U.S. Customs and Border Protection

Slip Op. 12–48

UNITED STATES STEEL CORPORATION, Plaintiff, -and- NUCOR CORPORATION, Intervenor-Plaintiff, v. THE UNITED STATES, Defendant, -and- ESSAR STEEL, LIMITED, Intervenor-Defendant.

Court No. 08–00216

[Remand to International Trade Administration for reconsideration of its results of initial remand.]

Dated: April 11, 2012

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer*, *Jeffrey D. Gerrish*, and *Ellen J. Schneider*) for the plaintiff.

Wiley Rein LLP (*Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*) for the intervenor-plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Thomas M. Beline*), of counsel, for the defendant.

Arent Fox LLP (Mark P. Lunn and *Diana Dimitriuc Quaia*) for the intervenor-defendant.

MEMORANDUM & ORDER

AQUILINO, Senior Judge:

This court's slip opinion 11–66, 35 CIT ___ (2011), filed herein, familiarity with which is presumed, granted plaintiff's and intervenor-plaintiff's motions for judgment on the agency record compiled *sub nom*. *Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 Fed.Reg. 31,961 (Dep't of Comm. June 5, 2008) ("*Final Results*"), to the extent of remand to the International Trade Administration, U.S. Department of Commerce ("ITA") to clarify or reconsider its analysis of the intervenor-defendant Essar Steel Limited's entitlement to duty-drawback adjustment within the meaning of 19 U.S.C. §1677a(c)(1)(B).

In conformity therewith, the defendant has filed ITA's Final Results of Redetermination Pursuant to Court Remand, upon which each of the parties to this case has now filed with the court written com-

ments. Indeed, those on behalf of the intervenor-defendant have caused the defendant to concede a "ministerial error" and therefore to itself request a "voluntary remand" to correct the matter. *See* Defendant's Response to Comments Upon the Remand Determination, pp. 12–13. Each of the other parties also seeks further reconsideration.

I

ITA did reconsider Essar's duty-drawback claim by reopening the administrative record and obtaining from it redemption applications lodged with the Government of India ("GOI") related to its particular advance licenses, a letter from the GOI releasing Essar from its obligation to pay duties upon completion of the required exports for each advance license, "including the appropriate linkage between imports and exports[,]" bank realization certificates confirming inward remittance of export proceeds, and bills of lading confirming shipment to the United States. *See Remand Results*, p. 4, referencing Essar's August l7, 2011 Response. To prove that duty-free import of raw materials took place prior to exportation of its finished goods, Essar "submitted each shipping bill that contains an endorsement that specifies the advance license number and date." *Id*. at 4–5 (citation omitted). ITA then preliminarily determined Essar had provided sufficient proof of complete removal of the contingent liability for deferred import duties under the GOI advance license program. *See id*., referencing Slip Op. 11–66, p. 12.

At that point, the domestic-industry petitioners cum plaintiffs United States Steel Corporation ("USSC") and Nucor Corporation requested that the agency deny Essar's duty-drawback claim with respect to one particular U.S. invoice, arguing the company did not provide export documentation linking that invoice to duty drawback under any of Essar's advance licenses and that the documentation it provided shows the particular claimed advance license identifies other invoices in the database but fails to indicate that sales pursuant to the one invoice were purportedly made pursuant to that advance license. *See id*. at 5–6. ITA agreed "nothing on the record links exports pursuant to that invoice to any of Essar's advance licenses" and thus disallowed the duty-drawback claim on exports pursuant to that particular invoice, but otherwise allowed the claim(s) as to the other documented export invoices. *See id*. at 6–7. *See also* Memorandum to File from V. Cho, Case Analyst, "Remand of the 2005–2006 AD Admin. Rev. of Certain Hot-Rolled Carbon Steel Flat Products from India: Calculation Memorandum for Essar Steel Ltd.", p. 4 (Oct. 3, 2011) ("CalcMemo") (Essar failed to "report the export documents that link [a particular] invoice . . . to the duty drawback under its advance

license number"). Confidential Record Document ("ConfDoc") 53. *See* Def's Conf. Appx., Tab A.

A

With respect to the single disallowed invoice, Essar argues it satisfied its burdens of production and persuasion on its claim for duty drawback. The evidence of record, however, does not support it. Essar provided a copy of the invoice and a list of invoices purportedly related to a particular advance license, but the one in question is not among those listed for that advance license. *See* Essar's Aug. 17, 2011 Supplemental Questionnaire Response. *See also* Nucor Corp. Appx. to Nov. 2, 2011 Comments, Tab 7. Essar's attempt to establish a connection, by providing a list of exports and arguing that invoices are related to shipping bills by quantity and shipping bill number, fails because the invoice number is not actually listed on the bank certificates of export and realization. Lacking from the record is a copy of the relevant shipping bill, and therefore ITA found no demonstrable connection between the invoice and the relevant advance license.

Substantial evidence on the record supports the *Remand Results* as to the allowable extent of Essar's eligible duty-drawback claim, which must therefore be, and hereby are, sustained in regard thereto.

B

ITA having permitted Essar's duty-drawback claim in part and adjusted its export price ("EP") as a result, USSC and Nucor argue the agency should also have made a corresponding adjustment by increasing Essar's cost of production in accordance with the change in ITA policy recently upheld in *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335, 1341–44 (Fed.Cir. 2011). The agency denied their "claim", relying on *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed.Cir. 2010), reasoning the matter should have been raised in the original proceeding and concluding it was either waived or not administratively exhausted. *See Remand Results*, p. 8 and 604 F.3d at 1375 (holding respondent failed to exhaust administrative remedies when it did not challenge omission from methodology in its administrative case brief, even though it raised the issue in rebuttal brief and again during ministerial comment period).

Relying on *Qingdao Taifa Group Co. v. United States*, 33 CIT ___, ___, 637 F.Supp.2d 1231, 1237 (2009), the plaintiffs deny that exhaustion or waiver is applicable because the preliminary administrative-review determination denied Essar's duty-drawback claim, which meant ITA had to re-open the record on remand in search of evidentiary support therefor, and that was the first instance the matter of its calculation methodology became of moment.

The defendant responds that (1) neither USSC nor Nucor sought to amend its complaint to add a new count to address the issue, (2) the change in administrative practice affirmed in *Saha Thai* occurred after the completed *Final Results*, *supra*, (3) the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U.S. 519 (1978), "expressly held that . . . consideration of extra-record developments would lead to never-ending administrative proceedings and subsequent [*sic*] judicial review"[1], and (4) the only exception to the "record rule" is *Home Prods. Int'l v. United States*, 633 F.3d 1369 (Fed.Cir. 2011), wherein a litigant presented "clear and convincing evidence establishing a *prima facie* case of fraud." Def's Resp. to Comments Upon the Remand Determ., pp. 8–9. Summarizing, it argues,

> [i]n point of fact, nothing changed from the final results published in June 2008 to Commerce's remand redetermination released October 2011 with respect to Essar's duty drawback adjustment. Commerce continued to grant Essar its duty drawback offset. The claim that Essar's cost of manufacturing should have been adjusted should have been raised when US Steel and Nucor challenged Commerce's Final Results in 2008. At no point did US Steel or Nucor amend their complaint to add a new count. They do not attempt to do so now. Accordingly, this issue was settled with the final results and later-in-time case law does not resuscitate waived arguments. Doing so here would run contrary to the Supreme Court's holding in *Vermont Yankee*. . . . Commerce properly limited its decision in the remand redetermination to the specific factual issue remanded by the Court.

Id. at 10.

To the extent it is arguing ITA's hands were tied by a "record rule" *vis-à-vis* application of its new policy to a matter remanded for reconsideration, the argument misstates the law. *See e.g., Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1378–79 (Fed.Cir. 2004) (any errors in remand orders do not survive ITA decisions to adopt a new

[1] *Videlicet*:

> "Administrative consideration of evidence . . . always creates a gap between when the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."

435 U.S. at 554–55, quoting *ICC v. Jersey City*, 322 U.S. 503, 514(1944).

policy; the Supreme Court "has repeatedly emphasized[] the *Chevron* doctrine contemplates that agencies can and will abandon existing policies and substitute new approaches" as necessary, and including on remand); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed.Cir. 2001) ("an agency must be allowed to assess 'the wisdom of its policy on a continuing basis'", quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984)).

The *Remand Results* correctly note the specific question on remand was "whether record evidence proves Essar's contingent liability for deferred import duties under the duty drawback program has been removed or permanently excused". But this court's order did not state "without considering any calculation changes should [ITA] continue to grant the duty drawback adjustment." *See Remand Results*, p. 8, referencing Slip Op. 11–66, p. 9. And, in point of fact, something *has* changed. Whereas ITA's original duty-drawback determination rested upon an insufficient premise, it now rests on firmer footing. Even though the result is the same, the remand determination replaced the original determination as a matter of law. *See, e.g., Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357, 363 and 427 F.Supp.2d 1249, 1255, n. 11 (2006).

The defendant claims the plaintiffs "had the opportunity to raise their arguments in their case briefs in the administrative review", but the matter was not a problem of exhaustion or waiver: informing ITA that it must apply its newly-announced practice (of adding exempted duties to the respondent's costs of production and/or constructed value when ITA adjusts EP to account for those exemptions) was not the plaintiff-petitioners' burden.

It is axiomatic that agencies must follow their own announced or established practices, or else provide justifiable reasoning for deviation therefrom. *E.g., SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed.Cir. 2008); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368 (Fed.Cir. 2003). ITA applied the new practice on numerous occasions by the time this matter was remanded[2], and, as noted, the practice was recently upheld by the Court of Appeals for the Federal

[2] *See* the Issues and Decision Memoranda accompanying *Ball Bearings and Parts Thereof from France, Germany, and Italy*, 76 Fed.Reg. 52,937 (Aug. 24, 2011) (final results of antidumping administrative and changed-circumstances reviews) at cmt. 8; *Polyethylene Retail Carrier Bags from Thailand*, 76 Fed. Reg. 12,700 (March 8, 2011) (final results of antidumping-duty administrative review) at cmt. 5; *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 75 Fed. Reg. 64,696 (Oct. 20, 2010) (final results of antidumping-duty administrative review) at cmt. 2; *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 75 Fed. Reg. 64,250. (Oct.19, 2010) (final results of antidumping-duty administrative review) at cmt. 3; *Certain Steel Concrete Reinforcing Bars from Turkey*, 74 Fed. Reg. 45,611 (Sept. 3, 2009) (final results and final partial rescission of antidumping-duty

Circuit in *Saha Thai*, *supra*, 635 F.3d at 1341–44, of which the agency is presumed to have had notice. This being the case, the burden on remand was on ITA to abide its new practice or explain deviation therefrom.

The agency is not to be faulted, of course, for following a strict construction of the terms of the remand order, but its applied duty-drawback methodology in the context of Essar's claim cannot be sustained on the record of the *Remand Results* at this point. They therefore must be, and hereby are, remanded for application of the new policy or reasonable explanation of inapplicability.

C

Essar's claim for duty drawback having been allowed in part, it and ITA additionally agree the *Remand Results* should be remanded again to allow correction of a certain ministerial error in computer programming (that inadvertently resulted in setting "DTYDRAWU" to zero for all sales, not just for the one invoice in question). The *Remand Results* are therefore hereby further remanded for correction thereof.

II

The remaining comments concern ITA's determination of the "date of sale" for Essar's EP sales. The statute does not specify the manner in which it shall determine such a date. The Statement of Administrative Action approved by Congress as part of the Uruguay Round Agreements Act explains that it is the "date when the material terms of sale are established", *i.e.*, price, quantity, delivery terms, payment terms, and tolerances. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, p. 810. Normally, ITA presumes the date of invoice as the EP sale date, but the presumption is rebuttable if and when the agency is "satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale."[3] *See also Antidumping Duties; Countervailing Duties*, 62 Fed.Reg. 27,296, 27,349 (Dep't of Comm. May 19, 1997) ("If [ITA] is presented with satisfactory evi-

administrative review) at cmts. 1 &2; and *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 73 Fed.Reg. 61,019 (Oct. 15, 2008) (final results of antidumping-duty administrative review) at cmt. 5.

[3] 19 C.F.R. §351.401(i) provides as follows:

. . . 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 []he . . . is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

dence that the material terms of sale are finally established on a date other than the date of invoice, [it] will use that alternative date as the date of sale"). Any inquiry is intended to be flexible. *See, e.g., Allied Tube and Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F.Supp.2d 207, 219 (2000) (Congress "has expressed its intent that, for antidumping purposes, the date of sale be flexible so as to accurately reflect the true date on which the material elements of sale were established"); *Sahaviriya Steel Indus. Pub. Co. v. United States*, 34 CIT ___, ___, 714 F.Supp.2d 1263, 1280 (2010) ("Flexibility is the cornerstone of Commerce's date of sale analysis").

Essar argues the *Remand Results* incorrectly use invoice date as its EP sale date. It contends the correct date is the date of the letter of credit, as determined in the *Final Results*, wherein ITA reasoned,

> for Essar's EP sales, the material terms of sale are set at the time of the sales contract, but are occasionally changed when the letter of credit is issued. Because the letter of credit is issued after the sales contract, any changes to the letter of credit would also signal a departure from the sales contract. [ ] Petitioners point to instances where material terms changed after the letter of credit was issued. In these instances, the original letter of credit was amended and we used the amended letter of credit. Thus, for the instant review, the letter of credit is a better test than the sales contract for when the terms of sale are set. Moreover, in all circumstances, the invoice is issued after the letter of credit, or in some instances the amended letter of credit, when the merchandise is shipped and the essential terms are never changed between the letter of credit, or the amended letter of credit, and the invoice.

Issues and Decision Memorandum accompanying *Final Results*, 73 Fed. Reg. 31,961, cmt. 21 (footnote omitted), PDoc 180.

In the *Remand Results*, page 9, ITA changed its position and determined "the material terms of sale were not fixed on the letter of credit date or amended letter of credit date." Because of multiple instances of price and quantity being invoiced beyond the tolerances in the sales contracts, the agency determined there was no "meeting of the minds" as of the letter-of-credit date or amended letter-of-credit date and concluded (essentially) Essar had not overcome the presumption in favor of using the date of invoice as the EP sales date. *See Remand Results*, pp. 9–10.

Essar does not challenge ITA's discretion as to the appropriate date of sale or the regulatory presumption in favor of invoice date, but, of

course, it is the respondent's burden to present sufficient evidence to establish that the material terms are set at a different time if it wishes to overcome that presumption. *See*, *e.g.*, *Sahaviriya Steel*, 34 CIT at ___, 714 F.Supp.2d at 1279; *Nakornthai Strip Mill Public Co. v. United States*, 33 CIT ___, ___, 614 F.Supp.2d 1323, 1334 (2009) ("*Nakornthai III*"). Essar's attempt involves pointing to the unchanged evidentiary record between the *Final Results* and the *Remand Results* and arguing only one invoice had an overall quantity change of more than the tolerance of the letter of credit. It contends that the decisions ITA relied upon for support, *Nakornthai III* and *Nucor Corp. v. United States*, 33 CIT ___, ___, 612 F.Supp.2d 1264, 1271 (2009), involved only limited changes between invoice and letter-of-credit issuance and that these decisions actually support its position because its record of changes consists of only "two items out of approximately 280", which Essar contends does not amount to substantial evidence but proof of the correctness of ITA's original position in the *Final Results*. *See generally* Def-Int. Essar Steel Ltd's Comments . . . Pursuant to Court Remand, pp. 4–10.

The "two items" were apparently of greater impact than Essar represents. ITA addressed the reliance on *Nakornthai III* and *Nucor* by explaining that "the material term of sale changed on one contract" in each of those matters, whereas "Essar's material terms of sale changed on many transactions [by] contrast". *Remand Results*, p. 11, referencing *Nakornthai III*, 33 CIT at ___, 614 F.Supp.2d at 1326 ("one U.S. sale of hot-rolled steel pursuant to a contract" that was changed), and *Nucor*, 33 CIT at ___, 612 F.Supp.2d at 1301 ("a price change as to one of ICDAS' U.S. contracts").

The standard is whether ITA's selection of the presumptive date of sale is unsupported by substantial evidence. *See* 19 U.S.C. §1516a(b)(1)(B)(i); *Allied Tube*, *supra*, 24 CIT at 1373, 127 F.Supp.2d at 220–21. Applying it herein, the court finds adequate support for the agency's decision, given the detailed changes in material terms of sale between the letters of credit and the related invoices. *See Remand Results*, pp. 9–10 ("Essar's material terms of sale were altered outside of the built-in tolerances in the sales contracts and those changes occurred up to the invoices in Essar's submitted sales documentation"); Def's Conf. Appx., Tab A (CalcMemo), Tab B (Essar's Aug. 16, 2007 Questionnaire Response, Conf Doc 33); Nucor's Conf. Appx., Tab 7 (copies of Essar's letters of credit and invoices). Hence, the *Remand Results* can be, and they hereby are, sustained as to ITA's selection of the date of intervenor-defendant Essar's EP sales.

III

The defendant may have until May 25, 2012 to amend and correct the *Remand Results* in accordance with the foregoing and report the results thereof to the parties and the court.

So ordered.

Dated: April 11, 2012
New York, New York

/*s*/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

Slip Op. 12–49

UNITED STATES, Plaintiff, v. GREAT AMERICAN INSURANCE CO. OF NY, AND WASHINGTON INTERNATIONAL INSURANCE CO., Defendants.

Before Richard W. Goldberg, Senior Judge
Court No. 09–00187

[Plaintiff's Motion to Amend the Judgment is denied.]

Dated: April 11, 2012

Stuart F. Delery, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; *Amy M. Rubin*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Joseph M. Barbato* and *Andrew G. Jones*, Office of Assistant Chief Counsel for the U.S. Customs and Border Protection, Of Counsel; *Joanna Theiss*, Office of Chief Counsel for the International Trade Administration, U.S. Department of Commerce, Of Counsel, for the plaintiff.

Mark D. Plevin, *Theodore R. Posner*, and *Alexander H. Schaefer*, *Crowell & Moring LLP*, for defendant, Great American Insurance Company of New York.

Thomas Randolph Ferguson and *Arthur K. Purcell*, *Sandler*, *Travis*, *& Rosenberg*, *P.A.*, for defendant, Washington International Insurance Company.

OPINION AND ORDER

Goldberg, Senior Judge:

Before this Court is Plaintiff's motion to amend the judgment entered on August 31, 2011 for the above-referenced case. Plaintiff moves to amend the judgment to include pre-and post-judgment interest, pursuant to USCIT Rule 59(e).

Background

Plaintiff, the United States ("Government"), moved for summary judgment against Defendant, Great American Insurance Company of New York ("GA"), to recover under eight single transaction basic

importation and entry bonds and against defendant, Washington International Insurance Company ("WIIC"), to recover under one continuous such bond.

This Court entered judgment on August 31, 2011, granting the Government's motion for summary judgment with respect to five of GA's single transaction bonds and WIIC's continuous bond.

Discussion

The Government argues that it is entitled to interest under 19 U.S.C. § 580 ("section 580 interest"), which it claims is a statutory incentive for the prompt payment of debts, designed to prevent the Government from having to sue to collect those debts. The Government also contends that it is entitled to equitable prejudgment interest, which compensates the Government for the lost use of the funds owed.

Defendants oppose the Government's motion, arguing that: (1) the Government did not timely brief the issue of prejudgment interest; (2) even if the Court entertains the motion, the Government is not entitled to equitable interest; (3) if equitable interest is awarded, it did not accrue until after Defendant's protest was denied; (4) 19 U.S.C § 580 does not apply to surety bonds securing the payment of antidumping duties; and (5) the Government is not entitled to both equitable and statutory interest.

A Rule 59(e) motion "involves 'reconsideration of matters properly encompassed in a decision on the merits.'" *United States v. Ford Motor Co.*, 31 CIT 1178, 1180 (2007) (quoting *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L. Ed. 2d 325, 331 (1982)). Specifically, a Rule 59(e) motion questions the correctness of a judgment and seeks to have the judgment altered or amended. *Id.* The motion must be "aimed at reconsideration, not initial consideration." *Fed. Deposit. Ins. Corp. v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (citations omitted).[1] Thus, a motion under Rule 59(e) "cannot be used to raise arguments that could, and should, have been made before the judgment issued." *Marseilles Homeowners Condo. Ass'n v. Fid. Nat'l Ins. Co.*, 542 F.3d 1053, 1058 (5th Cir. 2008);

[1] This Court commonly refers to other courts' interpretations of the Federal Rules of Civil Procedure when a specific federal rule corresponds to this Court's own rules. *See Apple Computer, Inc. v. United States*, 14 CIT 719, 720, 749 F. Supp. 1142, 1144 (1990) ("In considering a motion to alter or amend the judgment, made under Rule 59(e) of the Rules of this Court, the court may look for guidance to those cases which have interpreted and applied the corresponding federal rule of civil procedure.").

see also Fed. Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986).[2]

The Government's motion requests that the Court reconsider the correctness of its judgment. However, the Government fails to recognize that the Court's judgment purposely excluded an award of interest because the Government did not raise this issue in its motion for summary judgment. The Government only made two references to interest in the papers submitted to the Court. First, the *wherefore clause* of the Government's complaint sought a sum of money "together with pre-and post-judgment interest . . . ." The second reference is in the *proposed order* attached to the Government's motion for summary judgment, which merely stated that the Government was seeking a specific sum of money "plus interest in accordance with 19 U.S.C. § 580." The Government did not request equitable prejudgment interest in its complaint or its motion for summary judgment.

Now, in its Rule 59(e) motion, the Government sets forth the reasons it is entitled to prejudgment interest under 19 U.S.C. § 580. The plain language of the statute does not indicate whether the provision applies to bonds securing payment of antidumping duties. 19 U.S.C. § 580 provides that:

> Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due.

Notably, this statute was enacted in 1799. Act March 2, 1799, ch. 22, § 65, 1 Stat. 676. At that time, the only duties collected were customs duties. Thus, 19 U.S.C. § 580 significantly predates antidumping law, which emerged in the early twentieth century, and it is unclear whether it applies to bonds issued to secure payment of antidumping duties.

The Government asserts that section 580 interest applies, irrespective of whether the bonds secure customs, antidumping, or countervailing duties, because it "is an exaction aimed at motivating recalcitrant debtor sureties to pay their debts instead of forcing the Government to sue to collect on those debts." Pl. Br. at 8. The Government takes this language from a 1983 proposed change to the Customs regulations that sought to establish interest charges on

[2] A court "may grant a Rule 59(e) motion to alter or amend the judgment if the movant presents newly discovered evidence that was not available [before] or if the movant points to evidence in the record that clearly establishes a manifest error of law or fact." *Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1369 (Fed. Cir. 2004); *see also Marseilles Homeowners*, 542 F.3d at 1058 (stating that a motion under Rule 59(e) must clearly set forth a "manifest error of law or fact or must provide newly discovered evidence").

certain delinquent accounts. *See* 48 Fed. Reg. 10,077 (Mar. 10, 1983). The specific portion relied on by the Government begins with the statement that "[i]t is the position of the U.S. Customs Service that section 580 is not an interest charge for the use of funds, but an exaction aimed at motivating apparently recalcitrant debtor sureties to pay . . . ." *Id.* at 10,078. In the final adopted rule, Customs' analysis states:

> The Act of March 2, 1799, C. 22, Section 65, 1 Stat. 676 (19 U.S.C. 580), is applicable to suits brought to the Government upon all bonds for the recovery of duties. The importer of record is liable for the principal amount of the debt (duty) and interest which is assessed upon the late payment of that principal amount. A surety bears the same liability. If Customs must sue the debtor under a bond, it is entitled to recover the principal amount of the debt, plus interest assessed for the late payment, plus an additional amount of 6 percent assessed under 19 U.S.C. 580. [Customs] believe[s] 19 U.S.C. 580 is applicable only against delinquents where the Government must pursue collection through judicial action . . . .

51 Fed. Reg. 34,954 (Oct. 1, 1986).

In ruling on the Government's motion, the Court need not, and does not, decide whether Customs' construction of section 580 nearly thirty years ago is correct. This issue should have been raised in the Government's motion for summary judgment, especially considering the Government's argument that Customs' interpretation is entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which is a separate legal issue. It is not appropriate to raise the issue in a Rule 59(e) motion because "'[p]rejudgment interest, unlike post-judgment interest, normally is considered an element of the judgment itself, that is, of the relief on the merits . . . .'" *First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 572 (7th Cir. 2009) (quoting *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 410 (7th Cir. 1999)). Thus, the party seeking interest must clearly set forth its request for such relief and the legal basis supporting it. This is particularly true in light of the ambiguity of the statute under which the Government claims it is entitled to interest.

The Government also asserts that it is entitled to equitable prejudgment interest. The Government's contention that it is entitled to both statutory and equitable interest is incorrect because it is in the absence of a statute that provides for interest that a court may exercise its equitable powers to award prejudgment interest. *See City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194,

115 S. Ct. 2091, 2095, 132 L. Ed. 2d 148, 154 (1995) (stating that "the absence of a statute merely indicates that the question is governed by traditional judge-made principles") (citing *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336–337, 108 S. Ct. 1837, 1843, 100 L. Ed. 2d 349, 359 (1988)). Nevertheless, the Government failed to raise this issue in its motion for summary judgment, and even if it had, the Court is not convinced that a balancing of the equities would result in an award of equitable prejudgment interest.

The Court notes that in the case upon which the Government primarily relies, *United States v. Canex Int'l Lumber Sales, Ltd.*, 35 CIT __, Slip Op. 11–98 (Aug. 5, 2011), the Government did not request interest pursuant to 19 U.S.C. § 580. In that case, the Government *did* raise and fully brief the issue of equitable prejudgment interest in its motion for summary judgment. The Court finds that case inapposite because (1) it did not address a bond securing payment of antidumping duties; (2) it did not address section 580 interest; and (3) the parties briefed the issue of prejudgment interest at the appropriate time in the litigation process, not in a subsequent Rule 59(e) motion.

Here, other than making two passing references to interest in the complaint and a proposed order, the Government did not raise or brief the issue of prejudgment interest in its motion for summary judgment. Thus, the Government's motion to amend the judgment is not requesting the Court to reconsider this issue, but rather, to consider it for the first time, which contravenes the purpose of a Rule 59(e) motion. *World Univ. Inc.*, 978 F.2d at 16. Given the statutory ambiguity and the unique nature of the request,[3] it was incumbent upon the Government to set forth the reasons that it was entitled to section 580 interest in its motion for summary judgment. The Government cannot now raise arguments that it could, and should, have made before the judgment issued. *Marseille Homeowners*, 542 F.3d at 1058.

Therefore, although the issue of prejudgment interest *may* be a proper subject for a Rule 59(e) motion, the party seeking prejudgment interest must have requested such interest prior to the entry of judgment. *Monticello*, 555 F.3d at 572. The Government's attempt to "[raise] the issue of prejudgment interest for the first time in a Rule 59(e) motion, after summary judgment [has been] entered, [is] too

[3] Research has not revealed a reported decision in which the U.S. Court of International Trade has awarded interest pursuant to 19 U.S.C. § 580 in a case in which the Government has sued an importer or surety for recovery on a bond securing payment of antidumping duties.

late." *Id.* In sum, because there is nothing for the Court to reconsider and no oversight for the Court to rectify, the Government's Rule 59(e) motion is denied.[4]

Conclusion and Order

For the foregoing reasons, the Government's motion to amend the judgment to include interest is **DENIED. IT IS SO ORDERED**.

Dated: April 11, 2012
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

[4] The Court declines to award post-judgment interest at this time because the Government did not address this issue in its motion. The Court notes that the statute to which the Government refers in its proposed amended judgment, 28 U.S.C. § 1961, does not apply. *See* 28 U.S.C. § 1961(a), (b)(2).