U.S. Customs and Border Protection

Slip Op. 09–136

ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Plaintiff, v. UNITED STATES, Defendant, and KEJRIWAL PAPER LIMITED DEFT.-INT.

Before: Richard K. Eaton, Judge
Consol. Court No. 06–00395

[United States Department of Commerce's final results of redetermination pursuant to remand in the antidumping investigation of certain lined paper products from India are sustained.]

Dated: December 10, 2009

Wiley Rein LLP (*Alan H. Price, Timothy C. Brightbill*, and *Maureen E. Thorson*), for plaintiff Association of American School Paper Suppliers.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*John J. Todor*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Sapna Sharma*), of counsel, for defendant United States.

deKieffer & Horgan (*J. Kevin Horgan* and *Gregory S. Menegaz*), for defendant-intervenor Kejriwal Paper Limited.

OPINION

Eaton, Judge:

Introduction

This consolidated action[1] is before the court following remand to the Department of Commerce ("Commerce" or "the Department" as provided for in the court's Opinion and Order dated November 17, 2008. *See Ass'n of Am. Sch. Paper Suppliers v. United States*, 32 CIT __, Slip Op. 08–122 (Nov. 17, 2008) (not reported in the Federal Supplement) ("*Association I*"); Final Results of Redetermination Pursuant to Court Remand (Dep't of Commerce Mar. 16, 2009) ("Remand Results"). Plaintiff Association of American School Paper Suppliers (the "Association") and defendant-intervenor Kejriwal Paper Limited ("Kejriwal") each object to the Remand Results, though for different reasons.

[1] This action includes court numbers 06–00395 and 06–00399. *See Ass'n of Am. Sch. Paper Suppliers v. United States*, Consol. Ct. No. 06–00395 (Feb. 26, 2007) (order granting consent motion to consolidate cases).

See Plaintiff's Comments Resp. Remand Results ("PI.'s Comments") 1–2; Defendant-Intervenor's Comments Resp. Remand Results ("Def.-Int.'s Comments") 2–3.

The Remand Results relate to the treatment of general and administrative ("G&A") expenses provided for in the Department's earlier final results in its antidumping investigation of certain lined paper products ("CLPP") from India, covering the period of investigation ("POI") July 1, 2004, through June 30, 2005. *See* CLPP from India, 71 Fed. Reg. 45,012, 45,012 (Dep't of Commerce Aug. 8, 2006) (notice of final determination of sales at less than fair value and negative determination of critical circumstances) and the accompanying Issues and Decision Memorandum (Dep't of Commerce Aug. 8, 2006) ("lssues & Dec. Mem.") (collectively, the "Final Results"). On remand, the Department has reduced Kejriwal's antidumping duty margin from 3.91 percent to 3.06 percent. Remand Results at 1.

Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a) (2) (B) (i). For the reasons set forth below, the Remand Results are sustained.

Background

In September 2005, the Association, an "*ad hoc* trade organization" acting on behalf of the domestic paper industry,[2] filed a petition with Commerce seeking the imposition of antidumping duties on imports of CLPP.[3] CLPP from India, Indonesia, and the People's Republic of China, 70 Fed. Reg. 58,374, 58,374 (Dep't of Commerce Oct. 6, 2005) (initiation of antidumping duty investigation). Thereafter, Commerce commenced its investigation, and in accordance with its procedures, conducted a verification of Kejriwal's operations. *See* Final Results, 71 Fed. Reg. at 45,012. Commerce's verification examined the company and found that its primary business was not producing and exporting the subject CLPP, but rather trading newsprint. *See* Issues & Dec. Mem. at 6. Commerce's verification report "explained that Kejriwal finds suppliers and purchasers of newsprint in the domestic market, and negotiates purchase and sale prices with the manufacturers and purchasers of newsprint." Memorandum to File from Laurens van Houten re: Verification of the Cost Response of Kejriwal

[2] The Association consists of MeadWestvaco Corporation, Norcom, Inc., and Top Flight, Inc. *Association I*, 32 CIT at __, Slip Op. 08–122 at 3 n.2.

[3] CLPP refers to "[paper] products . . . [such] as single-and multi-subject notebooks, composition books, wireless notebooks, looseleaf or glued filler paper, graph paper, and laboratory notebooks . . ." CLPP From India, 71 Fed. Reg. 19,706, 19,707 (Dep't of Commerce Apr. 17, 2006) (notice of preliminary determination of sales at less than fair value) (footnotes omitted).

Paper Limited in the Antidumping Investigation of Lined Paper from India at 4–5 (Dep't of Commerce June 13, 2006) (the "Verification Report").

The Department concluded that Kejriwal incurred "significant expenses" in financing and conducting its newsprint transactions, but that, as a strategic business decision, it did not take title to or possession of the newsprint so that it might "take advantage of a 16 percent tax exemption offered by the Government of India if newsprint 'is supplied directly from the manufacturer to the end consumers.'" Verification Report at 8.

Standard Of Review

The court reviews the Final Results under the substantial evidence and in accordance with law standard set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . ."). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quotation omitted).

Discussion

I. Kejriwal's General and Administrative Expense Ratio

The sole issue on remand is Commerce's calculation of Kejriwal's G&A expense ratio.[4] This ratio is the component of constructed value

[4] If Commerce cannot determine the normal value of imported merchandise from home market or third country sales, it uses a "constructed value" of the subject merchandise as the normal value. *See* 19 U.S.C. § 1677b(a)(4); *see also Bridgestone Americas, Inc. v. United States*, 33 CIT __, __, 636 F. Supp. 2d 1347, 1356 (2009). The constructed value is calculated by applying a statutory formula that requires Commerce to total: "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise;" "the actual amounts incurred and realized by the specific exporter. . for selling, general, and administrative expenses in connection with the production and sale of a foreign like product;" and "the cost of all containers and coverings . . . incidental to placing the subject merchandise in condition packed ready for shipment to the United States." 19 U.S.C. § 1677b(e)(1), (2)(A), (3).

In addition, the statute directs that

[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

by which Commerce computes[5] a part of a company's overhead expenses. *Association I*, 32 CIT at ___, Slip Op. 08–122 at 37. These are expenses, incurred during the period of investigation, "which relate indirectly to the general operations of the company rather than directly to the production process." *See* Section D: Cost of Production and Constructed Value Questionnaire at D–18, *available at* http://ia.ita.doc.gov/questionnaires/20080402/q-inv-sec-d-040108.pdf (last visited Nov. 18, 2009). They "include amounts incurred for general [research and development] activities, executive salaries and bonuses, and operations relating to [a] company's corporate headquarters." *Id.*

II. Commerce's Original Calculation of the G&A Expense Ratio

In the Final Results, Commerce departed from its usual methodology for calculating the G&A expense ratio:

> The Department's longstanding methodology is to calculate a ratio by dividing the company's general expenses by its total cost of sales as reported in the respondent's audited financial statements. The Department's established practice in calculating the G&A expense rate is to include only those items that relate to the general operations of the company as a whole in the numerator of the G&A expense ratio calculation.

Remand Results at 6 (citation omitted). Because Kejriwal's business had both a CLPP manufacturing side and a newsprint trading side, Commerce found that its longstanding methodology would not produce an accurate result since Kejriwal never took title to the newsprint it traded. *See* Issues & Dec. Mem. at 5. As a result of Kejriwal not taking title to the newsprint, the cost of its purchase was not contained in the company's financials. That being the case, under Commerce's usual methodology, the cost of sale number (or cost of goods sold) for the traded newsprint in the ratio's denominator would be zero, and hence nearly all of the G&A expenses would be attributed to the manufacture of CLPP. This would be the case even though it was clear that some large portion of the G&A expenses should be attributed to the newsprint business. Thus, as the Department explained on remand:

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19 U.S.C. § 1677b(f) (1) (A). The statute, however, "provides no further guidance" or methodology for calculating general and administrative expenses. *Am. Silicon Technologies v. United States*, 334 F.3d 1033, 1037 (Fed. Cir. 2003).

[5] The G&A expense ratio is multiplied by the cost of manufacture in order to obtain an amount for G&A expenses. *Fuyao Glass Indus. Group Co. v. United States* 29 CIT 109, 131 n.12 (2005) (not reported in the Federal Supplement).

> The unique business model of Kejriwal, where its two main lines of business include one in manufacturing (*e.g.*, lined paper) and one in trading (*e.g.*, acting as a broker in the sales of newsprint between two third parties) does not fit squarely with our normal approach for allocating financial statement classified G&A expenses over the financial statement classified cost of sales of manufactured products. The Department recognized in this case that Kejriwal's primary business activity was as a newsprint trader. Kejriwal acted as a broker between purchasers and suppliers of newsprint prior to and during the POI. Kejriwal began producing lined paper during the POI. The Department also recognized that many of Kejriwal's employees were involved in the newsprint trading activity. Because Kejriwal had many employees and offices dedicated to the newsprint operation, during verification the Department questioned where the newsprint trading operation related expenses were recorded. At verification, the Department reviewed all of the company's expenses to determine whether the expenses had been appropriately included in the reported costs or excluded.

Remand Results at 6–7 (citations and footnote omitted).

In other words, because the specific expenses associated with the cost of the newsprint business were not separately identified in Kejriwal's audited financials, the Department decided to depart from its usual methodology:

> The Department found that most expenses reported on Kejriwal's G&A Expense Ratio Worksheet could be categorized as manufacturing expenses, packing expenses, selling expenses, interest expenses, investment related expenses, or G&A expenses. If the Department identifies expenses that are directly related to one process or product, it normally and more appropriately considers those to be manufacturing costs. By contrast, G&A expenses by their nature are indirect expenses incurred by the company as a whole, and are not directly related to a particular process or product. These general expenses usually include corporate expenses such as salaries and benefits, rent, travel expenses, electricity, vehicle expenses, insurance, transport expenses, and audit expenses.
>
> We found unique circumstances in this case because the respondent reported, and we verified, that a large part of the company's G&A expenses reported in the company's financial statement resulted directly from the trading of newsprint, rather than from the general operations of the company. Put another

> way, although these costs were reported as G&A expenses on the income statement, they were nonetheless costs directly related to Kejriwal's newsprint trading operations and were not supporting the general operations of the company as a whole (*e.g.*, expenses for payroll and accounting supported the company as a whole, while expenses for newsprint marketing salaries were directly related to the newsprint trading operation).

Id. at 7–8 (citations and footnotes omitted).

As a result of these findings, Commerce modified its methodology by looking closely at Kejriwal's G&A expenses, reported in its financials, in order to determine if any of as these expenditures were directly attributable to the trading of newsprint. *Id.* at 8–9. The Department did this because it believed that these expenses would be more accurately characterized as "costs of sales" of the newsprint business rather than general company expenses. Commerce then moved these values from the numerator to the denominator of the G&A expense ratio. *Id.* at 9.

In *Association I*, the court did not question Commerce's revised methodology, but found lacking Commerce's explanation for not including an amount for the cost of the newsprint traded in the denominator when calculating the G&A expense ratio. *Association I*, 32 CIT at __, Slip Op. 08–122 at 49. In this connection, the court further sought an explanation as to why an amount for newsprint traded had been included when calculating the financial expense ratio. *Id.* at 50.

III. Commerce's Remand Results

On remand, the Department has sought to explain its reasons for: (1) declining to include a cost of newsprint traded in the denominator when calculating Kejriwal's G&A expense ratio; (2) moving additional costs from the numerator to the denominator when calculating the ratio; and (3) including the cost of newsprint traded in the denominator of the financial expense ratio, but not in the G&A expense ratio.

Kejriwal, as it did with respect to the Final Results of the investigation, disputes Commerce's calculation of its G&A expense ratio by insisting that the Department must include the cost of newsprint traded in the ratio's denominator.

> The Department's claim that it has attempted to associate reported expenses with the general and administrative activities of the whole company continues to be contradicted by the immutable facts of the administrative record. While the Department reasonably accommodated the economic reality of Kejriwal's business activity so that the purpose of the finance ratio would not be thwarted, the Department continues to blind itself

> to the same economic reality in dramatically understating the G&A ratio denominator by not including a reasonable equivalent cost of the newsprint.

Def.-Int.'s Comments 2. Thus, Kejriwal argues that, by not including the cost of newsprint traded in the G&A expense ratio's denominator, Commerce "can never arrive at a 'fair equivalent value' of [the newsprint] trading activity." Def.-Int.'s Comments 18.

For its part, the Association maintains that:

> Consistent with the Department's past practice, Kejriwal's G&A ratio should be based on its [cost of goods sold] as established in its normal books and records. These costs do not include the cost or value of traded newsprint, because no such cost was ever incurred. Rather than second-guessing the company's own auditors, and the company's own decision as to its business model and structure, the Department should follow its precedent with respect to the calculation of [cost of goods sold], and should be directed to include only those costs that can be directly associated with manufacturing processes and products.

PI.'s Comments 8. In other words, the Association argues that the Department should have adhered to its usual practice and kept all of G&A expenses reported on Kejriwal's financial statements in the numerator and allocated none to the denominator. Pl.'s Comments 7.

The Department continues to cite Kejriwal's unusual business model as a justification for departing from its methodology of relying on the characterization of costs found in a company's financial records when constructing the G&A expense ratio.

> We deviated from our normal methodology for both financing expense and G&A ratios due to the problems posed by the unique business model of Kejriwal's newsprint trading business. Following our normal method of allocating company-wide financing or G&A expense over company-wide actual cost of sales as reported on the income statement would have resulted in an unreasonable allocation of all financial and G&A expenses as reported on the income statement to lined paper because 1) Kejriwal's financial statement cost of sales consisted solely of lined paper expenses (understating the denominator) and 2) its reported G&A expenses included expenses directly related to newsprint operations (overstating the numerator for the G&A expense ratio). This is because the newsprint trading business is an administrative-type operation while the lined paper business is a manufacturing operation. As a result, Kejriwal classified all

> newsprint trading costs as G&A in Kejriwal's financial statements, and all lined paper costs as the only element in the cost of sales in its financial statements. Our normal method of allocating G&A and financing costs would have resulted in virtually all such costs being allocated to lined paper.

Remand Results at 15–16.

Thus, as part of its remand procedures, Commerce again took a close look at the amounts reported as G&A expenses in Kejriwal's financials.

> For the G&A ratio calculation, we attempted to reasonably identify and segregate those administrative costs that directly relate to Kejriwal's newsprint trading operation from those costs relating to the general operations of the company as a whole, based on Kejriwal's classification and description of the expenses. We excluded those costs identified by Kejriwal as newsprint trading costs from the G&A numerator and included them in the cost of sales denominator. *In effect, the costs associated with Kejriwal's newsprint operations are the cost of its newsprint trading sales. While these expenses may have been administrative in nature, as described above, and we typically do not attribute administrative costs directly to specific products or divisions, we considered the facts and circumstances in this case to be unusual. Specifically, these expenses were directly related to generating revenue in the company's trading activity (akin to the cost of sales of manufactured products)*, and accordingly, reasonably associated to Kejriwal's newsprint trading operations based on the analysis provided by Kejriwal at verification, and added to the denominator. In this sense, the Department's G&A calculation is consistent with its normal methodology for calculating G&A expenses, which is to allocate a company's expenses that relate to the general operations of the company over the company's total cost of sales.

Id. at 17 (emphasis added).

Indeed, its examination on remand revealed further expenses the Department believed should be credited to the company's newsprint business.

> During our reexamination of the record pursuant to the Court's remand, we realized that while we had allocated a significant amount . . . of the reported G&A to newsprint, certain administrative rent and administrative depreciation expenses had not been allocated to the newsprint trading operation. For the re-

> mand determination, we have recalculated the G&A expense ratio to reflect a reasonable allocation of these expenses to newsprint trading because, like other expenses we examined, we consider some administrative rent and administrative depreciation expenses to be more properly considered directly related to newsprint trading operations.

Id. at 11.

Responding to Kejriwal's claim that the cost of newsprint should have been included in the cost of goods sold, Commerce explained that "Kejriwal did not incur or record an acquisition cost for newsprint in its income statement because it did not purchase or sell newsprint during the POI. As a result, Kejriwal did not have any newsprint [cost of goods sold]." *Id.* at 20.

Finally, the Department addressed its reasons for taking the cost of the newsprint into account in the financial expense ratio, but not the G&A expense ratio:

> [W]e recognized that including an imputed value for newsprint in the denominator of the financial expense ratio, while not an actual cost to Kejriwal, would be reasonable in allocating the company's financing expenses to its two main business operations (newsprint trading and lined paper) because Kejriwal incurred financing costs directly related to the value of the newsprint. In other words, interest expenses incurred in the newsprint trading operations were dependent on the value of the newsprint traded. Kejriwal borrowed money from lenders to both finance its lined paper manufacturing, and to finance its newsprint trading operations. Since financing expenses reflect a company's cost of capital, we allocated such costs over the operating activities that required capital investment (*i.e.*, lined paper manufacturing and the imputed value of the traded newsprint) .

Id. at 16.

Put another way, the Department concluded that the expenses incurred in financing the cost of the newsprint traded were directly proportional to the value of the newsprint and would be the same regardless of whether Kejriwal took title to the newsprint or not. This is because the interest expense for financing the newsprint would not be any more or less if Kejriwal actually purchased the paper or merely financed its sale and purchase by others. As a result, the Department accounted for these expenses by adding an amount equal

to the cost of newsprint to the denominator of the finance expense ratio in order to allocate these financing expenses to the newsprint trading business.

IV. Commerce's Remand Results Are Sustained

Commerce is charged with computing a constructed value as accurately as possible by including in its calculations an amount for general and administrative expenses. *See Thai I-Mei Frozen Foods Co. v. United States*, 32 CIT __, __, 572 F. Supp. 2d 1353, 1359 (2008) ("Commerce must be guided by the objectives of achieving an accurate margin and a fair comparison between export price and normal value."). Furthermore, Commerce must be able to "provide[] a reasonable explanation" for how it arrives at its final calculations. *Wuhan Bee Healthy Co. v. United States*, 32 CIT __, __, Slip Op. 08–61 at 7 (May 29, 2008) (not reported in the Federal Supplement). This is particularly the case where the Department departs from a previously employed methodology. *M.M. & P. Mar. Advancement, Training, Educ. & Safety Program (MATES) v. Dep't of Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984). That Commerce reasonably has complied with these injunctions, when confronted with a difficult factual situation, can be seen by examining the proposed methodologies urged by Kejriwal and the Association.

Here, the parties are disputing the amount of G&A expenses to be included in the constructed value. This amount is important because the greater the constructed value of a product, the greater the dumping margin.[6] Thus, the larger the percentage resulting from the G&A expense ratio, the greater the amount of G&A expenses to be added to constructed value. As a result, an increase in the denominator (where the numerator is either undisturbed or made smaller) is advantageous to Kejriwal because it results in a smaller constructed value.

Kejriwal would have Commerce increase the value of the G&A denominator by an amount equal to the value of the newsprint traded. The problem with this proposal is that it presupposes that, had Kejriwal actually taken title to the newsprint, it would have incurred no greater overhead expenses than those now found in its financials. In other words, Kejriwal would increase the value of the denominator of the G&A expense ratio without changing the numerator in any way.

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[6] In antidumping investigations, Commerce must ultimately calculate a dumping margin, or "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35) (A). If the price of an item in the home market (normal value) is higher than the price for the same item in the United States (export price), then the dumping margin comparison produces a positive number that indicates dumping has occurred.

Because Kejriwal never took title to or possession of the newsprint, however, there is simply no record evidence as to whether Kejriwal would have incurred greater G&A expenses had it held title to the newsprint. "Kejriwal did not take title to the newsprint it traded [and] did not incur the associated costs . . ." Defendant's Reply Brief to Comments in opposition to Commerce's Final Remand Redetermination ("Def.'s Reply") 5. Therefore, there is nothing on the record indicating whether taking title to the newsprint would result in greater expenses for such items as: corporate salaries and benefits, rent, travel expenses, electricity, vehicle expenses, insurance, transport expenses, or audit expenses. *See, e.g.*, Remand Results at 8 (listing these expenses as common G&A expenses). Any increase in these expenses would necessarily result in the numerator of the G&A expense ratio being made larger. Without record evidence showing how the numerator of the G&A expense ratio would be affected had Kejriwal taken title to the newsprint, constructing a G&A expense ratio using Kejriwal's proposed methodology would be guesswork.

As to the Association's proposal, it urges Commerce to employ its usual methodology of taking the G&A values found in Kejriwal's financials and placing them in the G&A expense ratio without alteration. "Consistent with the Department's past practice, Kejriwal's G&A ratio should be based on its [cost of goods sold] as established in its normal books and records." Pl.'s Comments 8. This methodology, however, would disregard the existence of the newsprint trading business entirely and would result in nearly all of the G&A expenses being attributed to the production of CLPP. In other words, the Association wishes Commerce to ignore the employees, offices, and activities related to the newsprint business—an absurd result.

Rather than accept either Kejriwal's or the Association's proposed G&A methodologies, Commerce has chosen to take the newsprint trading business as it found it. That is, the Department has not assumed that Kejriwal took title to the newsprint, when it did not. At the same time, Commerce did not ignore the direct costs of the newsprint business altogether.

Thus, Commerce has kept its usual methodology by putting general expenses in the numerator of the G&A expense ratio and by putting expenses directly related to the newsprint business in the ratio's denominator. While Commerce has departed from its past practice by examining the expenses that Kejriwal identified as general expenses in its financials, and found that some were better categorized as direct expenses, it has given a complete and reasonable explanation for having done so based on the company's business model.

The Department has also given a reasonable explanation for further recharacterizing other amounts carried on Kejriwal's books as G&A expenses. During its reexamination of the record pursuant to remand, Commerce found that certain rent and depreciation expenses had not been allocated to the newsprint trading operation. Remand Results at 11. Accordingly, for the Redetermination, Commerce recalculated the G&A expense ratio and allocated a portion of these expenses to the newsprint operations, by moving them to the denominator of the ratio. *Id.* at 11–12.

With regard to the rent paid for administrative purposes, because there was no identification of rent expenses directly associated with the newsprint activity on Kejriwal's financials, Commerce "approximated an amount based on the ratio of newsprint salaries and remuneration to total financial statement classified G&A salaries and remuneration." *Id.* at 12 (citation omitted). Commerce explained that it was reasonable "to use the verified ratio of newsprint salaries to total salaries to allocate rent to newsprint because the newsprint trading employees work in Kejriwal's administrative offices for which rent is paid." *Id.* Commerce then used the percentage of total salaries devoted to its newsprint business to "identif[y] a portion of the rent to be allocated to the newsprint operation." Def.'s Reply 8. In other words, Commerce used the resulting ratio to determine a percentage of rent devoted to Kejriwal's newsprint trading business. The Department then moved the value of rent expense, determined using this ratio, to the denominator of the G&A expense ratio. Commerce found that the use of this salary ratio to be reasonable because the proportion of salaries devoted to the newsprint business would provide an approximation of the amount of rent paid to support the newsprint operation. *Id.*

Considering that Commerce has found the newsprint business to be largely administrative in nature, using administrative salaries to approximate the proportion of administrative rent directly related to the newsprint business is reasonable. That is, it is reasonable to assume that the salaries paid for the administrative personnel working in the newsprint business would be proportional to the amount of rent paid to house them. As a result, the court finds that Commerce's decision to place these expenses in the denominator of the G&A expense ratio is both reasonable and has been adequately explained.

In like fashion, Commerce identified a portion of the depreciation expense to be allocated to the newsprint operations, based on the percentage Kejriwal provided for the distribution of motor vehicle depreciation expenses. Remand Results at 13. This adjustment was made by using the percentage of automobile depreciation attributable

to newsprint trading to provide a surrogate for the amount of administrative depreciation, as a whole, attributable to newsprint trading. Commerce explained that Kejriwal had allocated administrative depreciation based on motor vehicle expenses because the majority of its administrative depreciation expenses were for motor vehicles. *Id.* Thus, the Department took the percentage of motor vehicle depreciation attributable to the newsprint business, and extended the use of the percentage to all administrative depreciation. Commerce then took this portion of the administrative depreciation expense, and moved it to the denominator of the G&A expense ratio calculation. *Id.*

Because Commerce had the actual percentage of motor vehicle use for the newsprint trading business, it was able to calculate the percentage of motor vehicle depreciation attributable to newsprint trading. The court finds that the extension of this treatment to all other property subject to administrative depreciation for which there is no breakdown in the financials between the CLPP business and the newsprint trading business is reasonable considering that motor vehicle depreciation made up the bulk of administrative depreciation expenses.

Finally, the court finds that Commerce has supplied a reasonable explanation for treating the cost of newsprint traded differently in the financial and G&A expense ratios. That is, while it can be said that the cost of financing its newsprint trading business would be the same whether Kejriwal actually took title to the newsprint or not, the same cannot be said of the amount of G&A expenses that would be incurred had Kejriwal actually purchased the newsprint. Thus, it is reasonable to account for the expense of financing the newsprint in the financial expense ratio by including an amount equal to what it would cost to buy it. There is simply no record evidence to justify similar treatment in the G&A expense ratio.

Having reviewed Commerce's findings and reasoning, the court concludes that Commerce supported with substantial evidence, adequately explained itself, and supplied the "reasoned analysis" necessary to depart from its normal practice when calculating the G&A expense ratio. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

Conclusion

For the reasons stated, Commerce's Remand Results in the antidumping investigation of certain lined paper products from India are sustained. Judgment shall be entered accordingly.

Dated: December 10, 2009
New York, New York

/s/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 09–137

UNITED STATES STEEL CORPORATION, Plaintiffs, and WHEATLAND TUBE COMPANY Pl.-Int. v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 09–00086

[Department of Commerce's remand results sustained.]

Dated: December 11, 2009

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer*, *Jeffrey D. Gerrish*, and *Nathaniel B. Bolin*), for plaintiff United States Steel Corporation.

Wiley Rein LLP (*Alan H. Price* and *Robert DeFrancesco*), for plaintiff Maverick Tube Corporation.

King & Spalding, LLP (*Gilbert B. Kaplan*, *Daniel Schneiderman*, and *Christopher T. Cloutier*), for plaintiff-intervenor Wheatland Tube Company.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White*, *Jr.*, Assistant Director, United States Department of Justice Commercial Litigation Branch, Civil Division (*John J. Todor*), for defendant United States.

OPINION

Eaton, Judge:

I.
Introduction

The complaint in this action challenged the final affirmative countervailing duty determination issued by the Department of Commerce ("Commerce" or the "Department") in Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China, 73 Fed. Reg. 70,961 (Dep't of Commerce Nov. 24, 2008); Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China, 74 Fed. Reg. 4,136 (Dep't of Commerce Jan. 23, 2009) (amended final determination) ("Final Determination"). The Final Determination applied adverse facts available with respect to the issue of government ownership of the producers which supplied hot-rolled steel to respondents Huludao Seven Star Steel Pipe Group Co., Ltd., Huludao Steel Pipe Industrial Co., Ltd., and Huludao Bohai Oil Pipe Industrial Co., Ltd. (the "Huludao Companies"). The Department found that the suppliers were government-owned, with the single exception being a

supplier for the Huludao Companies. Accordingly, the Department determined that the supplier was not government owned and thus did not include the hot-rolled steel supplied to the Huludao Companies in the subsidy calculation.

Plaintiffs' complaint included one claim:

> In determining the benefit to the Huludao Companies from the provision of hot-rolled steel for less than adequate remuneration and the resultant subsidy rate, the Department improperly concluded that a supplier of hot-rolled steel to the Huludao Companies was not government-owned.

Compl. ¶ 13. Consequently, plaintiffs claimed, the Final Determination was not supported by substantial evidence and otherwise not in accordance with law. Compl. ¶ 13.

Subsequently, the defendant sought and the court granted voluntary remand. *United States Steel Corp. v. United States*, Consol. Ct. No. 09–00086 (September 9, 2009) (order granting motion for remand). On October 20, 2009, the Department issued its Final Redetermination Pursuant to Remand (Dep't of Commerce Oct. 20, 2009), *United States Steel Corp. v. United States*, Consol. Court No. 09–00086 ("Remand Redetermination").

On remand, the Department determined that

> The Department made an erroneous finding off act in the *Final Determination* and that record evidence does not support the conclusion that one of Huludao's [hot-rolled steel] suppliers was a private company and not a state-owned enterprise. A correction is therefore warranted. On remand, the Department now includes the previously excluded [hot-rolled steel] supplier to Huludao in our subsidy calculations.

Remand Determination at 4.

The Department noted that it invited parties to the proceeding to comment on the draft Redetermination Pursuant to Remand and that it received no comments. Remand Determination at 3. Plaintiffs and plaintiff-intervenor submitted comments on the Remand Determination on December 2, 2009. Pls.' Comments on the Final Redetermination Pursuant to Remand Issued by the Department of Commerce ("Pls.' Comm."). Plaintiffs and plaintiff-intervenor state that they are "satisfied with the Department's Remand Redetermination and believe it fully addresses the single issue raised by Plaintiffs in this action. Accordingly, Plaintiffs respectfully request that the Court affirm the Remand Redetermination in all respects." Pls.' Comm. 2.

Having examined the Remand Determination and plaintiffs' and plaintiff-intervenor's comments, the court finds that Commerce's Remand Determination should be sustained (1) because it is reasonable and in accordance with law and (2) because the parties are "satisfied" with the results. Judgment will be entered accordingly.

Dated: December 11, 2009
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip. Op. 09–138

THYSSENKRUPP MEXINOX S.A. DE C.V. et al., Plaintiffs, v. UNITED STATES, et al., Defendant, AK STEEL CORPORATION, ALLEGHENY LUDLUM CORPORATION and NORTH AMERICAN STAINLESS, Defendant-Intervenors.

Before: Pogue, Judge
Court No. 06–00236

JUDGMENT

This action involves the distribution to affected domestic producers, pursuant to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), section 754 of the Tariff Act, 19 U.S.C. § 1675c (2000), of antidumping ("AD") duties assessed and collected on imports of certain steel products from Mexico. In their complaint, Plaintiffs claimed, correctly, that the Byrd Amendment may not be applied to AD duties on goods from Mexico. On the other hand, on May 13, 2009, the court denied Plaintiffs' motion to amend their complaint to add (1) a cause of action for unjust enrichment, against the Defendant-Intervenors, Plaintiffs' domestic competitors, for receiving and retaining distributions under the Byrd Amendment of AD duties collected upon the entry into the U.S. of Plaintiffs' goods, and (2) a claim for injunctive relief requiring the Defendant-Intervenors to disgorge those illegally-received distributions. *Thyssenkrupp Mexinox S.A. de C.V. v. United States*, __ CIT __, __, 616 F. Supp. 2d 1376, 1378 (2009). The court's decision resulted from its refusal to exercise supplemental jurisdiction over the former claim, and its recognition that the passage of the American Recovery and Reinvestment Act of 2009, H.R. 1, Pub. L. No. 111–5, §§ 1–7002, 123 Stat. 115, 115–521 (2008) mooted the latter claim. *Thyssenkrupp*, 616 F. Supp. 2d at 1378.

On November 16, 2009, the court granted Plaintiffs' request for declaratory relief equivalent to that granted in *Canadian Lumber Trade Alliance v. United States*, 30 CIT 391, 441–43, 425 F. Supp. 2d

1321, 1372–73 (2006) ("*Canadian Lumber I*"), aff'd in part & vacated in part on other grounds, 517 F.3d 1319 (Fed. Cir. 2008) and *Canadian Lumber Trade Alliance v. United States*, 30 CIT 892, 894–95, 441 F. Supp. 2d 1259, 1262–63 (2006) ("*Canadian Lumber II*"), *aff'd* as modified, 517 F.3d 1319. *Thyssenkrupp Mexinox S.A. de C.V. v. United States*, No. 06–00236, 2009 WL 3809614, at *1–2 (CIT Nov. 16, 2009). The court found that some entries of Plaintiff's merchandise — entries which are the subject of Plaintiff's complaint — remained unliquidated and therefore are subject to duty collection and disbursement under the CDSOA. Accordingly, the court determined that the court's prior opinions in *Canadian Lumber I* and *Canadian Lumber II* control this case, and that the Plaintiffs are entitled to declaratory relief.

Plaintiff further requested permanent injunctive relief. However, subsequent to the court's November 16th order, Plaintiff has abandoned its request, and the parties now agree that this action can proceed to final judgment.

Therefore, this action, having been duly submitted for decision, and the court, after due deliberation, having rendered decisions herein;

Now, in conformity with those decisions, it is hereby

ORDERED, ADJUDGED and DECREED that, pursuant to section 408 of the North American Free Trade Implementation Act, 19 U.S.C. § 3438, the CDSOA does not apply to the AD orders on stainless steel sheet and strip products from Mexico; and it is hereby

ORDERED, ADJUDGED and DECREED that Defendant United States' disbursement under the CDSOA to domestic producers of AD duties assessed on imports of stainless steel sheet and strip products from Mexico was and is contrary to law.

Dated: New York, New York
December 15, 2009

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip. Op. 09–139

DELPHI PETROLEUM, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 06–00245

[Defendant's motion for summary judgment denied. Plaintiff's cross-motion for summary judgment granted. Plaintiff did not file a drawback claim within three years of export, but the period for filing is extended under 19 U.S.C. § 1313(r)(1).]

Dated: December 15, 2009

James Caffentzis for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Todd M. Hughes*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Tara K. Hogan*); *Richard McManus*, Office of Chief Counsel, U.S. Bureau of Customs and Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge:

I.
Introduction

This matter is before the court on cross-motions for summary judgment by defendant United States ("the Government") and plaintiff Delphi Petroleum, Inc. ("Delphi") pursuant to USCIT Rule 56. Delphi seeks reliquidation of entries and drawback of Harbor Maintenance Taxes ("HMT") and Merchandise Processing Fees ("MPF") paid on certain imported petroleum products. The Government asserts that the United States Bureau of Customs and Border Protection ("Customs") properly denied Delphi's request for drawback of HMT and MPF.

II.
Background

Between 1998 and 2002, Delphi filed five drawback entries on certain petroleum products it imported and then exported as acceptable substitute finished petroleum derivatives pursuant to 19 U.S.C. § 1313(p). (Def.'s Statement of Material Facts Not in Dispute ("Def.'s Statement of Facts")2.) In general, Customs will repay fully, less one percent, the amount of duties paid upon goods previously imported into the United States and used in the manufacture or production of "commercially interchangeable" merchandise that is subsequently exported or destroyed. 19 U.S.C. § 1313(j). A claimant has three years from the date of exportation or destruction of the merchandise to file a drawback claim. 19 U.S.C. § 1313(r)(1).

Customs agreed that Delphi was entitled to drawback of ninety-nine percent of the duties it paid on the petroleum products upon importation under 19 U.S.C. § 1313(p).[1] (Def's Statement of Facts.) Delphi's drawback entries at issue did not include claims for HMT or MPF, but included the following correspondence in attached letters:

[1] The statutory provision states "that drawback shall be allowed" on qualified substitution of finished petroleum derivatives if "a drawback claim is filed regarding the exported article." 19 U.S.C. § 1313(p)(1).

> We have not included in this drawback application a drawback of the applicable Harbor Maintenance and Merchandise Processing fees, as we understand that U.S. Customs is appealing the decision in *Texport Oil Company v. U.S.*, Slip Opinion 98–21[]. We are not waiving our claim with respect to the drawback of these fees. We understand that we can file a protest, after we receive the duty drawback, with respect to these fees and that that protest will be resolved after the court rules on the U.S. Customs appeal. If we are incorrect in this regard, please inform us and we will amend this drawback claim to include those fees.[2]

(Def.'s App. 4–5.) When Delphi filed the claims at issue, Customs regulations expressly prohibited HMT and MPF drawback. *See* 19 C.F.R. § 191.3(b) (2002); HQ 231068 (Aug. 30, 2005), *available at* 2005 WL 3086998.[3] Delphi handled its HMT and MPF claims, as described in its letters, under the advisement of the Supervisory Drawback Liquidator, Thomas L. Ferramosca, in the drawback section of Customs at the Port of New York. (Pl.'s Resp. App. Tab 2.)

In May 2003, Customs liquidated Delphi's five drawback entries and refunded the full amount of duty drawback Delphi claimed. (Def.'s Statement of Facts 2.) The lengthy delay in liquidation was due to Customs' suspension of liquidation of § 1313(p) petroleum product claims between August 1, 1997 and June 26, 2002.[4] (Pl.s Resp. App. Tab 10, at 14) Further delay ensued when Delphi's claims

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[2] Before 2004, the drawback statute stated that the "duty, tax, or fee imposed . . . *because of its importation*. . . shall be refunded as drawback." 19 U.S.C. § 1313(j) (2000) (emphasis added). The Federal Circuit in *Texport* held that MPF was eligible for drawback because it was imposed "because of" importation. *Texport Oil Co. v. United States*, 185 F.3d 1291, 1296 (Fed. Cir. 1999). HMT was found not eligible for drawback, however, because it was a general charge "against all shipments, regardless of whether they [were] imports." *Id.*Thereafter, Congress passed the Miscellaneous Trade and Technical Corrections Act of 2004 ("2004 Trade Act"), which revised 19 U.S.C. § 1313. Pub. L. No. 108–429, 118 Stat. 2434 (2004). The statute now provides for drawback of duties and fees paid "upon entry or importation," rather than those paid only "because of" the good's importation. 19 U.S.C. § 1313(j)(1) (2006). Consequently, the 2004 Trade Act clarified that MPF and HMT are eligible for drawback claims. *See* Pub. L. No. 108–429, § 1557, 118 Stat. 2434, 2579; *Aectra Ref. & Mktg., Inc. v. United States*, 565 F.3d 1364, 1369 (Fed. Cir. 2009).

[3] While by late 1999, the law on MPF apparently was settled, regulations did not change, and confusion continued at Customs for some years, as HQ 231068 indicates. Of course, HMT drawback was precluded by case law. *See supra* note 2.

[4] Customs did not liquidate section 1313(p) claims between August 1, 1997 and June, 26, 2002, "in order for Customs to address issues raised by the trade community." (Pl.'s Resp. App. Tab 11, at 5.) Although "[t]hese disputes were largely resolved by . . . the 1999 Trade Act[,] . . . [subsequent] additional time was needed for Customs [to] provide liquidation instructions to the drawback offices on how to implement the [1999] amendments to the Customs laws." (*Id.*) This did not resolve the MPF and HMT issues. *See* Miscellaneous Trade and Corrections Act of 1999, Pub. L. No. 106–36, § 2420, 113 Stat. 127, 179.

were destroyed in the World Trade Center, and Customs asked Delphi to reconstruct four of the five entries at issue. (Pl.'s Resp. to Def.s Mot. for Summ. J. & Cross-Mot. for Summ. J. ("Pl.'s Resp.")16; Pl.'s Resp. App. Tab 10, at 12–13.) On June 12, 2003, Delphi filed a protest requesting HMT and MPF on the five entries at issue and included calculations of how much it believed Customs owed—ninety-nine percent of the taxes and fees paid. (Pl.'s Resp. App. Tab 8.)

Customs responded to the protest in October 2005 by asking Delphi to recalculate its claims in one of the five entries and submit new HMT and MPF calculation sheets to reflect a request for drawback on products exported no earlier than June 12, 2000, because earlier claims were outside the three-year period of limitations. (*See* Pl.'s Resp. App. Tab 3) In January 2006, Customs denied Delphi's protest with respect to drawback requests for entries before June 12, 2000. (Pl.'s Resp. 1–2.) Delphi challenged that decision here in July 2006. Subsequently, the court stayed Delphi's case pending *Aectra Refining & Marketing, Inc. v. United States*, 565 F.3d 1364 (Fed. Cir. 2009). Second Am. Scheduling Order (Jan. 16, 2009).

III.
Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate where, as here, "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).

IV.
Discussion

Delphi argues that the correspondence it included with the drawback claims at issue was sufficient to protect its HMT and MPF claims. (Pl.'s Resp. 7.) Alternatively, Delphi submits that its claims were timely because the protest after liquidation merely "perfected" the claim. (*Id.* at 4.) Finally, Delphi argues that if the claim was not protected or timely, the reason for such failings is directly attributable to Customs, and the limitation period is extended under § 1313(r)(1). (*See id.* at 15–16) The Federal Circuit's holding in *Aectra* precludes the first two claims, but the court agrees with Delphi's final claim.

I. Delphi's Claims Were Not Protected Within the Three-Year Filing Period

In order for Customs to grant a drawback claim it must be "complete." 19 U.S.C. § 1313(r)(1). Customs regulations define "a complete drawback claim" as consisting of specified forms, certificates, and

notices. 19 C.F.R. § 191.5(a)(1). *Aectra* concluded that a complete claim also includes a correct calculation of taxes and fees sought because payment of a drawback claim is "expressly conditioned—by statute—upon compliance with regulations promulgated by the Secretary of Treasury."[5] *Aectra*, 565 F.3d at 1371; *see* 19 C.F.R. § 191.51(b)(1) (requiring a correct calculation of the drawback sought).

According to Delphi, *Aectra* does not preclude a drawback claim if "a timely protective claim" is made, even if the calculations are filed outside the three-year time period.[6] (Pl.'s Resp. 7.) Although *Aectra* did not define "protective claim," the interpretation most consistent with its holding is that an effective protective claim must be complete (i.e., it must include calculations) and timely submitted, despite the fact that Customs would have rejected it. The Federal Circuit expressed concern that if calculations were not required to "complete" a claim, then "a claimant could submit a partial claim for duty that would be fully paid by Customs as requested, and then institute a second proceeding, perhaps years later, requesting by protest an additional amount, thereby plainly increasing the cost and complexity of processing the claim."[7] *Aectra*, 565 F.3d at 1372. Recognizing Delphi's correspondence, which did not include calculations for HMT and MPF drawback, as adequate notice to Customs or a "protective claim" would seem to permit exactly what the Federal Circuit expressly sought to avoid.[8] *See Aectra*, 565 F.3d at 1372.

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[5] Aectra imported petroleum products upon which it paid HMT and MPF between 1987 and 1997. *Aectra*, 565 F.3d at 1366. Aectra exported finished petroleum products, and the Government did not dispute that Aectra generally qualified for drawback. *Id.* at 1367. Aectra timely filed ten drawback claims, but did not include a claim for HMT or MPF. *Id.* Upon liquidation of its claims, Aectra filed a protest seeking drawback of HMT and MPF. *Id.* at 1368. The Federal Circuit held that Customs properly denied Aectra's claim for a refund of HMT and MPF because the claim was not a timely complete claim. *Id.* at 1375.

[6] Delphi's argument stems from two statements made in the *Aectra* decision. First, the Federal Circuit stated that "Aectra offers no explanation for why it did not include *protective claims* for MPF and HMT in its ten drawback claims . . . ." *Aectra*, 565 F.3d at 1367 (emphasis added). Second, the Federal Circuit held that "[the effective date] clause applies the 2004 Trade Act's amendments to unliquidated entries that already included a timely *protective request* for HMT." *Id.* at 1370 (emphasis added).

[7] These policy concerns are significantly different from those emphasized in the protest cases cited by Delphi in support of its "notice of claim" argument. *See, e.g.*, *Mattel v. United States*, 377 F. Supp. 955, 958–59 (CIT 1974) (noting that protests "need not be made with technical precision" as long as Customs is apprised of the objection and has an opportunity to "review [its] decision and take action accordingly").

[8] Delphi argues in its Reply that "since Delphi's notice document constituted a drawback claim for HMT and MPF, ... [C]ustoms must reject a drawback claim determined to be incomplete under 19 C.F.R. § 191.51(a)(1) and must notify the filer in writing." (Pl.'s Reply to Def.'s Resp. to Pl.'s Cross-Mot. for Summ. J. & Resp. to Def.'s Mot. for Summ. J. 3–4.) This argument fails because, by its own admission, Delphi stated in its correspondence that it

II. Delphi's Original Filings Were Neither Timely Supplemented Nor Perfected By Protest

A drawback claim is considered abandoned if it is not complete within three years of the date of export of the substitute merchandise.[9] 19 U.S.C. § 1313(r)(1). Delphi filed its protest outside of the three-year period for the claims at issue. (*See* Pl.'s Resp. App. Tab 8.) Delphi argues that its claim was timely, however, because its protest supplemented its earlier claims under 19 C.F.R. § 191.52(c), or otherwise perfected it under 19 C.F.R. § 191.52(b). (*See* Pl.'s Resp. 10.) These assertions are without merit.

Section 191.52(c) of title 19, C.F.R. governs amendments, which can be made only for entries that have not been liquidated and must be "made within three . . . years after the date of exportation" of the products. 19 C.F.R § 191.52(c). Because Delphi filed its completed claims for HMT and MPF more than three years after the date of exportation and subsequent to liquidation, the amendment provision does not apply.

Similarly, Delphi's protest did not perfect timely drawback claims for HMT and MPF under § 191.52(b).[10] Delphi argues that its drawback claims were "complete" under § 191.51(a)(1), and therefore adding calculations for HMT and MPF later in its protest was merely a perfection of the claims. (Pl.'s Resp. 10). Such a finding would be inconsistent with the Federal Circuit's holding in *Aectra* that a "complete claim" goes beyond the documentary requirements to complete a claim under § 191.51(a)(1) and includes the functional requirement to complete a drawback claim under § 191.51(b)(1)—a calculation of the fees sought.[11]

"ha[s] *not* included in this drawback application a drawback of the applicable [HMT] and [MPF] . . . ." (Pl.'s Resp. 8 emphasis added.) It would be unreasonable to expect Customs to interpret such correspondence to be an "incomplete claim" under § 191.51(a)(1) and notify Delphi of that fact, so that it could complete its application within the three-year period. *See* 19 C.F.R. § 191.52(a).

[9] The Federal Circuit in *Aectra* held that the 2004 Trade Act "did not suspend" this statutory time limitation period with respect to HMT and MPF drawback claims. *Id.* at 1375.

[10] Section 191.52(b) of 19 C.F.R. states:

If Customs determines that the claim is complete according to the requirements of § 191.51(a)(1), but that additional evidence or information is required, Customs will notify the filer in writing . . . . The evidence or information required under this paragraph may be filed more than 3 years after the date of exportation . . . of the articles which are the subject of the claim.

19 C.F.R § 191.52(b).

[11] In its Reply, Delphi asserts that because drawback QN2–9500010–4 was filed in January 1998, prior to the effective date of the provision requiring calculations, 19 C.F.R. § 191.51(b),

III. Delphi's Filing Time Period Should Have Been Extended by Customs Under 19 U.S.C. § 1313(r)(1)

Lastly, Delphi argues that if the claims were neither complete nor filed within the three-year period, the three-year filing limit is extended under the final clause of § 1313(r)(1). (Pl.'s Resp. 15–16.) The final clause states that "[n]o extension [of the three-year filing limit] will be granted unless it is established that the Customs Service was responsible for the untimely filing." 19 U.S.C. § 1313(r)(1). Delphi asserts that Customs was responsible for the untimely filing because: (1) Customs delayed in liquidating its claims and therefore its protests including HMT and MPF drawback claims were filed outside the three-year limit; (2) any HMT and MPF drawback claims would have been futile; and (3) the Customs supervisory drawback official in charge of its claims advised it to request drawback of HMT and MPF by filing a protest after liquidation rather than including a claim for such taxes and fees in the original claim. (*See* Pl.'s Resp. 9; 15–16; Pl.'s Reply to Def.'s Resp. 7.) The first two bases are insufficient to compel Customs to grant a filing extension, but the court agrees that the last basis is the key to a § 1313(r)(1) extension.

As an initial matter, the basic three-year time period for filing a drawback claim is clearly not jurisdictional, as 19 U.S.C. § 1313(r)(1) provides for extension.[12] Customs has not promulgated regulations indicating the circumstances or the procedures applicable for an extension based on Customs' actions in delaying a claim. Thus, the court addresses whether Customs abused its discretion in not extending the time for filing to the time Delphi actually filed its claims during the post-liquidation protest period.

The first two bases for an extension asserted by Delphi do not make Customs "responsible" for the delayed filing. They are, however, part of the chain of causation of the delay. But for the advice of the supervisory Customs official, Delphi did not need to wait for liquidation to file its claim. Nonetheless, because liquidation was so delayed, when Delphi followed the advice, its claims were outside the three-year filing period.

Next, *Aectra* did not address futility arguments in the context of the statutory extension provision. It rejected futility as a basis for excused untimeliness on more general equitable tolling principles. *See Aectra*, 565 F.3d at 1373–74. Here, because the Customs official

its motion for summary judgment should be granted for that claim. (Pl.'s Reply To Def.'s Resp. 9.) It is unnecessary to address this argument in light of the affirmative extension decision here.

[12] 19 U.S.C. § 1313(r)(3) contains provisions for a time-limited extension on grounds not implicated here.

thought the claims were not allowed under Customs regulations and applicable case law, he directed Delphi to use the protest of liquidation route. It was certainly true that during the period at issue and up to 2004, Customs would not have granted the HMT drawback claims. While beginning in at least 2000, Customs should have been granting MPF drawback, there apparently were regulatory and other practical impediments to such treatment, as discussed, *supra*, note 3. But, futility does not make Customs "responsible" for the delay, any more than it excused the late filing in *Aectra*. Futility does explain, however, part of the reason why Customs became responsible.

The court has addressed Delphi's claims in some detail to emphasize the narrowness of the ground upon which Delphi succeeds. Under the facts of this case, Delphi's reliance on advice by the Customs supervisory drawback official for the Port of New York rendered Customs responsible for the otherwise untimely filing and qualifies Delphi for a statutory extension under the final provision § 1313(r)(1).

There is a dearth of case law analyzing the final provision of § 1313(r)(1).[13] Legislative history upon its inclusion in 19 U.S.C. § 1313(r)(1) in 1993 is equally sparse. *See* H.R. Rep. No. 103–361, at 132 (1993), as reprinted in 1993 U.S.C.C.A.N. 2552, 2682. Congress, however, expressed its desire that Customs promulgate implementing regulations that "should provide, to the maximum extent possible under law, that claimants will be encouraged to export merchandise through the allowance of drawback claims. Such regulations should provide for fair treatment of the business community, while ensuring that Customs has the necessary enforcement information." *Id.* On its face, and consistent with this history, § 1313(r)(1) creates an explicit exception to the three-year time period limitation for drawback claims when Customs is "responsible" for the tardiness. The statute is written in terms which permit an extension by Customs, but Customs has not promulgated any regulations to implement this provision. Further, the parties have cited no instances in which Customs has granted such extensions, but the defendant seems to agree that if Customs makes the filing "impossible," an extension should be granted. *See Alyeska Pipeline Serv. Co. v. United States*, 643 F. Supp. 1128 (CIT 1986) (permitting protest in non-drawback claim context where Customs made filing impossible). Customs has not recognized the crucial difference in the rigid time limit of 19 U.S.C. § 1514(c) for

[13] While *Aectra* makes clear that only Congress may "suspend" the three-year time period of § 1313(r)(1), *see Aectra* 565 F.3d at 1370, *Aectra* found a case for administrative extension had not been made, *id.* at 1375. The extension provision was inapplicable because Aectra's failure to timely file could not be attributed to the agency. *Id.* Apparently, Aectra did not attempt the type of factual showing made here.

protest and the language of the statute at hand. This may go far in explaining why, as Delphi asserts, Customs has never allowed any extension under § 1313(r)(1).

Customs ignores its duty where it seeks to rewrite the statute to limit it to extremely narrow fact patterns, such as a case of absolute impossibility.[14] The statute is not so limited; it allows for an extension of time for filing a drawback claim when Customs is responsible for the late filing. Here, that is the case.

Delphi, justifiably confused by the state of the law—statutory, regulatory, and court-made—sought assistance from the very person responsible for the implementation of the applicable procedure. Delphi did not rely on the advice of a low-level employee in some far-flung outpost, who could not be expected to provide reliable guidance.[15] Instead, Delphi relied upon the advice of the Supervisory Drawback Liquidator in the drawback section of Customs at the Port of New York, who detailed the procedure to be followed in the light of regulations that did not permit the claims. Delphi's timely correspondence indicated it was willing and ready to present the complete claims, but was told not to do so until other events transpired, that is, liquidation, so that a protest could be filed. (Pl.'s Resp. App. Tab 2.) Customs did not respond to Delphi's inquiries as to the sufficiency of its filings because the same Supervisory Drawback Liquidator offering advice received Delphi's correspondence, with which he obviously concurred. (*Id.*) This is set forth in detail in the affidavits filed by Delphi, including the affidavit of Thomas L. Ferramosca, the Supervisory Drawback Liquidator responsible for the advice that dictated Delphi's actions. (*Id.*) These facts are not disputed by the Government and distinguish this case from *Aectra*. (*See* Def.'s Mot. 1.) In the light of these facts, under 19 U.S.C. § 1313(r)(1), Customs is deemed responsible for Delphi's delayed HMT and MPF filings because Delphi had no clear administrative path to follow and a responsible official unknowingly misled Delphi as to the proper course. Thus, Customs abused its discretion is not granting the extension of time to file the drawback claims.

[14] Defendant hints, without admitting as much, that perhaps a ruling from Customs' headquarters might suffice. Customs' "responsibility" has not been limited in any way to a particular office or position.

[15] 15 Both parties' reliance on equitable tolling and estoppel principles to support their positions on whether that reliance on a government official is enough to bind the government is misplaced. At issue is not the equitable tolling of the statute of limitations, but rather a statutorily provided extension when Customs is responsible for the late filing. *See* 19 U.S.C. § 1313(r)(1); *cf. United States v. Brockamp*, 519 U.S. 347, 352 (1997) (recognizing that an explicit listing of an exception to statutory time limits demonstrates congressional intent to provide relief on that basis to the exclusion of equitable remedies).

V.
Conclusion

Delphi's delayed drawback claims filing is permitted under § 1313(r)(1) because on these facts Customs is responsible for any noncompliance. Accordingly, the Government's motion for summary judgment is denied, Delphi's cross-motion for summary judgment is granted, and Delphi's claims for drawback of HMT and MPF are allowed. Judgment for plaintiff will be entered accordingly.

Dated this 15th day of December, 2009.

New York, New York.

/s/ Jane A. Restani

JANE A. RESTANI
Chief Judge

Slip Op. 09–140

FAUS GROUP, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 03–00313

JUDGMENT

On September 25, 2009, the Court of Appeals for the Federal Circuit issued its mandate following its decision in *Faus Group, Inc. v. United States*, 581 F.3d 1369 (Fed. Cir. 2009). In Faus, the Court of Appeals reversed this court's decision in *Faus Group, Inc. v. United States*, 28 CIT 1879, 358 F. Supp. 2d 1244 (2004) — where this court sustained U.S. Customs and Border Protection's ("Customs") classification of Plaintiff's laminated flooring panels — and directed that summary judgment be issued in favor of Plaintiff. The Court of Appeals' decision and mandate settle questions of law that are outcome determinative for the case herein.

THEREFORE, in accordance with the Court of Appeals' decision and mandate, it is hereby

ORDERED, ADJUDGED, and DECREED that Customs' classification and liquidation of Plaintiff's subject merchandise under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 4411.19.40 (2001) is not correct; and it is further

ORDERED, ADJUDGED, and DECREED that the subject merchandise are properly dutiable under HTSUS subheading 4418.90.40, as claimed by Plaintiff; and it is further

ORDERED, ADJUDGED, and DECREED that judgment be, and hereby is, entered for Plaintiff, that the subject entries be re-

liquidated accordingly at the applicable rates of duty, and that excess duty be refunded with interest thereon as provided by law.

Dated: December 15, 2009
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip Op. 09–141

WITEX U.S.A., INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Court No. 98–00360

JUDGMENT

On September 25, 2009, the Court of Appeals for the Federal Circuit issued its mandate following its decision in *Witex, U.S.A., Inc. v. United States*, 333 F. App'x 569 (Fed. Cir. 2009), which, in turn, followed its decision in the companion case *Faus Group, Inc. v. United States*, 581 F.3d 1369 (Fed. Cir. 2009). In *Witex* and *Faus*, the Court of Appeals reversed this court's decision in *Witex, U.S.A., Inc. v. United States*, 28 CIT 1907, 353 F. Supp. 2d 1310 (2004) — where this court sustained U.S. Customs and Border Protection's ("Customs") classification of Plaintiff's laminated flooring panels — and directed that summary judgment be issued in favor of Plaintiff. The Court of Appeals' decision and mandate settle questions of law that are outcome determinative for the case herein.

THEREFORE, in accordance with the Court of Appeals' decision and mandate, it is hereby

ORDERED, ADJUDGED, and DECREED that Customs' classification and liquidation of Plaintiff's subject merchandise under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 4411.19.40 (2001) is not correct; and it is further

ORDERED, ADJUDGED, and DECREED that the subject merchandise are properly dutiable under HTSUS subheading 4418.90.40, as claimed by Plaintiff; and it is further

ORDERED, ADJUDGED, and DECREED that judgment be, and hereby is, entered for Plaintiff, that the subject entries be reliquidated accordingly at the applicable rates of duty, and that excess duty be refunded with interest thereon as provided by law.

Dated: December 15, 2009
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip Op. 09–142

HARTFORD FIRE INSURANCE COMPANY, Plaintiff, – v – UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 07–00067

[Defendant's motion to dismiss for lack of subject matter jurisdiction granted.]

Dated: December 16, 2009

Barnes, Richardson & Colburn (*Frederic D. Van Arnam, Jr., Daniel F. Shapiro*, and *Eric W. Lander*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Michael J. Dierberg*); and *Beth C. Brotman*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, Of Counsel, for the Defendant.

OPINION

Pogue, Judge:

Introduction

In response to a demand by the United States Bureau of Customs and Border Protection ("Customs") for the payment of antidumping duties secured by Plaintiff Hartford Fire Insurance Company's ("Plaintiff" or "Hartford") bonds, Plaintiff brings this action, asking the court to declare its bonds unenforceable. Pursuant to USCIT R. 12(b)(1), Defendant moves to dismiss, claiming a lack of subject matter jurisdiction because of Plaintiff's failure to utilize or exhaust its administrative protest remedies. For the reasons stated herein, the court grants Defendant's motion.

Background

Customs' demand sought payment under eight single entry bonds issued by Hartford to secure entries of frozen cooked crawfish tail meat from the People's Republic of China (the "Hubei entries"). The Hubei entries were imported into the United States between July 30, 2003 and August 31, 2003 by Sunline Business Solution Corporation ("Sunline"). (*See* Am. Compl. ¶¶ 2, 8–9, 13; Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Resp.") 1–2.)

The Hubei entries were liquidated in July 2004 and March 2005 at an antidumping duty rate of 223%, following an antidumping administrative review. (Am. Compl. ¶¶ 10–12.) Sunline has made no payment of these antidumping duties, and on June 22, 2005, Customs made a demand on Hartford for, *inter alia*, the value of the eight

bonds Plaintiff issued to secure payment of duties on the Hubei entries. (*Id.* ¶ 13; Pl.'s Resp. 2.)

Prior to Customs' demand, Hartford was informed, on May 6, 2005, by an outside source, that certain Sunline personnel had been arrested for filing false invoices with Customs. (Aff. of Daniel F. Shapiro, Esq. in Supp. of Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss ("Shapiro Aff.") ¶ 4; Pl.'s Resp. 2.) *See United States v. Shen*, No. 03–CR–1208 (C.D. Cal. Nov. 25, 2003) (cited in Shapiro Aff. ¶ 7). Nonetheless, Hartford did not file a timely protest, pursuant to Section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (2006),[1] regarding the June 22, 2005 demand for payment.

Accordingly, on September 20, 2005, the time period for protesting Customs' June 22, 2005 demand against Hartford with respect to the Hubei entries expired. (Pl.'s Resp. 8; Def.'s Reply Br. in Supp. of its Mot. to Dismiss ("Def.'s Reply") 3.) *See also* 19 U.S.C. § 1514(c)(3) (2000) (amended 2004) ("A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond.").[2]

Plaintiff alleges that, rather than initiating a protest, on October 7, 2005, Plaintiff requested a copy of the court case file for *Shen*, No. 03–CR–1208, from the United States District Court for the Central District of California. (Shapiro Aff. ¶ 7.) On October 14, 2005, Plaintiff received a copy of this case file. (*Id.* ¶ 9.) The file was complete, with the exception of pages 1–38 of the "April 2004 Reporter's Transcript of Proceedings," which were received by Plaintiff on November 22, 2005. (Id.) As a result of reviewing the Shen case file, sometime between October 14, 2005 and November 2, 2005 Plaintiff ascertained that 1) on June 19, 2003, Customs had been informed by letter from Shanghai Taoen International Trading Co. ("STI letter") of the illegal importation of crawfish tail meat into the United States from China; and 2) that Customs had released to Sunline approximately $270,256 in cash deposits posted to secure other entries of crawfish tail meat from China. (*See* Shapiro Aff. ¶¶ 10–13.)

Plaintiff filed suit in this Court on February 26, 2007. In its amended complaint, Plaintiff alleges 1) that Customs' failure to disclose to Hartford the fact of Sunline's investigation for illegal impor-

[1] Unless otherwise noted, further citation to the Tariff Act of 1930 is to Title 19 of the U.S. Code, 2006 edition. In relevant part, 19 U.S.C. § 1514(a) provides that "decisions of the Customs Service . . . as to . . . charges or exactions . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section . . . ."

[2] Subsection 1514(c)(3) was amended in 2004 to extend the protest filing period to 180 days from the date of mailing of notice of demand for payment, Pub. L. 108–429, § 2103(2)(B)(iii),118 Stat. 2598; however, this amendment applies solely to entries made on or after the fifteenth day after December 3, 2004, *see id.* at § 2108, and is therefore not applicable here.

tation of crawfish tail meat prior to Hartford's issuance of bonds securing the Hubei entries "materially increased Hartford's risk . . . beyond that level of risk which Hartford intended to assume on those bonds" (Am. Compl. ¶¶ 34–35), thereby constituting a material misrepresentation fatal to the formation of an enforceable bond agreement (*id.* ¶¶ 41–42); 2) that, "[b]ased on its investigations, Customs knew or should have known that Sunline had induced Hartford to issue the bonds covering the Hubei entries through fraud or material misrepresentations" (*id.* ¶ 47), and that, as a result, "Customs did not, and could not, in good faith materially rely on the bonds issued by Hartford for the Hubei entries" (*id.* ¶ 48); 3) that, prior to releasing to Sunline cash deposits securing other entries of tail meat from China, Customs knew or should have known that the Hubei entries were as yet unliquidated and subject to an increase in dumping duties owed, and that, by releasing this "collateral," Customs increased Hartford's risk, thereby reducing Hartford's obligation to pay by the amount thus released (*id.* ¶¶ 53–62); and 4) that Hartford's obligation to pay should in any case be reduced by the amount of the released cash deposits because Customs "did not act with good faith and fair dealing when it refunded proceeds without notifying Hartford," denying Hartford the opportunity to seek relief under the equitable doctrine of set-off (*id.* ¶¶ 64–69).

For these reasons, Plaintiff contends that its bonds securing the Hubei entries are unenforceable as a matter of contract and suretyship law or, in the alternative, that its obligation to pay should be offset by the amount that was refunded by Customs to Sunline in connection with other entries. (*See* Am. Compl. ¶¶ 34–69.)

In its complaint, Plaintiff seeks to invoke the court's jurisdiction pursuant to 28 U.S.C. § 1581(i) (Am. Compl. ¶ 28), which grants the court exclusive residual jurisdiction over certain civil actions against the United States not covered by subsections 1581(a)–(h).

Defendant seeks dismissal, arguing that Hartford's claims could have been asserted in a timely protest and that jurisdiction for Hartford's challenge to Customs' charge must therefore be established pursuant to 28 U.S.C. § 1581(a).[3] (*See* Def.'s Mem. 1–2.)

Standard of Review

Plaintiff, as the party seeking to invoke the court's jurisdiction, has the burden of establishing that jurisdiction. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). Where, as here, the

[3] In relevant part, 28 U.S.C. § 1581(a) provides that the court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part . . . ."

Defendant brings a facial challenge to dismiss for lack of subject matter jurisdiction, the factual allegations in Plaintiff's pleadings "are taken as true and construed in a light most favorable to the complainant." *Id.* (citation omitted). On the other hand, Plaintiff's "mere recitation of a basis for jurisdiction" is not controlling; rather, the court must determine the "true nature of the action," *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (internal quotation marks and citation omitted), and, where Plaintiff's factual allegations fail to establish a basis for subject matter jurisdiction over the true nature of Plaintiff's action, because Plaintiff has another adequate and reviewable remedy which applies, the case will be dismissed. *See Hartford Fire Ins. Co. v. United States*, __ CIT __, 507 F. Supp. 2d 1331 (2007) (relying on *Parkdale Int'l, Ltd. v. United States*, 31 CIT 720, 491 F. Supp. 2d 1262 (2007) and *Abitibi-Consol., Inc. v. United States*, 30 CIT 714, 437 F. Supp. 2d 1352 (2006)), *aff'd*, 544 F.3d 1289 (Fed. Cir. 2008) ("*Hartford I*").

Discussion

By bringing this action, Hartford seeks to avoid payment of Customs' demand upon its bonds. *See Hartford I*, 544 F.3d at 1293. Thus, as in *Hartford I*, the "true nature" of Hartford's claim is that it is a challenge to that charge. As in *Hartford I*, "[t]he unenforceability of the bonds [Plaintiff] alleges in its complaint is merely a theory of defense upon which Customs may grant the relief of cancelling the charge. In other words, despite alleging otherwise, Hartford is challenging a charge." *Id.* "[T]he proper mechanism to challenge a charge is [by] a protest before Customs pursuant to 19 U.S.C. § 1514(a)(3)," *id.*, denial of which protest may be reviewed in this Court pursuant to 28 U.S.C. § 1581(a). It follows that the exercise of jurisdiction over Plaintiff's case under subsection 1581(i) is precluded by Plaintiff's failure to utilize the administrative protest remedy available to it. *See id.*

Plaintiff makes two alternative arguments in support of its claim that jurisdiction is nevertheless proper here pursuant to 28 U.S.C. § 1581(i). First, Plaintiff alleges that it learned of the bases for its present causes of action after the period for protesting Customs' demand for payment on Plaintiff's bonds for the Hubei entries had already expired. Plaintiff argues that because Hartford therefore could not have availed itself of the protest remedy, jurisdiction under 1581(i) is appropriate in this case. (*See* Pl.'s Resp. 5–13 (citing *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992)).)

Plaintiff's alternate ground for 1581(i) jurisdiction asserts that Hartford's claim is independent of the liquidation of the Hubei entries. Plaintiff contends that because, regardless of the status of liquidation, these bonds would have been subject to nullification by Hartford upon discovery of the contractual formation flaws it now alleges, Hartford's claim should be conceived not as the protest of a charge that could have been brought under 1581(a), but rather as a broader contractual claim that properly belongs under 1581(i). (*See id.* 13–16 (citing *Washington Int'l Ins. Co. v. United States*, 18 CIT 654 (1994) (relying on *Old Republic Ins. Co. v. United States*, 10 CIT 589, 645 F. Supp. 943 (1986))).) The court will consider each argument in turn.

I. Late Discovery of Bases for Protest

As mentioned above, taking Plaintiff's allegations as true for purposes of this facial challenge to subject matter jurisdiction, Plaintiff discovered the two pieces of information underlying its present claims upon reviewing the *Shen* case file at some point between October 14, 2005 and November 2, 2005. (*See* Pl.'s Resp. 10 ("The discovery of the reference to the STI letter is the key piece of information upon which Hartford's first and second causes of action hinge."); *id.* at 2 ("Hartford learned of the STI letter [] after it had requested the public portion of the *Shen* court file, and found reference to it therein."); *see also* Shapiro Aff. ¶¶ 10–11; Pl.'s Resp. 11 ("Hartford's third and fourth causes of action[] are based on Customs['] release of collateral . . . associated with the Hubei entries. . . . Hartford [] learned of [this release] after requesting, receiving and reviewing the *Shen* case file."); *see also* Shapiro Aff. ¶ 13.)

Because the period for protesting Customs' demand for payment on the bonds covering the Hubei entries expired on September 20, 2005, Plaintiff contends that this case is analogous to *St. Paul*, where the court held that when a surety "alleges [that] it did not know of the now-asserted legal basis for protesting the government demand within the time frame set by the statute for a protest[,] [then] . . . the administrative procedures regarding protests [do not necessarily] bar the assertion of a later discovered claim." (Pl.'s Resp. 7 (quoting *St. Paul*, 959 F.2d at 963–64).)

While it is true that "[n]o administrative procedure exists to cover the unusual situation where a claim does not accrue until after the protest period has expired," *St. Paul*, 959 F.2d at 964, it is equally true that a claim accrues when "the aggrieved party *reasonably should have known* about the existence of the claim." *Id.* (emphasis added) (citing *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834

(Fed. Cir. 1991); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Welcker v. United States*, 752 F.2d 1577, 1580–81 (Fed. Cir. 1985); *Braude v. United States*, 585 F.2d 1049, 1051–53 (Ct. Cl. 1978); *Japanese War Notes Claimants Ass'n of the Philippines v. United States*, 373 F.2d 356, 359 (Ct. Cl. 1967)); *see also Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 978 (Fed. Cir. 1994) (same).

In this case, taking Plaintiff's allegations as true, Hartford first learned of the *Shen* case and its potential relevance to Hartford's bonds securing other Sunline entries on or about May 6, 2005. (Pl.'s Resp. 12 n.3; Shapiro Aff. ¶ 4.) Nevertheless, it was not until October 7, 2005 — a full four months later — that Hartford requested a copy of the *Shen* case file, which it obtained one week later. (Shapiro Aff. ¶¶ 7,9.) Because Plaintiff learned of the facts underlying all four of its present claims from reviewing this 2003 case file (*see* Pl.'s Resp. 2, 10–11; Shapiro Aff. ¶¶ 10–13), had Plaintiff requested a copy of this file in a reasonably prompt manner, it could have discovered the bases for all of its present claims well within the then-90 day period for filing its protest with Customs.

Unlike *St. Paul*, therefore, where the plaintiff had first filed a timely protest with Customs on other grounds and only subsequently, during review of the denial of that protest under subsection 1581(a), was made aware for the first time of facts supporting a different claim, *St. Paul*, 959 F.2d at 961, 963–64, Hartford reasonably should have known about the existence of its claims within the time period allotted for filing a protest with Customs, *see, e.g., Pomeroy v. Shlegel Corp.*, 780 F. Supp. 980 (W.D.N.Y. 1991) (plaintiff's claim accrued when he learned of the existence of litigation potentially relevant to his claim, and plaintiff failed to exercise due diligence by waiting three months to obtain a copy of the complaint from that case). Hartford's failure to avail itself of the administrative procedures available to it does not negate the effect of the availability of those procedures. The availability of that adequate protest remedy precludes the exercise of jurisdiction over Plaintiff's present case under subsection 1581(i). *See id.* at 964; *Hartford I*, 544 F.3d at 1292–93.

Accordingly, because Plaintiff's claims are within the scope of claims protestable before Customs pursuant to 19 U.S.C. § 1514(a)(3), *see Hartford I*, 544 F.3d at 1294, and because Plaintiff could and should have reasonably known of the existence of its present claims against Customs within the statutorily prescribed time period for filing protest against Customs' demands for payment, *see, e.g.*, *Pomeroy*, 780 F. Supp. 980; *Johnston v. Standard Min. Co.*, 148 U.S. 360, 370 (1893) ("[T]he plaintiff is chargeable with such knowledge as

he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry."), the court concludes that "Hartford could have brought its claim through the protest mechanism, the denial of which would have triggered review pursuant to subsection 1581(a)," *Hartford I*, 544 F.3d at 1293, and that "[i]ts failure to do so renders subsection 1581(i) unavailable." *Id.*

II. Argument that Claims are Independent of Liquidation

As noted above, Plaintiff also argues, in the alternative, that jurisdiction over this case under subsection 1581(i) is proper because the true nature of its claims is not the protest of a charge demanded pursuant to liquidation of the Hubei entries, but is rather in the nature of broader contractual claims, which "are not of the type [that] Congress intended to subject to the protest mechanism and section 1581(a) jurisdiction." (Pl.'s Resp. 16.)

In support of its argument in this respect, Plaintiff relies on *Washington Int'l Ins. Co. v. United States*, 18 CIT 654 (1994) (Pl.'s Resp. 15–16), which itself relies on *Old Republic Ins. Co. v. United States*, 10 CIT 589, 645 F. Supp. 943 (1986), *Washington Int'l*, 18 CIT at 656. *Old Republic*, and accordingly *Washington Int'l*, are inapposite for the same reasons as those explained in *Hartford I*, __ CIT __, __, 507 F. Supp. 2d at 1336 ("In *Old Republic*, the court permitted a surety's contract challenge to the collection of duties to proceed under section 1581(i) where the claims could not have been made under section 1581(a) because, despite Plaintiff's protest and payment of the duties involved, Customs had legitimately extended the time for liquidation of the goods at issue. Consequently, the *Old Republic* court assumed that section 1581(a) jurisdiction was not available. Also, unlike the plaintiff in *Old Republic*, Plaintiff here has failed to utilize its administrative protest remedy." (citations omitted)).

Plaintiff has not offered any new arguments or evidence to distinguish the present case from *Hartford I*, where the court concluded that "Customs' charge required that Plaintiff make payment under its bond; Plaintiff objects, and thus the true nature of its complaint is to avoid making the requested payment," *Hartford I*, 507 F. Supp. 2d at 1336; *see also Old Republic*, 10 CIT at 598, 645 F. Supp. at 952 ("Where jurisdiction is asserted under 1581(i), the court . . . must determine the thrust of the complaint." (internal quotation marks and citation omitted)). Therefore, the court concludes that Plaintiff's

claims in this action, like its substantively similar claims in *Hartford I*, are precisely the type of claims that could have been brought in a protest with Customs,[4] and hence that jurisdiction pursuant to subsection 1581(i) is not available in this case. *See Hartford I*, 507 F. Supp. 2d at 1336; 544 F.3d at 1293–95.

Conclusion

For all of the foregoing reasons, Defendant's motion to dismiss this action for lack of subject matter jurisdiction is GRANTED, and Plaintiff's complaint is hereby DISMISSED. Judgment will be entered for Defendant.

It is SO ORDERED.

Dated: December 16, 2009
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip Op. 09–143

ENI TECHNOLOGY INC., Plaintiff, v. UNITED STATES, Defendant.

Hon. Donald C. Pogue, Judge
Consolidated Court No. 05–00170

JUDGMENT

Upon reading the parties moving papers for summary judgment and other papers in this proceeding, and upon due deliberation, it is hereby

ORDERED that defendant's classification of the subject RF generators is overruled and defendant's cross-motion for summary judgement is denied in its entirety,

ORDERED that plaintiff's motion for summary judgment is granted as to plaintiff's claim that the "principal use" of the subject RF generators is for plasma processing of semiconductors,

[4] The court notes that this case does not present the same situation as that addressed by the Federal Circuit in *United States v. Utex Int'l Inc.*, 857 F.2d 1408 (Fed. Cir. 1988) (surety not required to file protest and pay full amount of damages in order to preserve its right to defend on issue of liability for liquidated damages) because, unlike in *Utex*, the true nature of Plaintiff's complaint is a challenge to Customs' charge of unpaid duties, rather than a defense against liability pursuant to a liquidated damages clause. *See also United States v. Toshoku Am.,Inc.*, 879 F.2d 815, 818 (Fed. Cir. 1989) ("An assessment of liquidated damages is not a 'charge or exaction' . . . .").

ORDERED that plaintiff's for summary judgment is denied as to plaintiff's claim that all of the subject RF generators are classifiable in subheading 8479.89.84, Harmonized Tariff Schedule of the United States ("HTSUS") (2002–2004).

ORDERED that each of the subject RF generators are classifiable in the HTSUS according to the method or methods of plasma processing in which they were programmed to perform as follows: Models ACG–GB–02 and GHW25A13DF3N01 in subheading 8466.93.85 which relates to etch processing, Model GHW12Z13DF2N01 in subheading 8543.90.10 which relates to physical vapor deposition processing, and Models B–10013–00 and ACG–6B–01 in subheading 8479.89.84 which relates to chemical vapor deposition processing and/or undetermined or multiple processing methods, and

ORDERED that U.S. Customs and Border Protection shall reliquidate the subject entries and refund, with lawful interest, all duties paid on the subject RF generators.

Dated: New York, NY
This 16th day of Dec. 2009

/*s*/ *Donald C. Pogue*
JUDGE