Decisions of the United States Court of International Trade

SLIP OP. 08–55

DURFEY, *et al.*, Plaintiffs, *v.* UNITED STATES SEC'Y OF AGRICULTURE, Defendant.

Before: Pogue, Judge
Court No. 06–00316

[Defendant's remand determination remanded.]

Dated: May 22, 2008

Akin Gump Strauss Hauer & Feld LLP (*Spencer Stewart Griffith*, *Bernd G. Janzen*, *Bryce V. Bittner*) for the Plaintiffs.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); *Jeffrey Kahn*, Attorney, Office of the General Counsel, Department of Agriculture (of Counsel) for Defendant United States Secretary of Agriculture.

OPINION AND ORDER

Pogue, Judge: This case returns to court after a voluntary remand to the Department of Agriculture ("Department"). Upon remand, Defendant United States Secretary of Agriculture ("the Secretary") found Plaintiffs Ted and Pam Durfey DBA Lighthouse Ranch ("the Durfeys" or "Plaintiffs") ineligible for Trade Adjustment Assistance ("TAA") benefits,[1] claiming that Plaintiffs failed to show that they had suffered a decrease in net farm income from the pre-adjustment year of 2003 to the applicable marketing year of 2004.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (2000) *amended by* 19 U.S.C. § 2395(c) (Supp. II 2002).

[1] See Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107–210, Title I, Subtitle c § 141, 116 Stat. 953 (2002); *see also* 19 U.S.C. § 2401 (Supp. II 2002) *et seq.*

Standard of Review

In reviewing a challenge to a Department of Agriculture determination of eligibility for TAA benefits, the court will uphold the Department's determination if the factual findings are supported by substantial evidence on the record and the Department's legal determinations are otherwise in accordance with law. 19 U.S.C. § 2395(b);[2] *see also Former Employees of Shaw Pipe, Inc. v. United States Sec'y of Labor*, 21 CIT 1282, 1284–5, 988 F. Supp. 588, 590 (1997) (stating that substantial evidence is "more than a mere scintilla," but must be "sufficient evidence to reasonably support a conclusion" (internal quotations and citations omitted). In such a review, the court must also consider whether the underlying determination demonstrates that the Department has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational conection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

Background

We remanded this case to the Secretary with instructions that Plaintiffs submit any additional evidence relevant to the Department's determination of eligibility for TAA benefits. As well as the documents previously submitted, the Durfeys submitted additional documents supplied by their CPA which, they contend, properly document their net farm income when calculated on an accrual basis.

In its remand determinations the Department held the Durfeys to be ineligible for TAA benefits on the basis that their "net farm income . . . as reported to the Internal Revenue Service ("IRS"), did not decrease from the pre-adjustment year . . . on the basis of the amended tax returns filed by the Durfeys." Confidential Reconsideration Upon Remand of the Application of Ted Durfey at 1 ("Remand Determination"). To reach this conclusion the Department "compared line 36, 'Net farm profit or (loss)' on the 2003 and 2004 Schedule F's for concord grapes [submitted by the Durfeys], which the agency believes is the best evidence of net farm income." Remand Determination at 2. The use of line 36 of tax returns is taken by the Department to be "consistent with the definition of net farm income in the regulations and [to accord] with the generally accepted definition of net income." *Id.*

Plaintiffs reply that the Secretary failed to consider additional relevant evidence, supplied by their CPA, which would have shown the Durfeys to have met the required standard of declining net farm

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[2] Except where otherwise noted, all references to the U.S. Code are to the 2000 edition.

profit from the pre-adjustment year of 2003 to the marketing year of 2004. In failing to consider this evidence, Plaintiffs contend, the Department acted in violation of the TAA statute, the Department's own regulations, and relevant judicial precedent.

Discussion

The Department's regulations require that an applicant for TAA benefits must submit, "[c]ertification that net farm or fishing income was less than that of the producer's pre-adjustment year." This requirement may be met either by providing "[s]upporting documentation from a certified public accountant or attorney" (7 C.F.R. § 1580.301(e)(6)(i)) or "[r]elevant documentation and othersupporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency." 7 C.F.R. § 1580.301(e)(6)(ii). The disjunctive nature of this requirement is clear and specific; it indicates that the Department must, in making its decisions, consider "supporting financial data", whether or not such data was ever provided to the IRS. Consequently, the Department may not, without acting in violation of its own regulations, insist that it will consider only one type of evidence, that is, documents provided to the IRS. *See Steen v. United States*, 468 F.3d 1357, 1363 (Fed. Cir. 2006)(a determination of net farm income "is not to be made solely on the basis of tax return information if other information is relevant to determining the producer's net income . . . .")

Here Plaintiffs submitted their tax returns for 2003 and 2004. As noted by the Secretary, while Plaintiffs' tax returns show a net farm loss in both 2003 and 2004, the loss in 2004 was less than that in 2003. On the basis of this evidence, the Secretary determined that the Durfeys had not suffered a decline in net farm income from the pre-adjustment to the adjustment year and so were not eligible for TAA benefits. Remand Determination at 2.

The Durfeys, however, contend that their tax returns, as submitted to the IRS, which were prepared on a "cash basis,"[3] did not accu-

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[3] In defining these accounting methods, the IRS' regulations provide that

> [g]enerally, under the cash receipts and disbursements method in the computation of taxable income, all items which constitute gross income (whether in the form of cash, property, or services) are to be included for the taxable year in which actually or constructively *received*. Expenditures are to be deducted for the taxable year in which actually made.

26 C.F.R. § 1.446–1(c)(1)(i) (2006) (emphasis added). In contrast,

> under an accrual method, income is to be included for the taxable year when all the *events have occurred that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy*. Under such a method, a liability is incurred, and generally is taken into account for Federal income tax purposes, in the taxable year in which all the events have occurred that establish the fact of the liability, the

rately represent their finances in the years in question due to the nature of the grape-producers' co-op, of which they are members. Therefore, in addition to their tax returns, the Durfeys also submitted to the Department a report prepared by their CPA which, they claim, converts their tax returns for the relevant years from a cash to an accrual basis and which shows that they suffered a net farm loss from the pre-adjustment year of 2003 to the marketing year of 2004.

The Department, in its remand determination, gave several reasons for not considering the documentation provided by Plaintiffs' CPA. First, it claims that the method used by Plaintiffs' CPA is not an acceptable one as it would, the Department claims, require the Department to wait several years past the applicable marketing year to determine whether the applicant was eligible for TAA benefits or not.[4] Remand Determination at 2-3 More importantly, the Department seems to insist that, whatever method of accounting is used, the numbers used to determine TAA eligibility must be from documents "reported to the Internal Revenue Service." Because the Durfeys used a cash accounting method to report their net farm income to the IRS, the Department claims, it need not consider any other possible accounting method. *Id.* at 5.

On the first issue the Department is mistaken for two reasons. Initially, the Department appears to mischaracterize the nature of the accounting method used by Plaintiffs' CPA. The method of accounting used by the Durfeys' CPA is presented as a version of the accrual method, a method clearly acceptable for TAA purposes. *Anderson v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1333, 1336 (2006). However, even if the method used by Plaintiffs' CPA does differ from a standard accrual method, such a difference does not excuse the Department from its duty to subject the data provided by the applicant to actual review. As the Federal Circuit noted in *Steen*, TAA eligibility determinations are, "not to be made solely on the basis of tax return information if other information is relevant to determining the producer's net income . . . ." *Steen*, 468 F.3d at 1363. *Steen* is directly applicable here. The Department is required to actually consider the "other information" provided by Plaintiffs' CPA in determining their TAA eligibility. In failing to do so the Department has acted in violation of its own regulations and thus in a manner that is not in accordance with law.

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amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability.

26 C.F.R. § 1.446–1(c)(1)(ii)(A) (2006) (emphasis added).

[4] The Department's remand discussion in this regard includes no finding of fact or conclusion regarding the adequacy of Plaintiffs' filing at the time of its remand consideration. As Plaintiffs have not requested that the Department "wait until net farm income for the three years beyond the applicable program marketing year is reported to the IRS," the Department's hypothetical does not address the issues presented.

The Department is also mistaken on the second point. As we have earlier held, the Department may not limit its investigation to the materials submitted by an applicant to the IRS. The Court has held that, in its ruling in *Steen*, the Federal Circuit, "clearly did not intend for its opinion to be read to render the pro forma use of the net income line from the IRS's Schedule C in accordance with law in all circumstances." *Anderson v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 469 F. Supp. 2d 1300, 1301 (2006). To hold otherwise would be to so limit the language of 7 C.F.R. § 1580.301(e)(6)(i), which allows applicants to supporttheir applications for TAA benefits with "supporting documents from a CPA," as to render that language a nullity, essentially collapsing this arm of the regulation into 7 C.F.R. § 1580.301(e)(6)(ii).

In *Steen*, the Federal Circuit held that "[i]n [that] case" the Secretary did not commit error in relying on Mr. Steen's tax returns to determine his eligibility for TAA benefits. This was due to the fact that Mr. Steen had not alleged that his tax returns distorted his net fishing income for the relevant years. *Steen 468* F.3d at 1363–4. However, when an applicant alleges that other documentation is relevant for calculating his or her net farm or fishing income, the Federal Circuit stated, "the regulations make it reasonably clear that the determination of net farm income . . . is not to be made solely on the basis of tax return information . . . ." *Id.* at 1363. Given that the Durfeys here have clearly alleged that their tax forms distort the true nature of their net farm income the Department may not simply refuse to consider the documentation offered by Plaintiffs' CPA. In insisting otherwise the Department has confused tax reporting methodology with supporting documentation permitted by its own regulations.

Finally, in refusing to consider the documentation provided by Plaintiffs' CPA, the Department has failed to meet its duty to make a "reasonable inquiry" into whether the offered documents would affect an applicant's eligibility for TAA benefits. *See, Dus & Derrick, Inc. v. United States Sec'y of Agric.*, 31 CIT ___ , ___ , 469 F. Supp. 2d 1326, 1337 (CIT 2007). Here the Department gives no evidence at all of having engaged in a "reasonable inquiry" as to whether the documents supplied by the Durfey's CPA support their application for TAA benefits. Without such inquiry, however, the Department's determination cannot be based on substantial evidence.

CONCLUSION

For the foregoing reasons, the court remands this matter for further consideration consistent with this opinion. The agency shall have until July 22, 2008, to provide its second remand determination. Plaintiffs shall submit comments on the remand determination no later than August 12, 2008, and the government shall submit rebuttal comments no later than August 22, 2008.

SO ORDERED.

Slip Op. 08–56

E. I. DUPONT DE NEMOURS & COMPANY, Plaintiff, v. **UNITED STATES**, Defendant.

Before: Timothy C. Stanceu, Judge

Court No. 02–00737

[Denying plaintiff's motion for summary judgment and granting defendant's cross-motion for summary judgment because Customs did not underpay manufacturing substitution drawback upon reliquidation of the entry]

Dated: May 27, 2008

Crowell & Moring LLP (*Barry E. Cohen*, *Amy B. Newman*, and *Alexander H. Schaefer*) for plaintiff.

Gregory G. Katsas, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Amy M. Rubin*); *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

OPINION

Stanceu, Judge: Plaintiff E. I. du Pont de Nemours & Company ("DuPont") moves for summary judgment, contending that the U.S. Customs Service ("Customs") unlawfully denied DuPont a portion of a refund ("drawback") of duties that DuPont had paid on imported merchandise.[1] DuPont brought this action to contest the denial by Customs of its protest of the reliquidation of its entry seeking "manufacturing substitution drawback" under 19 U.S.C. § 1313(b) (Supp. V 1993). The decision Customs made upon reliquidation had the effect of limiting the duty refund to an amount that is approximately 55% of the amount of drawback DuPont had claimed. Defendant United States, in a cross-motion for summary judgment, submits that the Customs determination upon reliquidation of the drawback entry was correct. The court grants summary judgment in favor of defendant.

I. BACKGROUND

The "manufacturing drawback" procedures of the customs laws of the United States allow a refund, or "drawback," of 99% of the duties paid on imported merchandise, upon the exportation of products

[1] The Customs Service was renamed as "Bureau of Customs and Border Protection." *See Reorganization Plan Modification for the Dep't of Homeland Security*, H.R. Doc. No. 108–32, at 4 (2003); *Homeland Security Act of 2002*, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002).

("articles") manufactured or produced in the United States with the use of the imported merchandise. *See* 19 U.S.C. § 1313(a). This drawback, as authorized by subsection (a) of 19 U.S.C. § 1313, is known as "manufacturing direct identification drawback." Under subsection (b) of that section, an importer also may obtain drawback even if the specific imported merchandise on which the claim for a duty refund is made was not used in manufacturing the articles that were subsequently exported. *See id.* at § 1313(b). Under this "manufacturing substitution drawback" procedure, other merchandise, whether imported or domestic, may be substituted for the imported, duty-paid merchandise that is the subject of the claim for drawback, provided the manufacturer or producer of articles uses the imported, duty-paid merchandise and the substituted merchandise in the manufacturing or production of "such articles" within three years of receipt of the imported, duty-paid merchandise, and provided the substituted merchandise is of the "same kind and quality" as the imported, duty-paid merchandise. *See id.* Where all requirements for manufacturing substitution drawback are satisfied, the statute provides for payment of "an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported." *Id.*

The facts concerning DuPont's manufacturing process and its drawback entry that the court has found relevant to the disposition of this case and found to be uncontested, as discussed in this Opinion, are set forth in the various pleadings and exhibits thereto. *See* Compl. ¶¶ 4–13, Ex. A; Mem. in Supp. of Mot. for Summ. J. of Pl. E.I. DuPont de Nemours & Company ("Pl.'s Mem."), Ex. 2; Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s Statement of Material Facts"); Def.'s Resp. to Pl.'s Statement of Material Facts as to which There Are No Genuine Issues to Be Tried ("Def.'s Statement of Material Facts"); Def.'s Statement of Additional Material Facts as to which There Are No Genuine Issues to Be Tried ("Def.'s Statement of Additional Material Facts"); Pl.'s Resp. to Def.'s Statement of Additional Material Facts as to which There Are No Genuine Issues to Be Tried ("Pl.'s Resp. to Def.'s Statement of Additional Material Facts").

A. Manufacturing Process on which DuPont's Drawback Entry Was Based

DuPont sought drawback of duties it had paid on a quantity of "synthetic rutile," which is a processed ore that DuPont imported for the titanium contained within the ore. Compl. ¶ 6. Synthetic rutile is produced by subjecting ilmenite ore, a naturally-occurring ore containing crystalline titanium dioxide and oxides of iron, to processing that removes the iron oxide to increase the concentration of titanium dioxide. *Id.* Ex. A ¶ 8. DuPont used the synthetic rutile in manufacturing its "Ti-Pure" brand pigments. The pigments contain titanium dioxide, which imparts opacity to paints and other coatings. *Id.* ¶ 5.

DuPont used four different imported and domestic raw materials, referred to as "feedstocks," to obtain the titanium it required for manufacturing the titanium dioxide used in its pigments. *Id.* ¶ 6. Only one of the four feedstocks DuPont used was synthetic rutile. *Id.* ¶ 6, Ex. A ¶ 8. DuPont also used as feedstocks ilmenite and rutile, which are naturally-occurring ores. *Id.* Rutile consists largely of crystalline titanium dioxide. The fourth feedstock DuPont used was titanium slag, which is a synthetic form of crystalline titanium dioxide produced by processing ilmenite to remove iron oxides. *Id.* None of these feedstocks consisted of or contained pure titanium metal; each contained titanium dioxide in varying proportions and also contained other substances that were separated out as waste during the titanium dioxide production process. *See id.* ¶¶ 6–7, Ex. A ¶ 8; Pl.'s Statement of Material Facts ¶¶ 2–4.

B. Procedural History of DuPont's Drawback Entry

In the drawback entry at issue in this case (Entry No. G82–0000542–5), filed with Customs on December 6, 1991, DuPont based its claim for drawback on 6,961,934 pounds of Ti-Pure titanium dioxide pigment (identified by DuPont as "TiPure R–960") that had been exported during a period beginning in December 1988 and continuing through March 1989. Compl. ¶¶ 8–9, Ex. A–6. On the drawback entry form, DuPont designated for drawback 6,762,693 pounds of Australian-origin, duty-paid synthetic rutile that had been imported in April 1986 and used by DuPont in manufacturing during a period beginning in April 1986 and concluding in December 1987. *Id.* Ex. A–6. DuPont claimed drawback of $37,540 in duties paid on imported synthetic rutile. DuPont sought to use the substitution drawback procedure on the assertion that its feedstocks were of the "same kind and quality" as the designated imported synthetic rutile. *Id.* ¶ 8.

Customs, upon liquidating Drawback Entry No. G82–0000542–5, denied all drawback on the ground that no drawback contract had been approved by Customs. Compl. ¶¶ 9–10, Ex. A ¶ 13. After Customs denied DuPont's protest of the liquidation on the ground that the designated synthetic rutile and the substituted feedstocks were not of the same kind and quality and on additional grounds, DuPont contested the protest denial in the Court of International Trade. Compl. ¶ 10–11, Ex. A. In *E.I. DuPont de Nemours & Co. v. United States*, 24 CIT 1045, 116 F. Supp. 2d 1343 (2000) ("*DuPont I*"), the Court of International Trade held that DuPont was entitled to manufacturing substitution drawback. The Court of International Trade therefore granted DuPont's motion for summary judgment and ordered Customs to approve DuPont's proposed drawback contract, to reliquidate the drawback entry, and to "pay DuPont's drawback claim in accordance with this decision." *DuPont I*, 24 CIT at 1051, 116 F. Supp. 2d at 1350.

Upon reliquidating the drawback entry on July 13, 2001, Customs paid DuPont drawback in the amount of $20,839.63. Compl. ¶ 12, Ex. D. Upon DuPont's protest of the reliquidation, Customs headquarters issued a ruling ordering the Director of the Port of Elizabeth, New Jersey to deny the protest. HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373; Compl. Ex. E (setting forth the protest denial and HQ 229433, the headquarters ruling that accompanied the denial); Def.'s Mem. Ex. A (also setting forth HQ 229433). In the ruling, Customs reached three determinations, the combined effect of which limited DuPont's drawback to approximately 55% of the amount DuPont had claimed. First, Customs determined that the imported synthetic rutile and the feedstocks substituted for it were not of the "same kind and quality" for purposes of manufacturing substitution drawback. HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *1–*2. Second, Customs regarded the element titanium, which was obtained from the imported synthetic rutile and the other feedstocks, as the only "merchandise" that was "of the same kind and quality" for which the drawback law permitted substitution. *Id.* at *2–*3. Third, Customs limited DuPont's drawback based on what it calculated to be the duty paid on the titanium content of the quantity of imported synthetic rutile for which DuPont substituted the various feedstocks that appeared, in the form of titanium, in the exported TiPure pigment, instead of the entire duty that DuPont paid on that quantity of imported synthetic rutile. *Id.* at *3–*4. To make this calculation, Customs divided the atomic weight of titanium by the molecular weight of titanium dioxide and multiplied that percentage, .5993, by the percentage by weight of synthetic rutile that consists of titanium dioxide, .917. *Id.* at *5. The product of the two percentages was approximately 55%; on this basis, Customs determined that DuPont's drawback should be limited to approximately 55% of the drawback claimed. *See id.*; Pl.'s Mem. 7. In effect, Customs allocated the remaining 45% of the claimed drawback to the non-titanium content of the imported synthetic rutile, which DuPont describes as valueless waste and which appeared neither in the TiPure pigment nor in any other product of DuPont's manufacturing operation. *See* Pl.'s Mem. 12–13; Pl.'s Supplemental Mem. in Supp. of Mot. for Summ. J. 2–9 ("Pl.'s Supplemental Mem.").

The protest denial that plaintiff contests in this case occurred on June 14, 2002. Compl. Ex. E. The following month, Customs issued an interim rule amending its procedures governing manufacturing substitution drawback ("Interim Rule"). *See Manufacturing Substitution Drawback: Duty Apportionment*, 67 Fed. Reg. 48,368 (July 24, 2002) ("*Interim Rule*"). The Interim Rule, in 19 C.F.R. § 191.26(b)(4)(i), required that "[t]he duty paid on the imported material must be apportioned among its constituent components," *id.* at 48,370, and that the "claim on the chemical element that is the designated merchandise must be limited to the duty apportioned to that chemical element on a unit-for-unit attribution . . . ." *Id.* at 48,369. Customs stated that its reason for issuing the Interim Rule was to bring the rules governing manufacturing substitution drawback into accordance with the decision of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *International Light Metals, A Division of Martin Marietta Technologies, Inc. v. United States*, 194 F.3d 1355 (1999) ("*International Light Metals*"), and *DuPont I*. *Id.* at 48,369. The Interim Rule, amending the part of the regulations governing recordkeeping for drawback, was made to apply "[i]f the designated merchandise is a chemical element that was contained in imported material that was subject to an *ad valorem* rate of duty, and a substitition drawback claim is made based on that chemical element." *Id.* at 48,370 (codified at 19 C.F.R. § 191.26(b)(4) (2003)). Plaintiff filed its summons on November 8, 2002 and its complaint on November 22, 2002.

On August 22, 2003, following a period for public comment, Customs adopted the Interim Rule as a final rule ("Final Rule") without substantive change. *See Manufacturing Substitution Drawback: Duty Apportionment*, 68 Fed. Reg. 50,700 (Aug. 22, 2003) ("*Final Rule*"). In response to comments urging apportionment by value instead of weight, Customs stated that "the courts in both [*International Light Metals*] and *DuPont [I]* require apportionment by relative weight." *Id.* at 50,701. As did the Interim Rule, the Final Rule contained a single example to illustrate the new requirement of apportionment by relative weight. That example was based principally on the facts of DuPont's drawback entry. *See id.* at 50,703; *Interim Rule*, 67 Fed. Reg. at 48,370.

C. Voluntary Dismissal of Plaintiff's Claim Pertaining to the Judgment in DuPont I

As originally filed, the complaint in this case included a claim ("Count I") stating as follows: "This Court's ruling in *Dupont I* directed Customs to pay the full amount of the drawback claim in Entry No. G82–0000542–5. Customs' failure to do so is contrary to law." Compl. ¶ 14. With the consent of the parties, the court entered an order on March 3, 2006 designating Count I as a separate case (Court No. 06–00055). The new case was dismissed on May 16, 2006 after both parties voluntarily stipulated for dismissal pursuant to USCIT Rule 41(a)(1)(B).

II. DISCUSSION

This court exercises jurisdiction under 28 U.S.C. § 1581(a) (2000). Summary judgment is awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c).

DuPont's first argument is that the Court of International Trade in *DuPont I* ordered Customs to pay DuPont's drawback claim and did not authorize Customs to develop new reasons not to do so. Pl.'s Mem. 9. "Well-established principles of *res judicata* prevent Customs from refusing to reliquidate and pay in full the drawback claim that was before the Court in *DuPont I*." *Id.* According to plaintiff, "Customs' refusal to reliquidate the entry at the requested amount is nothing more than an attempt to relitigate the claim presented in *DuPont I* by asserting a defense that it could have raised and litigated there." *Id.* at 10. Second, in the alternative, DuPont argues that the drawback statute does not permit Customs to reduce the amount of its drawback claim by "apportioning" the refund of duties paid on synthetic rutile between the titanium content of the synthetic rutile and the non-titanium content. *Id.* at 11–19. In support of this argument, DuPont submits that the imported synthetic rutile and the substituted feedstocks are the merchandise that is of the "same kind and quality" for purposes of the manufacturing substitution drawback provision in the statute. *Id.* at 13–15. Plaintiff's third argument is that if apportionment is authorized by the drawback law, then such apportionment must be based on relative value rather than on relative weight. *Id.* at 19–23.

Defendant counters that if *res judicata* applies, it applies in favor of its own position because of certain language in the *DuPont I* opinion that defendant interprets as requiring apportionment of DuPont's drawback by weight. Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. 14–16 ("Def.'s Mem."). Defendant's second argument is that the reliquidation of the drawback entry was in accord with the aforementioned Customs regulation requiring, in certain circumstances, duty apportionment by relative weight. *Id.* at 10–11. Defendant maintains that this court must accord deference to the construction of the drawback statute underlying the regulation, even though the regulation was promulgated after Customs denied the protest leading to this action. *Id.* at 12–13. Defendant submits that the merchandise of the "same kind and quality" for purposes of the manufacturing substitution drawback provision is confined to the element titanium. *Id.* at 14. Additionally, defendant argues that "when drawback is claimed on an 'appearing-in' basis as it is here, drawback can only be paid on the portion of the merchandise actually appearing in the exported product." *Id.* at 18. Defendant argues, further, that because the statute is silent as to the method of apportionment between waste and the sought element, Customs' interpretation of the statute, under which the apportionment is made based on relative weight and not on relative value, should be upheld. *Id.* at 24–25. Defendant views the decision by Customs to apportion based on weight, and not value, as "reasonable and administratively reliable." *Id.* at 25. Defendant further argues that "even without deference, the method by which Customs calculated the amount payable on DuPont's drawback claim is consistent with prior judicial precedent, with prior Customs precedent, and with applicable statutory and regulatory provisions." *Id.* at 8.

Below, in part A, the court discusses the uncontested facts, concluding that there is no genuine issue as to any fact material to the calculation of the amount of drawback owed to DuPont. The court, in part B, then considers the effect of the *res judicata* principle of claim preclusion on the counts that remain in this litigation following the severance of the first count in the complaint. The court concludes, contrary to plaintiff's argument, that the principle of *res judicata* does not extinguish the government's defense to DuPont's claim that DuPont is entitled to drawback in the full amount. Next, in part C, the court discusses the reasons for its conclusions that *DuPont I* did not decide the amount of drawback that DuPont is to be paid on its drawback entry but did decide that the designated synthetic rutile and the substituted feedstocks are of the same kind and quality, an issue that defendant may not relitigate here because of the effect of the principle of issue preclusion. In part D, the court concludes that Customs erred in basing its "apportionment" on its "same kind and quality" finding and that the statute, in the manufacturing substitution drawback provision, does not limit DuPont's drawback according to the proportion of titanium in the synthetic rutile. The court, in part E, rejects defendant's deference argument pertaining to the Final Rule. In part F, in response to defendant's argument that HQ 229433 deserves deference, the court concludes that HQ 229433 is based on flawed reasoning. The court in part G explains that it is the approved drawback contract and the regulations governing the contract that limit the available drawback. Specifically, the drawback contract confines claims to the appearing-in basis, effectively precluding claims on the used-in basis, and thereby limits the available drawback according to the quantity, by weight, of the designated merchandise or substituted merchandise that appears in the exported TiPure. The court, therefore, denies DuPont's motion for summary judgment. Finally, in part H, the court concludes that in paying drawback of $20,839.63 on Entry No. G82–0000542–5, Customs paid DuPont drawback in an amount slightly higher than that actually owed and, for this reason, grants defendant's cross-motion for summary judgment.

A. The Parties Agree on the Facts Material to the Calculation of the Amount of DuPont's Drawback but Do Not Agree on the Calculation Method

In its complaint in this case, DuPont sought payment of drawback on Entry No. G82–0000542–5 in the amount of $37,547.[2] Compl. ¶ 9. However, DuPont has acknowledged that "[b]ecause of an apparent arithmetic error, the correct amount of the drawback claim should have been $37,510" and now seeks summary judgment in that amount. Pl.'s Mem. 6 n.4. It appears that the error affecting the drawback claim stemmed from a miscalculation of the titanium equivalent of the total imported synthetic rutile and that a similar error affected the reliquidation of the drawback entry. In view of these errors, and to provide context for the legal issues to be decided herein, the court will discuss in detail the undisputed facts upon which it concludes that an award of summary judgment to defendant is the correct disposition of this case.

1. Undisputed Facts Material to the Calculation of Drawback under Either the Method Advocated by Plaintiff or That Advocated by Defendant

The court notes the following uncontested facts, as stated in the various pleadings, exhibits thereto, the parties' statements as to material facts filed pursuant to USCIT Rule 56(h), and other submissions in this case. *See* Compl. ¶¶ 4–13, Ex. A; Pl.'s Mem. 5–7, Ex. 2; Def.'s Mem. & Ex. A; Pl.'s Statement of Material Facts; Def.'s Statement of Material Facts; Def.'s Statement of Additional Material Facts; Pl.'s Resp. to Def.'s Statement of Additional Material Facts. DuPont's drawback claim arose from exports of 6,961,934 pounds of TiPure pigments. Compl. ¶ 9, Ex. A–6 at 1; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5. According to the drawback entry, the titanium dioxide content of the TiPure pigments was 89%; the exports therefore contained 6,196,121 pounds of titanium dioxide. *See* Compl. Exs. A–6 at 1 & E; Def.'s Mem. Ex. A; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5. Because, as the parties agree, the titanium element comprises by atomic weight 59.93% of the molecular weight of the compound titanium dioxide, DuPont's exported TiPure pigments were the equivalent of 3,713,335 pounds of titanium. *See* Compl. ¶ 9; Def.'s Mem. 4–5, Ex. A; Def.'s Statement of Additional Material Facts ¶ 3; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5.

The parties also agree that DuPont paid $63,077 in duties on 11,248,972 pounds of imported synthetic rutile, the quantity imported on the single consumption entry on which the duty was paid.

[2] The actual amount of the drawback claim appears to be $37,540, as shown on the drawback entry. Compl. Ex. A–6 at 1.

Compl. ¶ 9, Exs. A–6 at 1 & C; Def.'s Mem. Ex. A; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5. The 11,248,972 pound quantity contained 10,315,307 pounds of titanium dioxide, based on a 91.7% titanium dioxide content in synthetic rutile. Compl. Exs. A–6 at 1 & C; Def.'s Mem. Ex. A; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5. Applying the 59.93% factor to determine the amount of titanium corresponding to the titanium dioxide yields a titanium equivalent of 6,181,963 pounds in the 11,248,972 pounds of imported synthetic rutile.[3] Compl. Exs. A–6 at 1 & C; Def.'s Mem. 4–5, Ex. A; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5.

Of the 11,248,972 pounds of imported synthetic rutile, DuPont designated 6,762,693 pounds of synthetic rutile for drawback, an amount shown on the drawback entry (Customs Form 331). *See* Compl. ¶ 9, Ex. A–6 at 1; Def.'s Mem. Ex. A; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5. Applying the same factors, *i.e.*, 91.7% titanium dioxide content in synthetic rutile and 59.93% titanium equivalent in titanium dioxide, produces a titanium equivalent of 3,716,493 pounds in the amount of imported synthetic rutile that DuPont designated for drawback.[4] *See* Compl. ¶ 9, Exs. A–6 at 1 & C; Def.'s Mem. 4–5, Ex. A; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5.

DuPont's manufacturing of the exported TiPure resulted in waste products due to impurities present in the various feedstocks, including iron chloride; it is uncontested that DuPont, in some instances, disposed of these waste products but in other instances sold them to other parties. *See* Pl.'s Mem. Ex. 2 ¶ 6 (setting forth the declaration of Norman Shurak, dated August 19, 2003) ("Norman Shurak Decl."); Compl. Ex. A–4 (setting forth the drawback contract and the proposed revisions that the Court of International Trade ordered approved in *DuPont I*, 24 CIT at 1051, 116 F. Supp. 2d at 1350) ("*Approved Drawback Contract*"). In support of its motion for summary

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[3] DuPont calculated its drawback claim using the amount of 6,176,709 pounds of titanium equivalent in the total imported synthetic rutile and used that amount in presenting its protest claim. *See* Compl. Ex. D at 2; HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5. The correct determination of titanium equivalent for the 11,248,972 pounds of imported synthetic rutile is 6,181,963 pounds. *See* Mem. in Supp. of Mot. for Summ. J. of Pl. E.I. DuPont de Nemours & Company 6 n.4 ("Pl.'s Mem."); HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5.

[4] The drawback entry (Customs Form 331) erroneously indicated that the titanium equivalent of the designated synthetic rutile was 5,357,165 pounds. *See* Compl. Ex. A–6 at 1. The uncontested facts cause the court to conclude that DuPont did not use this erroneous quantity in determining the amount of its drawback claim and that Customs, although identifying the error at or around the time of reliquidation, did not use the erroneous quantity in reliquidating the drawback entry. *See* HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *5; Compl. Ex. E (setting forth the protest denial and HQ 229433, the headquarters ruling that accompanied the denial); Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Mem.") Ex. A (also setting forth HQ 229433).

judgment, DuPont has not submitted as an uncontested fact the amount it received for the sale of this waste.

2. The Motion and Cross-Motion for Summary Judgment Differ on the Method By Which Drawback Is Calculated Using the Same Set of Material Facts

Under the method of calculating drawback advocated by DuPont, 60.067% of the total import shipment of synthetic rutile is considered to have been used to produce the quantity of TiPure pigment exported based on the stoichiometric substitution of titanium, *i.e.*, substitution on a pound-for-pound basis. Pl.'s Mem. 6–7. The .60067 percentage is obtained by dividing the titanium equivalent of the exported TiPure pigment (as noted above, 3,713,335 pounds) by the titanium equivalent of the total import shipment of synthetic rutile (as corrected, 6,181,963 pounds). *Id.* at 6. DuPont argues that the drawback is then calculated by applying the .60067 percentage to the duty paid on the synthetic rutile, which was $63,077; the result, reduced by the 1% drawback fee, is $37,510.[5] *Id.*

The agreement between the parties on the material facts is confirmed by use of those same facts by Customs in the headquarters decision which defendant maintains is correct. *See* HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373; Def.'s Mem. 1–5. In HQ 229433, the Customs ruling directing the Customs officials at the Port of Elizabeth, New Jersey to deny the protest of the reliquidated drawback entry, Customs recalculated DuPont's drawback claim according to its own method but also, in footnotes, presented a recalculation of the drawback according to the method DuPont advocated in the protest and advocates in this litigation. *See* HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *6, nn.1–5. The result of the Customs calculation using DuPont's method was $37,888. *Id.* at *6 n.3. Reduced by the 1% fee, this calculation yields a result in agreement with DuPont's current position that the correct calculation of its drawback claim is $37,510.[6] *See* Pl.'s Mem. 6 n.4.

The method the United States advocates is also based on the stoichiometric substitution of titanium on a pound-for-pound basis but would allow drawback of only 54.9558% of the $37,510 amount of drawback that DuPont now claims. *See* HQ 229433 (May 10, 2002),

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[5] The 1% reduction is required by the drawback statute. 19 U.S.C. § 1313(a) (Supp. V 1993) ("less 1 per centum of such duties"); *id.* § 1313(b) (. . . the total amount of drawback allowed . . . shall not exceed 99 per centum of the duty paid on such imported merchandise.").

[6] HQ 229433 states that "[u]sing the corrected amount of titanium in the imported rutile, 6,181,963 [pounds], and based on DuPont's formula, though incorrect, the amount of drawback claimed would have been $37,888 (3,713,335 / 6,181,963 X $63,077)." HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *6 n.3. Absent rounding in the last step of the calculation, the drawback claim would be $37,888.61, 99% of which is $37,509.72, which agrees with DuPont's position that the corrected calculation of its drawback is $37,510.

available at 2002 WL 1584373 at *6, nn.4–5 (calculating the amount of $20,822 without the 1% reduction, which reduction would further reduce the drawback amount to $20,614). Customs obtained the .549558 percentage by multiplying the percentage of the weight of the imported synthetic rutile that is comprised of titanium dioxide, *i.e.*, 91.7%, by the percentage of the molecular weight of the titanium dioxide molecule that is represented by the atomic weight of the titanium atoms within that molecule, *i.e.*, 59.93%. *Id.* at *6, nn.1, 4–5. The result of the calculation, $20,822, represents the amount of duty that Customs considers DuPont to have paid on the titanium contained within the quantity of imported synthetic rutile that corresponded, for substitution drawback purposes, to the titanium appearing in the exported TiPure pigments.[7] *Id.* at *6, n.5.

Customs allowed $20,839.63 in drawback upon the reliquidation of the drawback entry at issue. *Id.* at *2. Defendant's cross-motion for summary judgment seeks dismissal of the case, such that the drawback as determined upon that reliquidation, although slightly higher than defendant considers to be correct, would be allowed to stand. *See* Def.'s Mem. 26. In response to the protest of the reliquidation, Customs recalculated the drawback, concluding that the $20,839.63 amount was erroneous and that the correct amount of drawback should have been $20,822. HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *2, *5. The error, identified in HQ 229433, was in the determination of the titanium equivalent of the total amount of the imported synthetic rutile. *Id.* at *5. In reliquidating the entry, Customs used the quantity of 6,176,709 pounds of titanium equivalent instead of the correct titanium equivalent of 6,181,963 pounds, an error HQ 229433 attributed to the calculation DuPont used to prepare the drawback entry. *Id.*

B. Because DuPont Is Suing on a New Cause of Action, the Res Judicata Principle of Claim Preclusion Does Not Foreclose the Government's Defense

DuPont's first argument in support of its motion for summary judgment is that "[w]ell-established principles of *res judicata* prevent Customs from refusing to reliquidate and pay in full the drawback claim that was before the Court in *DuPont I*." Pl.'s Mem. 9. Specifically, plaintiff relies on the *res judicata* principle of claim

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[7] To perform this calculation, Customs in HQ 229433 "apportioned" DuPont's drawback by multiplying $63,077, the duty paid on total quantity of synthetic rutile imported, by the calculated 54.9558%, resulting in $34,664. This amount, representing what Customs considered DuPont to have paid for the titanium content of the entire shipment of synthetic rutile, is then multiplied by the ratio of 3,713,335, the pounds of titanium equivalent exported, to 6,181,963, the pounds of titanium equivalent on which the total duty was paid. The result is $20,822. It appears that the calculation as set forth in HQ 229433 did not include a final step to deduct the 1% fee. *See* HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *6 nn.4–5.

preclusion, arguing that "[u]nder the doctrine of *res judicata*, or claim preclusion, a 'judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.' " *Id.* (internal citations omitted). Plaintiff's argument essentially is that *DuPont I*, by operation of the *res judicata* principle of claim preclusion, forecloses the government's defense that DuPont is not entitled to the full amount of drawback it is seeking. *Id.* at 10. Defendant argues that *DuPont I* actually considered this defense when it considered the issue of apportionment and that *DuPont I* decided the apportionment issue in defendant's favor. Def.'s Mem. 15–16.

"Under res judicata, 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.' " *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Claim preclusion forecloses relitigation of claims that actually were raised or that could have been raised:

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. . . . The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Comm'r v. Sunnen, 333 U.S. 591, 597 (1948) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

Because *DuPont I* has culminated in a final judgment, the cause of action on which DuPont sued the United States in that case has been merged into the judgment in *DuPont I* and may not be the subject of a second suit by DuPont against the United States on that same cause of action. *See* Restatement (Second) of Judgments § 18 (1982) (setting forth "Judgment for Plaintiff—The General Rule of Merger" and stating that "[w]hen a valid and final personal judgment is rendered in favor of the plaintiff: (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and (2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action."). DuPont could obtain a remedy on its previous cause of action only by suing on the judgment entered in *DuPont I*. *See id.* As originally filed, plaintiff's complaint included Count I, which asserted that "[t]his Court's ruling in *DuPont I* directed Customs to pay the full amount of the drawback claim in Entry No. G82–0000542–5. Customs' failure to do so is contrary to law." Compl. ¶ 14. Count I reasonably could be construed as seeking enforcement of the judgment in *DuPont I*. With the consent of the parties, the court severed this count from the other two counts in the complaint and designated it as a separate case. That case subsequently was dismissed by stipulation of the parties under USCIT Rule 41(a)(1)(B).

Claim preclusion does not occur where the parties are identical but the cause of action in the second suit is not the same as that involved in the first suit. Therefore, to resolve the competing *res judicata* arguments the parties have presented, the court first must determine whether DuPont, in bringing its action against the United States according to the remaining counts in its complaint, is now suing on the same cause of action on which it sued the United States in *DuPont I*. The court concludes that because the instant matter arises out of a different group of transactional facts than those on which DuPont sued in *DuPont I*, this case must be considered to bring a new cause of action.

Count II of the complaint alleges that in reliquidating the drawback entry, Customs acted inconsistently with the drawback statute in apportioning the duties DuPont paid on the designated portion of the imported synthetic rutile and thus reducing DuPont's drawback. Compl. ¶¶ 15–16. Count III alleges that if any apportionment was lawful, it was required by the drawback statute to be accomplished according to relative value, and not according to relative weight as Customs did in reliquidating the drawback entry. *Id.* ¶¶ 17–18. Counts II and III (*i.e.*, the remaining counts) in the complaint contest the administrative decision that Customs made in denying the protest DuPont filed in response to the reliquidation of its drawback entry. That administrative decision, and events surrounding it, are essential to plaintiff's invoking the court's jurisdiction. These events followed the decision in *DuPont I* and the reliquidation of the drawback entry by Customs in response to the judgment entered in that case and include DuPont's protest of the reliquidation, issuance by Customs headquarters of HQ 229433 (which directed the Port of Elizabeth to deny the protest and explained the reasons for the headquarters decision), and a denial of the protest by the Port Director for Elizabeth in accordance with HQ 229433. *See* Compl. Exs. B-E. Thus, *DuPont I*, although involving the same drawback entry as this case, arose from a judicial challenge to a different administrative determination by Customs, *i.e.*, the denial of the protest DuPont filed to contest the *original* liquidation of the drawback entry at zero drawback. The group of transactional facts on which this case was brought differ in these respects from the facts that gave rise to *DuPont I*.

Where the transactional or operative facts in two cases differ as they do here, the causes of action in those two cases are not the same. *See Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362–64 (Fed. Cir. 2000) (concluding that the same cause of action can exist in two cases only where the same set of transactional facts are involved in those cases and that, where the transactional facts differ, the doctrine of claim preclusion does not apply); *Young Eng'rs Inc. v. Int'l Trade Comm.*, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (stating that claim preclusion prevents the "assertion of the same transactional facts in the form of a different cause of action or theory of relief."); *Black's Law Dictionary* 235 (8th ed. 2004) (stating that a "cause of action" is "1. [a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM . . . ."). In raising its defense in this case, the government is not collaterally attacking the judgment entered in *DuPont I*. *Cf. Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324 (Fed. Cir. 2008) (citing Restatement (Second) of Judgments § 18(2) (1982) and noting that a defense that could have been interposed in the first action cannot later be used to collaterally attack the judgment resulting from the first action). In summary, because the two remaining counts in DuPont's complaint involve a different cause of action from that upon which DuPont sued in *DuPont I*, the *res judicata* doctrine of claim preclusion does not foreclose the government's defense that Customs acted lawfully in limiting DuPont's drawback payment as it did.

C. Issue Preclusion: DuPont I Did Not Decide the Amount of Drawback that DuPont Should Be Paid on its Drawback Claim But Decided the Issue of "Same Kind and Quality"

Where the parties are the same but the cause of action is not the same as that asserted in the original suit between those parties, the principle of "issue preclusion," also referred to as "collateral estoppel," applies to foreclose relitigation of issues actually litigated and decided in the prior case.

> Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated.

Comm'r v. Sunnen, 333 U.S. at 598. The doctrine of issue preclusion applies to disallow relitigation of issues of law and issues of fact. As the Supreme Court has explained, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana*, 440 U.S. at 153). The principle of issue preclusion requires that the court determine which, if any, of the issues decided in *DuPont I* are also issues raised by this case.

1. DuPont I Did Not Decide the Amount of Drawback that DuPont Should Be Paid on its Drawback Claim

According to plaintiff's arguments, among the issues decided in *DuPont I* was the amount of drawback that DuPont was to be paid. Plaintiff points out that its complaint in *DuPont I* specified the exact amount of money it sought on its drawback entry.[8] Pl.'s Mem. 9. DuPont argues that *DuPont I* "remanded to Customs the same drawback entry that is the subject of this litigation, with the instruction that the agency 'approve the proposed drawback contract . . . , reliquidate the drawback entry, and pay DuPont's drawback claim in accordance with this decision.' " *Id.* at 9 (quoting *DuPont I*, 24 CIT at 1051, 116 F. Supp. 2d at 1350). Defendant disagrees with DuPont's analysis of *DuPont I*, arguing essentially that if issue preclusion applies, it applies in favor of the position of the United States. Def.'s Mem. 14–16. According to defendant's argument, *DuPont I* decided that DuPont's drawback must be limited by apportioning the duty paid between the titanium content of the synthetic rutile and the other elements contained in the synthetic rutile. *Id.* at 16.

Each of the parties supports its argument for summary judgment by citing passages from the *DuPont I* opinion. However, the court concludes from that opinion that the holding of *DuPont I* is narrower than that presumed by the arguments of either party. *DuPont I* settled in the affirmative the question of whether substitution drawback was available on Entry No. G82–0000542–5. *DuPont I* did not decide the issue of the actual amount of drawback that DuPont was owed and did not decide the method by which the drawback must be calculated. Instead, *DuPont I* left the calculation of the amount of drawback to be determined by Customs upon the reliquidation of the drawback entry.

Although the *DuPont I* opinion mentions the amount of the drawback claim, $37,540, it does so only in presenting the background of the case. *See DuPont I*, 24 CIT at 1046, 116 F. Supp. 2d at 1345. The holding in *DuPont I* is not directed to the specific issue of how DuPont's drawback is to be calculated. Instead, the opinion introduces the issue to be decided as follows: "At issue is DuPont's entitlement under 19 U.S.C. § 1313(b) to a drawback upon exportation from December 1988 through March 1989 of 60 shipments of 'Ti-Pure R–960' titanium dioxide pigment manufactured in the United States." *Id.* at 1045, 116 F. Supp. 2d at 1344–45. The text of the opin-

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[8] Paragraph 13 of the complaint in *E.I. DuPont de Nemours & Co. v. United States*, 24 CIT 1045, 116 F. Supp. 2d 1343 (2000) ("*DuPont I*") stated that "DuPont claimed a duty drawback of $37,540.00 in respect of exports of 6,961,934 pounds of 'Ti-Pure' brand titanium dioxide." Compl. Ex. A ¶ 13; Pl.'s Mem. Ex. 3 ¶ 13.

ion that follows is directed almost entirely to the issue of whether, under the factors discussed in *International Light Metals*, the "same kind and quality" requirement of 19 U.S.C. § 1313(b) precludes drawback because of the physical differences between synthetic rutile and the three other products used as feedstocks and because of the resulting differences in the manufacturing process. *Id.* at 1048–51, 116 F. Supp. 2d at 1347–50.

The sole passage in the *DuPont I* opinion that mentions the method of calculating drawback lends further support to the conclusion that *DuPont I* refrained from deciding the amount of drawback, intending instead that Customs was to calculate the drawback upon reliquidating the drawback entry. The passage reads as follows:

> The Government, as something of an afterthought, asserts that a ruling in favor of DuPont would place an undue burden on Customs because of the difficulty involved in *calculating the proper amount of DuPont's drawback*. According to the Government, the rate of duty on the imported merchandise for which drawback is claimed (synthetic rutile) was an *ad valorem* rate on the value of the ore, rather than on the value of the titanium content. The Government argues that any drawback would entail the difficult task of apportioning the duty paid between the synthetic rutile's titanium content and the other elements contained therein. *However, since the uncontroverted Manufacturing Drawback Certificate* [(the drawback entry form)] *contains the necessary percentages for making the calculation, this burden would not seem to be a sufficient reason for denying DuPont its relief.*

Id. at 1049–50, 116 F. Supp. 2d at 1348–49 (emphasis added and internal citations omitted). If, as plaintiff argues, the Court of International Trade in *DuPont I* had intended to direct Customs to pay DuPont $37,540, then the above-quoted passage would not have mentioned "the necessary percentages for making the calculation" in response to the government's claimed "difficulty involved in calculating the proper amount of DuPont's drawback." *Id.* at 1050, 116 F. Supp. 2d at 1348–49. Were DuPont correct in its interpretation of the holding in *DuPont I*, the calculation of "the proper amount of DuPont's drawback" already would have been made and decided by the Court of International Trade as part of the holding in the case. The above-quoted passage is inconsistent with any such interpretation of that holding, which must be ascertained from the *DuPont I* opinion as a whole. The court concludes from this passage, and from the absence of discussion of the calculation of drawback in the remainder of the opinion, that *DuPont I* did not decide "the proper amount of DuPont's drawback."

The court is not convinced by plaintiff's argument that the Court of International Trade in *DuPont I* intended to award summary judgment in the amount of $37,540 because that was the amount of drawback sought in DuPont's summary judgment motion. Nothing in the *DuPont I* opinion so states. Nor is *DuPont I* correctly interpreted as an award of partial summary judgment under USCIT Rule 56(d); had it been such an award, the court would have identified controverted facts. *See* USCIT R. 56(d). Instead, *DuPont I* is correctly construed to award a judgment based on the absence of a genuine issue of material fact, and also to require Customs to make, "in accordance with this decision," an additional administrative determination of the exact amount of drawback to be paid upon the reliquidation of the drawback entry, on the basis of the uncontroverted facts. *DuPont I*, 24 CIT at 1051, 116 F. Supp. 2d. at 1350. The Court of International Trade in *DuPont I* specifically identified, among those uncontroverted facts, the information presented on the drawback entry form that Customs would require were Customs to allocate "the duty paid between the synthetic rutile's titanium content and the other elements contained therein." *Id.* at 1050, 116 F. Supp. 2d at 1348. That information would have been irrelevant, and no such allocation could have occurred, had *DuPont I* considered DuPont to qualify for drawback in the full amount claimed in DuPont's motion for summary judgment. Although *DuPont I* decided, according to USCIT Rule 56(c), that DuPont was "entitled to a judgment as a matter of law," *the* judgment to which DuPont was entitled was a judgment directing Customs to reliquidate the drawback entry in accordance with the opinion in that case, and to approve the proposed drawback contract, *not* a judgment directing Customs to pay DuPont, upon reliquidation of the entry, an amount of drawback that the Court of International Trade had determined or intended. *See* USCIT R. 56(c) (emphasis added); *see also DuPont I*, 24 CIT at 1047–48, 1051, 116 F. Supp. 2d at 1346–47, 1350.

The court also must reject defendant's argument that under *DuPont I* Customs was *required* to award drawback in an amount reduced according to the percentage content of titanium in synthetic rutile. *See* Def.'s Mem. 14–16. The opinion in *DuPont I* does not state such a holding. The only sentence in the opinion that touches upon the general topic of a reduced amount of drawback is the following, from the passage quoted above: "However, since the uncontroverted Manufacturing Drawback Certificate contains the necessary percentages for making the calculation, this burden would not seem to be a sufficient reason for denying DuPont its relief." *DuPont I*, 24 CIT at 1050, 116 F. Supp. 2d at 1348–49; *see* Def.'s Mem. 16. This sentence does not support defendant's conclusion that *DuPont I* decided the specific way that DuPont's drawback was to be calculated upon reliquidation of the entry. The context of the sentence is not the statement of the holding of the case but is instead a refutation of the government's argument that the difficulty of such a calculation was a barrier to DuPont's obtaining any drawback.

In summary, the issue of the amount of drawback was not decided by *DuPont I*. As discussed below, however, issue preclusion forecloses defendant's argument that only titanium can be considered to be of the "same kind and quality." To the contrary, *DuPont I* decided that synthetic rutile and the other three feedstocks are of the "same kind and quality" and therefore are substitutable for drawback purposes.

2. Defendant Is Precluded from Contesting the Determination in DuPont I that the Imported Synthetic Rutile and the Substituted Feedstocks Were of the Same Kind and Quality

The parties disagree as to what constitutes the "merchandise" that is of the "same kind and quality" within the meaning of the manufacturing substitution drawback provision, 19 U.S.C. § 1313(b). Plaintiff asserts that the synthetic rutile and the other three feedstocks are all of the same kind and quality for manufacturing substitution drawback purposes.[9] Pl.'s Mem. 7, 13. Although the government agrees that DuPont is entitled to drawback as a result of the judgment in *DuPont I*, the government maintains that titanium, and only titanium, satisfies the same-kind-and-quality requirement of the statute. Def.'s Mem. 18 (stating that "[b]ecause Section 1313(b) permits drawback only on imported and substituted merchandise of the 'same kind and quality' and, in this case, that is the titanium, the drawback payable to DuPont must be measured by the titanium content only."). The court concludes that *DuPont I*, in ruling that DuPont was entitled to manufacturing substitution drawback, determined that the imported, designated synthetic rutile and the substituted feedstocks satisfy the "same kind and quality" requirement as set forth in 19 U.S.C. § 1313(b). Therefore, while the government's defense is not precluded by *res judicata*, the principle of issue preclusion does not permit defendant to relitigate the issue of whether the four feedstocks satisfy the same-kind-and-quality requirement of 19 U.S.C. § 1313(b).

The government interprets the decision of the Court of International Trade in *DuPont I* and the decision of the Court of Appeals in *International Light Metals* to hold that only titanium satisfied the same-kind-and-quality requirement of 19 U.S.C. § 1313(b). In so doing, the government misconstrues the holdings in both cases. The decision in *DuPont I* was based in part on the decision of the Court of Appeals in *International Light Metals*, which was decided while the

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[9] Plaintiff asserts that

> [i]n this case, instead of relying entirely on imported synthetic rutile as a source of titanium, DuPont relies on imported synthetic rutile and domestic titanium-bearing ores of the "same kind and quality." Section 1313(b) allows DuPont to use any of these materials in its manufacture of titanium dioxide pigment for export, and irrebuttably presumes that it used the imported synthetic rutile in the manufacture of the exported articles.

Pl.'s Mem. 13.

issue of whether DuPont was entitled to manufacturing substitution drawback on Drawback Entry No. G82–0000542–5 was pending in *DuPont I*. *International Light Metals* did not hold that, of the imported titanium sponge and substituted titanium scrap, only titanium qualified as the "same kind and quality." As it stated twice in its opinion, the Court of Appeals in *International Light Metals* was deciding the question of whether 19 U.S.C. § 1313(b) allowed titanium alloy scrap, which consisted of titanium (of at least 99.3% purity) and other elements, to be substituted for imported titanium "sponge," which consisted of commercially pure titanium (of at least 99.3% purity). *See Int'l Light Metals*, 194 F.3d at 1363 (stating that "[t]he issue before us is whether, under 19 U.S.C. § 1313(b), ILM was entitled to a contract permitting drawback upon substituting titanium alloy scrap for titanium sponge."); *id.* at 1364 (identifying the question before the Court of Appeals as "whether, under 19 U.S.C. § 1313(b), titanium-containing scrap may be substituted for titanium sponge.").

The issue had arisen after the importer, International Light Metals, Inc. ("ILM"), sought and obtained from Customs approval of a proposed contract for manufacturing substitution drawback. *Id.* at 1358. The approved drawback contract allowed ILM, a manufacturer and exporter of titanium alloy products, to import titanium sponge and substitute for it domestic titanium sponge meeting the same level of purity. *Id.* After Customs approved ILM's drawback contract, ILM began obtaining the titanium for manufacturing from a second source, domestic titanium alloy scrap. *Id.* The presence in the scrap of elements other than titanium did not prevent ILM from using the scrap in its manufacturing process; to the contrary, the alloying process made use of some of these elements. *Id.* at 1358–59. However, the use of the large solid pieces of scrap necessarily altered the manufacturing process.[10] *Id.*

Customs discovered in an audit that ILM, by using the scrap as the second source of titanium, had departed from the process Customs had approved in the drawback contract. *Id.* Although the appli-

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[10] The Court of Appeals for the Federal Circuit described ILM's manufacturing process as follows:

> When the source material was titanium sponge, ILM compressed it with alloying elements such as aluminum, iron, copper, vanadium, and carbon. When the source material was alloy scrap in the form of chips and turnings, ILM compressed it with any additional materials needed, including titanium sponge. These compressed materials were welded to form an electrode in a process that took about six hours to complete. When using large solid pieces of alloy scrap, however, ILM did not compress the pieces, but instead hand-welded them to form the electrode, in a process that took approximately forty hours to complete. Under any circumstance, the entire manufacturing process took from two to three months to complete.

Int'l Light Metals, A Div. of Martin Marietta Technologies, Inc. v. United States, 194 F.3d 1355, 1358 (1999) ("*Int'l Light Metals*") (internal citations omitted).

cable regulations allowed drawback to be claimed upon a drawback contract that was amended retroactively, Customs denied, on two grounds, ILM's application for an amended drawback contract. *Id.* at 1359–60, 1362–63. The principal ground was a conclusion by Customs that the imported titanium sponge and the substituted titanium alloy scrap were not of the "same kind and quality" for substitution drawback purposes. *Id.* at 1362–63. Second, Customs noted the additional time required for the manufacturing process, *i.e.*, forty hours of manual welding as opposed to six hours of automatic welding, when ILM used the large solid pieces of alloy scrap as opposed to the sponge. *Id.* at 1358, 1363.

ILM relied on Treasury Decision ("T.D.") 82–36, a 1982 administrative decision, in arguing that the titanium sponge and the titanium alloy scrap it used were of the "same kind and quality." *Id.* at 1359; *see* T.D. 82–36, 16 Cust. B & Dec. 97, 97–98 (1982). Customs, in the audit report, rejected this argument, concluding that T.D. 82–36 allowed substitution drawback only if no more than one "sought" element is contained in the domestically produced product and if substitution does not significantly alter the manufacturing process. *Int'l Light Metals*, 194 F.3d at 1359. Customs denied ILM's drawback claims for which the substituted merchandise was titanium scrap, reasoning that the scrap contained sought elements other than titanium that were used in manufacturing the alloys. *Id.* With respect to the large solid pieces of scrap, Customs also concluded that T.D. 82–36 would not permit drawback because the forty hours of manual welding required for scrap as opposed to the six hours of automatic welding for sponge represented a significant change in the manufacturing process. *Id.* at 1358–59, 1363.

The Court of Appeals, reversing a decision of the Court of International Trade, rejected the position of the United States. Concluding that the titanium alloy scrap could be substituted for the titanium sponge, the Court of Appeals found three points to be compelling:

> First, it is undisputed that the titanium in the scrap was identical to the titanium in the sponge that ILM imported. Accordingly, the titanium in the domestic scrap was "of the same kind and quality" as the titanium in the imported sponge. Second, there is no dispute as to the amount of titanium that was in the scrap. As a result, the amount of a drawback to which ILM would be entitled based upon the titanium in that scrap and the titanium in the imported sponge could be precisely determined.
>
> Third, the government's position results in a "no scrap" rule, one for which we find no support in the statute. To explain, if ILM used imported or substituted domestic titanium sponge to make an alloy ingot from which exported articles were made, under the government's theory ILM would get a drawback duty

> for the amount of titanium sponge found in the exported articles. But if the manufacturing process resulted in waste (scrap), or ILM used scrap from other sources, and ILM recycled the scrap into alloy ingots from which more articles for export were made, then no drawback would be paid for the amount of titanium sponge in the articles made from the "scrap" ingots, even if, as is the case here, the amount of titanium sponge in the scrap could be accurately determined. If, however, ILM first expended the time and money to extract the titanium sponge from the scrap, then mixed the extract with other metals to form ingots from which exported articles were made, the government would allow drawback.

Id. at 1366. Regarding the longer welding time required for scrap, the Court of Appeals found that the difference in welding time (forty hours for scrap as opposed to six hours for sponge) was not significant in the context of a process that takes two to three months to complete. *Id.*

Defendant points to certain of the above-quoted language in the opinion of the Court of Appeals for the proposition that only titanium qualifies as being of the same kind and quality. *See* Def.'s Mem. 21 (quoting *Int'l Light Metals*, 194 F.3d at 1366). In setting forth the three points that the Court of Appeals found compelling in concluding that the titanium alloy scrap could be substituted for the titanium sponge, the Court of Appeals stated that "it is undisputed that the titanium in the scrap was identical to the titanium in the sponge that ILM imported" and that "[a]ccordingly, the titanium in the domestic scrap was 'of the same kind and quality' as the titanium in the imported sponge." *Int'l Light Metals*, 194 F.3d at 1366. Defendant reads this language to mean that ILM's drawback claim was limited by a finding that *only* the titanium was of the same kind and quality. Defendant's reading of the opinion, however, is overly selective, overlooking the fact that the Court of Appeals was considering the issue of whether ILM's proposed drawback contract was consistent with 19 U.S.C. § 1313(b). That proposed contract depended on the substitution of titanium scrap for titanium sponge, not titanium for titanium.

The Court of Appeals concluded that ILM's proposed drawback contract was consistent with 19 U.S.C. § 1313(b), which necessarily required it to conclude that the substituted merchandise, the titanium scrap, was of the same kind and quality as the imported, duty-paid merchandise, the titanium sponge. *See id.* at 1367. The Court of Appeals relied on the legislative history of the substitution drawback provision to resolve the substitution issue, for which it viewed the "same kind and quality" phrase, standing alone, as insufficiently precise. *Id.* at 1364–66.

> Specifically, the unchanged purpose of section 1313(b) . . . was to facilitate honest drawback claims for such stable commodities as sugar, which present fungibility difficulties, i.e., difficulties in accounting for whether the imported merchandise has actually been used in the particular article. We therefore inform our understanding of the phrase "same kind and quality" with the concern expressed in the legislative history about alleviating difficulties of proof in honest drawback cases.

Id. at 1366.

Contrary to defendant's interpretation of *International Light Metals*, the fact that titanium in the sponge and in the scrap, being essentially identical, was of the "same kind and quality" served as one of the three reasons the Court of Appeals gave for its conclusion that ILM was entitled to drawback based on substitution of titanium scrap for titanium sponge. Later in the opinion, the Court of Appeals stated that "[w]e thus conclude that ILM's proposal for a revised drawback contract was consistent with the requirements of 19 U.S.C. § 1313(b) because the titanium alloy scrap that ILM used in its manufacturing process contained titanium that was, in the words of the statute, 'of the same kind and quality' as the titanium it imported." *Id.* at 1367. This language, which references ILM's proposed drawback contract, cannot properly be interpreted to disregard the fact that the proposed drawback contract was based on substitution of titanium scrap for titanium sponge, not on the substitution of titanium for titanium. The language neither states nor implies that the Court of Appeals considered the same-kind-and-quality requirement to be met *only* by the titanium.

The government's reasoning that the substitution drawback statute, as construed by the Court of Appeals in *International Light Metals*, limits DuPont's drawback by confining the same-kind-and-quality merchandise to titanium is also unconvincing because of a difference in the facts between the two cases. The designated merchandise in *International Light Metals* was titanium; specifically, it was titanium sponge, a commercially pure form of titanium with a minimum titanium content of 99.3%. *Id.* at 1357, 1360. In contrast, the designated merchandise in this case is synthetic rutile, not titanium. The drawback entries of ILM that Customs had approved prior to the litigation had substituted titanium sponge for titanium sponge, *i.e.*, titanium for titanium. With respect to the entries requiring a revised drawback contract that Customs had disallowed, the Court of Appeals was faced with the question of whether the presence of substances other than commercially pure titanium in the *substituted* merchandise, including other sought elements, was a reason to conclude that the titanium scrap did not qualify as substituted merchandise. These substances were not present in the *designated* merchandise. Under the holding in *International Light Metals*, the presence of these other substances in the substituted merchandise was no bar to drawback, and accordingly a drawback contract based on the use of the scrap as substituted merchandise was held to be permissible under the statute. *See id.* at 1366–67. According to the question presented upon appeal, either the scrap was substitutable for the designated titanium sponge or it was not. On the facts of *International Light Metals*, the Court of Appeals was not required to decide whether *only* the titanium in the scrap satisfied the same-kind-and-quality requirement and did not so decide.

DuPont I is properly interpreted to hold that the imported synthetic rutile and the four substituted feedstocks (only one of which was synthetic rutile) satisfy the same-kind-and-quality requirement. *DuPont I* arose after Customs, upon effecting the original liquidation of the drawback entry in 1996, had refused to allow DuPont any drawback on the drawback entry and had rejected DuPont's amended proposal for a drawback contract.[11] Compl. ¶¶ 11–13. Upon liquidation, Customs, maintaining the position it had taken twice previously in rejecting DuPont's original and amended proposals for a drawback contract, held that DuPont was entitled to no drawback because, according to Customs, DuPont's imported synthetic rutile and substituted feedstocks were not of the "same kind and quality" as required for manufacturing substitution drawback under 19 U.S.C. § 1313(b). *See id.* Exs. A–1 to A–6. Customs had reached this decision by concluding that DuPont's proposed drawback contract did not meet the requirements of T.D. 82–36 "because titanium was never isolated as an element during DuPont's manufacturing process." *DuPont I*, 24 CIT at 1046, 116 F. Supp. 2d at 1345 (citing T.D. 82–36, 16 Cust. B & Dec. at 97–98). "Customs emphasized that the titanium actually used in the manufacturing process was always combined with another element, i.e., oxygen, and that DuPont was actually seeking titanium only as part of the compound titanium dioxide, and not as a discrete element." *Id.* at 1046, 116 F. Supp. 2d at 1345.

In *DuPont I*, the Court of International Trade granted DuPont's motion for summary judgment and ordered Customs to approve plaintiff's proposed drawback contract, to reliquidate the drawback entry, and to pay the drawback claim in accordance with the court's decision. *Id.* at 1051, 116 F. Supp. 2d at 1350. Applying the three factors employed by the Court of Appeals in *International Light Metals*, 194 F.3d at 1366, the Court of International Trade in *DuPont I* re-

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[11] Under the Customs regulations applied by the Court of International Trade in *DuPont I*, DuPont could receive manufacturing substitution drawback upon approval by Customs of DuPont's proposed drawback "contract." *See DuPont I*, 24 CIT at 1046 n.1, 116 F. Supp. 2d at 1345 n.1; *see also* 19 C.F.R. §§ 191.21 & 191.23 (1996). The current regulations refer to the analogous procedure of a claimant's operating under a general or specific drawback "ruling" instead of a drawback "contract." *See* 19 C.F.R. § 191.7 (2007) (outlining procedures for operation under a general drawback ruling); *id.* § 191.8 (2007) (outlining procedures governing a specific drawback ruling).

jected Customs' reasoning and held that DuPont was entitled to manufacturing substitution drawback. *See DuPont I*, 24 CIT at 1049–50, 116 F. Supp. 2d at 1348–49. Regarding the first factor, the Court of International Trade, observing that the titanium in the four feedstocks was identical, concluded that the "same kind and quality" requirement in the statute had been satisfied. *Id.* at 1049, 116 F. Supp. 2d at 1348. Applying the second factor, the court noted that the amount of titanium found in each of the feedstocks could be precisely determined. *Id.* at 1049–50, 116 F. Supp. 2d at 1348–49. Third, the court found no support for the position "that, during the manufacturing process, titanium must be extracted as a discrete element from the various feedstocks . . . ." *Id.* at 1050, 116 F. Supp. 2d at 1349.

In discussing the issue of a change in the manufacturing process resulting from substitution, the Court of International Trade in *DuPont I* considered specifically "the question of whether or not the substitution of another feedstock for synthetic rutile would sufficiently alter DuPont's manufacturing process so as to defeat the notion that the *feedstocks* are *of the same kind and quality*." *Id.* at 1050–51, 116 F. Supp. 2d at 1349 (emphasis added). *DuPont I* concluded that the alteration was not sufficient to defeat the notion that the feedstocks were of the same kind and quality. *Id.* at 1051, 116 F. Supp. 2d at 1349–50. The resolution of this issue by *DuPont I* is inconsistent with defendant's interpretation that *DuPont I* found only titanium to satisfy the same-kind-and-quality requirement.

In summarizing its holding and underlying reasoning, the Court of International Trade in *Dupont I* relied on the holding in *International Light Metals*:

> Thus, this Court finds itself in the same posture as the Federal Circuit in [*International Light Metals*], and is therefore bound by that court's construction of 19 U.S.C. § 1313(b). In [*International Light Metals*], the Federal Circuit found that titanium sponge was eligible for drawback when titanium scrap was used in its place in a manufacturing process which required titanium metal. *See* [*International Light Metals*], 194 F.3d at 1367. The Federal Circuit held that the scrap satisfied the statutory requirement that the "merchandise" (titanium scrap) be of the "same kind and quality" as the imported "merchandise" (titanium sponge) for which it was substituted. *See id.* The Federal Circuit reached its conclusion even though the scrap, unlike the sponge, contained other metals which were salvaged as part of the manufacturing process, and even though the welding step of the manufacturing process took longer when scrap was used. *See id.* at 1366.

Id. at 1048–49, 116 F. Supp. 2d at 1347–48. Later in the opinion, the court in *DuPont I* rejected the government's argument that the four feedstocks were not of the same kind and quality because they were not classified under the same tariff provision:

> Furthermore, the Government's argument that the four source feedstocks were not at the time of this action classified under the same tariff provision and are, therefore, not of the "same kind and quality," is not compelling. This Court need not grant formal deference to T.D. 82–36 to note its statement of the self-evident, i.e., "[s]ame kind and quality does not . . . depend on the tariff schedules and never has. Often items classified under the same tariff provisions and subject to the same duty are not of the same kind and quality and vice versa."

Id. at 1050, 116 F. Supp. 2d at 1349 (ellipse in original and internal citations omitted). The court in *DuPont I*, after considering the competing arguments, again expressed a conclusion that it would not have reached, and would not have had occasion to reach, had it considered the same-kind-and-quality requirement to be satisfied only by titanium and not by the imported synthetic rutile and the substituted feedstocks.

Accepting defendant's argument that *DuPont I* limited its analysis of "same kind and quality" to the titanium element would require the court to ignore an important holding of *DuPont I*: the holding that DuPont's proposed drawback contract was consistent with 19 U.S.C. § 1313(b) and must be approved. *See id.* at 1051, 116 F. Supp. at 1350 (ordering that "[a]ccordingly, Customs is instructed to approve the proposed drawback contract as revised by DuPont on or about March 4, 1994 . . . ."). The proposed drawback contract, which now is an approved drawback contract as a result of *DuPont I*, designates for drawback "titanium ores and concentrates," "rutile (synthetic and natural)," and "titania slag" and lists the same substances as the merchandise that is "of the same kind and quality as that designated which will be used in the production of the exported products." Compl. Ex. A–4 at 2.

In making the argument that *DuPont I* considered only the titanium, and not the feedstocks, to be of the "same kind and quality," defendant points to the passage from the opinion in that case in which the Court of International Trade cites *International Light Metals* and explains that

> the court [in *International Light Metals*] reasoned that the phrase "same kind and quality" should be applied only to the sought element contained in a source material, and not to the source material as a whole or the impurities contained therein. Thus, although different ores may be made up of a number of elements, the "same kind and quality" standard applies only to the element used in manufacturing the exported article.

DuPont I, 24 CIT at 1049, 116 F. Supp. 2d at 1348 (internal citation omitted); *see* Def.'s Mem. 2–3. *DuPont I* reasoned that, as in *International Light Metals*, "the titanium contained in the imported and domestic feedstocks is of the 'same kind and quality' under 19 U.S.C. § 1313(b)." *Id.* The government's argument errs is in drawing from this language — despite the context provided by other language in the opinion and the order to approve the proposed drawback contract — the unwarranted conclusion that *DuPont I* considered *only* the titanium to meet the same-kind-and-quality requirement and considered the imported synthetic rutile and the substituted feedstocks *not* to be of the same kind and quality. As shown by the opinion when read in its entirety, *DuPont I* reached the opposite conclusion. In summary, the court concludes that defendant, in arguing that the "merchandise" held in *DuPont I* to be of the same kind and quality as the imported merchandise was titanium, and not the imported feedstocks, has misread both *DuPont I* and *International Light Metals*.

D. Customs Erred in Basing its "Apportionment" on its "Same Kind and Quality" Finding

As a consequence of the determination in *DuPont I* that all four feedstocks are of the same kind and quality, and as a consequence of the approval of the drawback contract, the court must conclude that DuPont's drawback claim is properly based on the substitution of synthetic rutile and the other three feedstocks (*i.e.*, ilmenite, rutile, and titania slag) for the imported, duty-paid synthetic rutile that DuPont designated for drawback. The court further concludes that 19 U.S.C. § 1313(b), when construed according to the plain meaning and the legislative history, did not permit Customs to rely on its "same-kind-and-quality" conclusion as a basis for its reducing, or "apportioning," DuPont's drawback according to the amount of titanium present in synthetic rutile.

In authorizing manufacturing substitution drawback, 19 U.S.C. § 1313(b) provides in pertinent part as follows:

> If imported duty-paid merchandise and any other merchandise (whether imported or domestic) *of the same kind and quality* are used in the manufacture or production of articles within a period not to exceed three years from the receipt of *such imported merchandise* by the manufacturer or producer of such articles, there shall be allowed upon the exportation . . . of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported . . . articles, *an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported* . . . ; but the total amount of drawback allowed upon the exportation . . . of such articles, together with the total amount of drawback allowed in

> respect of such imported merchandise under any other provision of law, shall not exceed 99 per centum of the duty paid on such imported merchandise.

19 U.S.C. § 1313(b) (emphasis added).[12] According to the uncontested facts, the "imported duty-paid merchandise" that was received by DuPont and used in manufacturing TiPure was synthetic rutile, not titanium.[13] Because synthetic rutile and the other feedstocks are all of the "same kind and quality" for purposes of 19 U.S.C. § 1313(b), DuPont potentially is entitled to drawback in an amount "equal to that which would have been allowable had the merchandise used therein been imported." *Id.*

Customs, apparently for some time, has construed the words "had the merchandise used therein been imported" to mean "had the merchandise used therein been the imported, duty-paid merchandise." *Id.*; *see* T.D. 82–36, 16 Cust. B & Dec. at 97–98. The Customs Regulations in effect since a 1998 amendment have been consistent with this construction in providing that "[t]he amount of [manufacturing substitution] drawback allowable cannot exceed that which would have been allowable *had the merchandise used therein been the imported, duty-paid merchandise*." *Drawback*, 63 Fed. Reg. 10,970, 11,016 (Mar. 5, 1998) (emphasis added) (setting forth 19 C.F.R. § 191.22 on substitution drawback); T.D. 98–16, 32 Cust. B. & Dec. 35, 156 (1998) (emphasis added) (also setting forth 19 C.F.R. § 191.22 on substitution drawback). While not the only possible construction, this construction is not at odds with the statutory language, appears reasonable in allowing practical administration (by avoiding the need to determine drawback based on the tariff treatment of the merchandise substituted for the imported merchandise), and deserves deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). Both parties agree with this construction. Pl.'s Resp. to Questions Posed by the Ct. in its Letter to Counsel Dated May 19, 2005 at 13; Responses to Questions in Ct.'s May 19, 2005 Letter at 2.

Because the feedstocks, and not merely titanium contained therein, are substitutable, the construction of 19 U.S.C. § 1313(b) applied by Customs, and advocated by defendant in this litigation, fails to afford DuPont "drawback equal to that which would have

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[12] The substitution drawback provision was amended in 1993 by the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, § 632, 107 Stat. 2057, 2192–2198 (1993), in ways not directly pertinent to the issues presented by this case. Congress intended the 1993 amendment to apply to drawback entries made before the date of enactment if the liquidation of such entries was not final on the date of enactment. *See* H.R. Rep. No. 103–361(I) at 132 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2682; S. Rep. No. 103–189 at 84–85 (1993).

[13] In this case, defendant has not disputed that the designated quantity of imported, duty-paid synthetic rutile was used in manufacturing within three years of such receipt by DuPont.

been allowable had the merchandise used therein" been the imported, duty-paid merchandise. 19 U.S.C. § 1313(b). In other words, that statutory construction does not allow the same maximum amount of drawback for manufacturing substitution drawback as would be allowed for manufacturing same condition drawback. Because the substituted feedstocks have been found to be of the same kind and quality as the designated synthetic rutile, the statute, when construed according to its plain meaning, potentially affords DuPont drawback equal to the same condition drawback that DuPont could have obtained had the substituted feedstocks that DuPont used in producing the 6,961,934 pounds of exported TiPure been the imported, duty-paid merchandise. The 6,762,693 pounds of imported, duty-paid synthetic rutile that DuPont designated for drawback contained the equivalent of 3,716,493 pounds of titanium, based on the uncontested facts (the imported synthetic rutile is comprised of 91.7% titanium dioxide by weight and the percentage of the molecular weight of the titanium dioxide molecule represented by the atomic weight of the titanium atoms therein is 59.93%). Upon a showing that the quantity of merchandise DuPont used to produce the exported TiPure (which consisted of the substituted feedstocks or the substituted feedstocks in combination with designated synthetic rutile) contained the equivalent of 3,716,493 pounds of the element titanium (a quantity determined according to stoichiometric substitution based on titanium content, as contemplated by *DuPont I*), DuPont theoretically would qualify for drawback of 99% of the duties paid on the 6,762,693 pounds of imported, designated synthetic rutile. That amount of drawback is $37,542.[14] The construction of the statute advocated by defendant, however, would disallow that amount and impose an additional step to "apportion" the drawback. In so doing, that construction is at odds with the plain meaning of the statute.

The court's conclusion that this construction is impermissible is grounded not only in the plain meaning but also in the relevant legislative history. In its opinion in *International Light Metals*, the Court of Appeals presented a detailed discussion of the purpose of manufacturing drawback, tracing the history of the current drawback law and its antecedent provisions. *See* 194 F.3d at 1364–66. The Court of Appeals observed that the purpose of manufacturing drawback is to provide U.S. manufacturers a rebate of duties paid on imported materials so that these manufacturers may compete in foreign markets with like articles manufactured in foreign countries. *Id.* at 1364–65.

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[14] This amount of drawback is obtained by dividing the 6,762,693 pounds of imported synthetic rutile by the total amount imported, 11,248,972 pounds of synthetic rutile, multiplying the resulting percentage by the total duties paid on the consumption entry ($63,077), and reducing the total of $37,920.83 by the 1% drawback fee.

> "The objects of [the drawback provision] were evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

Id. at 1364 (quoting *Tide Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898)). The Court of Appeals confirmed that "[t]hese objectives survive in the present embodiment of the drawback statute." *Id.* at 1364 n.12 (citing *Texport Oil Co. v. United States*, 185 F.3d 1291, 1296–97 (Fed. Cir. 1999)).

The manufacturing substitution drawback provision is intended to further the same general purpose as is the direct identification drawback provision, *i.e.*, enabling the manufacturer to compete in foreign markets by rebating 99% of the duties paid on imported merchandise, where the requirements for exportation and the additional requirements for substitution are satisfied. This much is apparent from the legislative history to the 1958 amendment to the drawback law that extended to all goods the procedure for manufacturing substitution drawback, which under the Tariff Act of 1930 previously had been limited to sugar, nonferrous metals, and ores containing nonferrous metals.[15] *See* S. Rep. No. 85–2165 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3576, 3576–78. The legislative history confirms that Congress, in expanding the scope of manufacturing substitution drawback, intended to relieve U.S. manufacturers of the difficulty and expense of specifically identifying the imported materials that had been used in manufacturing exported products, thus facilitating their claims for drawback. *Id.*, *as reprinted in* 1958 U.S.C.C.A.N. at 3577–78. The Senate Report accompanying the legislation provided in pertinent part as follows:

> The payment of drawbacks is designed to relieve domestic processors and fabricators of imported dutiable merchandise, in competing for export markets, of the disadvantages which the duties on the imported merchandise would otherwise impose upon them. Such relief for processors and fabricators has long been regarded as a concomitant of the tariff system. Provision for drawback of duties paid on imported merchandise used in the production of exported articles has, accordingly, been a feature of United States tariff legislation for a long time.

[15] Because the original substitution drawback provision included in the Tariff Act of 1930 allowed substitution drawback for nonferrous metals (such as titanium) and ore containing nonferrous metals, DuPont's drawback claim appears to be of a type contemplated under the substitution provision that was in effect prior to the 1958 amendment, as well as under the 1958 amendment itself.

> The substitution provision was first introduced in the Tariff Act of 1930. It was designed to relieve processors and fabricators of products made from these materials of the difficulty and expense of specifically identifying the imported materials that had been used in the production of exported products in order to establish eligibility for drawback. In support of the provisions as originally enacted in the 1930 act, it was pointed out that sugar refiners and processors of nonferrous metal ores frequently use raw materials of both foreign and domestic origin and that only with great inconvenience and expense could these processors conduct their operations in such a way as to separately identify that part of their output containing imported materials and the actual amounts so used. From time to time since the original substitution provision was added to the drawback section in the Tariff Act of 1930, other articles have been included in the list of articles on which substitution is permitted. The original provision for nonferrous metals and ore containing nonferrous metals was broadened to extend to all metals; flaxseed and linseed oil was added; and finally, printing paper, coated or uncoated, was added.

Id., *as reprinted in* 1958 U.S.C.C.A.N. at 3577–78.

The construction of the substitution drawback provision that Customs applied in denying the protest of the reliquidation, and that defendant advocates in this litigation, is at odds with the statutory purpose underlying manufacturing drawback generally, and manufacturing substitution drawback in particular, as revealed in the legislative history. Under that construction, DuPont has no means of obtaining, under substitution drawback, the same drawback it could have obtained under direct identification drawback, *i.e.*, 99% of the duties paid on the imported synthetic rutile, had DuPont used only imported synthetic rutile in manufacturing the exported product. Once it has been determined, as it has in *DuPont I*, that the substituted merchandise is of the same kind and quality as the designated merchandise, a claimant, if satisfying all procedural requirements, potentially is entitled to more drawback than the construction of the statute applied by Customs would allow.[16] Under the construction of

[16] The Interim Rule and Final Rule also appear to be intended to disallow the full amount of drawback available under the statute on the facts of this case, although the change made by the Final Rule applies only when "the designated merchandise is a chemical element that was contained in imported material that was subject to an *ad valorem* rate of duty, and a substitution drawback claim is made based on that chemical element." *Manufacturing Substitution Drawback: Duty Apportionment*, 67 Fed. Reg. 48,368, 48,370 (July 24, 2002) (Interim Rule); *Manufacturing Substitution Drawback: Duty Apportionment*, 68 Fed. Reg. 50,700, 50,702–03 (Aug. 22, 2003) (Final Rule) (setting forth an example to paragraph (b)(4) that identifies titanium, not the synthetic rutile, as the designated merchandise in the example apparently based on DuPont's entry); 19 C.F.R. § 191.26(b)(4) & Example to paragraph (b)(4) (2003). However, imported, duty-paid synthetic rutile, not

the statute applied by Customs, the statute cannot achieve its intended purpose of enabling these manufacturers to compete in foreign markets with producers located outside the United States, because the intended refund of 99% of the duties paid on the imported merchandise is not available, even on a claim made according to the "used-in" basis allowed by the former and current regulations.

As the legislative history of the 1958 amendment demonstrates, Congress intended to "relieve processors and fabricators of products made from these materials of the difficulty and expense of specifically identifying the imported materials that had been used in the production of exported products in order to establish eligibility for drawback." S. Rep. No. 85–2165 (1958), *as reprinted in* 1958 U.S.C.C.A.N. at 3577–78. In referring to "the difficulty and expense of specifically identifying the imported materials that had been used in the production of exported products," the Senate Report unquestionably is referring to the difficulty and expense that would attend a direct identification drawback claim. *See id.*, *as reprinted in* 1958 U.S.C.C.A.N. at 3577–78. Rather than relieve processors such as DuPont of this difficulty and expense, as the statute intended, the construction of the statute advanced by the United States frustrates the statutory purpose by making it impossible for DuPont to make a substitution drawback claim that is the equivalent of a direct identification drawback claim. In other words, as a price for obtaining the relief from "the difficulty and expense of specifically identifying the imported materials that had been used in the production of exported products," this construction in effect demands that DuPont relinquish approximately 45% of the drawback it otherwise could have obtained. If DuPont had used only imported, duty-paid synthetic rutile, and no substituted feedstocks, in producing the 6,961,934 pounds of TiPure pigment that it exported, DuPont would have been eligible to receive, under procedures authorized by § 1313(a), drawback in the amount of 99% of the duties paid on the imported synthetic rutile that it used for that purpose, *i.e.*, $37,542. The result of defendant's construction is that DuPont's choice to proceed under manufacturing substitution drawback, instead of potentially qualifying DuPont to receive that same amount, came at the cost of 45% of its drawback claim. Such a result cannot be reconciled with the language of § 1313(a) and (b) as interpreted consistently with the statutory purpose revealed in the legislative history.

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titanium, is the designated merchandise in this case. The apparent intent of the Interim Rule and Final Rule is that the synthetic rutile is not "eligible imported duty-paid merchandise" for purposes of designation under § 191.2(f). 19 C.F.R. § 191.2(f) (2003). The issue of whether the Final Rule is permissible under the statute is not before the court in this litigation.

E. The Final Rule Does Not Merit Chevron Deference

In arguing that 19 U.S.C. § 1313(b) authorizes drawback only in an amount reduced according to the relative weight of titanium in the imported synthetic rutile, defendant raises a deference argument that relies on *Chevron*, 467 U.S. at 842–44. Defendant argues that the construction of the drawback statute under which Customs limited DuPont's drawback in HQ 229433 is entitled to deference under *Chevron* because it subsequently was adopted in the Final Rule, promulgated on August 22, 2003 following a notice and comment procedure and codified at 19 C.F.R. § 191.26(b)(4), and must be upheld as a reasonable construction of the statute. Def's Mem. 10–13. Defendant relies on *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), in arguing that Customs regulations interpreting the tariff statute are entitled to *Chevron* deference, and on *Smiley v. Citibank*, 517 U.S. 735 (1996), in arguing that *Chevron* deference is due even though the Final Rule was promulgated after the commencement of this litigation. *Id.* at 11–13. According to defendant, *Chevron* deference would be owed even to a regulation prompted by litigation. *Id.* at 12–13.

The court does not agree with defendant's argument that the method Customs used to determine DuPont's drawback in HQ 229433 became entitled to *Chevron* deference once Customs had promulgated the Final Rule. The Supreme Court indicated in *Chevron* that judicial deference to an agency action may apply "[w]hen a court reviews an agency's construction of the statute which it administers . . . ." *Chevron*, 467 U.S. at 842. The Supreme Court reasoned that "[i]f 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." *Id.* at 843–44. Referring to the principle of judicial deference upon which it relied in *Chevron*, the Supreme Court has instructed that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

Courts have recognized that *Chevron* deference does not extend to a decision that an agency bases on its interpretation of a judicial precedent rather than its construction of the statute it is administering. *See Akins v. Fed. Election Comm'n*, 101 F.3d 731, 740 (D.C. Cir. 1996) (declining to grant deference under *Chevron* to a decision by the Federal Election Commission ("FEC") in which the FEC determined that an entity was not a "political committee" according to the Commission's interpretation of Supreme Court precedent); *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) (refusing to grant *Chevron* deference to the Secretary of Labor's decision to deny attorneys' fees and costs for appellate review because that decision was apparently based not on the Secretary's interpretation of the governing statute but rather on the Secretary's belief that he was required to follow a holding of the Court of Appeals for the Sixth Circuit); *Thomas Hodgson & Sons, Inc. v. Fed. Energy Regulatory Comm'n*, 49 F.3d 822, 823, 826 (1st Cir. 1995) (rejecting the Federal Energy Regulatory Commission's claim of *Chevron* deference for the decision to assert licensing jurisdiction over a hydroelectric facility because the Commission did not base its decision on an interpretation of the relevant statute but instead looked to case law, and because the decision was contrary to clear congressional intent).

The constructions by Customs of the manufacturing substitition drawback provision that resulted in *International Light Metals* and *DuPont I*, both of which constructions denied any drawback, were rejected by the Court of Appeals and the Court of International Trade, respectively. The notices Customs issued to promulgate the Interim and Final Rules reveal that Customs did not base the Final Rule on its own construction of the drawback statute. In promulgating the Interim Rule, Customs stated that it was doing so to implement the holdings in *DuPont I* and *International Light Metals* and relied on this rationale for placing the rule into effect as an interim rule prior to conducting a public comment procedure. *See Interim Rule*, 67 Fed. Reg. at 48,369 (stating that "Customs has determined that prior public notice and comment procedures on this regulation are unnecessary and contrary to public interest" and that "[t]he regulatory changes to the Customs Regulations add language necessitated by recent decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit"). The notice announcing the Final Rule does not state to the contrary or imply a changed rationale; the only changes made to the Interim Rule were "non-substantive editorial changes" and a change to correct what a commenter, and Customs, considered to be an error in the drawback calculation in one of the examples (the "synthetic rutile" example apparently based on DuPont's drawback issue) that was presented in the text of the Interim Rule. *Final Rule*, 68 Fed. Reg. at 50,702. Customs rejected all other comments, relying in part on the claim that the holdings in *DuPont I* and *International Light Metals* do not permit Customs to adopt those comments. *Id.* at 50,701–02. In summary, the Final Rule does not qualify for deference under *Chevron* because it is based not on the agency's own construction of the drawback statute but instead on the interpretations Customs placed on the holdings of *International Light Metals* and *DuPont I*.

F. Although HQ 229433 Is of a Type Potentially Qualifying for Deference under Skidmore, It Is Unpersuasive Because It Is Based on Faulty Reasoning

In arguing that 19 U.S.C. § 1313(b) authorizes drawback only in an amount reduced according to the relative weight of titanium in the imported synthetic rutile, defendant also raises a deference argument that relies on *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Defendant argues that even absent the subsequently-promulgated regulation, the method Customs used to calculate DuPont's drawback, as presented in HQ 229433, the 2002 Customs ruling directing the denial of the protest of the reliquidation, is entitled to the measure of deference held to apply to certain administrative issuances in *Skidmore*, 323 U.S. 134, and afforded to a Customs ruling in *United States v. Mead Corp.*, 533 U.S. 218 (2001). Def.'s Mem. 10 n.5.

In *Skidmore*, the Supreme Court concluded that certain "rulings, interpretations and opinions" of the Administrator under the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. The Supreme Court concluded, therefore, that "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* The Supreme Court subsequently concluded in *Mead* that

> *Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, 323 U.S., at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.*, at 140.

Mead, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139–40).

In directing the denial of DuPont's protest of the reliquidation, HQ 229433 cites various grounds, including the interpretation Customs places on *DuPont I* and *International Light Metals*, but it also cites previous Customs rulings and policies. *See* HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373. The court concludes that this ruling is of a type that may be owed *Skidmore* deference. That Customs did not base HQ 229433 principally on its own construction of the drawback statute is not a basis for denial of *Skidmore* deference. The Supreme Court acknowledged in *Skidmore* that the rulings of the Administrator of the Fair Labor Standards Act "do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." *Skidmore*, 323 U.S. at 139. However, even when considered with the benefit of *Skidmore* deference, HQ 229433 is unpersuasive because it rests on faulty reasoning.

1. Customs, in HQ 229433, Misinterprets Judicial Precedent Regarding "Apportionment" of Drawback

Among other errors, Customs, in the HQ 229433 ruling, misinterprets the holdings in *International Light Metals* and *DuPont I* in the same way that defendant does in this case. HQ 229433 states that "[i]n DuPont's case, the merchandise of the 'same kind and quality' upon which its § 1313(b) drawback claim is based is titanium." HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *3. "This fact was understood by the CIT and is evidenced by its language." *Id.* (citing *DuPont I*, 24 CIT at 1046, 116 F. Supp. 2d at 1345). The portion of the *DuPont I* opinion that the ruling initially cites in support of this incorrect conclusion consists of two sentences from the second paragraph of the background section of the opinion, not from the discussion portion of the opinion, which, as discussed previously, concludes that the imported synthetic rutile and the other feedstocks were of the same kind and quality. *See DuPont I*, 24 CIT at 1048–51, 116 F. Supp. 2d at 1347–50. The discussion in the background section is not correctly interpreted to mean that titanium is the only material satisfying the same-kind-and-quality requirement in the statute.

HQ 229433 errs in stating that "[t]he CIT in [*DuPont I*], following the Federal Court [*sic*] in [*International Light Metals*], held that the titanium in the imported feedstock was the merchandise of the 'same kind and quality' as the titanium in the exported pigment." HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *2 (internal citation omitted). As discussed previously in this Opinion, neither *International Light Metals* nor *DuPont I* considered titanium to be the *only* substance that satisfied the same-kind-and-quality requirement in the statute. To the contrary, the two cases considered and decided, in favor of the plaintiffs, the respective issues of whether manufacturing substitution drawback was available based on the substitution of titanium scrap for imported titanium sponge (in *International Light Metals*) and whether such drawback was available based on the substitution of the four feedstocks for the imported synthetic rutile (in *DuPont I*). HQ 229433 concludes that "[b]oth the Federal Circuit and the CIT stated unequivocally that the drawback claimed in these cases was to be based on the amount of titanium contained in the imported and exported materials." *Id.* at *3. Although both decisions recognized that titanium content served as the basis for determining the quantity of merchandise needed to substitute for the designated merchandise, Customs proceeded to draw an incorrect conclusion in the next sentence in the ruling: "Hence, Customs was obligated to follow these decisions and apportion the drawback claimed by DuPont according to the titanium content in the merchandise and manufactured articles." *Id.* The holdings in *International Light Metals* and *DuPont I* did not concern the question of "apportionment" to which HQ 229433 alludes.

2. Customs, in HQ 229433, Erred in Applying Retroactively the Drawback Regulations as Amended in 1998

In support of its conclusion that DuPont's drawback "must be measured by the amount of titanium in the imported and substitute merchandise," HQ 229433 relies on a provision of the then-current Customs regulations, 19 C.F.R. § 191.23(b) (2002). HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *3. The court concludes, however, that this provision, which was promulgated in 1998 and is still in effect, does not apply to DuPont's drawback contract and drawback claim.

Section 191.23(b) sets forth the "appearing in" basis of claiming drawback and provides that "[d]rawback is allowable under this method based only on the amount of imported or substituted merchandise that appears in (is contained in) the exported articles." 19 C.F.R. § 191.23(b). Section 191.23(b) distinguishes "appearing in" drawback claims from the "used in" drawback claims described in § 191.23(a) and the "used-in-less-valuable-waste" claims described in § 191.23(c). *Id.* § 191.23(a)-(c).

An appendix to the current regulations (Appendix B), in setting forth sample formats for specific manufacturing drawback rulings, clarifies that any waste resulting from the use of the designated or substituted merchandise in the manufacturing process, regardless of whether the waste is valuable or valueless, and regardless of whether the waste is recoverable or irrecoverable, reduces the amount of drawback when a drawback claim is made on the "appearing-in" basis. *See* 19 C.F.R. Part 191 App. B (2002). Appendix B distinguishes the appearing-in basis from the used-in and used-in-less-valuable-waste bases, under which irrecoverable or valueless waste does not reduce the amount of drawback, clarifying that this distinction applies both to manufacturing direct identification and to manufacturing substitution drawback claims and providing illustrative examples. *See id.* The text of Appendix B, together with the examples, informs the reader that under an appearing-in claim for manufacturing substitution drawback, the quantity of the waste, whether valuable or valueless (and whether recoverable or irrecoverable), reduces on a unit-for-unit basis, not on the basis of value, the quantity of the designated merchandise on which drawback is payable. *See id.*

The court concludes that if the current § 191.23(b) were applied to DuPont's drawback claim according to the drawback contract, the amount of drawback determined by HQ 229433, $20,822, if reduced by the 1% drawback fee, would be correct. As the complaint states, DuPont manufactures TiPure pigment in a process that extracts titanium from the feedstocks and combines it with oxygen in a multistep industrial process. Compl. ¶ 7. The portion of the imported synthetic rutile or substituted merchandise that can be considered to "appear in" the exported TiPure consists solely of the extracted titanium that, in the form of titanium dioxide, was combined with other materials to formulate the TiPure. *Id.* The process results in waste products that include oxygen and metal chlorides, including iron chloride. *Id.*; Norman Shurak Decl.; *Approved Drawback Contract* Attach. A.

In HQ 229433, however, Customs did not address the issue of why § 191.23(b) should be applied retroactively and instead presumed that it governs issues arising under DuPont's drawback contract and the subject drawback entry. *See* HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *3. The provision, and the explanatory Appendix B as well, were promulgated as part of a major revision of the Customs drawback regulations promulgated in 1998. *Drawback*, 63 Fed. Reg. 10,970; T.D. 98–16, 32 Cust. B. & Dec. 35. Subsections (a), (b), and (c) of § 191.23 are designated in the Parallel Reference Table included in the 1998 revision as "new" subsections. *Drawback*, 63 Fed. Reg. at 11,000; T.D. 98–16, 32 Cust. B. & Dec. at 119.

The effective date of the new regulations was April 6, 1998. *Drawback*, 63 Fed. Reg. at 10,970; T.D. 98–16, 32 Cust. B. & Dec. at 35. Concerning retroactive effect of the 1998 amendments, Customs stated in the preamble to the amendments that existing drawback contracts may continue to be relied upon by the manufacturer or producer provided they did not materially conflict with the statute or the new regulations. *Drawback*, 63 Fed. Reg. at 10,977; T.D. 98–16, 32 Cust. B. & Dec. at 55. Customs further stated that

> [a] drawback entry based upon [an] existing drawback 'contract' which materially conflicts with these regulations and for which exportation is before the effective date of these regulations is governed by the existing drawback "contract", unless there is also a necessary material conflict with the amendments to the statute (19 U.S.C. 1313) made by the NAFTA Implementation Act (Public Law 103–182, § 632), in which case the effective date of § 632 of that Act controls.

Drawback, 63 Fed. Reg. at 10,977; T.D. 98–16, 32 Cust. B. & Dec. at 55.

Although the "appearing-in" and "used-in" bases for claiming drawback existed under the previous regulations, the 1998 revision expanded on the meanings given to those terms, added clarifying language and examples, and subdivided the previous used-in basis to recognize specifically a new, more limited used-in basis and to treat as a separate basis the "used-in-less-valuable-waste" basis. *See Drawback*, 63 Fed. Reg. at 11,017 (setting forth 19 C.F.R. § 191.23); T.D. 98–16, 32 Cust. B. & Dec. at 157–58 (setting forth 19 C.F.R. § 191.23). The court concludes that the issue of how much drawback is available under DuPont's appearing-in claim is not properly decided according to a retroactive application of the 1998 regulatory amendments but instead must be resolved under the previous regulations, which were promulgated in 1983. *See Customs Regulations Revision Relating To Drawback; Specialized and General Provisions*, 48 Fed. Reg. 46,740 (Oct. 14, 1983); T.D. 83–212, 17 Cust. B. & Dec. 465 (1983). Construing the 1991 drawback entry and the drawback contract (which resulted from an amended proposal drafted in 1994) according to the 1998 regulatory amendments potentially would be prejudicial to DuPont's substantive drawback rights and therefore unfair. The sections in the 1983 promulgation relevant to this case were not changed in substance until the 1998 comprehensive revision and thus were in effect when DuPont exported the merchandise in 1988–89, when it filed its drawback entry in 1991, and when it submitted its amended proposed drawback contract in 1994.

The court recognizes that a drawback contract could come into existence under the 1983 amendments only at the time that Customs approved a drawback proposal, and as a result, DuPont was not operating under an actual drawback contract at the time of the 1998 regulatory changes. *See* 19 C.F.R. § 191.23(a). *DuPont I*, however, concluded that Customs acted contrary to law in rejecting the amended proposal that DuPont submitted for approval as a drawback contract in March 1994. *DuPont I*, 24 CIT at 1051, 116 F. Supp. 2d at 1350. In so doing, *DuPont I* fashioned a remedy that related back to 1994, when the drawback proposal was drafted and submitted for approval and when the regulations as amended in 1983 were still in effect. *See id.* When, in 2000, *DuPont I* ordered Customs to approve the proposed drawback contract, Customs expressly was directed to approve the proposal as a drawback contract, not as a drawback "ruling" that would be governed by the 1998 amendments.[17] *See id.* The court concludes that HQ 229433, although correct in its conclusion that DuPont claimed drawback on the "appearing-in" basis and in so doing limited its potential drawback, erred in resolving the issue according to the 1998 amendments to the Customs drawback regulations.

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[17] The regulations as amended in 1998 discontinued the use of the procedures for drawback contracts in favor of a new procedure under which Customs now issues drawback "rulings." *Drawback*, 63 Fed. Reg. 10,970, 11,009 (Mar. 5, 1998) (setting forth § 191.7 on general manufacturing drawback rulings); T.D. 98–16, 32 Cust. B. & Dec. 35, 139 (1998) (also setting forth § 191.7 on general manufacturing drawback rulings); *Drawback*, 63 Fed. Reg. at 11,010 (setting forth § 191.8 on specific manufacturing drawback rulings); T.D. 98–16, 32 Cust. B. & Dec. at 141 (also setting forth § 191.8 on specific manufacturing drawback rulings). The drawback ruling procedure established by T.D. 98–16 is analogous to and similar to the drawback contract procedure of the previous regulations; there are, however, some differences. For example, specific drawback rulings, in parallel with the general procedures for Customs rulings set forth in Part 177 of the Customs Regulations, remain in effect indefinitely unless terminated. *Drawback*, 63 Fed. Reg. at 11,011 (setting forth § 191.8(h)); T.D. 98–16, 32 Cust. B. & Dec. at 143 (also setting forth § 191.8(h)). Specific drawback contracts have a fifteen-year term and may be renewed. *Customs Regulations Revision Relating To Drawback; Specialized and General Provisions*, 48 Fed. Reg. 46,740, 46,758 (Oct. 14, 1983) (setting forth §§ 191.23(a) and 191.26); T.D. 83–212, 17 Cust. B. & Dec. 465, 520, 522 (1983) (setting forth §§ 191.23(a) and 191.26).

3. Customs, in HQ 229433, Mischaracterizes DuPont's Claim as a Claim for Drawback on Waste

In response to DuPont's argument, made in the protest, that the statute does not provide a basis for apportionment of the duties DuPont paid on the imported merchandise, HQ 229433 concludes that by seeking drawback absent such apportionment DuPont is impermissibly seeking drawback on its waste. HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *4. Defendant reiterates this argument in support of its cross-motion for summary judgment. Def.'s Mem. 23 (explaining that "by arguing that it is entitled to drawback on the synthetic rutile as a whole when it only uses the titanium to manufacture its pigments, DuPont is asking for drawback on its waste."). In support of this contention, Customs stated in HQ 229433 that "it has long been Customs [*sic*] position, based on longstanding Court decisions, that drawback is not allowable on the exportation of waste." HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *4. The ruling cites C.S.D. 80–137, 14 Cust. B. & Dec. 941 (1979), and *United States v. Dean Linseed-Oil Co.*, 87 F. 453, 456 (2d. Cir. 1898), *cert. denied*, 172 U.S. 647 (1898). *Id.* Relying on the Customs position that drawback is not available on the exportation of waste, the ruling concludes that "DuPont is not entitled to drawback on the waste which results from its manufacturing process." *Id.*

Although the court agrees that drawback, on the facts of this case, is not payable on the waste that resulted from the TiPure production process, the limitation occurs because DuPont's drawback contract limits claims to the appearing-in basis, not because DuPont attempted to claim drawback on the exportation of waste. According to the undisputed facts, DuPont exported TiPure pigment, not waste from synthetic rutile or the other feedstocks. The decisions HQ 229433 cites in support of its position that drawback is not available on exported waste, C.S.D. 80–137 and *Dean Linseed Oil*, have no relevance to the issues in this case.

In C.S.D. 80–137, Customs ruled that manufacturing same-condition drawback is not available upon the exportation of a "valuable waste byproduct" resulting from the manufacture in the United States of steel coils from imported steel slabs. 14 Cust. B. & Dec. at 941–42. DuPont exported the product it manufactured using the feedstocks, not a "valuable waste byproduct" occasioned by its manufacturing of another product. *Dean Linseed-Oil* involved a claim for drawback of duties paid on imported linseed that was processed in the United States to yield two products, linseed oil and oil cake. 87 F. at 454–55. The manufacturing drawback statute in effect at that time provided for manufacturing direct-identification drawback, as does the current 19 U.S.C. § 1313(a), but did not contain a provision such as that in the current 19 U.S.C. § 1313(a) addressing the question of how such drawback is to be apportioned when two or more products result from the manufacturing process. *Id.* at 455; *see* 19 U.S.C. § 1313(a) (stating that "[w]here two or more products result from the manipulation of imported merchandise, the drawback shall be distributed to the several products in accordance with their relative values at the time of separation.").

At issue in *Dean Linseed-Oil* was whether the apportionment between the two products should be calculated according to relative weight or instead according to relative value, consistent with Treasury Department practice. 87 F. at 455. Finding the statute ambiguous on the point and deferring to a long-standing construction of the statute by the Treasury Department, the Court of Appeals for the Second Circuit, reversing the trial court, decided in favor of apportionment by relative value. *Id.* at 456–57. In relying on *Dean Linseed-Oil*, HQ 229433 not only cites a case that is inapposite but also misconstrues language in the opinion. The appellate court rejected the argument made by the United States that no drawback was available "because oil cake is not a manufactured article, but is waste." *Id.* at 456. Because it concluded that the oil cake was a manufactured article and not a waste product, the Court of Appeals for the Federal Circuit did not reach the issue of whether drawback was available on the exportation of waste.

For these reasons, the court finds no merit in the attempt by Customs to characterize DuPont's drawback claim as one for exported waste.

4. HQ 229433 Incorrectly Relies on the Apportionment Provision of 19 U.S.C. § 1313(a)

In response to DuPont's protest argument that apportionment by weight, as opposed to value, is not appropriate where, as here, the titanium in the synthetic rutile is the only valuable material in the synthetic rutile, HQ 229433 quotes 19 U.S.C. § 1313(a) in concluding that "apportionment of drawback by relative value . . . is available only where, 'two or more products result' from the manufacture." HQ 229433 (May 10, 2002), *available at* 2002 WL 1584373 at *4 (quoting 19 U.S.C. 1313(a)). Defendant reiterates this argument in support of its cross-motion for summary judgment. Def.'s Mem. 22–23. The court is unpersuaded by the logic of the argument, both because the need for apportionment does not arise when the drawback statute (as opposed to the regulations) is applied to the facts of this case and because 19 U.S.C. § 1313(a), in providing that apportionment of drawback by relative value must occur when two or more products result from the manufacturing process, does not logically support a conclusion that apportionment by relative value necessarily is precluded in all other instances.

G. DuPont's Motion for Summary Judgment Must Be Denied Because DuPont Does Not Qualify for $37,510 in Drawback Under the Approved *Drawback* Contract

Although the statute potentially makes drawback of $37,542 available on Entry No. G82–0000542–5, DuPont is not necessarily eligible to receive that amount or the amount it now claims, $37,510. DuPont may be paid only the drawback, up to the statutory maximum, that is consistent with the applicable regulations and its approved drawback contract. For the reasons discussed previously, DuPont's drawback must be determined according to the Customs regulations resulting from the amendments promulgated in 1983 by T.D. 83–212.[18] *See Customs Regulations Revision Relating To Drawback; Specialized and General Provisions*, 48 Fed. Reg. 46,740 (Oct. 14, 1983); T.D. 83–212, 17 Cust. B. & Dec. 465 (1983). The only drawback contract available for Entry No. G82–0000542–5 is that ordered to be approved by *DuPont I* on the proposal amended on or about March 4, 1994. *See DuPont I*, 24 CIT at 1051, 116 F. Supp. 2d at 1350; *Approved Drawback Contract*. Therefore, to rule on DuPont's motion for summary judgment, the court must determine whether DuPont qualifies for drawback of $37,510 under that drawback contract and the 1983 amendments to the regulations. *See* 19 C.F.R. § 191.23(d) ("*Payment of drawback*. After approval of the contract, drawback will be paid on articles manufactured or produced and exported in accordance with the law, regulations, and contract."); *id.* § 191.71(d) (providing that drawback will be determined upon liquidation "on the basis of the complete drawback claim and the drawback contract."). For the reasons that follow, the court concludes that drawback of $37,510 is not available.

Under the 1983 regulatory amendments, a manufacturing drawback claim may be made either on the basis of the quantity of imported, duty-paid merchandise (or, in the case of substitution drawback, merchandise of the same kind and quality that is substituted for that merchandise) that is *used in* producing the exported articles, or alternatively, on the basis of the quantity of such merchandise *appearing in* the exported articles.[19] *See* 19 C.F.R. §§ 191.22(a)(1)(ii),

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[18] As noted previously, the regulatory provisions relevant to determining the amount of drawback due on Entry No. G82–0000542–5 were substantively unchanged from T.D. 83–212 to the promulgation of the 1998 amendments by T.D. 98–16. *Compare Drawback*, 63 Fed. Reg. 10,970 (Mar. 5, 1998) and T.D. 98–16, 32 Cust. B. & Dec. 35 (1998) *with Customs Regulations Revision Relating To Drawback; Specialized and General Provisions*, 48 Fed. Reg. 46,740 (Oct. 14, 1983) *and* T.D. 83–212, 17 Cust. B. & Dec. 465 (1983). In the discussion construing the drawback contract and claim, the court's references to the Customs drawback regulations are to the regulations as amended by T.D. 83–212.

[19] As explained earlier in this Opinion, the current regulations set forth a similar regulatory scheme but provide more detailed instruction than the regulations promulgated in 1983.

191.32(a)(1)-(2) (1991) (setting forth requirements for direct identification and substitution drawback, respectively). DuPont's drawback contract authorizes drawback only on an "appearing-in" basis. *See Approved Drawback Contract* & Attach. A. The regulations confine an appearing-in claim to the quantity of imported duty-paid merchandise (or, in the case of substitution drawback, imported duty-paid merchandise or substituted merchandise) that appears in the exported product. *See* 19 C.F.R. §§ 191.22(a)(1)(ii), 191.32(a)(1)–(2). Appearing-in claims and used-in claims differ with respect to the treatment of waste. If the manufacturer or producer is claiming substitution drawback on the used-in basis, "the records of the manufacturer or producer shall show the quantity and value of both the merchandise used in the manufacture or production of the articles and valuable waste incurred in order that the deduction provided for in § 191.22(a)(2) may be made in liquidation." *Id.* § 191.32(b). According to that deduction, which is set forth in the regulations for direct identification claims (§ 191.22) but also applies, in the same way, to substitution claims, "the quantity of imported duty-paid merchandise or drawback products used will be reduced by an amount equal to the quantity of merchandise the value of the waste would replace." *Id.* § 191.22(a)(2).

According to the uncontested facts, DuPont's manufacturing of TiPure produced wastes that consisted of oxygen and metal chlorides that originated as impurities in the feedstocks and that did not appear in the finished TiPure pigment. *See* Compl. ¶ 7; Norman Shurak Decl.; *Approved Drawback Contract* Attach. A. A small amount of titanium from the feedstocks also may have resulted in waste. *See Approved Drawback Contract* at 3 & Attach. A. DuPont's appearing-in drawback claim is based on the appearance, in the exported TiPure pigment, of 3,713,335 pounds of titanium. The imported synthetic rutile that DuPont used in manufacturing and designated for drawback had a slightly higher titanium content, 3,716,493 pounds; the small difference of 3,158 pounds can be considered to be titanium obtained from designated synthetic rutile or substituted feedstocks that resulted in irrecoverable waste. It is possible that a small amount of titanium was contained within the wastes that DuPont describes, although the uncontested facts do not reveal exactly what happened to the lost titanium. The drawback contract states that losses of titanium are negligible and that the metal chloride wastes may contain trace amounts of titanium. *Approved Drawback Contract* at 3 & Attach. A.

From the uncontested facts, the court can conclude that if, hypothetically, DuPont's contract had authorized a used-in claim and DuPont were able to show through records that all of the waste resulting from the manufacturing process was valueless waste, DuPont, upon compliance with all other regulatory requirements, would qualify for drawback in the maximum amount allowed by the statute, $37,542. The court so concludes because, on these hypothetical facts, § 191.32(b) and § 191.22(a)(2) would not result in a reduction in the quantity of imported, duty-paid merchandise on which drawback is payable. Specifically, the merchandise on which drawback is payable would consist of the entire quantity of imported, duty-paid synthetic rutile that is designated for drawback on the drawback entry form, *i.e.*, 6,762,693 pounds of imported synthetic rutile. For the reasons discussed previously in this Opinion, the maximum drawback potentially made available by the statute on that amount of designated merchandise is $37,542.

Even had DuPont's drawback contract authorized a used-in claim, DuPont still could not qualify for drawback in the full amount of $37,542 because it could not establish, on the uncontested facts, that the waste was valueless. DuPont asserts, in support of its motion for summary judgment, that the waste may be transferred to third parties and that "[t]he minimal revenue that DuPont receives from the transfers to third parties does not cover the cost of the additional processing necessary to make the material suitable for transfer." Norman Shurak Decl. ¶ 6. Because some of the waste was sold rather than disposed of, because plaintiff admits that it received revenue for the sale, and because plaintiff, in support of its motion for summary judgment, has not asserted facts from which the value of the waste could be determined, it could not be presumed that all of the waste was valueless. Therefore, it is possible that the deduction required by 19 C.F.R. § 191.22(a)(2) would reduce the drawback that would be available to DuPont on a used-in claim to an amount less than the statutory maximum of $37,542; on these facts, however, the amount of the reduction could not be determined.

In contrast, for an appearing-in claim, the regulations regard as irrelevant to the calculation of drawback the composition and value of any waste resulting from the manufacturing of the exported merchandise. Consistent with the more limited scope of appearing-in claims, the regulations do not impose on appearing-in claims a general requirement that records reveal the quantity or the value of the waste resulting from the production process.[20] Similarly, the regulations do not apply to appearing-in claims the deduction for valuable waste that is provided for in § 191.22(a)(2). Because what appears in the exported product is not waste, it would be illogical for the regulations to account for valuable waste on an appearing-in claim by reducing the amount of merchandise on which drawback is payable, and the regulations do not do so. In comparison, duties paid on a portion of imported duty-paid merchandise that resulted in waste

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[20] The regulations, in § 191.22, set forth recordkeeping requirements for direct identification claims that also apply to substitution claims, with exceptions for the specific recordkeeping requirements applying to substitution claims under 19 C.F.R. § 191.32. *See* 19 C.F.R. §§ 191.22, 191.32 (1991).

may be refunded in drawback on a used-in claim, subject to the reduction for valuable waste, provided the manufacturer or producer maintained the required records, including in particular the records to show the value of any valuable waste that resulted from the process. *See* 19 C.F.R. §§ 191.22(a)(2), 191.32(b) (setting forth requirements for direct identification and substitution drawback, respectively).

Relevant to determining the correct amount of drawback on DuPont's appearing-in claim is the fact that what appeared in the exported TiPure was not synthetic rutile. The only portion of the designated synthetic rutile, or of the feedstocks substituted for the designated synthetic rutile, that appeared in the TiPure was titanium, which was present in the TiPure in the form of the compound titanium oxide. The non-titanium content of the synthetic rutile and other feedstocks that were used to produce the exported TiPure (and, apparently, some small portion of the titanium content as well) resulted in waste. Titanium originating in the designated and substituted merchandise, and appearing in the TiPure, was the only portion of the designated or substituted merchandise that was not converted to waste.

DuPont argues that its claiming drawback on an appearing-in basis does not reduce its drawback from the amount it claims because the non-titanium wastes, rather than becoming valueless during manufacturing, never had value. Pl.'s Supplemental Mem. 5–9. In support of its position that $37,510 is the correct amount of drawback on Entry No. G82–0000542–5 even though its claim is an appearing-in claim, DuPont argues that waste that was valueless before the manufacturing process is not the type of waste that can reduce the drawback available on an appearing-in drawback claim. *Id.* at 6. DuPont argues that under the proper construction of the previous version (*i.e.*, the 1983 version) of the regulations, only waste that became valueless during the manufacturing process (such as, in this case, the small amount of titanium lost in processing) reduces the drawback payable, and waste that already was valueless, such as the non-titanium content of the synthetic rutile, does not. *Id.* at 3–6. In effect, DuPont's position is that only the slight loss of titanium occurring during processing reduces DuPont's drawback under the appearing-in basis from that which would have been available under a used-in basis. *See id.* at 7–9; *Approved Drawback Contract* at 3 & Attach. A. According to this logic, had all the titanium in the designated synthetic rutile appeared in the exported TiPure, DuPont would qualify for drawback of $37,542, and the slight loss of titanium would reduce the drawback payable only slightly, to $37,510.

The court is unable to agree with DuPont's interpretation of the regulations. For manufacturing drawback claims made according to the appearing-in basis, the regulations treat as entirely irrelevant the question of whether or not waste resulting from the process has value. This principle is the same whether the drawback claimed is direct identification or substitution drawback. *See* 19 C.F.R. § § 191.22(a)(1)(ii) & (a)(2), 191.32(a)(2) & (b) (setting forth requirements for manufacturing direct identification drawback and manufacturing substitution drawback, respectively). The error in DuPont's construction of the regulations does not stem from the process of substitution but arises from the way in which the drawback regulations treat waste, which is common to both direct identification and substitution drawback. Because waste does not appear in the exported product, the regulations exclude from the drawback payable on an appearing-in claim any duties paid on any portion of the imported duty-paid merchandise that resulted in waste, whether the waste was valuable or not. To agree with DuPont's argument, the court not only would have to accept, as a matter of fact, that all of the waste resulting from the production of the exported TiPure was valueless waste but also would have to conclude that a factual determination of the value of the waste is relevant to DuPont's appearing-in claim. The principal shortcoming in DuPont's argument is not DuPont's inability to show that the waste was entirely valueless (although that would be a problem on the uncontested facts, were DuPont to be pursuing a used-in claim), it is that the court, in deciding the amount of drawback payable on an appearing-in claim under the 1983 version of the drawback regulations, cannot properly attach any significance to the question of whether the waste was valuable or valueless.

Moreover, the court finds nothing in the text of the regulations to support DuPont's interpretation distinguishing between material that became waste as a result of processing and material that was inherently valueless before processing began and remained so after the processing was completed. The regulations distinguish between waste that has value and waste that does not, but they contain no hint of the distinction drawn by plaintiff. DuPont would have the court adopt a construction under which some types of waste are deemed, absent any proof based on records, to be valueless in all drawback situations. Nothing in the regulations so provides. For claims seeking the full drawback on the portion of the imported duty-paid merchandise that results in waste, the regulations require the manufacturer or producer to keep records on that waste. *See* 19 C.F.R. §§ 191.22(a)(1)(iv) & (2), 191.32(b) (setting forth requirements for direct identification and substitution drawback, respectively).

Plaintiff has not identified, and the court is unaware of, any rulings or other issuances in which Customs has construed the 1983 drawback regulations in the way plaintiff advocates here. Customs headquarters rulings construing the 1983 regulations, although not involving the precise drawback waste issue presented in this case, contain language addressing generally the treatment of waste in appearing-in claims and used-in claims. *See* HQ 227559 (Mar. 3, 1998), *available at* 1998 WL 262180; HQ 226184 (May 28, 1996), *available at* 1996 WL 612304. This general language is consistent with the court's construction of the regulations. *See* HQ 227559 (Mar. 3, 1998), *available at* 1998 WL 262180 (stating that "if the basis of the drawback claim is the quantity of imported merchandise appearing in the exported articles, the quantity of waste incurred, whether it is valueless or valuable, will reduce the drawback paid."); HQ 226184 (May 28, 1996), *available at* 1996 WL 612304 (stating that "[u]nder the 'appearing in' method, of course, the portion of the imported merchandise resulting in waste would not appear in the exported article and, therefore, the effect would be to reduce the amount of drawback available.").

DuPont also argues that waste that was valuable merchandise when imported must be distinguished from waste that is intrinsically worthless material stripped away from valuable imported merchandise, lest an absurd result be reached in this case. Pl.'s Supplemental Mem. 6–9. Plaintiff views the used-in and appearing-in methods of claiming drawback as "nothing more than accounting structures" that "do not, and could not, have any effect on substantive drawback rights conferred by statute." *Id.* at 3.

The court does not consider it absurd, or contrary to the intent of Congress, that an appearing-in claim based on manufacturing generating significant quantities of waste typically will result in less drawback than will a used-in claim made according to the same facts. Used-in claims differ from appearing-in claims precisely in the treatment of waste. The distinction between the two methods is created by the Customs regulations, not the statute. An appearing-in claim potentially allows the manufacturer or producer to avoid entirely the burden of maintaining records on the waste; no records of waste need be kept for an appearing-in claim unless they are necessary to show the quantity of merchandise appearing in the exported articles (which is not the situation present in this case).[21] Absent such records, it is reasonable, if not administratively necessary, that the regulations do not presume the waste to be valueless and instead presumptively treat the waste as having value. Both the used-in basis and the appearing-in basis were available under the 1983 version of the regulations that were in effect at the time DuPont drafted and submitted its proposed drawback contract and its proposed amended drawback contract.[22] The court disagrees that a construction of

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[21] For manufacturing direct identification drawback, the regulations provide that "[i]f claim for waste is waived and the appearing in basis is used, waste records need not be kept unless required to establish the quantity of imported duty-paid merchandise or drawback products appearing in the articles." 19 C.F.R. § 191.22(a)(1)(iv). *See also* 19 C.F.R. § 191.32(b) (substitution drawback).

[22] The 1983 regulations allow drawback entries to be filed prior to the approval by Cus-

those regulations that does not distinguish between the two types of waste identified by plaintiff will defeat the intent of Congress.

For the reasons discussed, the court declines to adopt the construction of the regulations advocated by plaintiff in support of its claim for drawback in the amount of $37,510. The drawback contract ordered to be approved in *DuPont I* clarifies that the appearing-in basis is to apply; consistent with the use of that method, the contract recognizes that there will be no “valuable waste” deduction from the drawback being sought. *See Approved Drawback Contract* Attach. A (stating that “[DuPont] will claim drawback on an appearing-in basis, and waste factors will not impact on the drawback calculations.”). Only titanium from the synthetic rutile and substituted feedstocks appeared in the exported TiPure. Titanium constituted approximately 55% by weight of the total weight of the synthetic rutile; the remaining 45% of the synthetic rutile (and, according to the uncontested facts, a small amount of titanium as well) became waste as a result of the manufacturing process. Plaintiff misconstrues the drawback regulations to deem the waste resulting from the non-titanium content of the synthetic rutile to be valueless and to have no significance for the calculation of drawback on an appearing-in claim. Under those regulations, however, it is irrelevant whether the waste is valuable or valueless and whether or not it consisted of titanium or other substances. *See* 19 C.F.R. §§ 191.22(a)(1)(ii) & (a)(2), 191.32(a)(2) & (b). What is relevant to the determination of payable drawback on this appearing-in claim is that a significant percentage of the quantity of the designated synthetic rutile (consisting largely of the non-titanium content of the feedstocks and a small amount of the titanium), all of which represents waste, may not properly be considered to appear in the exported TiPure. For these reasons, the court must deny DuPont’s motion for summary judgment.

H. Defendant Must Be Awarded Summary Judgment Because DuPont Does Not Qualify for Drawback Exceeding the Amount Already Paid on Entry No. G82–0000542–5

Customs paid DuPont $20,839.63 in drawback on Entry No. G82–0000542–5. The court concludes that DuPont does not qualify for drawback in a higher amount. DuPont designated 6,762,693 pounds of synthetic rutile for drawback and paid duties of $37,920.83 on this merchandise. Because titanium, in the amount of 3,713,335 pounds, is the only portion of the designated merchandise (imported duty-paid synthetic rutile) and the substituted merchandise (synthetic rutile, rutile, ilmenite and titania slag) that appeared in the ex-

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toms of a proposed revision to a specific drawback contract. *See* 19 C.F.R. § 191.23(c) (1991); *Int’l Light Metals*, 194 F.3d at 1359. However, DuPont did not submit to Customs a proposal to revise its drawback contract to allow claims on a used-in basis.

ported TiPure, the difference between the 6,762,693 pounds of designated synthetic rutile and the 3,713,335 pounds of appearing-in titanium constitutes 3,049,358 pounds of waste for drawback purposes. As discussed above, under the applicable regulations it is irrelevant to the drawback calculation whether this waste is recoverable or whether it has value; nor does it matter that the waste consisted almost entirely of substances other than titanium. The undisputed facts indicate that the 3,049,358 pounds of waste included 3,158 pounds of irrecoverable titanium; however, for the reasons previously discussed, it also is irrelevant to the drawback calculation whether the waste resulted from titanium or instead resulted from the other substances in the designated and the substituted merchandise. DuPont is not eligible for drawback on any of this waste because the approved drawback contract authorizes drawback to be claimed only on an appearing-in basis. For the reasons discussed previously, drawback is payable on the approximately 55% of the quantity of the synthetic rutile that appeared in the exported TiPure, which is $20,822. Less the 1% drawback fee, the amount of drawback is $20,614.

III. CONCLUSION

The court concludes that plaintiff is not entitled to drawback on Entry No. G82–0000542–5 exceeding the amount it already was paid. Defendant United States, in cross-moving for summary judgment, seeks dismissal of this action on the ground that the Customs determination of the amount of drawback upon the reliquidation of the entry was correct. The court, therefore, will enter summary judgment in favor of defendant and dismiss this action.

Slip Op. 08–57

THE POMEROY COLLECTION, LTD., *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 05–00103

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

Dated: May 27, 2008

Fitch, King and Caffentzis (*Peter J. Fitch*), for Plaintiff.

Gregory G. Katsas, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

Plaintiff Pomeroy Collection, Ltd. commenced this action to challenge the decision of the United States Customs Service ("Customs")[1] denying Pomeroy's protests concerning the tariff classification of a variety of pieces of merchandise imported from Mexico in 2000. Customs classified the merchandise as "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes . . . ," under five different subheadings of heading 7013 of the Harmonized Tariff Schedule of the United States ("HTSUS"), assessing duties at rates ranging from 3.8 % to 16 % *ad valorem*. *See* Heading 7013, HTSUS (2000).[2] Pomeroy, in turn, asserts that – depending on the item – the merchandise should have been classified either as "[l]amps and lighting fittings" under HTSUS heading 9405 or as

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[1] The U.S. Customs Service – formerly part of the U.S. Department of Treasury – is now part of the U.S. Department of Homeland Security, and is known as U.S. Customs and Border Protection. The agency is referred to as "Customs" herein. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); 72 Fed. Reg. 20,131 (April 23, 2007).

[2] The HTSUS consists of the General Notes, the General Rules of Interpretation ("GRIs"), and the Additional U.S. Rules of Interpretation ("ARIs"), including all section and chapter notes and article provisions, as well as the Chemical Appendix. *See*, *e.g.*, *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007) (citations omitted); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that "HTSUS is indeed a statute but is not published physically in the United States Code") (*citing* 19 U.S.C. § 1202).

All citations herein are to the 2000 edition of the HTSUS. Further, all tariff provisions at issue in this action are properly preceded by the prefix "MX," to indicate that the merchandise qualifies for the duty rate applicable to products of Mexico. However, the prefix is otherwise irrelevant to the classification analysis, and is therefore generally omitted herein.

"[c]andles, tapers and the like" under heading 3406, and liquidated duty-free. *See* Complaint; Headings 3406 & 9405, HTSUS.

Customs now concedes that all but four of the numerous pieces of merchandise at issue in this action are, indeed, properly classifiable as Pomeroy claims. *See generally* Plaintiff's Brief In Support of Its Motion for Summary Judgment ("Pl.'s Brief") at 1, 17; Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Reply Brief") at 32 n.5; Defendant's Memorandum in Support of Its Motion for Summary Judgment and In Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Brief") at 1 n.1, 3 n.3 ; Defendant's Reply Brief In Support of [Its] Motion for Summary Judgment and In Opposition to Plaintiff's Response ("Def.'s Reply Brief") at 6.

Pending before the Court are the parties' cross-motions for summary judgment as to the four pieces of merchandise that remain in dispute. Jurisdiction lies under 28 U.S.C. § 1581(a) (2000).[3] Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640.

As discussed in greater detail below, all four pieces of merchandise still at issue are properly classifiable under HTSUS subheading MX 9405.50.40, as "Lamps and lighting fittings . . . : Non-electrical lamps and lighting fittings: Other: Other," and are thus duty-free. Pomeroy's motion for summary judgment is therefore granted, and the Government's cross-motion is denied.[4]

I. *Background*

Although Customs now concedes that the vast majority of the items at issue in this action are properly classifiable as Pomeroy claims, and are therefore duty-free, four pieces of merchandise remain in dispute – the Geo Table Lighting, the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives.

A. *Geo Table Lighting*

As imported, the Geo Table Lighting (article # 291517) consists of a rustic iron stand roughly 15 inches tall (including a rustic iron "cradle" that hangs from the top of the stand), a bell-shaped glass vessel approximately five-and-one-half inches tall (with a top opening approximately five inches in diameter, or six-and-three-fourths inches including the lip), a packet of sand, a packet of small granite rocks, and a vanilla-scented pillar candle (three inches in diameter and two inches tall), all packaged in a box bearing photos of the mer-

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[3] All statutory citations herein are to the 2000 edition of the United States Code.

[4] Judgment also will be entered as to the classification of all those pieces of merchandise on which the parties have reached agreement.

chandise as assembled. *See* Pl.'s Exh. 2 (sample of Geo Table Lighting, in box); Pl.'s Exh. 6 (Pomeroy Price List, including sketch of "Geo Table Lighting" under caption "Pillar Holders").

As depicted in the photos on the box in which the merchandise is sold, the Geo Table Lighting is assembled by pouring the sand into the bottom of the glass vessel, positioning the candle on top of the sand, arranging the stones around the base of the candle, inserting the glass vessel into the "cradle," and hanging the "cradle" on the hook at the top of the iron stand. In addition to the large, attractive color photos of the fully-assembled merchandise (which are featured on the top and all four sides of the box), the box is also prominently labeled "Geo Table Lighting," as well as "San Miguel Candle Lamps" on the top and all four sides of the box, and advises shoppers "Candle, Stones & Sand Included." Other promotional language on the box emphasizes "Graceful rustic finish iron stand holds glass bowl," "Includes vanilla-scented candle, granite rocks and sand," and "Enchanting accent for patio, casual areas indoors or out." *See* Pl.'s Exh. 2 (photo box, containing sample of Geo Table Lighting).

B. *St. Tropez CLS and St. Tropez Cardinal Bowl*

The St. Tropez CLS (article # 571008) consists of a rustic iron stand roughly five-and-three-fourths inches tall, a bell-shaped glass vessel approximately five-and-one-half inches tall (with a top opening approximately six inches in diameter, or eight inches including the lip), a packet of stones, and three vanilla-scented floating candles (each approximately two-and-three-fourths inches in diameter and one inch tall), all packaged in a box bearing photos of the merchandise as assembled. *See* Pl.'s Exh. 3 (sample of St. Tropez CLS, in box); Pl.'s Exh. 6 (Pomeroy Price List, including sketch of "St. Tropez" under caption "Floating Candle Holders").

As depicted in the photos on the box in which the merchandise is sold, the St. Tropez CLS is assembled by inserting the glass vessel into the iron stand, placing the stones in the bottom of the vessel, filling the vessel with water, and floating the three candles on the surface of the water. In addition to the large, attractive color photos of the fully-assembled merchandise (which are featured on the top and all four sides of the box), the box is also prominently labeled "St. Tropez CandlePot," as well as "St. Tropez by San Miguel Candle Lamps" on the top and all four sides of the box, and advises shoppers "Candles and stones included." Other promotional language on the box emphasizes "Rustic Finish iron frame holds a glass bowl to fill with stones and floating candles," "Includes three vanilla-scented floating candles plus stones," and "Lighting of exceptional warmth and beauty." *See* Pl.'s Exh. 3 (photo box, containing sample of St. Tropez CLS).[5]

Although no sample of the St. Tropez Cardinal Bowl (article # 571022) was submitted as an exhibit, the merchandise is virtually identical to the other St. Tropez merchandise at issue, the St. Tropez CLS described immediately above. The sole differences between the two pieces of merchandise are that the St. Tropez Cardinal Bowl includes a packet of faux "gems" made of glass (in lieu of a packet of stones), and a stand that is gold/bronze in color (rather than rustic iron). The St. Tropez Cardinal Bowl is assembled by inserting the glass vessel into the gold/bronze-colored stand, placing the faux "gems" in the bottom of the vessel, filling the vessel with water, and floating the three candles on the surface of the water (as shown in the photo on the box of the other St. Tropez item, the St. Tropez CLS).

Pomeroy emphasizes that the two contested St. Tropez items (the St. Tropez CLS and the St. Tropez Cardinal Bowl) are essentially just slightly larger versions of Pomeroy's Calder Mini Table Bowl – a piece of merchandise which Customs now concedes is properly classified under heading 9405 ("[l]amps and lighting fittings"), and which Pomeroy asserts is "identical in function" to all four pieces of merchandise in dispute.[6] *See* Pl.'s Brief at 11–12; *see also id.* at 5, 16; Pl.'s Reply Brief at 8–9. *Compare* Pl.'s Exh. 3 (sample of St. Tropez CLS, in box) *and* Pl.'s Exh. 5 (sample of Calder Mini Table Bowl, in

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[5] The box containing the St. Tropez CLS sample submitted to the Court states that that particular merchandise was "Handcrafted in China." *See* Pl.'s Exh. 3 (photo box, containing sample of St. Tropez CLS). However, there is no dispute that the actual merchandise in the entries at issue in this action are all products of Mexico. *See* Pomeroy Affidavit ¶ 7.

[6] The Calder Mini Table Bowl (item # 957703 and item # 957710) consists of an iron stand (either rustic wrought iron, or gold/bronze-colored) which is roughly four-and-three-fourths inches tall, a bell-shaped glass vessel approximately four-and-one-fourth inches tall (with a top opening approximately three-and-three-fourths inches in diameter, or five-and-one-half inches including the lip), a packet of either stones (supplied with the rustic iron stand) or faux glass "gems" (supplied with the gold/bronze-colored stand), and one vanilla-scented floating candle (approximately two-and-three-fourths inches in diameter and one inch tall), all packaged in a box bearing photos of the merchandise as assembled. *See* Pl.'s Exh. 5 (sample of Calder Mini Table Bowl, in box); Pl.'s Exh. 6 (Pomeroy Price List, including sketch of "Calder Mini Table Bowl" under "Floating Candle Holders").

As depicted in the photos on the box in which the merchandise is sold, the Calder Mini Table Bowl is assembled by inserting the glass vessel into the iron stand, placing the stones or "gems" in the bottom of the vessel, filling the vessel with water, and floating the candle on the surface of the water. In addition to the large, attractive color photos of the fully-assembled merchandise (three of which show the merchandise with stones, while the other two photos show it with "gems"), the box is also prominently labeled "Calder Mini Floater," as well as "San Miguel Candle Lamps" on the top and all four sides of the box, and advises shoppers "Candle and stones or gems included." Other promotional language on the box emphasizes "Rustic finish iron frame holds a glass insert filled with small stones and a vanilla-scented floating candle," "Gold finish iron frame holds a glass insert filled with glass gems and a vanilla-scented floating candle," and "Opening [in the box] shows color of iron frame inside." *See* Pl.'s Exh. 5 (photo box, containing sample of Calder Mini Table Bowl, with opening in box to allow viewing of contents).

box); *see also* Pl.'s Exh. 6 (Pomeroy Price List, including sketches of both "Calder Mini Table Bowl" and "St. Tropez" merchandise, under "Floating Candle Holders").

C. *Serenity Votives*

The fourth, and final, piece of merchandise in dispute – the Serenity Votives (article # 633058) – consists of three cylinder-shaped glass vessels of varying heights (approximately ten-and-one-half inches tall, eight inches tall, and five-and-three-fourths inches tall,[7] each with a top opening approximately three inches in diameter, or four-and-one-half inches including the flared lip), as well as a packet of stones, and three vanilla-scented floating candles (each approximately two-and-three-fourths inches in diameter and one inch tall), all packaged in a box bearing photos of the merchandise as assembled. *See* Pl.'s Exh. 4 (sample of Serenity Votives, in box); Pl.'s Exh. 6 (Pomeroy Price List, including sketch of "Serenity Votives" under caption "Floating Candle Holders").

As depicted in the photos on the box in which the merchandise is sold, the Serenity Votives are assembled by placing the stones in the bottoms of the glass vessels, then filling the vessels with water and floating a candle on the surface of the water in each. In addition to the large, attractive color photos of the fully-assembled merchandise (which are featured on the top and all four sides of the box), the box is also prominently labeled "Serenity Glass Votive Trio," as well as "San Miguel Candle Lamps" on the top and the two largest sides of the box, and advises shoppers "Candles & Stones Included." Other promotional language on the box emphasizes "Three graduated glass columns float votive candles above bases filled with water and pebbles," "Stones and three vanilla-scented candles included," and "Enchanting light for buffet or dinner table." *See* Pl.'s Exh. 4 (photo box, containing sample of Serenity Votives).

D. *Customs' Classification of the Four Contested Pieces of Merchandise*

According to Pomeroy, the four pieces of merchandise which remain in dispute – the Geo Table Lighting, the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives – are all properly classifiable under HTSUS subheading 9405.50.40, as "Lamps and lighting fittings . . : Non-electrical lamps and lighting fittings: Other: Other," and thus should be duty-free.

Customs liquidated the Geo Table Lighting merchandise and the St. Tropez merchandise (including the St. Tropez CLS merchandise,

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[7] The shortest of the three glass cylinders was broken in transit, and therefore was not included in the sample submitted to the Court. *See* Pl.'s Exh. 4 (sample of Serenity Votives, in box).

as well as the St. Tropez Cardinal Bowl merchandise) under subheadings 7013.39.50 and 7013.39.60, respectively, as "Glassware of a kind used for table, kitchen . . . or similar purposes . . . : Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics: Other: Other: Valued over \$3 each: Other," and assessed duties at the rate of either 8 % or 3.8 % *ad valorem*, depending on the value of the merchandise. The Government has since abandoned those classifications, however, and now contends that the Geo Table Lighting merchandise and the St. Tropez merchandise should be classified under subheadings 7013.99.80 and 7013.99.90, respectively, as "Glassware of a kind used for . . . indoor decoration or similar purposes . . . : Other glassware: Other: Other: Other: Valued over \$3 each: Other," dutiable at the rates of 8 % or 3.8 % *ad valorem*, depending on the value of the merchandise.

The Government maintains that Customs properly liquidated the Serenity Votives under subheading 7013.99.80 (quoted above), assessing duties at the rate of 8 % *ad valorem*.

E. *HQ 960499 and Similar Customs Ruling Letters*

Customs issued no ruling specific to the merchandise at issue in this action. Instead, in defense of its asserted classifications, the Government relies on HQ 960499 and several other ruling letters. *See* Def.'s Brief at 6 & n.4 (*citing* HQ 960475 (June 30, 1998); HQ 960499 (July 8, 1998); HQ 960962 (July 15, 1998); HQ 960819 (July 16, 1998); HQ 961095 (July 20, 1998); HQ 961211 (July 23, 1998)). In those ruling letters, Customs classified assorted merchandise either as "decorative glassware" under heading 7013 or as "candle holders" under heading 9405, based on what were then newly-developed agency criteria.[8]

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[8] In contrast to the four pieces of merchandise at issue in the case at bar, none of the merchandise at issue in the ruling letters cited by the Government included candles – not even those pieces of merchandise which Customs ultimately classified as "candle holders" under heading 9405. *See* HQ 960499 (merchandise without candle classified under heading 9405); HQ 960962 (same); HQ 960819 (same); HQ 961095 (same); HQ 961211 (same).

Indeed, in a number of those rulings, Customs classified the merchandise in question under heading 9405 even though it not only did not include a candle, but – in fact – was actually marketed and sold as something other than a candle holder. *See* HQ 960819 (classifying as candle holder under heading 9405 a bell-shaped, "crackle"-finish glass "potpourri holder," with brass stand); HQ 961095 (classifying as candle holder under heading 9405 a clear glass, bell-shaped potpourri holder with metal stand, packaged with potpourri and sold in display box labeled "Potpourri Gift Set"); HQ 961211 (classifying as candle holder under heading 9405 a flowerpot-shaped serving dish made of green-tinted glass with metal stand, packaged in container which describes merchandise as "Garden Server" and depicts it being used to serve salsa).

On the other hand, in a number of the rulings on which the Government relies, Customs refused to classify merchandise under heading 9405, even though the merchandise was marketed and sold as a candle holder (although it did not include a candle). *See* HQ 960475

Customs' analysis in HQ 960499 and most of the other cited ruling letters begins by assuming that the merchandise at issue in the ruling is a "composite good" or a "set" subject to GRI 3(b) and its "essential character" inquiry, and does not consider whether that merchandise might be classified pursuant to any of the preceding GRIs (specifically, GRI 1 through GRI 3(a)). *See* HQ 960499 (composite goods); HQ 960819 (composite good); HQ 960962 (composite goods and sets); HQ 961095 (set).

In addition, HQ 960499 and the other cited ruling letters treat the relevant subheadings of both heading 7013 and heading 9405 as "principal use" provisions, implicating Additional U.S. Rule of Interpretation ("ARI") 1(a). ARI 1(a) provides for classification "in accordance with the use in the United States at, or immediately prior to, the date of importation, of *goods of that class or kind to which the imported goods belong*," and specifies that "the controlling use is the principal use." *See* ARI 1(a) (emphasis added); HQ960475; HQ 960499; HQ 960819; HQ 960962; HQ 961095; HQ 961211.

As noted above, HQ 960499 and the other cited ruling letters also apply the criteria that Customs developed to distinguish between merchandise classifiable as "decorative glassware" under heading 7013 and merchandise classifiable as "candle holders" under heading 9405. According to the Government, "[i]n order to more fairly and consistently apply ARI 1(a) to merchandise involving glassware of the kind at issue [here], Customs developed criteria based upon information regarding use, received from various industry sources in connection with a notice published in the March 25, 1998, Customs Bulletin . . . proposing to modify or revoke certain glassware rulings." *See* Def.'s Brief at 6–7 (*citing* "Proposed Modification or Revocation of Ruling Letters Relating to Tariff Classification of Bell-Shaped and Similarly Shaped Glassware," 32 Customs Bulletin 32–68 (March 25, 1998)).[9]

(classifying under heading 7013 a flowerpot-shaped glass article with packaging that depicts merchandise with a votive or pillar candle burning in it, which is sold and – to importer's knowledge – principally used as candle holder); HQ 960962 (classifying under heading 7013 a pith helmet-shaped glass article with metal stand, although "marketing literature" describes item as "candle holder"); *see also* HQ 960499 (classifying under heading 7013 various articles of "caged glass" (glass blown into a metal frame), which – according to the protestant – "are sold by the importer as candle holders, although they can be used in a number of ways").

In fact, in rulings that the Government does not cite, Customs has refused to classify under heading 9405 merchandise which both included a candle and was marketed and sold as a candle holder. *See, e.g.*, HQ 961866 (July 29, 1998) (classifying under heading 7013 merchandise consisting of three cylinder-shaped pieces of glassware of graduated heights, packaged with a floating candle).

In HQ 960499 and each of the five other rulings that the Government cites (as well as HQ 961866, cited above), Customs classified the merchandise based solely on the size (and, in some cases, also the shape) of the glass component alone, as discussed in greater detail below.

[9] The actual information and documentation that Customs received from industry

As set forth in HQ 960499, the criteria that Customs applies to distinguish between merchandise classifiable as decorative glassware under heading 7013 and merchandise classifiable as candle holders under heading 9405 focus solely on the glass vessel, and draw a bright line based on the size (and, to some extent, the shape) of that piece alone:

> Based on [information received in response to the March 25, 1998 Customs Bulletin notice], Customs has concluded that the class or kind for goods such as those under consideration is defined by the form or shape of the article (*e.g.*, bell-shape, similar to bell-shape, flower pot shape, tulip or flower petal shape, cube or rectangle shape, disk shape, bowl shape, and other shapes) and its size. We have found there to be a clear distinction between glassware used as candle holders and that used for general indoor decoration based on the size of the articles, in the absence of other pertinent evidence or information. *Glassware with an opening of 4 inches or less in diameter and a height or depth of 5 inches or less is used substantially more frequently as a candle holder* than for any other purpose, according to the information we have obtained, *and larger glassware is used substantially more frequently for general indoor decoration.*

HQ 960499 (emphases added).[10]

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sources, on which the criteria set forth in HQ 960499 were based, was forwarded from agency headquarters to Customs' National Import Specialist Division in New York, and was subsequently lost in the September 11, 2001 attack on the World Trade Center (where the Division's offices were located at the time). However, according to the Government, Customs headquarters had prepared (and retained) a summary of the catalogue and advertisement information submitted in response to the March 25, 1998 Customs Bulletin notice. *See* Def.'s Brief at 11.

[10] Pomeroy harshly criticizes Customs' development of its size criteria, particularly as applied to larger articles (*i.e.*, glassware taller than five inches and/or with an opening more than four inches in diameter). Specifically, Pomeroy emphasizes that the March 25, 1998 Customs Bulletin notice was withdrawn by the agency, and – even more to the point – that none of the articles at issue in that notice was taller than five inches and/or had an opening more than four inches in diameter. *See generally* Pl.'s Reply Brief at 23–25, 28–29.

As Pomeroy notes, the March 25, 1998 Customs Bulletin notice proposed to modify or revoke various existing agency ruling letters classifying as candle holders under heading 9405 certain flowerpot-shaped glassware and other iron and glass articles, and to re-classify that merchandise as decorative glassware under heading 7013. *See* Pl.'s Reply Brief at 23. However, as Pomeroy correctly points out, Customs later withdrew the March 25, 1998 notice. *Id.* at 23–24 (*citing* "Withdrawal of Proposed Modification or Revocation of Ruling Letters Relating to Tariff Classification of Bell-Shaped and Similarly Shaped Glassware," 32 Customs Bulletin 12–14 (July 15, 1998)), 28–29.

Pomeroy is similarly correct that none of the merchandise at issue in the ruling letters which were the subject of the notice in the March 25, 1998 Customs Bulletin measured more than five inches tall or more than four inches in diameter. Larger glassware thus was not at issue. *See* Pl.'s Reply Brief at 24, 28; *see also* Def.'s Reply Brief at 4–5 (explaining that the March 25, 1998 Customs Bulletin notice was withdrawn "precisely because the

Thus, in the case of the four pieces of merchandise in dispute here, the Government's asserted classifications are based solely on the fact that the glass components of the four pieces are more than five inches tall or have top openings more than four inches in diameter.

II. *Standard of Review*

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to . . . judgment as a matter of law."

USCIT R. 56(c).

Customs' classification decisions are reviewed through a two-step analysis – first construing the relevant tariff headings, then determining under which of those headings the merchandise at issue is properly classified. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1364–65 (Fed. Cir. 1998) (citation omitted).

Interpretation of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. *See id.* Summary judgment is thus appropriate where – as here – the nature of the merchandise is not in question, and the sole issue is its proper classification. *See Bausch & Lomb*, 148 F.3d at 1365 (citation omitted) (explaining that summary judgment is appropriate

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comments received supported a finding that glass vessels of particular shapes that are 5 inches or less in depth and have a top opening of 4 inches or less in diameter are generally of the class or kind that are principally used as candleholders").

As Pomeroy puts it:

> At no time was there a question of comparison of [the articles at issue in the subject ruling letters] to larger articles, as larger articles were not involved in the rulings sought to be modified or revoked. Any discussion of larger articles would have been . . . *obiter dictum*, had the ruling been a court decision, as larger articles simply were not involved in the determination to be made. While the government states that HQ 960499 was issued as a result of . . . [the March 25, 1998 Customs Bulletin] notice and the responses thereto, any response to that notice which dealt in merchandise having a diameter larger than 4 inches or a depth of more than 5 inches would have had nothing to do with the question at hand regarding the rulings noted . . . and would not have been determinative of the questions presented by . . . [the March 25, 1998] notice. The only actual determinations to be made were as to the use of the smaller articles. Any larger articles were simply not in question.

Pl.'s Reply Brief at 24–25. *See also id.* at 2 (asserting that "none of the rulings proposed to be modified in the [March 25, 1998 Customs Bulletin] notice . . . measured over 4 inches in width, or over 5 inches in depth to begin with, so it is difficult to see how commentary regarding the proposed [modifications and revocations] . . . would have resulted in the issuance of HQ 960499, or any other ruling dealing with goods in excess of those measurements").

It is also worth noting that, although Customs characterizes the analysis conducted by the agency as a result of the March 25, 1998 Customs Bulletin notice as an "exhaustive[ ] review[ ]" (*see*, *e.g.*, HQ 960499), the agency actually received only six comments in response to the notice. *See* "Withdrawal of Proposed Modification or Revocation of Ruling Letters Relating to Tariff Classification of Bell-Shaped and Similarly Shaped Glassware," 32 Customs Bulletin at 13 (July 15, 1998); Pl.'s Reply Brief at 21.

in customs classification cases "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is").

In the case at bar, although the parties argue for classification under different headings of the HTSUS, there are no genuine disputes of material fact. The parties are in agreement as to "exactly what the merchandise is"; the sole question is the legal issue of the proper classification of the merchandise.[11] This matter is therefore ripe for summary judgment.

III. *Analysis*

The proper tariff classification of all merchandise imported into the United States is governed by the General Rules of Interpretation ("GRIs"). The GRIs provide a framework for classification under the HTSUS, and are to be applied in sequential order. *See*, *e.g.*, *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439–40 (Fed. Cir. 1998). As detailed below, the four pieces of merchandise here in dispute are properly classified under HTSUS subheading 9405.50.40 through the straightforward application of GRI 1 and GRI 2(a). Resort to subsequent GRIs – including GRI 3(b) and its "essential character" analysis – is therefore unnecessary. Application of Additional U.S. Rule of Interpretation ("ARI") 1(a) is similarly improper, under the circumstances of this case.

A. *Classification Under Heading 9405 by Application of GRI 1 and GRI 2(a)*

GRI 1 provides for classification "according to *the terms of the headings* and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following [GRIs 2 through 6]." GRI 1 (emphasis added). Thus, the first step in any classification analysis is to determine whether the headings and notes require a particular classification.

For reasons explained in greater detail below, if merchandise is properly classifiable under HTSUS heading 9405, it cannot be classified under heading 7013. The classification analysis therefore begins with heading 9405.

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[11] The parties bicker over the extent to which Customs' classifications of the merchandise here at issue are entitled to a statutory presumption of correctness. *See* Pl.'s Brief at 6, 7–8, 9–10; Def.'s Brief at 5–6, 7–8, 9, 13–14; 28 U.S.C. § 2639(a)(1). What both parties generally fail to recognize is that the presumption of correctness is irrelevant at the summary judgment stage, where – by definition – there is assertedly no dispute as to any material fact. *See*, *e.g.*, *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (holding that, "[b]ecause there was no factual dispute between the parties, the presumption of correctness is not relevant"); *see generally Universal Elec., Inc. v. United States*, 112 F.3d 488, 491–93 (Fed. Cir. 1997); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997).

By its terms, heading 9405 covers "[l]amps and lighting fittings. . . and parts thereof, not elsewhere specified or included." *See* Heading 9405, HTSUS. Explanatory Note 94.05 defines "[l]amps and lighting fittings" expansively, to include items that are "constituted of any material" (other than "those materials described in Note 1 to Chapter 71," a caveat not relevant here), and that "use any source of light" including, *inter alia*, "candles." *See* World Customs Organization, Harmonized Commodity Description and Coding System: Explanatory Note 94.05 (2d ed. 1996).[12] Indeed, the Explanatory Note further specifies that heading 9405 "covers in particular . . . [c]andelabra" and "candlesticks," in addition to "candle brackets" (such as those used on pianos). *See id.* Heading 9405 thus covers not only "[*e*]*lectrical lamps* and lighting fittings," but also lamps and lighting fittings of other types – including "[*n*]*on-electrical lamps* and lighting fittings," such as candle holders and candle lamps. *See* Explanatory Note 94.05 (emphasis added); Subheading 9405.50, HTSUS (emphasis added); Def.'s Brief at 10 (noting that heading 9405 covers "candle holders").

GRI 2(a) provides, in relevant part:

> Any reference in a heading to an article shall be taken to include a reference to that article *incomplete* . . . , provided that, as entered, the incomplete . . . article has the essential character of the complete . . . article. It shall also include a reference to that article complete . . . , entered *unassembled or disassembled*.

GRI 2(a) (emphases added). Pursuant to GRI 2(a), then, the merchandise classifiable under heading 9405 includes not only complete, fully-assembled candle lamps, but also (1) "incomplete" candle lamps (provided that, as entered, any "incomplete" candle lamp has the essential character of a complete candle lamp), as well as (2) complete candle lamps that are entered in an "unassembled or disassembled" condition.

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[12] The Explanatory Notes ("ENs") function as an interpretative supplement to the HTSUS, and are "generally indicative of . . . [its] proper interpretation." *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (*quoting* H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582). They are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council (now known as the World Customs Organization), the international institution that drafted the international nomenclature. Thus, while the Explanatory Notes "do not constitute controlling legislative history," they "nonetheless are intended to clarify the scope of HTSUS [provisions] and offer guidance in interpreting [those provisions]." *Mita Copystar Am., Inc. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (*citing Lynteq*, 976 F.2d at 699). *See also Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003); *Rollerblade, Inc.*, 112 F.3d at 486 n.3.

All citations herein are to the second edition of the Explanatory Notes, published in 1996.

As described in section I.A above, one of the items still in dispute – the Geo Table Lighting – is a complete candle lamp within the scope of heading 9405 (as set forth in the Explanatory Note), which was entered in an “unassembled or disassembled” condition. *See* Pl.’s Exh. 2 (sample of Geo Table Lighting, in box).[13] As depicted on the box in which the merchandise is imported and sold, assembly is a very simple matter: The sand is poured into the bottom of the glass vessel, the candle is positioned on top of the sand, the stones are arranged around the base of the candle, the glass vessel is inserted into the “cradle,” and the “cradle” is hung from the hook on the top of the stand. Thus assembled, the Geo Table Lighting falls squarely within the broad description of “[n]on-electrical lamps” set forth in the Explanatory Note to heading 9405. That description expressly includes lamps that use candles as a light source. *See* Subheading 9405.50, HTSUS (emphasis added) (covering “[n]on-electrical lamps and lighting fittings”); Explanatory Note 94.05.

Like the Geo Table Lighting, the other three pieces of merchandise still at issue – the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives – are also candle lamps within the scope of heading 9405, which were entered in an “unassembled or disassembled” condition and require some simple assembly. *See* Pl.’s Exh. 3 (sample of St. Tropez CLS, in box); Pl.’s Exh. 4 (sample of Serenity Votives, in box); section I.B, *supra* (describing St. Tropez Cardinal

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[13] According to the relevant Explanatory Notes, for purposes of GRI 2(a), “ ‘articles presented unassembled or disassembled’ means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, provided only assembly operations are involved.” *See* Explanatory Note 2(a)(VII).

That is not to say that assembly of an imported article *must* involve “fixing devices (screws, nuts, bolts, etc.) or . . . riveting or welding” to fall within the definition of an “unassembled or disassembled” article for purposes of GRI 2(a). Articles involving even simpler assembly are also covered. *See*, *e.g.*, HQ 965440 (Aug. 7, 2002) (ruling that “Swiffer Wet Jet” (a manual floor mop with an internal, hand-operated sprayer, used to wet-mop hard surface floors), which is imported unassembled in three basic pieces that “snap together for ease of assembly by the ultimate consumer,” is properly classified under heading 8509 “at [the level of] GRI 1 and GRI 2(a) (because the Wet Jet is imported unassembled)”). Indeed, the Explanatory Notes themselves state that “[n]o account is to be taken . . . of the complexity of the assembly method.” *See* Explanatory Note 2(a)(VII).

In contrast, as the Explanatory Notes make clear, the reference in GRI 2(a) to “articles presented unassembled or disassembled” does not cover merchandise which requires more than mere assembly. Specifically, merchandise is not “unassembled or disassembled” for purposes of GRI 2(a) if the components must “be subjected to any further working operation for completion into the finished state.” *See* Explanatory Note 2(a)(VII); *see also*, *e.g.*, HQ 960165 (Sept. 18, 1997) (ruling that Lindal Cedar Homes “home packages” are not “unassembled” prefabricated buildings classifiable under heading 9406, because some components require, *inter alia*, “trimming” and “field cuts” – more than the “assembly operations” contemplated by GRI 2(a)).

The Explanatory Notes further observe that, when merchandise is presented “unassembled or disassembled,” “it is usually for reasons such as requirements or convenience of packing, handling or transport.” *See* Explanatory Note 2(a)(V). That is obviously the case here, where part of the merchandise is fragile glass.

Bowl by comparison to St. Tropez CLS, and explaining how all three items are assembled). When assembled as depicted on the boxes in which the merchandise is sold, each of the three items clearly falls within the broad description of "[n]on-electrical lamps" set forth in the Explanatory Note to heading 9405, which expressly includes lamps that use candles as a light source. *See* Subheading 9405.50, HTSUS (emphasis added) (covering "[n]on-electrical lamps and lighting fittings"); Explanatory Note 94.05.

Further, although the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives were "incomplete" as imported, all three pieces of merchandise had the "essential character" of the *complete* candle lamps, as contemplated by GRI 2(a). Indeed, to "complete" the incomplete lamps, users "just add water."[14]

Moreover, the candle lamps at issue are "not elsewhere specified or included," in the words of heading 9405. The classification urged by the Government – heading 7013, covering "[g]lassware of a kind used for . . . indoor decoration or similar purposes" – does not describe Pomeroy's merchandise, which is not "glassware" *per se* (such as a vase), but is instead goods ready for assembly that have, *inter alia*, a *component* made of glass. Nor does any other heading of Chapter 70 ("Glass and Glassware"), or, for that matter, any other

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[14] Both GRI 2(a) and GRI 3(b) employ the term "essential character," but in rather different contexts. As explained above, GRI 2(a) provides that "[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete . . . , provided that, as entered, the incomplete . . . article has *the essential character of the complete . . . article*." GRI 2(a) (emphasis added). In contrast, GRI 3(b) provides, in relevant part, that mixtures, composite goods, and sets "which cannot be classified by reference to 3(a), shall be classified as if they consisted of *the material or component which gives them their essential character*." GRI 3(b) (emphasis added). Further, while the Explanatory Notes to GRI 3(b) elaborate on the concept of "essential character" as used in GRI 3(b), the Explanatory Notes to GRI 2(a) are silent. *See* Explanatory Note GRI 3(b)(VIII). Moreover, there is relatively little caselaw concerning the concept of "essential character" for purposes of GRI 2(a). But the paucity of guidance gives no pause here. By any measure, the "incomplete" merchandise at issue in this action had the "essential character" of "complete" merchandise.

Even the incomplete candle lamps, as imported, were capable of providing illumination by candle light, and thus had the "essential character" of complete candle lamps. *See*, *e.g.*, *Filmtec Corp. v. United States*, 27 CIT 1730, 1736, 293 F. Supp. 2d 1364, 1369 (2003) (holding that, for purposes of GRI 2(a) "essential character" analysis, incomplete merchandise as imported "does not have the essential character of 'the complete or finished article' – the ability to strain salt from water," and thus cannot be classified as straining cloth); *Sharp Microelecs. Tech., Inc. v. United States*, 20 CIT 793, 800–01, 932 F. Supp. 1499, 1504–05 (1996), *aff'd*, 122 F.3d 1446 (Fed. Cir. 1997) (holding that, for purposes of GRI 2(a) "essential character" analysis, "it is the ability to process data that gives the essential character to articles under [a tariff provision covering "[a]utomatic data processing machines and units thereof"]"). Similarly, if the test for "essential character" under GRI 2(a) is whether the identity of the complete article to be made from the incomplete imported goods is "fixed and certain" at the time of importation, the incomplete candle lamps here had the "essential character" of complete candle lamps. *See*, *e.g.*, *Baxter Healthcare Corp. v. United States*, 22 CIT 82, 97, 998 F. Supp. 1133, 1145 (1998), *aff'd*, 182 F.3d 1333 (Fed. Cir. 1999) (noting that, in conducting GRI 2(a) "essential character" analysis of textiles, Customs evaluates whether "the identity[ ] of the article to be made from the imported goods is . . . fixed . . . [and] certain") (citation omitted).

heading of the HTSUS, describe the *lamps* which are at issue here.

In sum, pursuant to GRI 1 and GRI 2(a), all four pieces of merchandise remaining at issue in this action – the Geo Table Lighting, the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives – are properly classifiable as "[l]amps and lighting fittings . . . not elsewhere specified or included," under heading 9405. There is no need to reach any subsequent GRI.

Pursuant to Explanatory Note 70.13, "[l]amps and lighting fittings and parts thereof of heading 94.05" are expressly excluded from classification as "[g]lassware of a kind used for . . . indoor decoration" under heading 7013. *See* Explanatory Note 70.13; *see also* Note 1(e) to Chapter 70.[15] Accordingly, because the Geo Table Lighting, the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives

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[15] The parties focus their attention not on Explanatory Note 70.13, but – rather – on Note 1(e) to Chapter 70. According to the parties, if the four pieces of merchandise here at issue are properly classifiable under heading 9405, their classification under heading 7013 is barred as a matter of law by Chapter Note 1(e), which provides, in relevant part:

> 1. This chapter does not cover:
>
> . . . .
>
> (e) *Lamps or lighting fittings*, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 9405;

Note 1(e) to Chapter 70 (emphasis added); *see* Def.'s Brief at 7 n.5; Pl.'s Reply Brief at 3, 7. Unlike Explanatory Notes (which are persuasive, but not binding), Chapter Notes are mandatory and conclusive statutory law for all purposes. *See*, *e.g.*, *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (noting that "chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings," in contrast to "[e]xplanatory notes," which "are not legally binding but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision") (citation omitted); *Libas, Ltd.*, 193 F.3d at 1364 (describing chapter notes as "statutory language" of the HTSUS).

As a matter of syntax, Note 1(e) to Chapter 70 is somewhat ambiguous. In particular, the phrase "having a permanently fixed light source" can fairly be read to modify "[l]amps or lighting fittings," as well as "illuminated signs" and "illuminated name-plates or the like." *See* Note 1(e) to Chapter 70. If that reading is correct, then – because the merchandise here at issue does not feature a "permanently fixed light source" – Chapter Note 1(e) would not preclude the *prima facie* classification of that merchandise here under heading 7013, even if the merchandise is also *prima facie* classifiable under heading 9405 (although giving force to Explanatory Note 70.13 still would have that effect).

There is an alternative – and, frankly, better – reading of Chapter Note 1(e), to which the parties subscribe. That reading draws support from the language of heading 9405 itself, where it is clear (from the punctuation of the heading) that the phrase "having a permanently fixed light source" modifies only "illuminated signs" and "illuminated nameplates and the like," and *does not* modify "[l]amps and lighting fittings." *See* Heading 9405, HTSUS. If that reading is correct, then – as the parties contend – if the four pieces of merchandise at issue are *prima facie* classifiable under heading 9405, Chapter Note 1(e) absolutely prohibits the classification of that merchandise under heading 7013, as a matter of statutory law.

In any event, as discussed above, quite apart from Note 1(e) to Chapter 70, giving force to Explanatory Note 70.13 as an expression of the intent of the drafters precludes the classification of the merchandise at issue under heading 7013, if that merchandise is *prima facie* classifiable under heading 9405.

are classifiable as "[l]amps and lighting fittings" under heading 9405, they cannot be classified under heading 7013.

B. *The Government's Arguments*

The Government asserts that "Customs' classification of these goods is based upon a long line of rulings, exemplified by HQ 960499," as outlined in section I.E above. *See* Def.'s Brief at 6 & n.4. Relying on HQ 960499 and other similar ruling letters, the Government advances two main arguments.

The Government first maintains that each of the four pieces of merchandise still at issue – the Geo Table Lighting, the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives – must be classified based on its "essential character," pursuant to GRI 3(b); and, according to the Government, it is the glass vessel(s) that impart the essential character to each piece. *See generally* Def.'s Brief at 4, 6, 10; Def.'s Reply Brief at 2–3.

Second, the Government contends that the two competing headings – heading 7013 and heading 9405 – are both "principal use" provisions, and thus implicate Additional U.S. Rule of Interpretation ("ARI") 1(a), which provides for classification in accordance with the use of merchandise "of that class or kind to which the imported goods belong." *See* ARI 1(a); *see also* Def.'s Brief at 4, 6, 10; Def.'s Reply Brief at 4 n.4. According to the Government, Customs has properly determined that glass vessels of certain specific shapes and sizes are "of the class or kind of articles that are principally used as candle holders" (and are thus classifiable under HTSUS heading 9405), while larger glass vessels "are used for more varied purposes and thus are properly classified as decorative glassware of a kind used for indoor decoration or similar purposes in subheading 7013.99, HTSUS." *See* Def.'s Brief at 6–7; section I.E, *supra*; *see generally* Def.'s Brief at 8, 11–13, 15–16; Def.'s Reply Brief at 1–2, 3–7 & n.7.

As discussed below, however, the Government's arguments are lacking in merit.[16]

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[16] The Government urges the Court to accord *Chevron* deference to Customs' position (as articulated in the July 15, 1998 Customs Bulletin notice) that "glass vessels of certain shapes and less than 5 inches in height and 4 inches in diameter at the top opening are of the class or kind of articles that are principally used to hold candles, while glassware having these shapes but which exceed these dimensions . . . have more varied uses." *See* Def.'s Brief at 8 (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); "Withdrawal of Proposed Modification or Revocation of Ruling Letters Relating to Tariff Classification of Bell-Shaped and Similarly Shaped Glassware," 32 Customs Bulletin 12–14 (July 15, 1998).

As Pomeroy notes, however, Customs' classification rulings generally are not entitled to *Chevron* deference. *See* Pl.'s Reply Brief at 27 (*citing United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)). The Government counters that the agency position at issue "was developed as the result of public comments that were received in connection with . . . [the March

1. *The Government's GRI 3(b) Argument*

The Government insists that GRI 3(b) mandates that each of the four pieces of merchandise still in dispute be classified based on its "essential character." Asserting further that it is the glass vessel(s) that impart the essential character to each of those four pieces of merchandise, the Government concludes that all four are properly classifiable as "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes . . . ," under heading 7013 of the HTSUS. *See generally* Def.'s Brief at 4, 6, 9–10; Def.'s Reply Brief at 2–3; Heading 7013, HTSUS.

GRI 3 provides, in relevant part:

25, 1998 Customs Bulletin notice] concerning the proposed change in the tariff classification of glassware from heading 9405 to heading 7013." *See* Def.'s Brief at 8–9. Thus, the Government contends, "it represents the type of agency position that was intended to be given deference, in accordance with Chevron." *Id.*

The Government greatly overstates the case for *Chevron* deference. The administrative process that led to the development of Customs' position, as articulated in the July 15, 1998 Customs Bulletin notice, bore little resemblance to the formal "notice-and-comment" rulemaking procedures that are generally the hallmark of agency determinations entitled to *Chevron* deference. *See* Pl.'s Reply Brief at 28–29 (discussing unusual procedural context of agency's development of size criteria). Moreover, the size criteria set forth in the July 15, 1998 Customs Bulletin notice reflect only six public comments, which Pomeroy dismisses as "hardly the basis for 'an exhaustive review' of principal use, even if a number of advertise ments were included in those six responses." *Id.* at 21. Further, none of the merchandise at issue in the rulings which were the subject of the Customs Bulletin notice included candles, or otherwise closely resembled the merchandise at issue in this action. In short, among other things, it is far from clear that all potentially interested parties had proper and sufficient advance notice of (and timely opportunity to comment on) the position that Customs ultimately took, particularly as to merchandise of the type at issue in this action.

In the alternative, the Government asserts that, "[i]f not afforded *Chevron* deference, at a minimum, . . . [Customs'] position should be granted [*Skidmore*] deference, on the ground that it is reasonable and persuasive." *See* Def.'s Brief at 9 (*citing Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *see also* Def.'s Reply Brief at 5–7 (asserting entitlement to deference). *But see* Pl.'s Reply Brief at 26–30 (arguing against deference); *see also id.* at 23–25 (same).

As the Court of Appeals has explained, "Under *Skidmore*, a classification ruling receives a measure of deference proportional to its 'power to persuade.' " *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (*quoting Skidmore*, 323 U.S. at 140). In this case, however, there is no need to decide the extent of any deference that might otherwise be warranted, because – for reasons detailed more fully elsewhere herein – Customs' size criteria have no application here.

As noted above, for example, none of the merchandise at issue in the rulings which were the subject of the July 15, 1998 Customs Bulletin notice or in the six Customs ruling letters cited by the Government included candles or was otherwise similar to the merchandise in dispute here. It is true that, over the years, in cases that the Government *does not* cite, Customs has sought to extend the reach of its position, applying its size criteria in a limited number of ruling letters to merchandise that does include candles. *See*, *e.g.*, HQ 961866. But research has disclosed no formal agency ruling letter where Customs has applied its size criteria to merchandise remotely comparable to that at issue here – that is, merchandise which is both imported with candles, and which is so obviously designed, configured, packaged, labeled, marketed, merchandised, advertised, and sold solely and exclusively for use as "candle lamps" or "candle holders." In short, there is no need to reach the question of *Skidmore* deference here, because the Customs "position" for which the Government seeks deference does not control this case.

> When, by application of rule 2(b) [which provides for the classification of "goods consisting of more than one material or substance . . . according to the principles of Rule 3"] or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. . . .
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

GRI 3.

Contrary to the Government's claims, GRI 3 has no application here. By its terms, GRI 3 applies only where "goods are, *prima facie*, classifiable under two or more headings." *See* GRI 3. As set forth in section III.A above, however, the four pieces of merchandise in dispute are properly *prima facie* classifiable under heading 9405, pursuant to GRI 1 and GRI 2(a). And Explanatory Note 70.13 expressly excludes from classification under heading 7013 "[l]amps and lighting fittings and parts thereof of heading 94.05." *See* Explanatory Note 70.13; *see also* Note 1(e) to Chapter 70.[17] There is therefore no basis for invoking GRI 3, because the merchandise at issue is not "*prima facie*, classifiable under two or more headings." *See*, *e.g.*, *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed. Cir. 1997) (holding that chapter note which excludes articles of heading 9505 from classification under chapter 69 "obviates . . . [the] need to decide whether the items . . . *prima facie* fall under the alternative headings 6912 . . . and 6913").[18]

The Government emphasizes that, in addition to one or more glass vessels, each of the four pieces of merchandise incorporates "other items/components (gems, stones, etc.)" (*see* Def.'s Reply Brief at 2), and contends that each of the four pieces is therefore a "set" or a "composite good" subject to classification under GRI 3(b). *See generally* Def.'s Brief at 9–10; Def.'s Reply Brief at 2.

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[17] *See* n.15, *supra* (discussing effect of Note 1(e) to Chapter 70).

[18] As the Court of Appeals explained in *Midwest of Cannon Falls*, under circumstances analogous to those here:

> Note 2(ij) to chapter 69 states that the chapter does not cover "Articles of chapter 95." Accordingly, the issue here is whether the items at issue *prima facie* are classifiable under heading 9505. If so, then pursuant to note 2(ij), chapter 69, the items cannot fall under chapter 69 and must be classified under chapter 95.

Midwest of Cannon Falls, 122 F.3d at 1429.

However, contrary to the Government's implication, the mere fact that a piece of merchandise consists of more than one item or article does not necessarily make that merchandise a "set" or a "composite good" subject to classification under GRI 3(b).[19] GRI 3(b) applies only if "no provision exists in the Harmonized System that provides for the set [or composite good] *as a whole*." U.S. Customs and Border Protection, "What Every Member of the Trade Community Should Know About Tariff Classification" at 19 (May 2004) (emphasis added) (illustrating application of GRI 3(b) through, *inter alia*, "Composite Good Example" and "Set Example"). That is not this case.

Here, as discussed in section III.A above, there *is* a tariff provision "that provides for the set [or composite good] as a whole" – specifically, HTSUS heading 9405, which broadly covers "[l]amps and lighting fittings." *See* Heading 9405, HTSUS. To the extent that elements such as faux gems, stones, and sand serve a decorative function – rather than (or in addition to) helping to anchor and stabilize the light source (*i.e.*, the candles) – their presence in no way precludes classification of the four pieces of merchandise at issue under heading 9405. Even common household table lamps classifiable under heading 9405 as "[l]amps and lighting fittings" are often both functional and ornamental, serving as illumination but incorporating decorative elements as well.[20]

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[19] The fact that the four pieces of merchandise each consist of "other items/components" in addition to glassware is the linchpin of the Government's argument that classification under heading 9405 requires a GRI 3(b) analysis, and thus a determination as to the "essential character" of each of the four pieces of merchandise.

However, as Pomeroy pointedly notes, "[f]or purposes of classification under Heading 9405, it does not matter whether or not [the four pieces of merchandise] are composed of more than one material, as the Explanatory Notes clearly state that [merchandise classifiable under heading 9405] may be composed of any material." *See* Pl.'s Reply Brief at 4–5. Pomeroy continues: "Under Heading 9405, there is no question of essential character according to material. Material is not a consideration of classification under that heading, and it is of no import whether the articles consist of glass, metal, plastic or other components." *Id.* at 5.

[20] Chandeliers typically have many decorative crystals hanging separate and apart from the main lighting fixture, for ornamental purposes. Yet chandeliers (ornamental crystals and all) are expressly included within the scope of heading 9405. *See* Subheading 9405.10, HTSUS (covering "Chandeliers and other electric ceiling or wall lighting fittings," with narrow exceptions not relevant here). Similarly, the Government has here stipulated to the classification of the Calder Mini Table Bowl under heading 9405, even though that merchandise consists of not only an iron stand and a glass vessel, but also a packet of either stones or faux glass "gems," as well as a vanilla-scented floating candle. *See* Pl.'s Exh. 5 (sample of Calder Mini Table Bowl, in box); n.6, *supra* (describing Calder Mini Table Bowl). *See also*, *e.g.*, *The Home Depot, U.S.A., Inc. v. United States*, 30 CIT ____ , ____ and *passim*, 427 F. Supp. 2d 1278, 1305 and *passim* (2006), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007) (where parties stipulated to classification under heading 9405 and only dispute was as to proper subheading, court analyzed numerous lighting fixtures, and expressly took note of decorative, ornamental, and stylistic elements of each fixture, such as "a stylized decorative dome shade" that "contributes to the decorative appearance" of the fixture and "defines [the] fixture from design and marketability standpoints").

In any event, even assuming, *arguendo*, that the four pieces of merchandise at issue were "*prima facie*, classifiable under two or more headings" (*i.e.*, heading 9405 and heading 7013),[21] the merchandise would nevertheless be properly classified under heading 9405, pursuant to GRI 3(a) – the rule of "relative specificity." As outlined above, GRI 3(a) requires that – where merchandise is *prima facie*, classifiable under two or more headings – "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." *See* GRI 3(a). As the Explanatory Notes emphasize, only if merchandise cannot be classified pursuant to GRI 3(a) does GRI 3(b) come into play. *See* Explanatory Note GRI 3(b)(VI) (stating that GRI 3(b) "applies only if Rule 3(a) fails"); *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1252 (Fed. Cir. 2004) (holding that, where the GRI 3(a) "rule of relative specificity" adequately resolved proper classification of merchandise, Customs erred in reaching GRI 3(b) "essential character" analysis).

It is clear beyond cavil that heading 9405, which covers "[l]amps and lighting fittings," is more specific than heading 7013, which covers "[g]lassware of a kind used for table, kitchen, toilet, office, indoor

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An automobile's tariff classification does not differ depending on whether it is a stripped-down model designed solely as basic transportation or a high-end luxury sedan supplied with every conceivable option and amenity. *See* Heading 8703, HTSUS (covering "Motor cars and other motor vehicles principally designed for the transport of persons . . . , including station wagons and racing cars"). Just as a "motor vehicle" is a "motor vehicle," so too a "lamp" is a "lamp," no matter how simple or elaborate it may be. Nothing limits classification under heading 9405 to merchandise consisting of only that which is absolutely integral and indispensable to the function of illumination.

Similarly, the fact that faux gems, stones, and sand (even candles) would be classifiable under tariff provisions other than heading 9405 if imported separately (rather than incorporated into the candle lamps at issue here) is of no moment. As Pomeroy aptly observes:

> An automobile . . . is comprised of a myriad of different materials, including steel, plastics, glass, fabrics, mechanical assemblies, engines, tires, etc., all of which contribute to its construction and operation. Notwithstanding that fact, . . . [a tariff classification analysis would give no consideration] to the specific tariff provisions for articles of plastics, articles of iron and steel, articles of glass, textiles, internal combustion engines, or the other possible classifications, whether based upon materials or otherwise, in the face of a tariff provision for "motor cars and motor vehicles" in Headings 8702 and 8703, which do not include restrictions by material designation. The only question to be answered would be whether the item to be classified was a motor vehicle. Similarly, the articles before the court are "candle holders" which are articles conceded by the defendant to be a type of lamp. If they are provided for as "lamps," a provision which does not include a requirement as to material, one need not examine the tariff provisions for each of the components of which they are constructed, any more than one would examine such provisions with the motor vehicle. . . .

Pl.'s Reply Brief at 6–7.

[21] As discussed in section III.A above, however, Explanatory Note 70.13 expressly excludes from classification under heading 7013 "[l]amps and lighting fittings and parts thereof of heading 94.05." *See* Explanatory Note 70.13. Thus, because the four pieces of merchandise in dispute are *prima facie* classifiable under heading 9405, they cannot be classified under heading 7013. *See also* n.15, *supra* (discussing effect of Note 1(e) to Chapter 70).

decoration or similar purposes." *See* Heading 9405, HTSUS; Heading 7013, HTSUS; Pl.'s Brief at 12; Pl.'s Reply Brief at 7.[22] The more specific provision is "the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *BASF Corp. v. United States*, 497 F.3d 1309, 1315 (Fed. Cir. 2007) (*quoting Orlando Food Corp.*, 140 F.3d at 1441). "Lamps and lighting fittings" may be made of glass, and thus may also be considered "[g]lassware of a kind used for . . . indoor decoration or similar purposes." But "[l]amps and lighting fittings" is a much narrower and more precise description. Thus, even assuming that classification of the four pieces of merchandise here at issue required resort to GRI 3 (which it does not), the four pieces would nevertheless be properly classified under heading 9405, pursuant to GRI 3(a) (the "rule of relative specificity"). *See* generally Pl.'s Reply Brief at 7.[23] There would be no cause to reach GRI 3(b), on which the Government seeks to rely.

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[22] *Cf. Bauer Nike Hockey*, 393 F.3d at 1252–53 (holding HTSUS provision covering "ice hockey . . . articles and equipment" to be "much more specific" than HTSUS provision "which refers quite broadly to other garments of man-made fibers"); *Midwest of Cannon Falls Inc. v. United States*, 20 CIT 123, 135 (1996), *aff'd in relevant part and rev'd in part*, 122 F.3d 1423, 1426 n.1 (Fed. Cir. 1997) (holding that, pursuant to GRI 3(a) "relative specificity" analysis, HTSUS provision which covered merchandise when "viewed as a unit" is more specific than provision covering "glassware of a kind used for . . . indoor decoration," which "only describes a portion of the item").

[23] As discussed in greater detail below, although the parties agree that heading 7013 is a "principal use" provision, Pomeroy disputes the Government's contention that heading 9405 is also a "principal use" provision. Pomeroy maintains that heading 9405 is instead an *eo nomine* provision. *See* Pl.'s Brief at 4, 6, 12, 17; Pl.'s Reply Brief at 2–3, 31.

A "use" provision is "a provision describing articles by the manner in which they are used as opposed to by name," while an *eo nomine* provision is one "in which an item is identified by name." *Len-Ron Mfg. Co.*, 334 F.3d at 1308. And there are two types of "use" provisions – "actual use" and "principal (formerly known as "chief") use." An "actual use" provision is satisfied only if "such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered." *See* Additional U.S. Rule of Interpretation ("ARI") 1(b) (*quoted in Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998)). In contrast, a "principal use" provision functions essentially "as a controlling legal label, in the sense that even if a particular import is proven to be actually used inconsistently with its principal use, the import is nevertheless classified according to its principal use." Clarendon Mktg., 144 F.3d at 1467.

For purposes of GRI 3(a), "principal use" provisions are generally deemed to be more specific than *eo nomine* provisions. However, that principle is not an ironclad rule of law, but merely a "convenient rule of thumb for resolving issues where competing provisions are in balance." *Len-Ron Mfg. Co.*, 334 F.3d at 1313 (emphasis added) (citation omitted); *see also BASF Corp.*, 497 F.3d at 1315 (same); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1380–81 (Fed. Cir. 1999) (explaining that the "general rule" that a principal use provision is typically more specific than an *eo nomine* provision is "not obligatory"); *Orlando Food Corp.*, 140 F.3d at 1441 (stating that "[r]esort to this aid to statutory construction [that use provisions are generally deemed more specific than *eo nomine* provisions] is not obligatory, however, as it is merely a 'convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance.' ") (*quoting United States v. Siemens Am., Inc.*, 653 F.2d 471, 478 n.6 (CCPA 1981)). The general "rule of thumb" has no application where – as here – one tariff provision (in effect) "specifies a single article for proper classification" and the competing provision "is a broad provision encompassing a variety of articles with specific

Neither HQ 960499 nor any of the five other ruling letters to which the Government makes passing reference does anything to advance the Government's position here. As section I.E above explains, the analysis in most of those rulings begins with – and proceeds from – the assumption that the metal and glass items there at issue are "composite goods" or "sets" subject to classification pursuant to a GRI 3(b) "essential character" analysis. *See* HQ 960499; HQ 960819; HQ 960962; HQ 961095. Those rulings thus "leapfrog" over GRIs 1 and 2(a), which – as detailed above – properly and completely dispose of the classification of the merchandise at issue in *this* matter (particularly in light of Explanatory Note 70.13).[24] *See* section III.A, *supra*. Nor does the analysis in the rulings cited by the Government consider GRI 3(a). Yet, as explained above, even assuming, *arguendo*, that the merchandise here at issue were not classifiable under heading 9405 pursuant to GRI 1 and 2(a) (which it is), heading 9405 would still prevail over heading 7013 under a GRI 3(a) "relative specificity" analysis.

In short, there is simply no reason to reach a GRI 3(b) "essential character" analysis in this case – and a GRI 3(b) "essential character" analysis is the *starting point* in HQ 960499 and most of the other ruling letters on which the Government here relies.

2. *The Government's ARI 1(a) Argument*

The Government's argument based on Additional U.S. Rule of Interpretation ("ARI") 1(a) is similarly flawed. The Government contends that the two headings at issue – heading 7013 and heading 9405 – are both "principal use" provisions, and thus implicate ARI 1(a), which provides for classification in accordance with the use of merchandise "of that class or kind to which the imported goods belong." *See* ARI 1(a).[25] Pointing to HQ 960499, the Government as-

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and independent uses." *Len-Ron Mfg. Co.*, 334 F.3d at 1313 (citation omitted) (holding *eo nomine* tariff provision covering "vanity cases" to be more specific than tariff provision covering "[a]rticles of a kind normally carried in the pocket or in the handbag").

Accordingly, even assuming that it were necessary to reach GRI 3 in this case (which, as discussed above, it is not), and even assuming that heading 9405 is an *eo nomine* provision (*see* section III.B.2, *infra*), a GRI 3(a) "relative specificity" analysis of the two competing headings nevertheless would compel the classification of the four pieces of merchandise at issue under heading 9405, rather than heading 7013.

[24] As discussed above, Explanatory Note 70.13 expressly excludes from classification under heading 7013 "[l]amps and lighting fittings . . . of heading 94.05." *See* Explanatory Note 70.13; *see also* n.15, *supra* (discussing effect of Note 1(e) to Chapter 70).

[25] Specifically, the Additional U.S. Rules of Interpretation provide, in relevant part:

1. In the absence of special language or context which otherwise requires –

   (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the day of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use[.]

serts that Customs has properly determined that glass vessels of certain specific shapes and sizes are "of the class or kind of articles that are principally used as candle holders" (and are thus classifiable under HTSUS heading 9405), while larger glass vessels "are used for more varied purposes and thus are properly classified as decorative glassware of a kind used for indoor decoration or similar purposes in subheading 7013.99, HTSUS." *See* Def.'s Brief at 6–7; *see generally id.* at 8, 11–13, 15–16; Def.'s Reply Brief at 1–2, 3–7 & n.7.

The Government's reliance on HQ 960499 and ARI 1(a) is misplaced. As a threshold matter, it is entirely unclear that heading 9405 is a "principal use" provision, as the Government insists it is. *See* Def.'s Brief at 4, 6, 10 (claiming that heading 9405 is a "principal use" provision); *but see* Def.'s Reply Brief at 4 n.4 (claiming that *subheading* 9405.50.40 is a "principal use" provision).[26]

Although Customs has repeatedly asserted in various ruling letters that *subheading* 9405.50.40 is a "principal use" provision, the agency has contented itself with conclusory statements to that effect and has proffered no reasoning to support the proposition. *See*, *e.g.*, HQ 960499 (asserting that subheading 9405.50.40 is a "principal use" provision). The Government's briefs in this matter are also conspicuously silent on the point. Nor has the Government identified any authority or advanced any substantial rationale to support its claim that *heading* 9405 – as opposed to some *subheading* thereunder – is a "principal use" provision. Certainly no court has ever held heading 9405 (or, for that matter, even subheading 9405.50.40) to be a "principal use" provision.[27]

Pomeroy makes a compelling argument that heading 9405 is not a "principal use" provision, but is instead an *eo nomine* provision. *See generally* Pl.'s Brief at 4, 6, 12, 17; Pl.'s Reply Brief at 2–3, 31. To be

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ARI 1(a).

[26] Significantly, tariff *subheadings* become relevant only if it is determined that merchandise is properly classified under the relevant *heading*. Thus, "[o]nly after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." *Len-Ron Mfg. Co.*, 334 F.3d at 1308–09 (*quoting Orlando Food Corp.*, 140 F.3d at 1440).

[27] HTSUS subheading 9405.30.00 – the subheading of heading 9405 covering "lighting sets *of a kind used for* Christmas trees" – was found to be a "principal use" provision in *Primal Lite*. *See* Subheading 9405.30.00, HTSUS (emphasis added); *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363–64 (Fed. Cir. 1999). However, the language of that particular subheading includes the phrase "of a kind used for . . . ", which typically characterizes "principal use" provisions. *See*, *e.g.*, *Len-Ron Mfg. Co.*, 334 F.3d at 1313 n.7. And that subheading is not at issue in this action. Nothing in *Primal Lite* supports the Government's claim that heading 9405 (which *does not* include the phrase "of a kind used for . . . ") is a "principal use" provision.

The only other case involving heading 9405 is *Home Depot*. There, however, the parties stipulated that the merchandise at issue was classifiable under heading 9405; the parties' dispute was as to the proper subheading. *See Home Depot*, 30 CIT at ____ , 427 F. Supp. 2d at 1291. As with *Primal Lite*, nothing in *Home Depot* supports the notion that heading 9405 is a "principal use" provision.

sure, unlike heading 7013,[28] neither heading 9405 nor subheading 9405.50.40 includes language such as "of a kind used for . . ." that typically characterizes "principal use" provisions. *See*, *e.g.*, *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363 (Fed. Cir. 1999); *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1313 n.7 (Fed. Cir. 2003).[29]

As Pomeroy explains, "[a]n *eo nomine* designation is one which describes a commodity by a specific name, usually one well known to commerce." *See* Pl.'s Reply Brief at 3 (*citing United States v. Bruchmann*, 582 F.2d 622, 625 n.8 (1978)); *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). "Lamps and lighting fittings" is terminology well known to commerce. According to Pomeroy, "[i]n providing for lamps and lighting fittings, along with other articles, such as illuminated signs and illuminated nameplates, all by name, heading 9405 is clearly identifiable as an *eo nomine* provision." *See* Pl.'s Reply Brief at 3. And, as Pomeroy emphasizes, absent some express restriction, an *eo nomine* designation generally "encompasses all forms of the named article." *See* Pl.'s Brief at 12 (citation omitted); Pl.'s Reply Brief at 3 (citation omitted); *see also JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000). In the instant case, the Government has pointed to nothing to suggest that the broad language of heading 9405 (or even that of subheading 9405.50.40) does not embrace "all forms of the named article." If heading 9405 is indeed an *eo nomine* designation, as Pomeroy persuasively argues, ARI 1(a) has no relevance here.

Even more fundamentally, however, the purpose of ARI 1(a) is to classify imported goods, or imported goods belonging to a class or kind of goods, that have *multiple uses*. But that is not the case here. And the purpose of ARI 1(a) is to classify imported merchandise according to the principal use of such merchandise, even though the specific imported goods in a particular case may be put to some atypical, "fugitive" use. *See Primal Lite, Inc.*, 182 F.3d at 1364. Contrary to the Government's assertions, ARI 1(a) plainly does not provide for the classification of imported merchandise according to the principal use of just *a part* of that merchandise.

As illustrated by HQ 960499 and its progeny, the Government's claim that the four pieces of merchandise in dispute are classifiable under heading 7013 is based on what the Government asserts is the principal use of *part only* of the imported goods, or the goods of the

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[28] As discussed above, heading 7013 covers "[g]lassware *of a kind used for* table, kitchen, toilet, office, indoor decoration or similar purposes . . . ." *See* Heading 7013, HTSUS (emphasis added).

[29] *But see Stewart-Warner Corp. v. United States*, 748 F.2d 663, 667 (Fed. Cir. 1984) (noting that a tariff provision may be a "principal use" provision notwithstanding the absence of the word "use" or the words "chiefly [now, "principally"] used" in the language of the provision).

class or kind to which they belong. In other words, the Government's "principal use" argument focuses solely on what it asserts is the principal use of only a single part of each of the four pieces of merchandise at issue – *i.e.*, the articles of glass. Specifically, the Government contends – in essence – that, for purposes of ARI 1(a), the "class or kind" of goods to which the merchandise here belongs is determined solely by the glass components of the merchandise, and turns on whether those glass components are more than five inches tall or have top openings greater than four inches in diameter. According to the Government, smaller glassware (*i.e.*, glassware of a size within the specified parameters) is classifiable as "candle holders" under heading 9405, and larger glassware is not. *See generally* HQ 960499; Def.'s Brief at 6–7, 11–13, 15–16; Def.'s Reply Brief at 1–2, 3–7.[30]

Even assuming that ARI 1(a) applied in this case (which it does not), ARI 1(a) would not permit such an analysis here. Instead, ARI 1(a) looks to the principal use of goods of the class or kind to which the imported goods at issue belong, *in the condition in which those goods are imported*. *See BASF Corp.*, 497 F.3d at 1314 (referring to "the longstanding rule of tariff law that goods are to be classified according to their condition when imported") (*citing United States v. Citroen*, 223 U.S. 407, 414–15 (1912)); Pl.'s Brief at 14; Pl.'s Reply Brief at 10 (noting that "[t]he government would have classification depend, *not upon the merchandise as imported*, but solely upon the size of a portion of those articles") (emphasis added).[31]

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[30] According to the Government, "Customs has used the[ ] size criteria [set forth in the July 15, 1998 Customs Bulletin notice, as well as the ruling letters that the Government cites] as guidelines only, to be applied in the absence of contrary evidence regarding the principal use of the imported merchandise." *See* Def.'s Reply Brief at 6. HQ 960499 at least implicitly recognizes possible exceptions to Customs' size "guidelines," stating that the agency "found there to be a clear distinction between glassware used as candle holders and that used for general indoor decoration based on the size of the articles, *in the absence of other pertinent evidence or information*." *See* HQ 960499 (emphasis added); *see also* "Withdrawal of Proposed Modification or Revocation of Ruling Letters Relating to Tariff Classification of Bell-Shaped and Similarly Shaped Glassware," 32 Customs Bulletin at 13–14 (July 15, 1998) (stating Customs' conclusion that, "in the absence of evidence to the contrary," glass vessels with a height of five inches or less and a top opening with a diameter of four inches or less "are principally used as candle holders").

Independent research, however, has identified no instance in which merchandise larger than Customs' "guidelines" has been classified under heading 9405, pursuant to any such exception. Certainly the Government has identified no such case. Pomeroy emphasizes that "[i]n this case we have other evidence and pertinent information." *See* Pl.'s Reply Brief at 21. "The articles . . . in the instant action were all imported with, merchandised with, and clearly intended to be used with, candles . . . ." *Id.*

[31] The Government concedes that the merchandise at issue may be used for illumination, "at least until the candles with which they are sold are consumed." Def.'s Brief at 14; *see also* Def.'s Reply Brief at 7 (referring to use of the merchandise "until the candles are consumed or discarded"). But Customs is not free to simply "assume away" any part of imported merchandise that is subject to classification. Customs is not free to "assume away" the candles (or, for that matter, any of the other components) included as part of the im-

The Government's "principal use" argument turns a blind eye to the existence of the candles as a light source, and ignores the only possible use for the four pieces of merchandise in dispute *in the condition in which those pieces were imported*, and the class or kind of articles to which they belong. As amply evidenced by the samples (which here serve as particularly "potent witnesses"), the undisputed facts are that the four pieces of merchandise are designed, configured, packaged, labeled, marketed, merchandised, advertised, and sold solely and exclusively for use as candle lamps. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (emphasizing that "the merchandise itself is often a potent witness in classification cases") (citation omitted); Pl.'s Exh. 2 (sample of Geo Table Lighting, in box); Pl.'s Exh. 3 (sample of St. Tropez CLS, in box); Pl.'s Exh. 4 (sample of Serenity Votives, in box); section I.B, *supra* (describing St. Tropez Cardinal Bowl by comparison to St. Tropez CLS); Pomeroy Affidavit ¶¶ 4–6.[32] The Government conspicuously fails to

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ported merchandise at issue here. *See generally* Pl.'s Reply Brief at 9 (noting that the Government essentially contends that "the purchaser would purchase these articles in order to throw away everything except the glass bowl and the iron stand, so that they could be used for pot pourri or another use") (citation omitted).

By focusing solely and exclusively on the glass vessels included as part of the four pieces of merchandise at issue, and essentially ignoring the candles and other components of that merchandise as imported, the Government's classification analysis runs afoul of the "well settled law that merchandise is classified according to its condition when imported." *Mita Copystar*, 21 F.3d at 1082 (citation omitted); *see also Worthington v. Robbins*, 139 U.S. 337, 341 (1891) ("[T]he dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported"); *Rollerblade, Inc.*, 112 F.3d at 487 ("An item must be evaluated for tariff purposes in its condition as imported.") (citation omitted); *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1577 (Fed. Cir. 1989) (emphasizing that "*the principle* [*that merchandise is dutiable in its condition as imported*] *is so basic it hardly needs to be mentioned* in any discussion of a classification problem by judges, officials, or lawyers having any serious involvement in such matters") (emphasis added).

[32] Pomeroy's Chief Operating Officer has attested that he himself designed the four pieces of merchandise at issue, as well as the picture boxes in which those four pieces of merchandise are sold. *See* Pomeroy Affidavit ¶¶ 3–4. He has further attested that each of the four pieces is designed to "function . . . as a candle holder," and that the packaging is designed "to clearly identify for the purchaser the intended use of each article as a candle holder." *See* Pomeroy Affidavit ¶ 4. As discussed in section I above, each of the four boxes includes large, attractive, color photographs of the merchandise in question, fully assembled and *in use as a candle lamp*, on multiple sides of the box. *See* Pl.'s Exh. 2 (photo box, containing sample of Geo Table Lighting); Pl.'s Exh. 3 (photo box, containing sample of St. Tropez CLS); Pl.'s Exh. 4 (photo box, containing sample of Serenity Votives); section I.B, *supra* (describing St. Tropez Cardinal Bowl by comparison to St. Tropez CLS). No other use of the merchandise (or, for that matter, any part of the merchandise) is even alluded to, much less depicted, on the packaging.

In addition, Pomeroy's Chief Operating Officer has attested that all four pieces of merchandise in dispute are in fact sold as candle holders. *See* Pomeroy Affidavit ¶¶ 5–6. Thus, for example, the Geo Table Lighting is listed in Pomeroy's literature under the caption "Pillar Holders"; and the St. Tropez CLS, St. Tropez Cardinal Bowl, and Serenity Votives are listed under the caption "Floating Candle Holders." *See* Pomeroy Affidavit ¶ 5; Pl.'s Exh. 6 (Pomeroy Price List). Further, each of the boxes in which the four pieces of merchandise are sold includes not only the name of the particular piece of merchandise inside (*i.e.*, "Geo identify even a single possible use for the instant merchandise – in the condition in which it is imported – or the class or kind of merchandise to which it belongs, other than as candle lamps.

Even if ARI 1(a) were to apply in this case (and, again, it does not), the relevant class or kind of goods would consist of *candle lamps* (or candle holders) – not some broad, vague, arbitrary class of various goods made *in part* of glass, of some particular size and shape, as the Government claims. *See generally Primal Lite, Inc.*, 182 F.3d 1362 (rejecting similar attempt by Government to broadly define "class or kind" of goods, and endorsing "commercial fungibility" test for purposes of GRI 1(a) "principal use" analysis);[33] *see also* Pl.'s Brief at 4 (emphasizing that "in determining 'principal use,' it is the use of the imported merchandise, and merchandise which is fungible therewith, which is to be determined, and not the principal use of another, broader, class of goods").

In sum, in the condition in which they were imported, the four pieces of merchandise remaining in dispute are candle lamps, and – when fully and properly assembled – have no other use.[34]

Table Lighting," "St. Tropez CandlePot," "Serenity Glass Votive Trio," etc. – all of which are names evocative of candlelight, or at least "lighting"), but also prominent references to "San Miguel *Candle Lamps*" (emphasis added) and to the fact that candles are included with the merchandise. *See* Pl.'s Exh. 2 (photo box, containing sample of Geo Table Lighting); Pl.'s Exh. 3 (photo box, containing sample of St. Tropez CLS); Pl.'s Exh. 4 (photo box, containing sample of Serenity Votives); section I.B, *supra* (describing St. Tropez Cardinal Bowl by comparison to St. Tropez CLS, as well as the wording that appears on all boxes). Moreover, the Pomeroy executive has attested to the fact that Pomeroy's customers – the retailers – sell the merchandise at issue "in their picture boxes," and that the merchandise is "always advertised and exhibited to the public as candle holders with candles." *See* Pomeroy Affidavit ¶ 6.

[33] In *Primal Lite*, the Court of Appeals discussed with approval the "commercial fungibility" test that the trial court there used in determining whether the imported merchandise fell within the "class or kind" of merchandise to which it belonged, for purposes of a "principal use" analysis. *See Primal Lite*, 182 F.3d at 1364–65. As Pomeroy emphasizes, the *Primal Lite* approach "deals with the principal use *of the imported product*, and not a portion of that product," as the Government here suggests. *See* Pl.'s Reply Brief at 10.

The Government's analysis in this case is similarly at odds with the *Carborundum* factors traditionally used to determine whether particular imported merchandise falls within the "class or kind" of merchandise to which the imported merchandise belongs. As Pomeroy emphasizes, "the *Carborundum* tests all deal with the characteristics, sale and use of *the imported article*, not with a given *part* of that article which may or may not be similar to a part of another article put to uses different from that of the imported article." *See* Pl.'s Reply Brief at 10 (discussing *United States v. Carborundum Co.*, 536 F.2d 373 (C.C.P.A. 1976)); *see also* Pl.'s Reply Brief at 7–10 (applying *Carborundum* factors to four pieces of merchandise at issue), 21–22.

[34] Although this is not a close case, the outcome is particularly fact-intensive. The result might be very different given somewhat different facts. Here, the inclusion of candles with the imported merchandise (in contrast to the merchandise at issue in the Customs Bulletin notices and the Customs ruling letters cited by the Government), and the consistent, extensive, and pervasive manner in which this merchandise is promoted and sold, including the absence of even a hint of versatility of use (*compare*, *e.g.*, HQ 960499 (where protestant stated that "the articles are sold . . . as candle holders, although *they can be used in a number of ways*") (emphasis added)), are compelling. The outcome here thus sets no precedent

3. *Classification at the Subheading Level*

For the reasons detailed in section III.A above, the four pieces of merchandise at issue are classifiable under heading 9405 of the HTSUS. All that remains is to ascertain the correct subheading.

The Government candidly concedes that – if the merchandise is classifiable under heading 9405 – it is classifiable under Pomeroy's claimed classification, subheading 9405.50.40. And a review of the other subheadings of heading 9405 identifies no possible competing tariff provision. The four pieces of merchandise are therefore classifiable as "Lamps and lighting fittings . . . : Non-electrical lamps and lighting fittings: Other: Other," under subheading 9405.50.40 of the HTSUS.

IV. ***Conclusion***

Applying GRI 1 and GRI 2(a), the four pieces of merchandise here in dispute – the Geo Table Lighting, the St. Tropez CLS, the St. Tropez Cardinal Bowl, and the Serenity Votives – are properly classified as "Lamps and lighting fittings . . . : Non-electrical lamps and lighting fittings: Other: Other," under subheading MX 9405.50.40 of the HTSUS. Pomeroy's motion for summary judgment is therefore granted, and the Government's cross-motion is denied.

Judgment will enter accordingly as to the classification of the four specified items in dispute, and as to the classification of all those items subject to the parties' stipulation. *See* n.4, *supra*.

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for a case where candles are included with the merchandise, but the merchandise is not promoted and sold in the way that it is here. Nor does this decision speak to a case where candles are not included with the merchandise, but the merchandise is promoted and sold as a candle holder.

Slip Op. 08–58

NAKORNTHAI STRIP MILL PUBLIC COMPANY LIMITED, Plaintiff, *v.* UNITED STATES, Defendant, UNITED STATES STEEL CORPORATION, Defendant Intervenor.

Before: Pogue, Judge
Court No. 07–00180

Public Version

[Plaintiff's Motion for Judgment on the Agency Record granted-in-part and denied-in-part.]

Dated: May 28, 2008

Vinson & Elkins (*Kenneth J. Pierce*, *Robert L. LaFrankie*, *Victor S. Mroczka*) for the Plaintiff.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke*); *Matthew D. Walden*, Attorney, Of Counsel, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce

Skadden, *Arps*, *Slate*, *Meagher & Flom LLP* (*Robert E. Lighthizer*, *John J. Mangan*, *Jeffrey Gerrish*, *Luke A. Meisner*) for the Defendant-Intervenor.

OPINION

Pogue, Judge: In this action, Plaintiff Nakornthai Strip Mill Public Company Limited ("Nakornthai") challenges the final results of the Department of Commerce's ("Commerce") administrative review of the antidumping order on Nakornthai's imports. *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 72 Fed. Reg. 27,802 (Dep't Commerce May 17, 2007) (final results and partial recision of antidumping duty administrative review) ("*Final Results*"). Specifically, Nakornthai challenges Commerce's selection of the invoice date as the date of sale in the United States for Plaintiff's merchandise.[1] Because of Commerce's determination that the material terms of the contract for Plaintiff's sales were not final by the contract date, Commerce utilized the invoice date as the date of sale.

The court finds that Commerce's conclusion identifying the potentially material terms of Plaintiff's contract is based on the agency's reasonable interpretation of its own regulation; therefore, the court affirms this legal conclusion. However, because Commerce's factual finding of finality of the terms of sale is incomplete, the court re-

[1] "In general terms, an antidumping analysis involves a comparison of export price or constructed export in the United States with normal value in the foreign market." 19 C.F.R. § 351.401(a) The identification of a "date of sale" for U.S. price may affect its comparison with sales in the foreign or"home" market, for example, if exchange rates are changing during the period of review.

mands this issue for further consideration. The court also refrains from adjudicating Nakornthai's request for consideration of alternate dates—other than the contract date— as the date of sale because Nakornthai failed to exhaust its administrative remedies on these claims.

Background

The original antidumping investigation, which gave rise to the proceeding here, involved hot-rolled carbon steel products imported from Thailand by Sahaviriya Steel Industries ("SSI"). In the initial investigation, Commerce found that SSI was dumping the subject merchandise and imposed a duty of 4.44 percent. *Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 59,562, 59,563 (Dep't Commerce Nov. 29, 2001) (notice of antidumping duty order).[2] After Commerce published an opportunity to request an administrative review of the order, *see Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 70 Fed. Reg. 65,883 (Dep't Commerce Nov. 1, 2005) (opportunity to request administrative review); *see also* Section 751 of the Tariff Act of 1930, 19 U.S.C. § 1675,[3] Defendant-intervenor U.S. Steel, and Nucor Corporation ("Nucor"), pursuant to 19 C.F.R. § 351.213(b)(1), requested an administrative review for the period of November 1, 2004, through October 31, 2005.[4] Commerce granted the request, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 70 Fed. Reg. 76,024, 76,025 (Dep't Commerce Dec. 22, 2005), and issued an initial antidumping questionnaire ("Part A") to Nakornthai on January 3, 2006. Three other sets of questionnaires followed, Parts B, C, and D, and by March 9,

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[2] The November 29, 2001 antidumping order originally subjected SSI to a 4.44 percent antidumping duty, which was subsequently lowered to 3.86 percent. Nakornthai was subject to the same antidumping duty rate, under a separate "all others" rate category, up until the time it received its own company-specific rate in the proceeding challenged here. *See, e.g.*, *Final Results*, 72 Fed. Reg. 27,802 and accompanying Issues and Decision Memorandum 2, *available at* http://ia.ita.doc.gov/frn/summary/THAILAND/E7-9526-1.pdf ("*Issues and Decision Mem.*").

[3] Further citation to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2000 edition.

[4] 19 C.F.R. § 351.213(b) states:

> Request for administrative review. (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order . . . if the requesting person states why the person desires the Secretary to review those particular exporters or producers.

19 C.F.R. § 351.213(b)(1).

2006, Nakornthai had also responded to these supplemental questionnaires.

Nakornthai's questionnaire responses indicated that, during the period of review, Nakorthai contracted with one wholesaler of metals and metal ores, to import its products. This contract was the only U.S. sale of the subject merchandise that Nakornthai made during the period of review. Pl.'s Mot. for J. on the Agency R. 2 ("*Pl.'s Mot.*"); Def.-Intervenor's Mem. in Opp. to Pl.'s Mot. for J. on the Agency R. 1 ("*Def.-Intervenor's Opp. Mem.*"). Nakornthai's original contract, dated in a specific month in 2004, identified multiple line items designating products to be shipped to several end users in the United States. The parties later made three changes to the contract. The first amendment, made the next month in 2004, removed the specification of the range of quantities to be purchased for each item to be sold under the contract (the "per-item tolerance level"),[5] leaving only a total quantity tolerance level. The second amendment, made in yet again the following month, changed the payment terms, and the third amendment, made in yet again the following month, changed both the expiration date on the letter of credit and the last shipment date for the merchandise. In other words, in each of the three months following the original contract, the parties amended its terms.

Nakornthai shipped its products under this contract shortly after the third contractual amendment. The day after the last date of the shipments, Nakornthai issued a final invoice for its products.

Nakornthai's responses to Commerce's questionnaires identified its original contract date as the United States date of sale. Attach. to Letter from Kenneth J. Pierce, Willkie Farr & Gallagher LLP, on behalf of Nakornthai; to the Honorable Carlos M. Gutierrez, Secretary of Commerce, Re: *Antidumping Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Resp. to Section A of the Department's Questionnaire* (Feb. 14, 2005), C.R. Doc. 3 at A–3 ("*Nakornthai's Resp. to Part A Questionnaire*"). Nakornthai also stated in its responses that it considered the contract's amendments to be minimal and not material to the overall contract and sale. *Id.* at A–27; Pl.'s Resp. to the Dep't's July 26, 2006, Third Supplemental Questionnaire Re: Section C, Aug. 7, 2006, at 6.

Commerce made a preliminary determination that Nakornthai's products had been sold at less than fair value, i.e., a dumping determination, for the period of review. Commerce's preliminary determination did not adopt the contract date as the date of sale as Nakornthai had proposed in its questionnaire responses. Rather, Commerce, in calculating the dumping margin, used the final invoice date as the U.S. date of sale rather than the original contract

[5] The "tolerance" level is expressed as a quantity, plus or minus (+/–) a specified percentage.

date. *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 71 Fed. Reg. 65,458, 65,461–62 (Dep't Commerce Oct. 31, 2006) (preliminary results of antidumping duty administrative review and rescission in part) ("*Preliminary Results*"). In addition, Commerce determined that the amendments made material changes to the contract. In coming to these conclusions, Commerce reasoned, first, that department regulations created a presumption in favor of using the invoice date as the date of sale. Furthermore, Commerce reasoned, the fact that the parties had made three amendments to the contract in the space of a few months meant that the terms of the contract were not settled until the commercial invoice actually issued.

Commerce's preliminary results also reasoned that the amendments to the contract constituted material changes to the terms of sale because they "altered the payments terms and the letter of credit." Mem. From Stephen Bailey, Case Analyst, to File, *Preliminary Results Analysis for Nakornthai Strip Mill Public Co. Ltd: Antidumping Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, C.R. Doc. 39, 2 (Dep't Commerce Oct. 31, 2006) ("*Preliminary Results Mem.*"). In Commerce's view, the fact that material terms were being changed throughout the period of review also supported its choice of the invoice date as the date of sale; not only were the terms of the contract not finalized until the invoice issued, but also, the changes being made affected quantities at the heart of the contract. Def.'s Mem. in Opp. to Pl.'s Mot. for J. Upon the Admin. R., 8–9 ("*Def.'s Opp. Mem.*").

After Commerce made its preliminary determination, Nakornthai submitted a case brief, pursuant to 19 C.F.R. § 351.309(c).[6] In its case brief, Nakornthai objected to Commerce's use of the invoice date and argued generally for an alternative date of sale to be used instead of the invoice date. Specifically, the company again proposed that Commerce use the date on which the contract was formed, i.e., the original contract date. Case Brief of Nakornthai Strip Mill Public Company Limited, 6–7 (Jan. 8, 2007)("*Nakornthai Case Br.*").

Nakornthai also objected to Commerce's determination that the amendments to the contract affected the material terms of the sale. Nakornthai argued that "[n]one of [the changes] impacted the material terms of sale (i.e., price and quantity)." *Nakornthai Case Br.* 3. "In other words, there is no variance in the material terms of sale

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[6] 19 C.F.R. § 351.309(c)(2) specifies:

> The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results. As part of the case brief, parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited.

from the contract to the invoice." *Id.* at 4. The contract's first amendment "merely modified the tolerance level in the contract from per item to per total." *Id.* While the contract's second amendment changed the timing of the payment, and the third amendment changed the letter of credit's expiration date and the last date of shipment, Nakornthai maintained that the contract's "material terms," i.e., price and quantity, were not changed by any of the three amendments. *Id.*

In its final determination, Commerce continued to use the invoice date as the U.S. date of sale, based on its determination that one of the contract's amendments made a material change to the contract. *Final Results*, 72 Fed. Reg. 27,802, and accompanying Proprietary Arguments from the Issues and Decision Memorandum for the Final Results of Certain Hot-Rolled Carbon Steel Flat Products from Thailand 13–14 ("*Proprietary Issues and Decision Mem.*") Commerce reasoned that by eliminating the tolerance levels for individual line items in the contract, Nakornthai could potentially alter the mix of products ordered.[7] The final dumping determination issued on May 7, 2007. *Final Results*, 72 Fed. Reg. 27,802.

Nakornthai now seeks review of Commerce's determination, challenging it as contrary to law and unsupported by substantial evidence. Specifically, as the court understands Plaintiff's complaint, pursuant to USCIT R. 56.2, Plaintiff seeks judgment on the agency record, declaring contrary to law Commerce's conclusion that the specification of line-item quantities in Plaintiff's contract for the sale of merchandise imported into the United States was a material term of that contract. Plaintiff also seeks a judgment declaring unsupported by substantial evidence Commerce's determination that, because said line-item quantities were subject to change after the contract was signed, the material terms of Plaintiff's contract were not final or established by the contract date.

Jurisdiction and Standard of Review

28 U.S.C. § 1581(c) provides jurisdiction for the court's review of civil actions brought under Section 516A of the Tariff Act of 1930. 19 U.S.C. § 1516a. Under 19 U.S.C. § 1516a(a), the Court reviews determinations made, pursuant to 19 U.S.C. § 1675, by the Department of Commerce during its administrative review. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii).

In such a review, the court will uphold "any determination, finding or conclusion" which the agency has made unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance

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[7] Commerce also noted that it was moot whether changes to the payment terms or the letter of credit constituted changes to material sales terms. *See Proprietary Issues and Decision Mem.* 14.

with law." 19. U.S.C. § 1516a(b)(1)(B). *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996)(quoting 19 U.S.C. § 1516a(b)(1)(B)).

Discussion

To apply the standard of review to Nakornthai's claim, the court will divide its discussion into four parts. First, the court will summarize the statutory and regulatory provisions relevant to Commerce's determination. Second, the court will explain its conclusion that Commerce's interpretation of the materiality provision in the relevant regulation is reasonable and therefore in accordance with law. Third, the court will consider Commerce's factual finding of finality of the terms of Nakornthai's sale and whether that finding is supported by substantial evidence in the record. Fourth, the court will discuss its decision not to further adjudicate Nakornthai's request for consideration of alternate dates—other than the contract date—as the date of sale because Nakornthai has failed to exhaust its administrative remedies on these claims.

A. Relevant Statuory and Regulatory Provisions

The statutory provisions relevant to Nakornthai's challenge to Commerce's determination of a date of sale are 19 U.S.C. §§ 1673 and 1677a. These provisions leave the precise definition of "date of sale" to the agency. Section 1677a(a), for example, reads, "[t]he term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise . . . ." 19. U.S.C. § 1677a(a). This provision does not determine whether the date of sale is the contract date or invoice date; it could be either, if, as in the present case, both the date of sale and the date of invoice occurred before the merchandise was actually brought into the U.S. Because the statute is ambiguous, the court will defer to Commerce's reasonable interpretation of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Commerce's interpretation is contained in its regulations which state a presumption in favor of the use of the invoice date as the date of sale. 19 C.F.R. § 351.401(i)(2007).[8] *See Hornos Electricos de Venezuela, S.A. v. United States*, 27 CIT 1522, 153536, 285 F. Supp. 2d

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[8] That section reads:

> in identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

19 C.F.R. § 351.401(i).

1353, 1366–67 (2003). Consequently, unless the party seeking to establish a date of sale other than the invoice date produces sufficient evidence to establish, to Commerce's satisfaction, that "a different date better reflects the date on which the exporter or producer establishes the material terms of sale," Commerce will use the invoice date as the date of sale. 19 C.F.R. § 351.401(i)(2007); *Accord Hornos Electricos de Venezuela*, 27 CIT at 1537, 285 F. Supp. 2d at 1367.

In Nakornthai's case, Commerce determined that the quantity tolerance level specified in the contract was a "material term[ ] of [the] sale." Therefore, the next issue is whether Commerce's determination that the quantity tolerance level constituted a material term of Nakornthai's contract is a reasonable interpretation of Commerce's regulation and is therefore in accordance with law.

B. Commerce's Determination of Potential Materiality is Reasonable

From the beginning of the administrative process, Nakornthai has argued that the changes it had made to the contract were minimal and therefore immaterial. In response to the first questionnaire it received from Commerce, Nakornthai stated, "during [the fourth period of review], for U.S. sales, there were only two minor changes, (i.e., tolerance applicability and payment terms) after the terms of the contract were agreed upon . . . ." *Nakornthai's Resp. to Part A Questionnaire* C.R. Doc. 3 at A–27.[9]

The problem with this argument is that it conflates a factual issue, i.e., the extent of the actual change in contract terms, with a legal issue, i.e., whether a particular contractual term is a "material" term of sale.

Commerce's preliminary results acknowledged Nakornthai's argument that the changes contained in the contract's amendments were minimal, but noted that one of these amendments changed the tolerance level for the products at issue. *Preliminary Results Mem.*, C.R. Doc. 39, 2. On the strength of this change, Commerce determined that "material" changes to the contract had occurred as a result of the contract's amendments. *Id.* Nakornthai challenged this finding in its case brief before Commerce, arguing that the only material terms of a contract were price and quantity, to which there had been no changes. Attach. to Letter from Kenneth J. Pierce, Willkie Farr &

[9] In response to a question in Commerce's third questionnaire, Nakornthai also stated that all the copies of the final invoices that it had provided to its wholesaler "support a finding of contract date as the date of sale because all material terms of sale were set in the contract (i.e., there is no variance in material terms between the contract and the invoices.)" Attach. to Letter from Kenneth J. Pierce, Willkie Farr & Gallagher LLP, on behalf of Nakornthai; to the Honorable Carlos M. Gutierrez, Secretary of Commerce, Re: *Antidumping Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Resp. to the Department's Third Supplemental Questionnaire Re: Section C* (Aug. 7, 2006), C.R. Doc. 30 at 6.

Gallagher LLP, on behalf of Nakornthai; to the Honorable Carlos M. Gutierrez, Secretary of Commerce, Re: *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Case Brief of Nakornthai Strip Mill Public Co. Ltd.* (Jan. 8, 2007), C.R. Doc. 45 at 3.

In its rebuttal brief, U.S. Steel cited precedent to argue that Commerce had a long history of considering tolerance to be a material term. Attach. to Letter from Robert E. Lighthizer, Skadden, Arps, Slate, Meagher & Flom, LLP, on behalf of U.S. Steel; to the Honorable Carlos M. Gutierrez, Secretary of Commerce, Re: *Fourth Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from Thailand* (Jan. 16, 2007), C.R. Doc 48 at 5, n. 16 ("*U.S. Steel Case Br.*") (citing *Certain Hot-Rolled Steel Flat Products from Thailand*, 66 Fed. Reg. 49,622 (Dep't Commerce Sept. 28, 2001)(notice of final determination of sales at less than fair value) ("*Final Results of Original Investigation*"), and accompanying Issues and Decisions Mem. (Comment 9)(where the contract has a built in tolerance of +/– 10 percent and quantity changes occurred within such delivery tolerances, "we agree with petitioners that any differences between the quantity ordered and the quantity shipped which fall within the tolerance specified by the entire contract do not constitute changes in the material terms of sale.")); *see also Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil*, 64 Fed. Reg. 38,756, 38,768 (Dep't Commerce July 19, 1999)(notice of final determination of sales at less than fair value)("[t]he Department considers the date of sale to be the date on which all substantive terms of sale are agreed upon by the parties. This normally includes the price, quantity, delivery terms and payment terms."). U.S. Steel also argued that the elimination of the per item tolerance in the contract's amendments affected the product mix, a term which Commerce also considers to be material. *U.S. Steel Case Br.* 5. Commerce agreed with U.S. Steel's logic and precedent and determined that changes in tolerance could lead to changes in quantity, and therefore constitute material changes.

As noted above, the determination of whether a change in line-item quantities is "material" for purposes of Commerce's date of sale regulation is a *legal* issue, i.e., it involves Commerce's interpretation of its own regulation. Here, Commerce has interpreted "material terms of sale" to include the specification of a quantity tolerance level. Such a determination is reviewed to determine whether it is in accordance with law. To the court, Commerce's legal determination is reasonable because quantity tolerance level may reasonably be viewed as specifying the amount or quantity of the merchandise to be shipped. Accordingly, the quantity tolerance may reasonably be considered material to the terms of sale. *See SeAH Steel Corp. v. United States*, 25 CIT 133, 135 (2001)(finding line-item quantity data necessary to a determination of material terms of sale). Considered in this light, Commerce's adherence to its precedent, in its regulatory interpretation here, is reasonable. *See Royal Thai Government v. United States*, 436 F.3d 1330, 1340 (Fed. Cir. 2006)(deferring to Commerce's reasonable interpretation of its regulation.)

Nakornthai asserts that Commerce has not adhered to the use of the invoice date in every case that has come before it, and has used initial contract date even in cases where amendments to the contract have been made after the initial contract date. Pl.'s Reply Br. 5 (citing *Final Results of Original Investigation*, and accompanying Issues and Decision Mem. (Comment 9); *Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 7,016 (Dep't Commerce Feb. 10, 2006) (notice of final results of antidumping duty administrative review), and accompanying Issues and Decision Mem., 11; *Steel Concrete Reinforcing Bars from Latvia*, 71 Fed. Reg. 74,900 (Dep't Commerce Dec. 13, 2006) (notice of final results of antidumping duty administrative review), and accompanying Decision Mem. (Cmt. 2).

The court notes that although the cases to which Nakornthai cites are indeed cases where Commerce used the contract date rather than the invoice date, they are also cases in which Commerce considered a number of factors before arriving at the use of the contract date. These factors, such as whether there were changes to material terms such as price and quantity, and how significant these changes were, are the same factors that Commerce used in coming to its conclusion to use the invoice date in the present case. Here, Commerce examined these factors and determined that the first amendment to the contract changed the quantity tolerance level, a term which Commerce has a history of considering to be a material term; as a result, Commerce reasonably determined that the amendments had the potential to change the material terms of the contract. This much of Commerce's determination is therefore in accordance with law.

Commerce's determination, however, must also be supported by substantial evidence. Accordingly, the court now considers whether Commerce's choice to use the invoice date as the date of sale, rather than the contract date, was, based on the record in this administrative review, so supported.

C. Commerce's Factual Finding Regarding the Date on which the Material Terms of Nakornthai's Sale were established is Incomplete.

In choosing a date of sale, Commerce weighs the evidence presented and regularly determines the significance of any changes to the terms of sales involved. *See, e.g.*, *Certain Cut-to-Length Carbon Steel Plate from Romania*, 72 Fed. Reg. 6,522 (Dep't Commerce Feb. 12, 2007)(notice of final results of antidumping duty administrative review and final partial rescission), and accompanying Issues and Decision Mem. (Comment 7) (recognizing as not significant one sale of a small quantity outside the specified quantity tolerance level). As

Commerce noted in its issues and decision memorandum here, such a determination involves Commerce's consideration of "which date best reflects the date on which the exporter/producer *establishes* the material terms of sale (i.e., price and quantity)." *Proprietary Issues and Decision Mem.*, 13 (emphasis added).

Commerce argues that the fact that the quantity tolerance level was changed, in whatever amount, demonstrates that the contract's material terms were subject to change and therefore not finally settled until the invoice date. The problem with this argument is that it begs the question of whether any such changes were insignificant.

Nakornthai argues that the contract's amendments made changes that were minimal or insignificant. As a result, Nakornthai argues that it is appropriate to use the original contract date as the date of sale rather than the final invoice date.

As noted above, the record demonstrates that the original contract specified both an overall quantity tolerance and an individual, per item, tolerance level. One of the contract's amendments, however, removed the line-item quantity tolerance, giving Nakornthai greater leeway with respect to the products it shipped. Commerce examined Nakorthai's invoices and found that this leeway allowed Nakornthai to ship a larger amount of one item, and that this increase was large enough to fall outside the originally-specified line-item quantity tolerance level. *Def.-Intervenor's Opp. Mem.* 2. This increase appears to distinguish this case from the Sept. 28, 2001 determination in the original investigation, *Final Results of Original Investigation*, and accompanying Issues and Decision Mem. (Comment 9).

On the other hand, Nakornthai also argues that the contract amendment affected less than .1% of the total quantity of goods sold and shipped under the contract. Pl.'s Reply Br. 6. At the same time, the quantity actually shipped of the one changed line-item was 14.5% higher than the upper end of the originally specified tolerance level, and more than 25% above the specific line-item quantity for that product specified in the original contract.[10] Commerce did not discuss or make a finding with regard to this evidence, either on its own or when considered in light of the elimination of tolerance levels in the contract. Moreover, on this record, the court cannot conclude that Nakornthai has necessarily submitted sufficient evidence to establish that the contract date "better reflects the date on which" Nakornthai and its wholesaler set the material terms of sale. For example, it is not apparent to the court whether the variation in the quantities for one line-item is sufficient to affect "product mix" in any significant way or to alter the dumping margin. It is of course

[10] That is, the "total line-item quantity actually shipped was [ ]MT, which exceeds the initial contract quantity tolerance limit of [ ]MT by slightly more than [ ] MT." *Pl.'s Mot.* 4.

settled that the fact that the evidence could support two inconsistent conclusions does not mean that an agency's finding is not supported by substantial evidence, *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966), and the court will not substitute its own judgment for that of the agency. Here, however, the agency has not made a factual finding with regard to the significance of Nakorthai's evidence or the date the terms of the contract were essentially "established" in light of the evidence submitted. The agency's determination of this issue is therefore incomplete and must be remanded.

D. Nakornthai's Failure to Exhaust is Administrative Remedies Precludes Judicial Review of Alternative Dates of Sale.

In its briefs presented to the court, Nakornthai asks the court to consider alternative dates as a date of sale, and not limit its review to the contract date or the invoice date. Specifically, Nakornthai argues that, should the court find the contract date to be inappropriate as the date of sale, the court should consider using either the date on which the contract was last amended ("contract amendment date") or the date on which the goods shipped ("shipment date"), rather than uphold Commerce's use of the invoice date.

In rebuttal, both Commerce and U.S. Steel argue that, because Nakornthai failed to raise its alternative sales dates before Commerce, Nakornthai failed to exhaust its administrative remedies. Defendants argue that Commerce decided on the invoice date as between two choices: invoice date and contract date, and that the record amply supports the choice. As a result, they argue, alternative dates are not properly before the court.

As a judicially created doctrine, the requirement of exhaustion reflects courts' reluctance to usurp an agency's power by meddling in the agency's affairs before the issue is ripe for judicial determination. *See, e.g., Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998); *Ta Chen Stainless Steel Pipe v. United States*, 28 CIT 627, 342 F. Supp. 2d 1191 (2004). Federal courts therefore usually require parties to exhaust their administrative remedies before appealing.

This Court has the benefit of specific statutory support for the exhaustion doctrine. *See*, 28 U.S.C. § 2637(d) ("the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

In determining, case-by-case, when exhaustion is "appropriate," the Court has "generally taken a strict view of the need for parties to exhaust their remedies by raising all arguments in a timely fashion so that they may be appropriately addressed by the agency." *Ta Chen*, 28 CIT at 644, 342 F. Supp. 2d at 1205; *Pohang Iron and Steel Co. v. United States*, 23 CIT 778, 792 (1999).

Here, the court begins its exhaustion analysis with Commerce's administrative procedures for challenging an antidumping determination. This procedure requires parties to submit a case brief that "must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2). The Court recently noted that the requirement to present "all" relevant arguments means that arguments that are omitted before the agency cannot be argued on appeal. *Carpenter Tech. Corp. v. United States*, 30 CIT ___ , 452 F. Supp. 2d 1344 (2006).

Here, Nakornthai did submit a case brief to Commerce following the preliminary results. The issue, therefore, is whether that brief's general argument in favor of using a date other than the invoice date was sufficient to give Commerce notice of the specific alternatives that Nakornthai now raises on appeal, where those alternatives were not mentioned at the administrative level.

Several of the Court's precedents are instructive. In *Ta Chen*, for example, a Taiwanese producer and exporter of fittings submitted a case brief challenging Commerce's Constructed Export Price ("CEP"). *Ta Chen*, 342 F.Supp. 2d at 1205. The brief argued specifically that Commerce's calculation of the CEP adjustment was unsupported by substantial evidence. *Id.* Ta Chen also specifically challenged Commerce's decision to deny the company a CEP offset adjustment to normal value to reflect asserted level of trade differences between the home and U.S. markets. *Id.* at 1199, 1204. After the submission of Ta Chen's brief, Commerce reopened the response period because there were specific issues to which Ta Chen had not responded. *Id.* at 1196. When Ta Chen submitted a revised brief to the agency, it had deleted its discussion of the CEP offset issue and had omitted documents on the reimbursement issue. *Id.* When Ta Chen raised these specific arguments on appeal before the court, the court held that Ta Chen, in omitting these arguments from its revised brief, had failed to present them to Commerce before making them before the court. *Id.* at 1205. "Whatever may have been the merits" of these claims, the court said, they were "doomed by the company's failure to raise the issue before the Commerce Department in a timely fashion." *Id.* at 1205.

Paul Muller Industrie Gmbh & Co. v. United States is also informative here. *Paul Muller Industrie Gmbh & Co. v. United States*, 31 CIT ___ , 502 F. Supp. 2d 1271 (2007). In *Paul Muller*, Timken U.S. Corporation, a defendant-intervenor, argued broadly in its case brief that Commerce needed "to account for U.S. carrying costs incurred on an ex-factory basis, as it did for the home market side." *Id.* at 1274. Timken also "suggested that the sum of the time in inventory in the home market, the transit time, and the time in inventory in the U.S. would be a more accurate approach for the calculation." *Id.* The company also suggested "that Commerce consider the entered value as the cost of goods upon entry to the U.S." *Id.* On appeal before the court, however, Timken argued more specifically that for U.S. inventory, "the estimate of inventory cost must account for costs incident to the transaction between the producer and the U.S. affiliate such as transportation costs, duties, and brokerage fees." *Id.*

The court refused to allow these more specific arguments on appeal, finding that "Timken waived its right to raise the issue of freight, duties, and brokerage fees by failing to raise the issue before Commerce in the course of its review." *Id.* at 1275. The fact that Timken "raised general issues regarding inventory carrying costs is not adequate to apprise Commerce of what it would need to specifically respond to regarding these additional issues," the court held, and dismissed Timken's claims. *Id.*

To the court, the present case appears similar to that in *Paul Muller*. Nakornthai raised broad arguments before Commerce regarding the propriety of using the invoice date as the date of sale, but did not raise the specific alternatives it now seeks to raise before the court. Nakornthai did not properly raise these alternatives before Commerce, and may not now raise them on appeal because it has not exhausted its administrative remedies with respect to these alternative dates.[11] Despite Nakornthai's failure to exhaust, however, Commerce is still free on remand to determine, in accordance with its regulations and based on the record, which date "reflects the date on which the exporter or producer establish[ed] the material terms of sale."

Conclusion

Accordingly, Plaintiff's Motion for Judgment on the Agency Record is denied-in-part and granted-in-part. The matter is remanded to the agency for further consideration in accordance with this opinion. Remand results are due by July 28, 2008. Comments on the remand results are due by August 18, 2008. Reply comments are due by September 10, 2008.

SO ORDERED.

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[11] Nakornthai also argues that even if it has failed in its duty of exhaustion, such a requirement should be excused here because the presentation of alternative dates involves a pure matter of law. However, as the court analysis above has demonstrated, the agency's choice of the invoice date over any other alternative involves both legal and factual components. Accordingly, the presentation of alternative dates does not involve a pure matter of law.

Slip Op. 08–59

T.W.R., INC., Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard K. Eaton, Judge

Court No. 05–00356

[United States Department of Agriculture's final determination denying plaintiff's application for trade adjustment assistance remanded.]

Dated: May 28, 2008

Steven D. Schwinn and *Clayton P. Solomon*,[1] for plaintiff.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg*), for defendant.

OPINION AND ORDER

Eaton, Judge: This matter is before the court on the motion of plaintiff T.W.R., Inc. for judgment upon the agency record pursuant to USCIT Rule 56.1. By its motion, plaintiff challenges the final determination of the United States Department of Agriculture (the "Department") denying its application, pursuant to 19 U.S.C. § 2401e (2002), for cash benefits under the Trade Adjustment Assistance for Farmers ("TAA") program. *See* Mem. Supp. Pl.'s Mot. J. Agency R. ("Pl.'s Br."); Reconsideration Upon Remand of the Application of T.W.R., Inc. (Dep't of Agric. Dec. 14, 2006) (the "Negative Determination"). Jurisdiction lies under 19 U.S.C. § 2395(c).

For the reasons set forth herein, the Department's Negative Determination is remanded.

BACKGROUND

Plaintiff is a family-owned shrimping company that has operated its business off the Texas Gulf Coast since the early 1970s. Pl.'s Br. 2. According to plaintiff, from as early as 1984, its business has suffered because of declining shrimp prices attributable to increased competition from imports. Pl.'s Br. 3.

In October 2003, the Texas Shrimp Association ("TSA") filed a petition with the Department on behalf of Texas shrimp producers for TAA certification pursuant to 19 U.S.C. § 2401a and 7 C.F.R. § 1580.201 (2003). *See* TAA for Farmers, 68 Fed. Reg. 60,078 (Dep't

[1] Appearing pursuant to a Law Student Appearance Form, authorized by USCIT Admin. Order No. 06–01, and consented to by the court on April 20, 2007.

of Agric. Oct. 21, 2003) (notice).[2] On November 19, 2003, the Department certified Texas shrimp producers as eligible to apply for TAA cash benefits. *See* TAA for Farmers, 68 Fed. Reg. 65,239 (Dep't of Agric. Nov. 19, 2003) (notice). The certification was for a period of one year, with the possibility of additional time upon qualifying in subsequent years. *See* 19 U.S.C. § 2401a(d).

On November 30, 2004, the Department re-certified the TAA petition for Texas shrimp producers, finding that average prices during the "2003 marketing period (January-December 2003)" were 33.7 percent less than the average for the five-year base periodpreceding the 2002 marketing year, i.e., 1997 through 2001. *See* TAA for Farmers, 69 Fed. Reg. 69,582 (Dep't of Agric. Nov. 30, 2004) (notice).

In accordance with the statutory scheme, once the TSA received its certification, plaintiff, as a certified Texas shrimp producer, became eligible to apply for TAA cash benefits. *See* Pl.'s Br. 4; 19 U.S.C. § 2401e(a)(1). Plaintiff did not apply for benefits under the original certification. It did, however, apply on January 19, 2005 under the re-certification. *See* Application Dated Jan. 19, 2005 for TAA for Individual Producers, of T.W.R., Inc., Admin. R. ("AR") at 1; *see also* 7 C.F.R. § 1580.401(f) (stating that "[a]n eligible producer who did not apply for adjustment assistance in the initial year may apply [upon a re-certification]").

In support of its application, plaintiff submitted financial information to the Department, including its Form 1120 corporate tax returns for 2002 and 2001, along with their attached schedules and associated documents. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Resp.") 4–5. Plaintiff filed its tax returns on a fiscal year,[3] rather than a calendar year basis. Consequently, plaintiff's 2001 tax return[4] was based upon a taxable year beginning October 1, 2001, and

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[2] Obtaining TAA for Farmers cash benefits is a two-step process. Under the first step, a group of agricultural commodity producers or their authorized representative files a petition seeking a certification making them eligible to apply for TAA benefits. The Department, in turn, will grant the certification if the petitioning group establishes that certain criteria have been met. *See* 19 U.S.C. § 2401a(c). Under the second step, individual commodity producers can apply for cash benefits if they meet the requirements set forth in 19 U.S.C. § 2401e(a)(1).

[3] A "fiscal year" is defined as "[a]n accounting period of 12 consecutive months . . . [and] is often different from the calendar year, [especially] for tax purposes." Black's Law Dictionary 1646 (8th ed. 1990).

[4] Consistent with the Department's usage:

(1) plaintiff's year "2000 tax return" corresponds with its fiscal year 2001, and covers the time period October 1, 2000 through September 30, 2001;

(2) plaintiff's year "2001 tax return" corresponds with its fiscal year 2002, and covers the time period October 1, 2001 through September 30, 2002; and,

(3) plaintiff's year "2002 tax return" corresponds with its fiscal year 2003, and covers the time period October 1, 2002 through September 30, 2003.

Plaintiff's year "2003 tax return" is not in the record, but the court presumes, given plaintiff's consistency through the years, that this return would cover the time period October 1, ending September 30, 2002, while plaintiff's 2002 tax return was based upon a taxable year beginning October 1, 2002, and ending September 30, 2003. Def.'s Resp. 4–5.

The Department denied plaintiff's application in a letter dated March 7, 2005, stating in pertinent part:

> You have been denied a TAA cash benefit because you failed to meet the net income requirement, in accordance with 7 CFR Part 1580.401(e). An applicant's net income for 2003 must be less than their net income for 2001.

Letter Dated Mar. 7, 2005 from Department to T.W.R., Inc., AR at 46. Thus, the Department based its determination on a comparison of plaintiff's net income in fiscal year 2003 and fiscal year 2001, and concluded that plaintiff's net income did not decline between those periods. *See* Pl.'s Br. 4–5.

Plaintiff sought judicial review of this determination by filing a letter with the Court on May 6, 2005. Letter Dated May 6, 2005 from T.W.R., Inc. to Clerk of the Court, USCIT ("Compl."). The Clerk of the Court accepted plaintiff's letter, pursuant to USCIT Rule 5(e), "as fulfilling in principle the requirements of the summons and complaint . . . ." Letter Dated May 18, 2005 from Office of the Clerk, Donald C. Kaliebe, Case Management Supervisor, to Ms. Pearlene Walls, at 1. In the letter, plaintiff's primary allegation was that the Department improperly relied solely upon net income reported in its tax returns to assess its net income. Thus, in plaintiff's view, the Department should have looked beyond its tax returns, and assessed all "accounting variables," which, if considered, would provide a more accurate representation of plaintiff's net income. *See* Compl. 2–3.

On May 10, 2006, the Department filed a motion for voluntary remand because plaintiff's "2000 tax return [covering the period October 1, 2000 through September 30, 2001], rather than its 2001 tax return [covering the period October 1, 2001 through September 30, 2002], represented the tax year previous to that associated with the most recent marketing year[5] in the initial producer petition." Def.'s Resp. 6. Thus, the Department stated that it had made its initial determination using incorrect tax periods. On June 2, 2006, the court granted the Department's motion. *See T.W.R., Inc. v. United States Sec'y of Agric.*, Court No. 05–00356 (June 2, 2006) (order).

On October 31, 2006, plaintiff provided the Department with its year 2000 tax return, along with "additional competent evidence" of

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2003 through September 30, 2004, i.e., plaintiff's fiscal year 2004.

[5] "Marketing year means the marketing season or year as defined by National Agriculture Statistic Service (NASS), or a specific period as proposed by the petitioners and certified by the Administrator," 7 C.F.R. § 1580.102, in this case January 2003 through December 2003. TAA for Farmers, 69 Fed. Reg. at 69,582.

its net income during the period covered by its 2000 return and thus its 2001 fiscal year, i.e., October 1, 2000 through September 30, 2001. *See* Letter Dated Oct. 31, 2006 from T.W.R., Inc. to the Department ("Suppl. Letter"), Suppl. Admin. R. ("SR") at 2. The "additional competent evidence" consisted of, among other things, balance sheets reflecting loans from stockholders, invoices, and purchase orders. In its correspondence, plaintiff reiterated its position, asking the Department to consider the "many factors" that affect its net income in making its determination. *See* Suppl. Letter, SR at 2.

On December 14, 2006, the Department denied plaintiff's application, again reasoning that plaintiff was unable to demonstrate the requisite decline in net fishing income. *See* Negative Determination at 1. The Department stated:

> [T]he 2000 U.S. Corporation Income Tax Return corresponding to marketing year 2001, and the 2002 U.S. Corporation Income Tax Return corresponding to marketing year 2003, and other supporting documents provided by T.W.R., Inc., [demonstrate] that there was no decline in the net fishing income from the pre–adjustment year, 2001, to the most recent year for which marketing data was available, 2003. The 2000 U.S. Corporation Income Tax Return for the period October 1, 2000, ending September 30, 2001, on line 30 shows taxable income (income less deductions) as a loss of . . . . The 2002 U.S. Corporation Income Tax Return for the period October 1, 2002, ending September 30, 2003, on line 30 shows taxable income of . . . . Based on these returns, the plaintiff was unable to demonstrate the required decline in its net fishing income.
>
> Even if the agency were to consider the other supplemental documentation submitted by T.W.R., Inc., it also does not support a decline in T.W.R., Inc.'s net fishing income.

Negative Determination at 1–2 (citations omitted).

Plaintiff then moved to remand this matter to the Department for further consideration. *See* Pl.'s Br. 21. Plaintiff argues that the Department's denial of cash benefits was flawed because the Department: (1) failed to review tax returns from consecutive years and (2) failed to look beyond net income as reported in plaintiff's tax returns.

STANDARD OF REVIEW

The Department's TAA eligibility determination should be upheld if its factual findings are supported by substantial evidence in the record and its legal determinations are in accordance with law. *See* 19 U.S.C. § 2395(b); *Truong v. United States Sec'y of Agric.*, 31 CIT ___ , ___ , 484 F. Supp. 2d 1324, 1326 (2007)(citations omitted); *Van Trinh v. United States Sec'y of Agric.*, 29 CIT 1058, 1063, 395 F.

Supp. 2d 1259, 1265 (2005). Substantial evidence is "more than a 'mere scintilla,' but sufficient evidence to reasonably support a conclusion." *Viet Do v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1224, 1227 (2006) (citations omitted). The scope of review of the Department's actions is limited to the administrative record. *Defenders of Wildlife v. Hogarth*, 25 CIT 1309, 1315, 177 F. Supp. 2d 1336, 1342–43 (2001). For "good cause shown," the court may remand a case to the Department to take further evidence and make new and modified findings. *See* 19 U.S.C. § 2395(b).

DISCUSSION

I. Plaintiff's Application for TAA Cash Benefits

A. Relevant Law

As noted, an individual agricultural commodity producer's receipt of TAA benefits is the result of a two-step process, only the second of which is at issue here. Under the second step, following group certification under 19 U.S.C. § 2401b, an individual producer can apply for cash benefits[6] "within 90 days after the date on which the [Department] makes a determination and issues a [group]certification of eligibility." *See* 19 U.S.C. § 2401e(a)(1).

In order to qualify for cash benefits, an individual producer must establish, among others things, that its net income for the "most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part."[7] 19 U.S.C. § 2401e(a)(1)(C). With respect to establishing net income, "because of the *ex parte* nature of the [TAA]

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[6] Under 19 U.S.C. § 2401e(a)(1), the statutory requirements for an individual producer to receive benefits are as follows:

> (A) The producer submits to the Secretary sufficient information to establish the amount of agricultural commodity covered by the application filed under this subsection that was produced by the producer in the most recent year.
>
> (B) The producer certifies that the producer has not received cash benefits under any provision of this subchapter other than this part.
>
> (C) The producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part. . . .
>
> [and the producer has met certain other requirements with respect to seeking information and technical assistance.]

[7] The Department's regulations require that an individual producer demonstrate that its "net . . . fishing income was less than during the producer's pre-adjustment year." 7 C.F.R. § 1580.301(e)(4). Defendant's regulations define "net fishing income" as "net profit or loss, excluding payments under [19 U.S.C. §§ 2401– 2401g], reported to the Internal Revenue Servicefor the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102. Defendant's regulations define "pre-adjustment year" as "the tax year previous to that associated with the most recent marketing year in the initial producer petition." 7 C.F.R. § 1580.102.

certification process, and the remedial purpose of the [TAA] program, [the Department] is obligated to conduct [its] investigation with the *utmost regard for the interests of the petitioning workers*."[8] *See Van Trinh*, 29 CIT at 1066, 395 F. Supp. 2d at 1267 (citations omitted; second alteration added; emphasis in original).

B. The Department's Use of Non-Consecutive Years

During the pendency of this action, this Court decided *Dus & Derrick, Inc. v. United States Secretary of Agriculture*, 31 CIT ___ , 469 F. Supp. 2d 1326 (2007) ("*Dus & Derrick I*"), and *Dus & Derrick, Inc. v. United States Secretary of Agriculture*, 32 CIT ___ , Slip Op. 08–19 (Feb. 6, 2008) (not reported in the Federal Supplement) ("*Dus & Derrick II*"). *Dus & Derrick I* held:

> [T]he court finds that the language of the statute did not invite the Department to devise an alternative definition for the phrase "most recent year." For the court, that phrase can only refer to the year preceding that of the application. The statutory phrase "is less than" clearly indicates that a comparison is to be made between two years. Plaintiff was denied benefits based on a comparison between 2003 as the marketing year to 2001 as the pre-adjustment year. A plain reading of the statute, however, demands that, for an application made in 2005, net income for 2004 (the "most recent year") must be compared to that earned in 2003 ("the latest year in which no adjustment assistance was received by the producer").

31 CIT at ___ , 469 F. Supp. 2d at 1335 (footnote omitted). The court will follow *Dus & Derrick I* and *II* when making its findings in this case.

Thus, as an initial matter, the court will not accord *Chevron* deference to the Department's interpretation of 19 U.S.C. § 2401e as applied to the facts presented here. For the court, 19 U.S.C. § 2401e(a)(1)(C) clearly directs that two consecutive years should be compared when the producer has not previously received TAA benefits.[9] That is, the statute calls for a comparison of "the most recent

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[8] Under 7 C.F.R. § 1580.301(e)(4), individual producers must "certif[y] that net . . . fishing income was less than that during the producer's pre-adjustment year," but the regulation does not itself state which year's income must be less than that of the "pre-adjustment year." The definition of "net fishing income," however, provides guidance. As noted, the Department defines "net fishing income" as "net profit or loss, excluding payments under [C.F.R. Part 1580], reported to the Internal Revenue Service for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102. "Marketing year" is defined as "the marketing season or year as defined by National Agriculture Statistic Service (NASS), or a specific period as proposed by the petitioners and certified by the [Department]." *Id.*

[9] In *Dus & Derrick II*, the Court found that 19 U.S.C. § 2401e(a)(1)(C) does not always require that consecutive years be compared. When a producer has received benefits "in the

year" to plaintiff's January 19, 2005 application, i.e., plaintiff's fiscal year 2004, to "the latest year in which no adjustment assistance was received" by plaintiff, i.e., plaintiff's fiscal year 2003. *See* 19 U.S.C. § 2401e(a)(1)(C). Under its regulations, the Department compared plaintiff's net income from fiscal year 2003, as "the tax year that most closely corresponds with the marketing year under consideration," with its income from fiscal year 2001, as "the tax year previous to that associated with the most recent year in the initial [group] producer petition." *See* Def.'s Resp. 20–21. When a plain reading of the statute evinces Congress's clear intent, as it does here, then "that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

It thus follows that the Department's regulations, which do not provide for a comparison of consecutive years here, cannot apply to applicants in plaintiff's circumstances, i.e., those producers applying under re-certification, having not received benefits under the original certification. Accordingly, the court again finds that, under the facts presented here, the Department's regulations are an impermissible interpretation of 19 U.S.C. § 2401e(a)(1)(C) to the extent they require a comparison of non-consecutive years. Because the court finds that Congress's intent manifested in 19 U.S.C. § 2401e(a)(1)(C) is clear, this matter must be remanded for further consideration.[10]

On remand, the Department is instructed to compare plaintiff's net income from "the most recent year" to plaintiff's application to "the latest year in which no adjustment assistance was received" by plaintiff.[11] 19 U.S.C. § 2401e(a)(1)(C). Because the Department has not yet compared plaintiff's net fishing income for the appropriate years, the court will not address the adequacy of the Department's inquiry into plaintiff's net income as reflected in documents other than plaintiff's tax returns.[12] The Department is reminded, however, that the United States Court of Appeals for the Federal Circuit has

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year . . . preceding the 'most recent year,' the statute directs the comparison of non-consecutive years." *See Dus & Derrick II*, 32 CIT at ____ , Slip Op. 08–19 at 3 n. 2. Here, plaintiff has at no time received benefits.

[10] It is worth noting that, as in the *Dus & Derrick* cases, the Department does not argue for the reasonableness of its regulation based on the availability of information or efficiency of administration. *See Dus & Derrick II*, 32 CIT at ____ , Slip Op. 08–19 at 16.

[11] Based upon plaintiff's filing its tax returns on a fiscal year basis and the Department, in turn, performing its net income analysis using plaintiff's fiscal years, this instruction calls for the Department to compare plaintiff's net income from its 2002 tax return (covering October 2002 through September 2003) and 2003 tax return (covering October 2003 through September 2004), along with other appropriate documentation submitted by plaintiff.

[12] In 2001 and 2002, plaintiff took on loans from shareholders to pay outstanding expenses and "keep its boat on the water." Pl.'s Br. 3. It alleges:

stated that "the [Department's] regulations make it reasonably clear that the determination of . . . net fishing income is not to be made solely on the basis of tax return information if other information is relevant to determining the producer's net income from all . . . fishing sources." *Steen v. United States*, 468 F.3d 1357, 1363 (2006); *see also Durfey v. United States Sec'y of Agric.*, 32 CIT ___ , Slip Op. 08–55 (May 22, 2008).

CONCLUSION

Consistent with this Court's *Dus & Derrick* decisions, "[b]ecause the regulations at issue here govern situations other than those presented by the facts of this case, the court will not order their vacatur." *Dus & Derrick I*, 31 CIT at ___ , 469 F. Supp. 2d at 1338 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). On remand, the Department shall: (1) reconsider plaintiff's application in a manner consistent with this opinion, by comparing plaintiff's net fishing income from its 2003 fiscal year (October 2002 through September 2003) to its net fishing income from its 2004 fiscal year (October 2003 through September 2004); (2) inform plaintiff of the methodology by which it will reconsider its application; (3) afford plaintiff the opportunity to place on the record additional proof of its net income in accordance with 7 C.F.R. § 1580.301(e)(6);[13] (4) fully examine all information submitted by plaintiff in accordance with the remedial nature of the TAA statute; and, (5) fully explain its methodology and reasons for reaching its final determination with respect to plaintiff's application.

> [T]hese loans had a perverse effect on the Plaintiff's net income as reported on its corporate tax returns over time: the loans did not appear as "income" on the Plaintiff's corporate tax return[s], but the Plaintiff's expenses—which were financed by the loans—appeared as losses. In short, the loans were not credited toward income, but they appeared as deductions.

Pl.'s Br. 3. Plaintiff's business also faced other "losses," including officer and employee compensation, repairs, and depreciation, which plaintiff claims varied significantly each year as plaintiff's business adjusted to declining shrimp prices. *See* Pl.'s Br. 3–4. Thus, plaintiff maintains that its net income was "palpably declining," but that this decline was not reflected in its corporate tax returns. Pl.'s Br. 4.

[13] This provision provides:

> (6) To comply with certifications in paragraph (e)(4) of this section [regarding net income], an applicant shall provide either—
>
> (i) Supporting documentation from a certified public accountant or attorney, or
>
> (ii) Relevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency.

7 C.F.R. § 1580.301(e)(6).

Remand results are due on or before August 26, 2008. Comments to the remand results are due on or before September 25, 2008. Replies to such comments are due October 9, 2008.

Slip Op. 08–60

UNITED STATES, Plaintiff, v. UPS CUSTOMHOUSE BROKERAGE, INC., Defendant.

BEFORE: JUDGE GREGORY W. CARMAN

Court No. 04–00650

[Held: after trial, the Court finds that Defendant misclassified the subject merchandise; that such misclassifications under the circumstances of this case constitute multiple failures to exercise responsible supervision and control in violation of section 641 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641; and that the consequent fines imposed by Plaintiff are fair and reasonable. Judgment for Plaintiff.]

May 28, 2008

Gregory G. Katsas, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Melinda D. Hart*, *Courtney E. Sheehan*, and *Nancy Kim*); *Edward Greenwald*, of counsel, Department of Homeland Security, U.S. Customs and Border Protection, for Plaintiff.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Terence J. Lynam*, *Lars-Erik A. Hjelm*, and *Tamir A. Soliman*), for Defendant.

POST-TRIAL OPINION

CARMAN, JUDGE: The Bureau of Customs and Border Protection ("Customs") initiated this action[1] against Defendant, UPS Customhouse Brokerage, Inc. ("UPS") seeking to enforce monetary penalties of $75,000 for UPS's alleged violation of section 641 of the Tariff Act of 1930, as amended, 19 U.S.C § 1641 (2000) ("the broker statute").[2]

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[1] This Court has three times issued opinions concerning the instant litigation. *See United States v.UPS Customhouse Brokerage, Inc*. 30 CIT ____ , 442 F. Supp. 2d 1290 (2006) (denying UPS's motion for partial summary judgment and Customs's motion to strike) ("UPS I"); *United States v. UPS Customhouse Brokerage, Inc.*, 30 CIT ____ , 464 F. Supp. 2d 1364 (2006) (granting UPS's motion to certify question), *appeal den*., 213 Fed. Appx. 985, 986, 2006 WL 3913545, at *1 (Fed. Cir. Dec. 29, 2006); *United States v. UPS Customhouse Brokerage, Inc.*, 31 CIT ____ , Slip Op. 07–104 (Jul. 2, 2007) (denying Customs's motion for summary judgment) ("UPS II"). Familiarity with these decisions is presumed.

[2] Section 641(d)(1)(C) of the Tariff Act of 1930 permits Customs to impose a monetary penalty when a broker "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision." 19 U.S.C. § 1641(d)(1)(C).

In order to prevail, Customs needs to satisfy the statutory requirements of section 1641(b)(4),[3] which require that it prove, by a preponderance of the evidence, (1) that UPS was a licensed "customs broker"; (2) that UPS was engaged in "customs business"; and (3) that UPS failed to "exercise responsible supervision and control" over its "customs business." 19 U.S.C. § 1641(b)(4). As noted below, the parties have stipulated as to the first two elements. *See* Agreed Facts ¶¶ 1–8, *infra*. Therefore, the only remaining legal issue is for Customs to prove, by a preponderance of the evidence, the third element—that UPS failed to "exercise responsible supervision and control."

Customs alleges that UPS failed to "exercise responsible supervision and control" over its customs business by repeatedly misclassifying certain entries of merchandise under subheading 8473.30.9000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Merchandise properly classified under HTSUS 8473.30.9000 must contain a cathode-ray tube ("CRT"). Notwithstanding extensive warnings to UPS and remedial training by Customs, UPS continued to misclassify a variety of electronic merchandise under HTSUS 8473.30.9000 (parts and accessories of automated data processing machines) (hereinafter "30.90") despite the statutory requirement that items classifiable under 30.90 contain a CRT. UPS's persistence in this regard culminated in multiple violations of the broker statute. Accordingly, Customs levied a total of $90,000 in fines against UPS, of which $15,000 was paid. This action was instituted to collect the remaining $75,000 balance.

I. *Procedural Posture—The Trial*

A bench trial was held on December 4–6, 2007 and continued on December 19, 2007.[4] Testimony was taken from various witnesses and the parties also submitted post-trial briefs on January 30, 2008.[5]

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[3] Section 641(b)(4) of the Tariff Act of 1930 requires a customs broker to "exercise responsible supervision and control over the customs business that it conducts." 19 U.S.C. § 1641(b)(4).

[4] Counsel for the parties submitted a joint Pretrial Order ("PTO") that included a schedule of uncontested facts and witness list. The PTO, drafted and endorsed by counsel, was made an Order of this Court on November 20, 2007. Parties additionally submitted to the Court their respective trial exhibits. The parties also agreed to have the majority of their respective trial exhibits admitted into evidence and withdrew those exhibits where the parties could not agree.

[5] Parties filed separate post-trial briefs on February 7, 2008. On February 14, 2008, UPS submitted a letter to this Court requesting permission to file a reply brief to respond to certain arguments made by Customs in its post-trial brief. This Court denied that request. *See* Order, dated Feb. 15, 2008. On April 11, 2008, Customs filed a motion, on consent, for leave to file a corrected post-trial brief in order to withdraw the particular arguments that were the subject of UPS's letter of February 14, 2008. This Court granted that request on May

At trial, the Court heard testimony from six witnesses. Customs produced: (1) Ms. Lydia Goldsmith, a Supervisory Import Specialist and Trade Enforcement Coordinator at the Customs Area Port of Cleveland, Ohio; (2) Mr. Daniel Piedmonte, former Field National Import Specialist at the Customs Area Port of Cleveland, Ohio; (3) Mr. Karl Moosbrugger, former Import Specialist at the Customs Area Port of Cleveland, Ohio; and (4) Mr. Donald J. Woods, a former Compliance Manager at UPS. UPS produced three witnesses in support of its case: (1) again, Mr. Woods; (2) Mr. Norman T. Schenk, Vice President of Brokerage Services at UPS; and (3) Mr. Joe Welch, UPS's former manager for Training and Customs Compliance. This Court finds the testimony of all witnesses credible and thus probative of the issues in dispute.

Both Customs and UPS introduced at trial documents relating to several categories: (1) the relevant penalty actions and the entries at issue in this litigation; (2) the use of convenience classifications generally and 30.90 in particular; (3) training and education efforts by both Customs and UPS concerning the use of 30.90; (4) Custom's warning letters to UPS concerning its use of 30.90; and (5) internal UPS communications regarding the same. The Court finds this documentary evidence highly probative because it provides contemporaneous accounts of events related to Customs efforts to increase compliance under 30.90, including training, UPS's responses, and the eventual imposition of the penalty actions in this case.

In accordance with USCIT Rule 52(a), and having given due consideration to the testimony of all six witnesses and documentary evidence presented and admitted by the Court at trial, and for the reasons that follow, the Court enters judgment in favor of Customs pursuant to the following stipulated facts, findings of fact, and conclusions of law.

The Opinion proceeds as follows. Part II sets out the Jurisdiction and Standard of Review. Part III contains the Agreed Facts, as jointly stipulated to by the parties, and Part IV contains the Court's Findings of Fact. Part V contains the Court's Conclusions of Law, and Part VI provides for the eventual entry of judgment pursuant to USCIT Rule 58.

II. *Jurisdiction & Standard of Review*

This Court has jurisdiction over this matter pursuant to 28 U.S.C § 1582(1) (2000).

The Court reviews a case brought under 19 U.S.C § 1641(d)(2)(A) *de novo* as to the facts, the law, and the amount of the penalty. 28

28, 2008, and substituted Customs's corrected post-trial brief for its initially-filed post-trial brief.

U.S.C § 2640 (2000); *United States v. Ricci*, 21 CIT 1145, 1146, 985 F. Supp. 125, 126 (1997).

Applying this standard to the material facts in dispute in the instant case, Customs has the burden to establish that the particular entries at issue here do not contain a CRT.[6] The parties have stipulated that the merchandise in 37 of the 45 entries at issue in this case do not contain a CRT. (*See* Agreed Facts ¶ 7, *infra*.) Three of the remaining eight disputed entries were withdrawn by Customs at trail. (*See* note 8, *infra*.) Therefore, Customs need only present evidence that the remaining five entries do not contain a CRT. (*See* Agreed Facts ¶ 8, *infra*.)

III. *Agreed Facts*

The parties jointly agreed to the following facts before and during trial:

1. At all times relevant to the matters that are the subject of this action, UPS was a licensed customs broker doing business in Louisville, Kentucky.
2. UPS was the broker of record for the entries that are the subject of this action.
3. A cathode-ray tube ("CRT") is a glass vacuum tube that produces light or images and can serve as a display on a monitor or television.
4. Between January 10 and May 10, 2000, UPS filed with Customs in the Port of Louisville, 60 entries of merchandise under 30.90 that became the subject of penalty case numbers 2000–4196–300217, –300218, –300219, –300221, –300222, –300223, –300319, and –300320.
5. Beginning May 15, 2000, Customs initiated 8 penalty actions against UPS covering the 60 entries referenced in Agreed Facts, ¶ 4, as follows:
   A. May 15, 2000: Three Penalty Actions under cases –300217 ($5,000), –300218 ($5,000), and –300219 ($5,000).
   B. July 11, 2000: Three Penalty Actions under cases –300221 ($5,000), –300222 ($5,000), and –300219 ($5,000).
   C. August 15, 2000: Two Penalty Actions under cases –300319 ($30,000) and –300320 ($30,000).
6. UPS paid $15,000 for the three penalty actions initiated on May 15, 2000.[7] The remaining five penalty actions, penalty case

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[6] Because Customs's allegation of misclassification is central to its case that UPS did not exercise responsible supervision and control, if Customs does not meet its burden regarding the absence of CRT's in the merchandise, and therefore fails to establish that the merchandise was misclassified, its conclusion that UPS violated the responsible supervision and control provision of section 1641 would be "unwarranted by the facts before the court." *See* 5 U.S.C. § 706(2)(F).

[7] At trial the Customs offered evidence pertaining to the 15 entries associated with the

numbers 2000–4196–300221, –300222, –300223, –300319, and –300320, comprising 45 of the original total of 60 entries, and representing $75,000 in assessed uncollected penalties, are the subject of the amended complaint filed in this action.

7. In advance of trial, the parties stipulated that the following 37 entries (out of 45 entries) of merchandise, entered under 30.90, did not contain a CRT:

Chart 1: Stipulation – 37 Entries: Merchandise Contained No CRT

Penalty Action Date	Penalty Action Number	Entry Date	Entry Nos.
July 11, 2000 [Pre-penalty Notices] September 26, 2000 [Penalty Notices]	2000–4196–300221	1–10–00	582–0152166–2
		1–20–00	582–0164486–0
		1–23–00	582–0165993–4
	2000–4196–300222	1–22–00	582–0166770–5
		1–23–00	582–0166776–2
		1–24–00	582–0168407–2
		1–25–00	582–0168646–5
		1–25–00	582–0168649–9
	2000–4196–300223	1–28–00	582–0173091–7
		2–2–00	582–0178807–1
		2–11–00	582–0190127–8
		2–15–00	582–0193413–9

penalty actions under cases –300217, –300218, and –300219 "in an abundance of caution" with no objection from the UPS since they "think [those penalty actions are] part of this case." (Trial Transcript ("Tr.") 6–7). Notwithstanding, the Court need not address these 15 entries as such since they were not subject of Customs's Amended Complaint. (*See also* Tr. 266–67.)

Penalty Action Date	Penalty Action Number	Entry Date	Entry Nos.
August 8, 2000 [Pre-Penalty Notices] October 19, 2000 [Penalty Notices]	2000–4196–300319	3–20–00	582–0235856–9
		3–24–00	582–0242329–8
		3–24–00	582–0242341–3
		3–29–00	582–0248249–2
		4–3–00	582–0252891–4
		4–6–00	582–0258379–4
		4–6–00	582–0258099–8
		4–6–00	582–0258552–6
		4–7–00	582–0259972–5
		4–12–00	582–0266194–7
		4–13–00	582–0266658–1
		4–18–00	582–0272385–3
		4–19–00	582–0273885–1
	2000–4196–300320	4–20–00	582–0275794–3
		4–20–00	582–0276456–8
		4–21–00	582–0278391–5
		4–21–00	582–0278099–4
		4–21–00	582–0276683–7
		4–25–00	582–0279974–7
		5–3–00	582–0289733–5
		5–3–00	582–0290367–9
		5–4–00	582–0291357–9
		5–4–00	582–0291150–8
		5–4–00	582–0292552–4
		5–4–00	582–0292853–6

8. The Parties stipulated that there exists a factual dispute over whether the following five entries[8] of merchandise, entered under 30.90, contained a CRT:

Chart 2: Dispute – Did these 5 entries include a CRT?

Penalty Action Date	Penalty Action Number	Entry Date	Entry Nos.
July 11, 2000 [Pre-penalty Notices]	2000–4196–300221	1–16–00	582–0157461–2
September 26, 2000 [Penalty Notices]	2000–4196–300223	2–10–00	582–0188677–6

[8] Customs withdrew evidence pertaining to three entries since the supporting documents were inadvertently not disclosed to UPS prior to trial. (*See* Tr. 277–82:7, 295–97.) The entries are: entry number 582–0165996–7 [dated Jan. 1, 2000, penalty action 2000–4196–300221]; entry number 582–0276226–5 [dated Apr. 20, 2000, penalty action 2000–4196–300320]; and entry number 582–0276220–8 [dated Apr. 20, 2000, penalty action 2000–4196–300320]. (Exs. 19, 45, & 46.) Consequently, Customs did not meet its burden to show that these entries were misclassified.

Penalty Action Date	Penalty Action Number	Entry Date	Entry Nos.
August 8, 2000 [Pre-penalty Notices]	2000–4196–300319	3–28–00	582–0245010–1
		4–9–00	582–0261334–4
October 19, 2000 [Penalty Notices]	2000–4196-300320	5–9–00	582–0298398–6

(PTO, Schedules C and C'; Tr. 34–35, 265–66; Exhibits ("Exs.")[9] 16, 27, 33, 40, & 59.)

IV. *Findings of Fact*

The court makes the following findings of fact based on the testimony and evidence presented at trial, and the Agreed Facts adopted by the parties:

1. UPS is an express consignment operator ("ECO")[10] responsible for preparing and filing customs entry documents on behalf of its clients and has been a licensed customs broker since 1985. (*See* First Am. Compl. ¶ 3; Answer ¶ 3; PTO, Schedule C, ¶ 1; Tr. 59:8–15, 671–72, 679–81.)
2. UPS operated at six different "hub" cities, with the largest hub being at Louisville, Kentucky. (Tr. 498–99.)
3. UPS considered itself to be in a "partnership" with Customs so that as issues arose, both positive and negative, courtesy telephone calls would be generated at the highest levels of management in order to address issues and devise appropriate response plans in a spirit of cooperation. (Tr. 704–10, 733–35, 740–42, 809.)
4. In the period January through May 2000, UPS made approximately 2,900–3,900 Customs entries per day at its Louisville facility totaling approximately 375,000 entries for this period. (Tr. 569–70, 569–70.)
5. During this same period, UPS made customs entries of "thousands" of computer parts and accessories. (Tr. 633–34.)
6. Beginning around 1995, Customs instituted a compliance measurement program in order to assess and improve Customs's compliance figures as measured against merchandise entry summaries. Entry summaries are filed by importers and brokers ten days following the release of merchandise, when duties are deposited. (Tr. 94–97.)

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[9] Customs's trial exhibits are designated by numbers, whereas UPS's trial exhibits are designated by letter.

[10] Customs regulations define an "express consignment operator or carrier" as "an entity operating in any mode or intermodally moving cargo by special express commercial service under closely integrated administrative control. Its services are offered to the public under advertised, reliable timely delivery on a door-to-door basis. An express consignment operator assumes liability to Customs for the articles in the same manner as if it is the sole carrier." 19 C.F.R. § 128.1(a) (2006).

7. Customs headquarters determined that certain industries would be designated as "primary focus industries" pursuant to the compliance measurement program. In Mr. Piedmont's commodity team, the communications industry was the primary focus industry that was concentrated upon. (Tr. 95–100; 114.)

8. Particularly, Customs decided to narrow the focus on the communications industry's compliance rates for merchandise entered under HTSUS heading 8473. Customs determined that subheading 8473.30.9000 had extremely low compliance rates. In fact, merchandise classified with subheading 8473.30.9000 was classified "99% of the time in error." (Tr. 171–72, 179, 207, 244; Ex. 114 at 5.) Customs partially attributed the industry's low compliance rate for subheading 8473.30.9000 to its use as a "convenience classification" or "basket provision" in that through its use by brokers or importers, the release of merchandise could be obtained from Customs without the broker determining what in fact was the correct classification. (Tr. 93–94, 114, 121–22, 125, 178–80, 182, 207, 240–41, 243–44, 368–69, 854–57; Exs. 113, 114 at 5.)

9. Customs notified various members of the trade community, including UPS, not to use convenience classifications. Particularly, on April 3, 1996, Customs issued a memorandum to importers and brokers doing business at the port – called a "port pipeline" – notifying all interested parties that the use of convenience classifications was prohibited. (Ex. 89; Tr. 91–94, 175–83, 850–57.)

10. Customs consider proper classification of merchandise important and not limited to revenue purposes, but also for maintenance of accurate trade statistics. (Tr. 218–20, 923–14.) The rate of duty for 30.90 is "free" or 0% ad valorem.

11. As part of its compliance efforts, Customs provided training sessions to the industry. Particularly, between September 9 and 11, 1997, Customs at the Port of Cleveland, provided training to UPS at a "Train-the-Trainer" program, where, in addition to instruction, educational materials were distributed to all participants. (Exs. A, 99–102, 108; Tr. 86–91, 128–35, 866–68.)

12. Customs presented a variety of topics at the "Train-the-Trainer" program, which was attended by UPS personnel, including instruction on section and chapter notes to Chapters 84 and 85 of the HTSUS and seven different tariff headings including heading HTSUS 8473. (Exs. A, 99–101; Tr. 86–91, 128–35, 187–88, 866–68.)

13. Specifically discussed at the "Train-the-Trainer" program were what Customs termed "areas of concern" and "discrepancies within particular HTS numbers." (Ex. 106.)

14. Customs's instructors and materials drew attention to HTSUS Chapter 84, particularly 30.90. Participants were instructed that "[a]ll of the items under these numbers *must contain a cathode ray rube*. . . . These numbers should *almost never* be used. Using

8473.30.9000 sends up the red flag to Customs to look at that entry– it is usually never correct!!!" (Ex. 108 p. 34 (emphasis in original); Tr. 136–38.)

15. UPS represented to Customs by letter that it had participated in the "Train-the-Trainer" program and received instruction on Customs's areas of concern, including HTSUS heading 8473. (Ex. 104.) Beginning in late September 1997 and continuing into 1998, UPS developed a compliance plan that featured the seven tariff headings highlighted at the "Train-the-Trainer" program, including heading HTSUS 8473. (Ex. B; Tr. 600–03.) UPS continued with these efforts over the subsequent months, which manifested itself in the form of additional internal UPS compliance and commodity training for classification personnel and the creation of a new position dedicated to training. (Exs. E, F; Tr. 537, 600–03.)

16. In a letter dated October 8, 1997, Customs notified UPS of its compliance rate for various tariff headings including heading HTSUS 8473, which was 54.35%. (Ex. 103.) One year later, Customs revised UPS's 1997 compliance rate for heading HTSUS 8473 to 59.52%. (Ex. AA.) Additionally, Customs apprised UPS that heading HTSUS 8473 was receiving "heightened scrutiny" by the Bureau. (Exs. 103, AA.)

17. Subsequently, in a December 22, 1997 letter, UPS notified Customs of its compliance training efforts, which "emphasized the importance of the accurate use of the tariff numbers under these headings," and "provided [approximately 100 of] its rating group [personnel] with detailed information as to invoice requirements and the need for customer follow-up when invoices are deficient." (Ex. 107.)

18. Again, on February 12, 1998, UPS informed Customs by letter of its compliance training efforts, including further training and hiring additional compliance personnel. (Ex. 109.)

19. Customs conducted an on-site visit to UPS's Louisville, Kentucky facility on February 17–18, 1998 and among the issues discussed were UPS's "compliance rates of HTSUS 8471 and 8473." (Exs. 110–12.)

20. Notwithstanding efforts by UPS to improve its compliance rates through training and other means, its misclassification of merchandise under 30.90 continued. (Exs. 84–86, 90; Tr. 251–56.)

21. Between September 1997 and May 1998, Customs had notified UPS on multiple occasions about the improper use of 30.90 through its training efforts, Notices of Action (a.k.a Customs Form 29 (CF–29)), and phone calls between its Import Specialists and UPS personnel. On May 6, 1998, Customs issued a warning letter to UPS "strongly suggesting" that UPS review the types of merchandise classifiable under 30.90. Customs explained that UPS "consistently used this particular HTS[US] number . . . when in fact, Customs has informed [UPS] that this HTS[US] number should rarely be based,

unless it is for 'parts of ADP[11], incorporating a cathode ray tube.' " (Exs. 84–86, 90, 92–98, 100–01, 103–116, H, I; Tr. 247, 256–257, 878–79.)

22. On or about May 19, 1998, UPS finally decided, on its own accord and as a failsafe measure, to remove the tariff number 30.90 from UPS's electronic data file (the "tariff tape"), which contained the entire HTSUS, in order to physically prevent its use and thus eliminate potential misclassifications. (Ex. I; Tr. 477–78, 509–10.) Along with personnel training endeavors, UPS substantially relied on the removal of tariff number 30.90 from the tariff tape as its principle means of maintaining compliance.

23. Tariff tape revisions were provided to UPS by Customs twice a year – typically each January and July. Removal of the tariff number 30.90 from the UPS tariff tape was conducted by UPS computer systems personnel and needed to occur each time a new tariff tape was issued, so long as UPS wanted to physically prevent its employees from using the 30.90 tariff subheading. (Tr. 510–11, 521, 608–09.)

24. UPS continued to remove 30.90 from the tariff tape through the second half of 1998 and continuously through 1999. UPS had informed Customs that it had removed the 30.90 tariff number from its tariff tape so that its "classification specialist[s could] . . . not use it without further investigation as to whether the merchandise contains a [CRT] or not." (Ex. CC.)

25. Though UPS had removed 30.90 from the tariff tape, it could nevertheless be "manually" entered by a UPS classification specialist, following a review of the commercial invoice and upon receiving the appropriate supervisory and technical approvals. In the "rare" case where the importer "insisted" that 30.90 was the appropriate subheading, following UPS supervisory scrutiny and vetting, UPS would then manually enter it under this tariff number. (Tr. 513–14, 544–48, 55–56, 595–98.)

26. Through the first three quarters of FY 1998, UPS had improved its compliance rate for heating HTSUS 8473 to an unweighted[12] 80.00%. (Ex. AA.) In FY 1998, the national average compliance rate for heading HTSUS 8473 for ECOs was 65% (Ex. 113; Tr. 201–05.)

27. In a December 3, 1998 letter, the Cleveland Port Director for Custom's John M. Regan, acknowledged to Norm Schenk, UPS, that UPS had participated in training and problem solving sessions with Customs. The letter reflected upon the notion that such participation improved the communications between UPS and Customs. (Ex. K; Tr. 703–04.)

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[11] An "ADP" is an "automated data processing machine," *i.e.*, a computer. HTSUS heading 8471.

[12] That the reported compliance rate was "unweighted" would only account for a variance of 1–2% at most. (Tr. 212.)

28. Between mid-1998 through the end of 1999, there were no entries made by UPS that were the subject of any Customs Notices of Action involving the use of 30.90. (Tr. 927–28.) However, there were several entries during this period that had been improperly classified utilizing the tariff number 30.90. (Exs. 86–88; Tr. 258–59.)

29. On September 21, 1999, Customs announced a new nationwide initiative directed at ECOs, called the Multi-port Approach to Raise Compliance, or "MARC 2000." Customs noted that ECOs generally had maintained a 65% compliance rate for heading 8473 in 1999, and set as its goal 89% compliance by 2000, and 95% by 2004.

30. Customs conducted formal training under the aegis of MARC 2000, as well as other informal sessions. Again, UPS participated and was instructed on the proper use of 30.90, which is to say, UPS was instructed not to use it. (Exs. 91, 110–14, M, O; Tr. 85–87, 623–24, 872–74.)

31. Testimony by Messrs. Welch and Woods explained that though UPS had, by plan, been removing 30.90 from its tariff tape, with the latest revision in the HTSUS in January 2000, UPS had failed to execute the removal of 30.90 from the tariff tape, and continued not to do so until at least the end of May 2000. (Tr. 520–22, 544–56, 560–61, 563–65, 603–13.)

32. On January 31, 2000, Customs issued a second warning letter to UPS concerning the misuse of 30.90, stressing that "Customs is paying close attention to those filers/importers who do not fulfill their legal obligations in the preparation, research and submission of Customs entries. Frequent or repetitive errors . . . will be met with appropriate action." (Ex. 91; Tr. 884–85.)

33. UPS never communicated to Customs that 30.90 was confusing or ambiguous, nor sought a binding ruling regarding this subheading, nor filed a protest. (Tr. 727–735, 820–21, 883–84.) UPS now claims, however, that it did not agree with Customs's interpretation of 30.90. The company maintains that it did not file a protest because of its "gentlemen's agreement," that existed between UPS and Customs whereby UPS orally agreed that it would not file a protest where there was no duty or where the duty was $100 or less. (Tr. 730–33, 735.)

34. Between January 10, 2000 and May 10, 2000, UPS filed 60 entries in the Port of Louisville under 30.90 that formed the subject of several Notices of Action. (Agreed Facts, ¶ 4.)

35. UPS has stipulated that all but 8 of the 45 entries in this lawsuit did not contain a CRT. (*Cf.* Charts 1& 2, *supra*; Tr. 268.) Following Customs's withdrawal of evidence pertaining to entries, there remained a factual dispute as to whether the remaining 5 entries (*see* Chart 2) contained CRTs.

36. Customs Import Specialist Moosebrugger testified that, based his experience and familiarity with these imported electronic goods, the disputed remaining 5 entries did not contain CRTs. This Court

finds Moosebrugger a highly credible witness and along with the documentary evidence, finds, by a preponderance of the evidence, that:

a. Entry 582–0157461– did not contain a CRT. This entry is for a UP 2030 stencil printer that is used to print solder paste onto printed circuit boards in assemblies when manufacturing them. The UP 2030 printer is neither a part nor accessory of an automated data processing machine, nor does it contain a CRT. (Ex. 16; Tr. 271–75.)

b. Entry 582–0188677–6 did not contain a CRT. This entry is for security key swiping equipment, which is neither a part nor accessory of an ADP, nor does it contain a CRT. (Ex. 27; Tr. 283–88.)

c. Entry 582–0245010–1 did not contain a CRT. This entry is for an industrial computer with a liquid crystal display ("LCD") unit. An LCD unit does not contain a CRT. This merchandise, while an ADP, is neither a part nor accessory containing a CRT. (Ex. 33; Tr. 289–93.)

d. Entry 582–0261334–4 did not contain a CRT. This entry is for an industrial computer with a flat panel LCD display unit, which does not contain a CRT. (Ex. 40; Tr. 293–94.)

e. Entry 582–0298398–6 did not contain a CRT. The entry documents vaguely describe the item at issue as a "computer accessory." However, the entry quantity on the commercial invoice states 80 units, and the unit cost per item is $2.60. The stated cost for this quantity and weight "would not be consistent with normal practices or cost practices" for a CRT. (Ex. 59; Tr. 297–301.)

37. Customs decided that, as customs broker, UPS was responsible for the misclassifications, as opposed to the various importers of record, since UPS had been warned before and subsequently received training with respect to 30.90. (Tr. 886–91.)

38. The pre-penalty notices for all eight penalty actions each alleged violations of the responsible supervision and control provision of the broker statue as a result of the erroneous classification of particular entries of merchandise specified in each prepenalty notice. (Exs. 60, 61, 63, 65, 67, 69, 71 and 73; Tr. 960.)

39. Prior to the May 15, 2000 penalty actions, UPS had not been the subject of any penalty action involving an alleged failure to exercise responsible supervision and control in over 15 years of operation as a licensed customs broker. (Tr. 828.)

40. Every entry that comprised penalty case numbers 2000–4196–300221, –300222, –300223, –300319, and –300320, had been filed by UPS between January 10, 2000 and May 10, 2000 at the Port of Louisville, Kentucky. (Agreed Facts, ¶ 4.)

41. Customs at the Port of Louisville, Kentucky packaged and shipped the entry papers to the Area Port of Cleveland, Ohio for an

import specialist review to determine whether the classification employed by UPS was used correctly. Due to what this Court will term "bureaucratic lag," the Port of Cleveland did not receive these entry papers for nearly 1½ to 2 months following entry of the merchandise. (Tr. 995–97.)

42. Customs's Import Specialist Team at the Port of Cleveland decided that each time a misclassified entry by UPS was discovered, it would be collected, and when Customs collected five misclassified entries, the entries would be bundled together, and referred to Customs's Office of Fines, Penalties and Forfeitures ("FP&F"), which then would issue a single administrative penalty notice to UPS.[13] (Tr. 995–96, 892–93, 901, 940–41, 962–63, 1000–01, 1006.)

43. An FP&F supervisor, along with input from the Import Specialist Team, had devised a plan: for the initial penalties, the penalty notices would be issued at $5,000 each based upon relevant sections of the mitigation guidelines (*see generally* 19 C.F.R. Pt. 171, App. C.). The recommended penalty amount would then be increased to $10,000 for subsequent referrals. (Tr. 886–93, 899–907, 1004–05, 1009–10, 1013–14.)

44. Customs's plan with respect to UPS, described above, as devised and executed was not intended to circumvent the statutory cap of $30,000 for each penalty, per 19 U.S.C. § 1641(d)(2)(A). (Tr. 1009–1018.)

45. In executing this plan, Customs issued, on May 15, 2000, three pre-penalty notices of $5,000 each, which were each separately based upon five misclassified entries received seriatim, as filed by UPS under 30.90:

Chart 3: Assessment of Fines & Dispositions

Penalty Action Date	Penalty Action Number	Imposed Fine	Disposition
May 15, 2000 [Pre-penalty Notices] September 15, 2000 [Penalty Notices]	2000–4196–300217	$5,000	Fine paid by UPS
	2000–4196–300218	$5,000	Fine paid by UPS
	2000–4196–300219	$5,000	Fine paid by UPS

After considering UPS's pre-penalty response, Customs issued three penalty notices, assessing a $5,000 fine in each penalty action. These fines were paid and are not a part of this action. (Exs. 60, 61; Tr. 6–7, 266–67.)

46. On July 11, 2000, Customs initiated three additional $5,000 penalty actions and on August 8, 2000, two $30,000 penalty actions were initiated:

[13] The broker statute requires that Customs notify a broker prior to enforcing a penalty against it for a violation of the statute. 19 U.S.C. § 1641(d)(2)(A).

Chart 4: Assessment of Fines & Dispositions

<table>
<tr><th>Penalty Action Date</th><th>Penalty Action Number</th><th>Imposed Fine</th><th>Disposition</th></tr>
<tr><td rowspan="3">July 11, 2000
[Pre-penalty Notices]

September 26, 2000
[Penalty Notices]</td><td>2000–4196–300221</td><td>$5,000</td><td>Not Paid; Subject of Amended Complaint</td></tr>
<tr><td>2000–4196–300222</td><td>$5,000</td><td>Not Paid; Subject of Amended Complaint</td></tr>
<tr><td>2000–4196–300223</td><td>$5,000</td><td>Not Paid; Subject of Amended Complaint</td></tr>
<tr><td rowspan="2">August 8, 2000
[Pre-penalty Notices

October 19, 2000
[Penalty Notices]</td><td>2000–4196–300319</td><td>$30,000</td><td>Not Paid; Subject of Amended Complaint</td></tr>
<tr><td>2000–4196–300320</td><td>$30,000</td><td>Not Paid; Subject of Amended Complaint</td></tr>
</table>

(Exs. 65, 67, 69, 71, 73.) Each $5,000 penalty action was based upon five misclassified entries, as they accumulated, following which each $30,000 penalty case was based on fifteen misclassified entries, as they thereafter accumulated. (*Id.*;*see also* Agreed Facts ¶ 5; PTO, Schedule C'; Charts 1–4, *supra*.) After considering UPS's pre-penalty responses, Customs issued penalty notices dated September 26, 2000 and October 19, 2000, respectively, for a total amount of $75,000 in penalties. (Exs. 66, 68, 70, 72, 74.)

47. UPS failed to remit the $75,000 in penalties imposed by the September 26 and October 19, 2000, penalty notices. On December 17, 2004, Customs commenced this action against UPS seeking to enforce the monetary penalties Customs imposed on UPS. (Amd. Compl. ¶¶ 14, 21, 24, 27, 30, 33.)

V. *Conclusions of Law*[14]

A. *Classification Under HTSUS subheading 8473.30.9000 ("30.90")*

Because the justification by Customs for the penalties it issued to UPS was that the company continually misclassified merchandise by improperly using subheading 30.90, the first question of law presented by the case is whether UPS, in fact, misclassified merchandise that formed the basis for the challenged penalties by Customs.[15] As Customs concedes, if UPS did not misclassify the entries at issue

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

[15] The Court, in classification cases, has an independent obligation to ascertain the proper classification of merchandise in dispute. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984); *Simon Mktg., Inc. v. United States*, 29 CIT _____ , _____ , 395 F. Supp. 2d 1280, 1286 (2005). "[T]he Court must determine 'whether the governments classification is correct, both independently and in comparison with the [broker's] alternative.' " *Cargill, Inc v. United States*, 28 CIT 401, 408, 318 F. Supp. 2d 1279, 1287 (2004) (*quoting Jarvis Clark*, 733 F.2d. at 878).

then there would be no basis for the penalty claims in this case. (Tr. 960–61.) (*See* Agreed Facts ¶ 7; Finding of Facts ¶ 37.)

Customs's classification decisions are reviewed through a two-step analysis – first construing the relevant tariff headings, then determining under which of those headings the merchandise at issue is properly classified. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (*citing Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed Cir. 1997)). Determining the proper meaning of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. *Id.*

When construing tariff terms, the Court may look to common and commercial meanings if such construction would not contravene legislative intent. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000). To ascertain the common meaning of a tariff term, the Court may refer to dictionaries, scientific authorities, and similarly reliable resources. *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002). The Court may also look to the explanatory notes for guidance. *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006) (noting that explanatory notes are "instructive, but not binding").

"The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). "A classification analysis begins, as it must, with the language of the headings." *Id.* at 1440.

In pertinent part, the HTSUS General Rule of Interpretation ("GRI") 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS (2000). In fact, "Section and Chapter Notes are not optional interpretive rules, but are statutory law, codified at 19 U.S.C. § 1202." *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003) (*citing Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999)). The GRIs are applied in numerical order. *See ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n.4 (Fed. Cir. 2005) (*citing Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)).

To apply GRI 1, the Court must construe "the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading." *Orlando Food*, 140 F.3d at 1440. The Court must identify the proper heading or headings in which an article is classifiable before it can determine the subheading that provides the classification for the item. *Id.*

As explained below this Court holds as a matter of law that, by operation of GRI 1, for merchandise to be classified under HTSUS subheading 8473.30.9000, the imported article must contain a CRT. This Court grounds its conclusion in the text of the tariff, its organization, and from the plain meaning of the tariff language. *See Pillowtex Corp. v. United States,* 171 F.3d 1371, 1373 (Fed. Cir. 1999) ("It is a general rule of statutory construction that where Congress has clearly stated its intent in the language of a statute, a court should not inquire further into the meaning of the statute.") (citation omitted).

The Court first looks to the terms of the heading. Heading 8473 covers "[p]arts and accessories" of certain "machines of headings 8469 to 8472," which are defined elsewhere in the tariff code. HTSUS 8473 (2000). Heading 8469 covers "[t]ypewriters other than printers." HTSUS 8469 (2000). Heading 8470 covers "[c]alculating machines and pocket-size data recording, reproducing and displaying machines with calculating functions; accounting machines, postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device; cash registers." HTSUS 8470 (2000). Heading 8471 covers "[a]utomatic data processing machines . . . ; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data." HTSUS 8471 (2000). Finally, heading 8472 covers [o]ther office machines (for example, hectograph or stencil duplicating machines, addressing machines, automatic banknote dispensers, coin-sorting machines, coin-counting or wrapping machines, pencil-sharpening machines, perforating or stapling machines)." HTSUS 8472 (2000).

The scope of heading 8473 as such, is a "parts and accessories" provision; it does not pertain to the wholly assembled articles. Specifically, heading 8473 pertains to the parts and accessories of typewriters, calculating machines, office machines and computers, but not the computers themselves, as they are classifiable under the more specific tariff heading 8471. This interpretation is supported by the plain language and structure of the tariff schedule for heading 8473. Specific characteristics or qualities of merchandise are described under the tariff schedule label "article description."

Subheading 8473.30 is specifically reserved for "[p]arts and accessories of the machines of heading 8471." As stated above, heading 8471 covers "[a]utomatic data processing machines" ("ADPs") — *i.e.*, computers.[16] Thus, in order for merchandise to be classified under subheading 8473.30, the item would have to meet three requirements: (i) that the item is a part or accessory (ii) of an ADP, as de-

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[16] Heading 8471 is for "[a]utomatic data processing machines ["ADPs"] and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included." HTSUS 8471 (2000).

fined by 8471 and note 5, Chapter 84 HTSUS, and (iii) that the item is either a part or accessory of an ADP.

Subheading 8473.30 breaks out further into additional differentiated subcategories:

8473.30	Parts and accessories of the machines of heading 8471:
	Not incorporating a cathode ray tube:
8473.30.1000	Printed circuit assemblies
8473.30.2000	Parts and accessories, including face plates and lock latches, of printed circuit assemblies
847.30.3000	Other parts for printers, specified in additional U.S. note 2 to this chapter
8473.30.5000	Other
	Other:
8473.30.6000	Other parts for printers, specified in additional U.S. note 2 to this chapter
8473.30.9000	Other

The articles described in subheadings 8473.30.1000 through 8473.30.5000 can not contain CRTs, as CRTs are explicitly excluded by the language "[n]ot incorporating a cathode ray tube."

Conversely, articles described in subheadings 8473.30.6000 and 8473.30.9000 – which subheadings fall under the "[o]ther" article description – *must* contain a CRT. Provisions such as subheadings 8473.30.6000 and 8473.30.9000 are known as "basket" or "residual" provisions. *See, e.g.*, *EM Indus., Inc. v. United States*, 22 CIT 156, 165, 999 F. Supp. 1473, 1480 (1998) (" 'Basket' or residual provisions of HTSUS Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading."). As such, these residual subheadings encompass all "[o]ther" articles that fall within subheading 8473.30, but which are not classifiable under the more specific provision, *i.e.*, ADP parts incorporating a CRT. Specifically, subheading 8473.30.6000 is reserved for printer parts[CI] that contain a CRT and 8473.30.9000 is reserved for ADP parts that contain a CRT.

Customs argues that in order for merchandise to be classified under subheading 8473.30.9000, the items must be: (i) parts or accesso-

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[17] Subheadings 8473.30.3000 and 8473.30.6000 are reserved for "[o]ther parts for printers" that are specified in Additional U.S. note 2 to Chapter 84. Additional note 2, Chapter 84, lists an array of printer parts of ADP machines described in subheading 8471.60. Subheadings 8471.60 describers "[i]nput or output units" of ADP machines, *i.e.*, stand-alone printers. Subheading 8471.60 breaks out this tariff, in part, by whether it has a CRT or not. Thus, based on the structure and the language of this tariff, the drafters clearly contemplated that there were parts of printers that contained CRTs.

ries; (ii) of an ADP; (iii) that contain a CRT. Should an article fail to meet any of these perquisites, it could be classified under subheading 8473.30.9000. (Ex.117; Tr. 223–226, 410–11, 414, 427–28; Pl.'s Post-Trial Br. 2 ¶4.)

UPS argues that the limitation under subheading 8473.30 "[n]ot incorporating a CRT" only applies to the ADP *machine*, defined under heading 8471, and not the individual part. Therefore, they argue, that the parts and accessories imported under subheadings 8473.30.6000 and 8473.30.9000 need not themselves contain CRTs, but merely the assembled whole need contain CRTs. (Exs.117, NN; Tr.415, 427–28; Def.'s Post-Trial Br. 3 ¶4.) The nub of UPS's textual argument is that under subheading 8473.30, the phrase "[n]ot incorporating a cathode ray tube" immediately follows after the phrase "'machines of heading 8471." Therefore "it is appropriate to read these phrases together, rather than read 'not incorporating a cathode ray tube' as modifying 'parts and accessories,' which appears earlier in 8473.30." (Def.'s Post-Trial Br. 3 ¶4(a); *see also* Tr. 775–781.)

UPS's preferred construction of the tariff, however, is in conflict with the plain language, grammar, punctuation, and organization of subheading 8473.30.9000.[18] First, as stated above, key among the factors to consider is that heading 8473 is a *parts* provision – the articles described thereunder are parts and accessories of ADP machines, and not the machines themselves. ADP machines are provided for under a different tariff heading: 8471. Therefore, when a characteristic is listed that subdivides articles preliminarily falling into the "parts and accessories" heading, we would expect that the characteristic would refer to the "part or accessory," not the machine that the part goes into. Second, UPS is essentially adcovating the use of the "last antecedent rule" to buttress is preferred interpretation. Under the last antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). However, to read the tariff text as UPS urges, belies both common sense and grammar.[19] The main clause of subheading 8473.30 provides: "Parts and accessories of the machines of heading 8471." Immediately following this phrase, on the next line (and indented), is the text "[n]ot incorporating a cathode ray tube." Returning to the first line of text, the prepositional phrase "of the machines of heading 8471 [*i.e.*, ADPs]" modifies "[p]arts and accessories." The

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[18] In construing tariff terms, "the court may rely upon its own understanding, dictionaries and other reliable sources." *Medline Indus., Inc v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (*citing Marubeni Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994)).

[19] *See* 2 LAWRENCE J. BOGARD, CUSTOMS LAW & ADMINISTRATION § 32.5, at ¶ 211 (3d ed. 2007) ("The grammatical rule of construction that a qualifying clause modifies only its immediate antecedent has been held inapplicable where such a construction would not be reasonable or in accord with legislative intent.").

phrase "[n]ot incorporating a cathode ray tube" cannot be read coherently to modify "machines of heading 8471 [ADPs]" since it is set off on a separate line and indented. It is unreasonable to employ the "last antecedent rule" as UPS advocates because, if the phrase "[n]ot incorporating a cathode ray tube" were modifying ADP machines, the phrases would not be offset by paragraph structure or separated by punctuation. Customs's interpretation is therefore more reasonable in light of the plain language and structure of the text. Finally, Congress drafted subheading 8473.30.9000 employing the use of colons.[20] Under subheading 8473.30.9000, the colon introduces the categorical list of the ADP parts classifiable under it according to whether those parts and accessories either incorporate a CRT (*see, e.g.*, HTSUS 8473.30.6000) or do not incorporate a CRT (*see, e.g.*, HTSUS 8473.30.1000). *See Bruckman v. United States*, 435 F. Supp. 1219, 1222 (Cust. Ct. 1977) ("The colon of the superior heading clearly represents, through punctuation, an attempt to show that each provision under it is intended to be specific elaboration of the superior heading."), *rev'd. on other grounds*, 582 F.2d 622 (C.C.P.A. 1978). The interpretation advocated by UPS makes no sense grammatically and would render the punctuation here useless.[21] As such, UPS's construction is untenable.

Therefore, this Court holds that, as a matter of law, for articles to be properly classifiable under subheading 8473.30.9000 the articles must: (i) be parts or accessories; (ii) of an ADP machine; and (iii) those parts or accessories must incorporate a CRT. Should an article fail to meet any of these prerequisites, it may not be classified under 30.90.

The Court observes the parties stipulated that 37 entries underlying the penalty actions contained no CRTS (*see* Chart 2, Agreed Facts ¶ 7), and having found by a preponderance of the evidence that 5 disputed entries contained no CRTs (*see* Findings of Fact ¶ 36), the Court concludes that the total of 42 entries at issue here were misclassified by UPS as a matter of law. (*See* Charts 1 & 2.). With respect to the 3 entries withdrawn by Customs at trial, *see* note 8, *supra*, Customs has no established that they were misclassified.

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[20] *See* THE CHICAGO MANUAL OF STYLE ¶ 6.63 (15th ed. 2003) ("A colon introduces an element or a series of elements illustrating or amplifying what has preceded the colon.").

[21] The Court presumes all statutory language serves a purpose, *see Bailey v. United States*, 516 U.S. 137, 145 (1995) (" 'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting. . . .' ") (bracketed text in original) (citation omitted); *Application of Barker*, 559 F.2d 588, 591–92 (C.C.P.A. 1977), *cert. den.*, 434 U.S. 1064 (1978) ("As a principle of statutory construction, it is presumed that Congress did not use superfluous words.") (citation omitted).

B. UPS's Failure to Exercise Responsible Supervision and Control Over its Brokerage Business Pursuant to 19 U.S.C. § 1641(b)(4)

The Court now turns to the principal issue to be decided: Whether UPS failed to exercise responsible supervision and control, in violation of 19 U.S.C. § 1641(b)(4), by repeatedly misclassifying imported merchandise under 30.90 when that merchandise did not contain CRTs. The Court must initially consider the question of what "responsible supervision and control" means in the context of a Customs brokerage business, and analyze it *de novo* in light of the evidence presented at trial.

The term "responsible supervision and control" is not defined by section 1641 of the broker penalty statute. When Congress enacted 19 U.S.C. § 1641(a),[22] it explicitly delegated gap-filling authority to Customs. 19 U.S.C. § 1641(f) (2000). Pursuant to that delegation, and after a period of notice and comment, Customs enacted regulations defining, among other things, the term "responsible supervision and control." *See* 19 C.F.R. § 111.1 (2000).

The U.S. Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), instructs that when an agency acts pursuant to delegated authority, "the fruits of notice-and-comment rulemaking" are entitled to *Chevron* deference. *Mead Corp.*, 533 U.S. at 230 (*referring to Chevron U.S.A. Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (add'l citations omitted). *Chevron*, in turn, holds that courts should defer to an agency's interpretation of an ambiguous statute when Congress has left a gap for the agency to fill, so long as the gap-filling interpretation is reasonable. *Chevron*, 467 U.S. at 843–44.

Customs's regulations provide that "[r]esponsible supervision and control":

> means that degree of supervision and control necessary to ensure the proper transaction of the customs business of the broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide. While the determination of what is necessary to perform and maintain responsible supervision *will vary depending upon the circumstances in each instance*, factors which Customs *will consider include, but are not limited to*:

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[22] The cause of action here is section 1641(d)(2)(A) of title 19, U.S. Code, which provides that Customs "shall service notice in writing upon any customs broker why the broker should not be subject to a monetary penalty not to exceed $30,000 in total for a violation or violations of this section." The provision Customs alleges UPS violated is 19 U.S.C. § 1641(b)(4), which requires that "[a] custom broker shall exercise reasonable supervision and control over the customs business it conducts."

–the training required of employees of the broker;

–the issuance of written instructions and guidelines to employees of the broker;

–the volume of type of business of the broker;

–the reject rate for various customs transactions;

–the maintenance of current editions of the Customs Regulations, the [HTSUS], and Customs issuances;

–the availability of an individually licensed broker for necessary consultation with the employees of the broker;

–the frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have a resident individually licensed broker;

–the frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker;

–the extent to which the individually licensed broker who qualifies the district permit is involved in the oepration of the brokerage; and

–any circumstances which indicates that an individually licensed broker has a real interest in the operations of the broker.

19 C.F.R. § 111.1 (emphasis added).

The parties do not argue that the definition of "responsible supervision and control" under 19 C.F.R. § 111.1 is an unreasonable interpretation of the customs penalty broker statute. (Pl.'s Post-Trial Br. 11–15; Def.'s Post-Trial Br. 10–12.) Rather, what the parties do quibble over, is the *application* of the broker penalty statute and associated regulations to the facts presented in this matter. Customs argues that where "regulations [such as 19 C.F.R. § 111.1] consist of possible factors for consideration, it is left to customs's discretion to weigh them as a deemed appropriate." (Pl. Post-Trial Br. 16.) UPS argues that Customs failed to meet its burden of proof to show that UPS "failed to exercise responsible supervision and control and specifically did not show that it was deficient in any of the factors listed in [19 C.F.R.] § 111.1." (Def.'s Post Tr. Br. 12.)

"[I]t is well settled that an agency's interpretation of its own regulations is entitled to broad deference from the courts." *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005) (*citing Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The rationale for this greater degree of deference accorded to an agency's interpretation of its own regulations, as compared with an agency's construction of a statute, is because in the former case, the agency is voicing its institutional intentions as opposed to the intentions of Congress. *Cathedral Candle Co.*, 400 F.3d at 1363–64 (*citing Am. Express Co. v. United States*, 262 F.3d 1376, 1382–84 (Fed. Cir. 2001)). So great is this heightened deference that, "an agency's interpretation is given 'controlling weight unless itis plainly erroneous or inconsistent with the regulation.' " *Lee v. United States*, 329 F.3d 817, 822 (Fed. Cir. 2003) (*quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

At the outset, this Court holds that Customs's definition of "responsible supervision and control," as set forth in section 111.1, is reasonable.

The next question to answer is whether Customs established, by a preponderance of the evidence, that UPS failed to exercise responsible supervision and control, as the agency has reasonably defined that statutory term. UPS contends that it did not breach its obligations under section 1641(b)(4), *ergo* it has exercised responsible supervision over its brokerage business. UPS argues that section 111.1 requires Customs to consider *all* ten factors listed under section 111.1 before determining whether a broker was derelict in its duty to responsibly exercise supervision and control over its customs brokerage business. (Def's Post Trial Br. 13–15). As support for this proposition, UPS cites to two adminsitrative letter rulings stating that

> [u]nless each of the listed criteria in 19 C.f.R. [111.1] was considered and where appropriate, the apparent failure to meet a specific criterion . . . was analyzed, it would be improper for Customs to make a determination whether responsible supervision and control was being exercised.

U.S. Customs Admin. Ltr. Rul. HQ 225010 (Jul. 21, 1994), 1994 U.S. custom HQ LEXIS 1645, at *7–*8; *see also* U.S. Customs Admin. Ltr. Rul. HQ 115005 (May 2, 2000), 2000 U.S. Custom HQ LEXIS 906, at *3–*6 (same). Customs responds that UPS's interpretation is "unreasonable[e]" since: (1) common sense and the plain language of section 111.1 belies UPS's interpretation, and (2) UPS's reliance on the letter rulings is "misplace[d]," as these rulings are, in fact, consistent with Customs's interpretation of section 111.1. (Pl. Post-Trial Br. 21–22.) The Government instead interprets the factors listed in section 111.1 as examples of "steps a broker should take . . . to exercise responsible supervision and control," but notes that by its terms the list in section 111.1 is non-exclusive and the regulation "in no way suggest that engaging in any one of the steps or that any one factor would preclude a finding by Customs that a broker failed to engage in responsible supervision and control. (*Id.*) Customs's interpretation of section 111.1 is grounded in the plain text of the regulation. Section 111.1 states that "[w]hile the determination of what is necessary to perform and maintain responsible supervision will vary *depending upon the circumstances in each instance*, factors which

Customs will consider include, *but are not limited to* . . . [listing the factors].” 19 C.F.R. § 111.1 (emphasis added). Thus, Customs argues that the listed factors are not exhaustive and are written disjunctively. (Pl. Post-Trial Br. 21.) Consequently, “there [is] no need to find deficiencies in each and every [factor listed in section 111.1] prior to concluding that a broker had failed to exercise responsible supervision and control.” (*Id.*) The plain text of the regulation allows Customs to consider factors not listed in section 111.1. Further, the regulation makes clear that Customs may weigh factors as it deems reasonably fit.

UPS insists, however, that use of the words “will consider” means that Customs *must* consider *each* of the factors. (Def.’s Post-Trial Br. 14–15.) However, where a rule states that an agency “will consider”[23] certain factors, this textual directive “implies wide areas of judgment and therefore discretion.” *Carolina Tobacco Co., v. Bureau of Customs & Border Protection*, 402 F.3d 1345, 1350 (Fed. Cir. 2005) (*citing Sec’y of Agric. v. Cent. Roig Refining Co.*, 338 U.S. 604, 611–14 (1950)) (internal brackets and quotes omitted) (“In considering the [regulation] factors, the port director may give them whatever weight he deems appropriate; he may conclude that particular factors should be given no weight whatsoever.”) Therefore, the Court holds that Customs was not required to weigh each factor listed in section 111.1 when evaluating whetehr UPS failed to exercise responsible supervision and control.

Customs presented a holistic, totality-of-the-circumstances application of section 111.1 to UPS’s persistent misclassification violations where no single listed factor dominated. (Pl.’s Post-Trial Br. 16–22.) At trial, Customs presented evidence demonstrating that Customs worked with the brokerage community since the mid-1990s to improve compliance regarding classification, specifically, merchandise entered under HTSUS 8473.30.9000. UPS, as a licensed customs broker and ECO, was fully on notice about the importance of accurate classifications under 30.90 since at least late 1997. (Exs. 113 at 95, 107 at 111.) Customs conducted training programs with UPS, specifically addressing 30.90. (Tr. 867.) Customs also sponsored instruction courses, distributed education materials, held informal discussions and organized telephone conferences. (Ex. 107.) When UPS’s compliance did not improve materially–defined by Customs officials as achieving a 95% compliance rate in the use of heading 8473–Customs issued warning letters and Notices of Action, which stated that continued improper use of 30.90 would be viewed as a significant violation that may result in monetary penalties. (Exs. 90–98; Tr. 914–16.) Notwithstanding Customs’s remedial train-

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[23] The word “will” when used as a verb can be used to express capability or sufficiency, *see, e.g.*, WEBSTER’S THIRD NEW INT’L DICTIONARY 2616 (1986), whereas “shall” is used to express a command or exhortation. *Id.* at 2085–86.

ing and extensive warnings, UPS continued to submit misclassified entries under 30.90 and did not satisfactorily improve its compliance rates under 30.90. To wit, in 1999, the tariff number 30.90 continued to appear on UPS prepared customs entry papers despite its prophylactic removal of that number from the tariff tape. (Tr. 604–12.) Further, between January 10 and May 10, 2000, Customs discovered no less than 57 misclassified entries improperly classified under 30.90. (Exs. 1–18, 20–44, 47–59.) It is clear from the facts found at trial that UPS failed to successfully stem the cascade of errors that resulted from supervisory neglect. (Tr. 509–10, 608, 612, 656, 689.)

UPS asserts that it did in fact exercise “responsible supervision and control” over its brokerage business, Def.’s Post-Trial Br. 8–9, and advances two defenses. First, that UPS’s compliance rate for computer parts was higher than the national average; and second, that is responsibly and actively responded to the various Customs warnings in a manner befitting a responsible broker. (Def.’s Post-Trial Br. 7–8.) UPS correctly notes that, among the many factors Customs will consider in its determination of responsible supervision, section 111.1 includes “the volume of type of business of the broker” and “the reject rate for various customs transactions.” 19 C.F.R. § 111.1. UPS submitted statistical evidence bearing down on the “volume” and “reject rate” factors. For example, during the period from January to May 2000, UPS made 2,900–3,900 Customs entries per day, for a total of approximately 375,000 entries. (Tr. 569–70.) Also, in 1998, UPS’s compliance rate for computer parts under heading 8473 was 80%, a rate 15% higher than the national average (65%) by all ECOs that year. (Exs. 113, AA; Tr. 202.) Moreover, this rate was a vast improvement over UPS’s 1997 compliance rate, which was 59%. (Exs. Z, AA,M; Tr. 201–205.) UPS concludes that these statistical measures demonstrate two points in their favor. First, concerning the “reject rate,” UPS states that Customs merely identified 42 misclassified entries using 30.90 out of 375,000 total entries during the relevant period, amounting to “less than 2/100ths of one percent,” hardly a significant breach. (Def.’s Post-Trial Br. 12–13.) Second, the next effect of Customs’s intense focus on the small number of misclassifications, here 42 entries, and failing to compare this number against a whole deprives any meaning from the term “reject rate” as such an analysis treats the 42 misclassifications in isolation, creating an error rate of 100%. (*Id.* at 13 n.5.) Thus, UPS argues, in order for this particular section 111.1 factor to have any meaning, its failures here need to be viewed against “a meaningful universe of Customs entries.” (*Id.* at 12–13.) Customs did not address UPS’s specific arguments concerning the “reject rate.”

As noted above, this Court defers to Customs’s reasonable interpretation of its own regulations. *See So. Cal. Edison Co. v. United Stated*, 226 F.3d 1349, 1356–57 (Fed. Cir. 2000); *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997). Customs has determined that the section

111.1 factors are not exclusive,but serve as guidance to the agency and the brokerage community. (*See* Tr. 889, 984–91; Pl.'s Post Trial Br. 16–22.) Customs, in the exercise of its lawful discretion, may consider the listed factors in section 111.1 or look beyond the factors and consider the totality of the circumstances, on a case-by-case basis as it did in this matter. *See* 19 C.F.R. § 111.1 ("While the determination of what is necessary to perform and maintain responsible supervision will vary *depending upon the circumstances in each instance*, factors which Customs will consider include, *but are not limited to* . . . [listing the factors].") (emphasis added); (Pl. Post-Trial Br. 21–22). Accordingly, this Court finds UPS's arguments on this point untenable because they place sole reliance upon the reject rate and disregard the totality of the facts and circumstances at issue here. Further, UPS's preferred interpretation of section 111.1 is unduly restrictive and not in accord with Customs's interpretation of its regulation.

Concerning UPS's second defense — that it responsibly and actively responded to the various Customs warnings in a manner befitting a responsible broker — is mere *ipse dixit*. It is true that UPS submitted unchallenged evidence that it attended Customs's training sessions and conducted extensive training programs. (Tr. 867, Findings of Fact ("FF") ¶¶11, 15, 17, 18, 27, 30), that is removed, at least intially, 30.90 from its tariff tape[24] (Tr. 612–13, 719–30; FF ¶¶22–25, 31), that it had a practice of warehousing merchandise in a "hold" area of its facilities when there was insufficient customs entry documentation (Tr. 599), and that it tended to work out troublesome issues with Customs by a way of a partnership relationship (Tr. 534; FF ¶¶3, 33). In addition, testimony of two Customs employees was elicited on cross-examination acknowledging that UPS did perform some "responsible steps." (*See* Def.'s Post-Trial Br. 21–22; Tr. 192–93, 379–80, 384.) In the final analysis, however, none of these activities or practices ceased UPS's erroneous use of 30.90. The bottom line is that UPS fell down on the job in this instance because it failed to effectively correct the oft-repeated misclassification errors under 30.90, in accordance with its responsibilities as a customs broker under 19 U.S.C. § 1641(b)(4).

Consequently, this Court holds that UPS's continued failure to remedy its shortcomings in 30.90 compliance after several years of identification, instruction, and warings by Customs, demonstrates

[24] That UPS argues that it was under no legal obligation to remove 30.90 from its tariff tape (and thus going above the call of duty) (*see* Tr. 612–13, 719–20) misses the point. Once UPS made the institutional decision to rely on this technology as its chosen remedy to foster compliance (along with training), it had a responsibility to ensure that it maintained and supported this measure so that there would be no further lapse or error, for as long as it was employed. (*See* Tr. 603–08; Exs. I, CC.) This is basic follow-through, which would seem to be a hallmark of supervisory competence.

by a preponderance of the evidence that UPS failed to exercise the control and supervision necessary to reasonably conduct its customs business.

C. A Single Violation or Multiple Violations of 19 U.S.C. § 1641(b)(4)?

The penultimate issue that this Court must resolve is whether UPS's violation of section 1641(b)(4) consisted of a single violation, as UPS contends, or multiple violations, as advanced by Customs. (Pl.'s Post Trial Br. 23–24; Def.'s Post Trial Br. 24–29.)

UPS argues that Customs's theory of the case centers on its characterization of UPS's repeated acts of misclassification as a pattern of conduct, and that it was the overall *pattern* of conduct and not any particular instance of misclassification that violated 19 U.S.C. § 1641(b)(4). (*See* Tr. 62, 1023, & 992 (associating UPS's conduct as a "pattern").) Because Customs had already charged a violation of 19 U.S.C. § 1641(b)(4) based on the same pattern of conduct (though different instances of misclassification), and UPS paid the associated $15,000 in fines, UPS argues that it has already satisfied its penalty obligation. (*See* Def.'s Post Trial Br. 25; note 7, *supra*.) UPS further complains that FP&F's "plan" of grouping together five misclassified entries and constructing a pre-penalty notice of $5000 per five entries (and later at $10,000 per five entries) "creates a classic multiplicity problem"[25] (*Id.* at n.15; *see also* Tr. 62, 1023, 992, 893.)

Customs maintains that each misclassified entry constitutes a "separate and distinct violation" of the broker statute. (Pl.'s Post Trial Br. 23–24.) Customs relies on its principle witness, Ms. Goldsmith, a Supervisory Import Specialist at Customs, to elucidate this argument. Ms. Goldsmith testified that each shipment of merchandise at issue here is a discreet event comprised of different merchandise from unique importers. Thus, "[e]ach Time [an entry] is done . . . incorrectly, it is one violation . . . each one [entry] is a separate distinct incident by itself." (*Id.* at 24; *see* Tr. 904–05.) The predicate fact for how each entry constitutes an additional violation of the broker statute is, as Customs argues, UPS's "unwillingness to correct its persistent misclassification of the subject merchandise." (*Id.*)

While it is correct, as UPS concedes, that the text of section 1641(b)(4) addresses a broader concept and "does not speak in terms of individual entries being a violation" of section 1641(b)(4), (*see*

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[25] UPS cites the following in support of its multiplicity argument: *United States v. Stewart*, 420 F.3d 1007, 1012 (9th Cir. 2005) ("[a]n indictment is multiplicitous when it charges multiple counts for a single offense, producing two penalties for one crime"); *United States v. Holmes*, 44 F.3d 1150, 1153–56 (2d Cir. 1995) ("A multiplicitous indictment . . . is one that charges in separate counts two or more crimes, when in fact and law, only one crime has been committed."); and *Rutledge v. United States*, 517 U.S. 292, 297 (1996) ("where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense") (quotation and citation omitted).

Def.'s Post Trial Br. 25; *cf.* Pl.'s Post Trial Br. 23–24), this Court finds that, once again, this issue boils down to a matter of deference.

In promulgating the broker penalty regulations, which were subject to notice and comment, 50 Fed. Reg. 31,871 (Aug. 7, 1985), Customs had adopted the position that in assessing whether a broker has violated section 1641(b)(4), it reserved for itself a degree of discretion. Section 111.1 explicitly states that "the determination of what is necessary to perform and maintain responsible supervision and control will *vary depending upon the circumstances* in each instance." 19 C.F.R. § 111.1 (emphasis added). Customs also listed several factors that the agency "will consider . . . but [is] not limited to." Thus, Customs institutionally decided not to enumerate the entire catalogue of circumstances and indicia of "responsible supervision and control." Moreover, Customs has the inherit discretion to weigh the regulatory factors or consider each situation on a case-by-case basis. *Cf. Cent. Roig Refining Co.*, 338 U.S. at 611–14 ("In considering the [regulation's] factors, the port directory may give them whatever weight he deems appropriate; he may conclude that particular factors should be given no weight whatsoever."); *Carolina Tobacco Co.*, 402 F.3d at 1350.

As such, UPS's over-reliance on Customs's trial counsel's discrete reference to UPS's actions in this case as a "pattern" (presumably resulting in one continuing wrong as opposed to a series of discrete wrongs) is misplaced. Moreover, Customs's fleeting reference to a "pattern" of conduct merely provides background for the specific allegations contained in the Complaint, but does not allege a substantive violation of section 1641 creating a multiplicity problem.[26] The underlying failure by UPS under section 1641(b)(4) is its failure to correct repeated misclassifications of merchanidse under 30.90, given the attention Customs had given to the issue and asked of UPS. Additional misclassifications meant that the company continued to fail in exercising responsible supervision and control. To hold that customs is limited to issuing only one penalty in instances like

[26] In addition, UPS's concern over a "multiplicity problem" is inapposite here. "Multiplicity is charging a single offense in several counts." 1A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE, CRIMINAL 3D § 142 (2004). "The danger presented by multiplicitous charges is that the defendant will be punished more than once for a single crime, offending the Double Jeopardy Clause of the Constitution." *United States v. Cassano*, 372 F.3d 868, 881 (7th Cir. 2004), *judgment vacated on other grounds*, 543 U.S. 1109 (2005). Here, UPS was not being targeted by Customs multiple times for the same offense. A series of misclassified entries was each determined by Customs to be a *separate violation* of section 1641(b)(4) in light of the totality of the circumstances addressed in this opinion. Moreover, it is doubtful that the doctrine of multiplicity is applicable to civil or administrative matters. *See Hudson v. United States*, 522 U.S. 93, 99 (1997) ("The Clause protects only against the imposition of multiple *criminal* punishments for the same offense.") (emphasis in origianl); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548–49 (1943) ("Only [criminal punishment] subject[s] the defendant to 'jeopardy' within the constitutional meaning"). Should such a doctrine be found to apply to the broker statute, that directive must come from the legislative branch.

this one where the defendant continually engages in the same conduct would hamper Customs's enforcement authority, and read a restriction into 19 U.S.C. § 1641 that does not exist. *See UPS I*, 30 CIT at ____ , 442 F.Supp. 2d at 1309 ("[n]either the broker penalty statute nor Customs regulations place any temporal [or numerical] restriction on a penalty issued by Customs"). As a result, this Court holds that Customs established that UPS violated section 1641 on multiple occasions, as encompassed in each of the five penalty actions brought against UPS, and not just a single violation.

D. The Assessed Penalty

Finally, the Court concludes, on the record before it, Customs has established, by a preponderance of the evidence, that UPS failed on multiple occasions to "exercise responsible supervision and control" over its "customs business." 19 U.S.C. § 1641(b)(4); 19 C.F.R. § 111.1. UPS misclassified at least 42 entries between January 10 and May 10, 2000, by improperly using tariff subheading HTSUS 8473.30.9000, despite repeated warnings and remedial instruction by Customs not to do so. UPS had adequate notice of the penalties arrayed against it, and had a full and fair opportunity to be heard. Therefore, based on the relevant law and the totality of the factual circumstances presented here before the Court, penalties are warranted. *See Ricci*, 985 F. Supp. at 127; *cf. UPS I*, 442 F. Supp. 2d at 1309 ("Customs may penalize a broker 'a maximum of $30,000 for any violation or violations of the statute in *any one* penalty notice.' ") (*citing* 19 C.F.R. Pt. 171, App. C, XII(A)) (emphasis added).

This Court adopts the penalties as calculated and imposed by Customs, *see* 19 U.S.C. § 1641(d)(1)(C) and 19 C.F.R. Pt. 171, App. C., XI & XII(A), and finds the same fair and reasonable in the following amounts: $5,000 (penalty action no. 2000–4196–300221); $5,000 (penalty action no. 2000–4196–300222); $5,000 (penalty action no. 2000–4196–300223); $30,000 (penalty action no. 2000–4196–300319); and $30,000 (penalty action no. 2000–4196–300320), for a total of $75,000.

VI. *Conclusion*

This Court holds that: (1) UPS misclassified certain merchandise under subheading HTSUS 8473.30.9000; (2) its misclassification under the facts and circumstances demonstrated at trial amounted to multiple violations of 19 U.S.C. § 1641, which requires brokers to "exercise responsible supervision and control" over their customs business; and (3) Customs is entitled to a judgment in the amount of $75,000 against UPS, plus any applicable interest that may be due.

A separate Judgment of the Court will be issued in conjunction and in accordance with this Opinion.