrectly included on an otherwise properly−filed protest at that port. Even if "appropriate customs officer" may be clarified by reference to the place−of−filing regulation, 19 C.F.R. § 174.12(d), section 1515 does not control the Court's jurisdiction, which is delimited in 28 U.S.C. § 1581(a) by reference to the parameters of 19 U.S.C. § 1514. *See, e.g., Volkswagen of Am., Inc. v. United States,* 31CIT ___, Slip Op. 07−26 at 6 (Feb. 21, 2007) ("Section 1514 is not a jurisdiction−granting statute; it defines the types of actions that are potentially reviewable under § 1581(a)" (citation omitted)). There, in contrast to the statutory particulars for the content of a protest, Congress did not specify in section 1514 that a protest had to be in a particular form, or that it had to be filed in a particular place. *See* Slip Op. 06−184 at 25. *Cf.* 28 U.S.C. § 1581(a) & 19 U.S.C. § 1514(c)(1) *with* 19 U.S.C. § 1515(a). Rather, Congress merely required that protests need to be "filed in writing . . . in accordance with regulations prescribed by the Secretary." 19 U.S.C. § 1514(c)(1). Since the place of filing is not a plain and specific statutory condition of invoking the jurisdiction of this Court, compliance with 19 C.F.R. § 174.12(d) is not a condition of subject matter jurisdiction but rather is an element of a putative plaintiff's claim. *See, e.g., Arbaugh*. It is also noteworthy that in section 1514 Congress specifically deleted all references to "the appropriate customs officer" or substituted "the Customs Service" therefor when enacting the North American Free Trade Agreement Implementation Act, *see* Pub. L. 103−182 § 645(1)(A), (E), (2) (Dec. 8, 1993).

Fundamentally, the government's argument, that subject matter jurisdiction at this Court is lacking because no port director other than the port director who rendered the decision on the original classification has the authority to render a decision on a protest, depends for its validity upon the government's interpretation of the place-of-filing regulation, which is to say that the argument grafts a

meaning onto that regulation that the regulation does not currently possess. *Cf.* 19 C.F.R. § 174.12(d) ("[p]rotests shall be filed with the port director whose decision is protested"). Even if the regulation possessed such meaning, the condition that a protest be filed at a particular place is beyond the metes and bounds of the subject matter jurisdiction established for this Court by statute by Congress. *See* 28 U.S.C. § 1581(a) & 19 U.S.C. 1514. The government argues that "the requirements of the regulations promulgated pursuant to the delegation authority in § 1514(c) are jurisdictional[,]" Def.'s Reply at 4 (referencing *Grover Piston Ring*, *Noury Chemical*, and *Po Chien*), but that is not a proper interpretation of residual delegation. Congress may delegate certain legislative policy determinations to the executive branch, *see, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 693−94 (1892), *Star-Kist Foods, Inc. v. United States*, 47 CCPA 52, 60, 275 F.2d 472, 480 (1959), but only Congress may delimit federal court subject matter jurisdiction. *See* U.S. Const., Art. III, § 1. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 453 (2004); *Cary v. Curtis*, 44 U.S. 236, 244 (1845). *Cf.* 19 U.S.C. § 1514(c)(1)(D) (a protest must be "filed . . . in accordance with regulations prescribed by the Secretary"). And for this court to construe 19 C.F.R. § 174.12(d) with the meaning the government here advocates would effectively amount to legislating the Court's own subject matter jurisdiction. Plainly, it is inappropriate for the court, or Customs, to do so. Moreover, to construe the regulation in the manner advocated by the government would theoretically preclude subject matter jurisdiction over *any* protest not *perfectly* "filed . . . in accordance with regulations prescribed by the Secretary," even if only slightly flawed, and thus would contradict the inherent authority of agencies to interpret their own regulatory requirements as appropriate and necessary. *See, e.g., PAM S.p.A. v. United States*, 463 F.3d 1345, 1349 (Fed. Cir. 2006) (agency has discretion to relax compliance with notice regulation where no substantial prejudice results); *National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 18 CIT 754, 762, 861 F. Supp. 121, 130 (1994) (defendant argued in favor of "Customs' longstanding practice" to allow certain duty-free shipments entry "under relaxed entry procedures without the requirement of a broker"); *Lee Yuen Fund Trading Co., Inc. v. Dep't of Treasury*, 18 CIT 139, 141 (1994) (Customs recognizing that non-complying submission was timely and informing plaintiff to file preferred Protest Form 19); *Sachs Auto. Prods. Co. v. United States*, 17 CIT 290, 294 n.3 (1993) (compliance with regulation waived by agency); *accord, American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). And it should go without saying that the Court's subject matter jurisdiction must encompass hearing whether there has been compliance with a relevant rule or regulation, if jurisdiction is otherwise satisfied. *See, e.g., Kyocera Indus. Ceramics Corp. v. United States*, 30 CIT ___, Slip Op. 06−187 (Dec. 21, 2006); *Carolina To-*

bacco Co. v. U.S. Customs Serv., 28 CIT ___ , Slip Op. 04−20 (Mar. 4, 2004); *see also Indianapolis Mach. & Exp. Co., Inc. v. United States*, 42 Cust. Ct. 137 (1959).

Since the function of the Court is to find the narrowest resolution, Slip Opinion 06−184 sought to avoid a specific finding on whether the place of filing a protest amounts to a "jurisdictional" prerequisite, because whether it is, or is not, it is solely a regulatory requirement, and as such may be waived. The government attempts to force the issue again, but the primary support for its motion is *United States v. Reliable Chemical Co.*, 66 CCPA 123, 605 F.2d 1179 (1979), a case that considered Customs's attempted waiver of an explicit statutory jurisdictional requirement. *See* Def.'s Br. at 9; Def.'s Reply at 11. The circumstances of this matter are not analogous to that situation but are rather akin to those of *Angelus Milling Co. v. Commissioner of Internal Revenue*, 325 U.S. 293 (1946), which involved the Commissioner's waiver of compliance with regulatory filing requirements promulgated by its agency pursuant to the same type of authority granted by Congress that this action presently confronts *vis à vis* 19 U.S.C. § 1514(c)(1) and subsection (c)(1)(D) ("any other matter required by the Secretary by regulation"). *Cf.* 325 U.S. at 295 n.1 ("Section 903 of Title VII of the 1936 Revenue Act, 49 Stat. 1648, 1747 . . . requires that no refund be made or allowed 'unless . . . a claim for refund has been filed . . . in accordance with regulations prescribed by the Commissioner with the approval of the Secretary'") *with* 19 U.S.C. § 1514(c)(1). The Supreme Court's observation in that case appears equally apt to the circumstances at bar:

> Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness.

325 U.S. at 397.

To summarize, neither 19 U.S.C. § 1514(c)(1), § 1515(a), nor 19 C.F.R. § 174.12(d) precludes a port director from ruling on entries from a different port. *Cf. also* 19 C.F.R. 174.13(b) (regarding "multiple entries": "[*a*] *single protest may be filed* with respect to more than one entry *at any port* if all such entries involve the same category of merchandise and a decision or decisions common to all entries [is/]are the subject of the protest") (italics added). The court has considered the government's other propositions, from *DaimlerChrysler, Autoalliance, Ford, etc.*, and finds them unavailing in the circumstances of this matter. The court therefore remains

unpersuaded that there is manifest error in its prior conclusion that it possesses jurisdiction over the disputed subject matter. *See* Slip Op. 06−184 at 25 (quoting *American Farm Lines*, 397 U.S. at 539). As an aside, although all three entries were encompassed by the protest originally summonsed to this action, two of the entries have since been encompassed by Court No. 06−00140. The Judgment on 06−184 could only encompass the remaining entry, of course, but the government represents that it would prefer to separate the jurisdictional issue from the other entries covered by this action, and the parties have conferred and agree that a preferable procedural posture is to sever those entries and make them the res of a new, separate civil action which shall then abide the Judgment of this action. The court concludes that the motions to sever and amend must be granted and will enter orders to that effect after any necessary consultations with the parties.

SLIP OP. 07–42

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

BEFORE: HON. R. KENTON MUSGRAVE, SENIOR JUDGE

Court No. 96–05–01309

JUDGMENT ORDER

In accordance with the Settlement Agreement between the parties in this action,

IT IS HEREBY ORDERED that U.S. Customs and Border Protection shall reliquidate the entries identified in Schedule A attached hereto on the basis of the appraised values less 17%, and shall promptly refund to Plaintiff the excess duties with interest as provided by law; and it is further

ORDERED that each party shall bear its own costs and expenses; and it is further

ORDERED that this action is dismissed as settled.

Schedule A

Port: Jackman, Maine

Court Number	*Protest Number*	*Entry Number*	*Entry Date*
96–05–01309	0101–95–100117	551–3518769–2	03/06/95
		551–3518988–8	03/31/95
(05/02/96)		551–3519001–9	03/23/95

Court Number	*Protest Number*	*Entry Number*	*Entry Date*
		551–3518451–7	03/21/95
		551–3518895–5	03/17/95
		551–3533062–3	04/07/95
		551–3517726–3	04/11/95
		551–3533115–9	04/14/95
		551–3533129–0	04/09/95
		551–3533049–0	04/06/95
		551–3533100–1	04/02/95
		551–3533125–8	04/17/95
		551–3533074–8	04/01/95
		551–3533196–9	04/28/95
		551–3533036–7	04/06/95
		551–3533175–3	04/28/95
		551–3517864–2	05/03/95
		551–3533204–1	05/04/95
		551–3533187–8	05/01/95
	0101–95–100128	551–3533169–6	04/26/95
		551–3533227–2	05/17/95
		551–3534516–7	05/26/95
		551–3517957–4	05/15/95
		551–3533212–4	05/15/95
		551–3533254–6	05/19/95
		551–3517993–9	05/23/95
		551–3534502–7	05/25/95
		551–3533267–8	05/22/95
		551–3532027–7	05/31/95
		551–3534787–4	06/23/95
		551–3532110–1	06/09/95
		551–3534649–6	06/07/95
		551–3534570–4	06/05/95
		551–3532639–9	06/27/95
		551–3534825–2	06/27/95
		551–3534839–3	06/27/95
		551–3534865–8	06/29/95