Slip Op. 07–186

ESSO STANDARD OIL CO. (PR), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 98–09–02814

[Partial summary judgment for plaintiff under 19 U.S.C. § 1520]

Dated: December 28, 2007

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Curtis W. Knauss*, *Steven P. Florsheim*, *Frances P. Hadfield*, *Robert F. Seely*, and *Robert B. Silverman*) for the plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Tara K. Hogan*); *Richard McManus*, Office of Chief Counsel, U.S. Customs & Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge: Reference is made to the court's recent opinion in *Esso Standard Oil Co. (PR) v. United States*, Slip Op. 07–171, 2007 WL 4125999 (CIT Nov. 20, 2007). The parties have consulted on the judgment to be entered and determined that pursuant to the court's prior opinion concluding that plaintiff's entries may qualify for relief under 19 U.S.C. § 1520, judgment should enter for plaintiff on the entries covered by protest numbers 4909–97–100057 and 4909–97–100058. That is, plaintiff's first attempt to obtain a refund of overpaid Harbor Maintenance Taxes ("HMT") as to the entries covered by the "57" protest number, which would be premature if it were a true protest, is not premature as a pre-liquidation request for refund of inadvertently collected charges under 19 U.S.C. § 1520(a)(4). The "58" protest entries are subject to reliquidation under former 19 U.S.C. § 1520(c).

The dispute now focuses on protest number 4909–97–100059. Because the government's briefing in this matter did not clearly indicate that the entries covered by the "59" protest were the subject of a

reliquidation request outside the one-year period allowed by former 19 U.S.C. § 1520(c), the court did not address this issue. Rather, the government claimed that § 1520(c) did not apply at all. Nonetheless, Defendant's Proposed Findings of Uncontroverted Fact, submitted with its opening brief, reflect that plaintiff's original request for reliquidation was dated August 25, 1997, more than one year after the last liquidation covered by the "59" protest. Thus, it was administratively time-barred. Plaintiff does not dispute the accuracy of relevant dates asserted by the defendant. Instead, it argues that the court's prior opinion requires that judgment be granted on the "59" protest.

As judgment has not been entered, it is permissible for both parties to clarify their positions. Accordingly, judgment will be entered on the first two protests in favor of plaintiff, because this is proper under 19 U.S.C. § 1520, and judgment will be denied as to the last protest, as this is also the proper course under § 1520.

ESSO STANDARD OIL CO. (PR), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 98–09–02814

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 plaintiff's motion for summary judgment is granted with respect to protest numbers 4909–97–100057 and 4909–97–100058, ORDERED that refund shall be made of Harbor Maintenance Taxes paid on the entries covered by such protests, ORDERED that any refunds payable by reason of this judgment are to be paid with interest as provided for by law, and ORDERED judgment is awarded to defendant as to protest number 4909–97–100059.

SLIP OP. 07–187

IMPACT STEEL CANADA CORPORATION, ET AL., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge
Court No. 06–00419

[Defendant's motion to dismiss granted in part and denied in part. Plaintiffs' motion for judgment upon the agency record denied.]

December 28, 2007

Hogan & Hartson, LLP (*Harold D. Kaplan*, *Craig A. Lewis* and *Lewis E. Leibowitz*) for the plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); *Mark B. Lehnardt*, International Trade Administration, U.S. Department of Commerce, of counsel, for the defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*John J. Mangan*, *Jeffrey D. Gerrish*, *Robert E. Lighthizer*, *Neena G. Shenai* and *Jared R. Wessel*) for the defendant-intervenor.

OPINION

Restani, Chief Judge: This matter is before the court on Plaintiffs Impact Steel Canada Corporation, Impact Steel Canada Company, and Impact Steel, Inc.'s ("Plaintiffs") motion for judgment upon the agency record and Defendant United States' motion to dismiss. Plaintiffs are importers and exporter-resellers of certain corrosion-resistant carbon steel flat products from Canada. (Req. for Admin. Rev. (Aug. 31, 2004), *available at* Mem. of P. & A. in Supp. of Pls.' Mot. for J. Upon the Agency R. ("Pls.' Br.") at Attach. 1 (P.R. 3).) Plaintiffs challenge the United States Department of Commerce's ("Commerce") interpretation of its regulations and resulting liquidation instructions as to antidumping duties on merchandise entered into the United States by resellers unaffiliated with a foreign producer. For the reasons stated below, the court finds its opinion in *Parkdale Int'l, Ltd. v. United States*, 508 F. Supp. 2d 1338 (CIT 2007) ("*Parkdale II*"), persuasive, such that the court concludes it has jurisdiction to adjudicate Plaintiffs' facial challenges to Commerce's policy, but nonetheless denies Plaintiffs' motion for judgment on the agency record, finding Commerce's policy valid.

BACKGROUND

An antidumping duty order was first applied to these steel products in 1993, and Plaintiffs made entry of steel products subject to the order. *See Certain Corrosion-Resistant Carbon Steel Flat Prods.*

& Certain Cut-to-Length Carbon Steel Plate From Canada, 58 Fed. Reg. 44,162 (Dep't Commerce Aug. 19, 1993). Under 19 U.S.C. § 1675, administrative reviews of an antidumping duty order are granted only upon request in the "anniversary month" in which the relevant order was published. 19 U.S.C. § 1675(a)(1) (2000). If no administrative review is requested, Commerce's regulation, 19 C.F.R. § 351.212(c)(1), governs the assessment of duties on entries subject to an antidumping duty order, including those of a reseller who exports subject Court No. 06-00419 Page 3 merchandise to the United States. 19 C.F.R. § 351.212(c)(1) (2007).[1]

On October 15, 1998, Commerce published notice and requested comments concerning its intention to clarify 19 C.F.R. § 351.212. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 63 Fed. Reg. 55,361 (Dep't Commerce Oct. 15, 1998) ("*Reseller Notice*"). Commerce extended the comment period on November 12, 1998, to allow for additional comments, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 63 Fed. Reg. 63,288 (Dep't Commerce Nov. 12, 1998) ("*1998 Comments*"), and in 2002, Commerce again requested additional comments on the proposal. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties; Additional Comment Period*, 67 Fed. Reg. 13,599 (Dep't Commerce Mar. 25, 2002) ("*2002 Comments*"). Commerce published its final policy statement for implementation of its reseller policy on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954 (Dep't Commerce May 6, 2003) ("*Reseller Policy*").

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[1] 19 C.F.R. § 351.212(c), provides:

(c) Automatic assessment of antidumping and countervailing duties if no review is requested.

(1) If the Secretary does not receive a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) To continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section.

(3) The automatic assessment provisions of paragraphs (c)(1) and (c)(2) of this section will not apply to subject merchandise that is the subject of a new shipper review (see § 351.214) or an expedited antidumping review (see § 351.215).

19 C.F.R. § 351.212(c).

The *Reseller Policy* states that automatic liquidation at the cash-deposit rate of the producer will apply to a reseller, who does not have its own rate, only when no administrative review has been requested of either the reseller or the producer. *Id.* If a review is conducted of "a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales." *Id.* If Commerce determines that "the producer knew, or should have known, that the merchandise it sold to the reseller was destined for the United States," the producer's assessment rate will be used. *Id.* Otherwise, the reseller's merchandise will be liquidated at the all-others rate, if no company-specific review was done of the reseller during that period. *Id.*

On August 3, 2004, Commerce provided notice of opportunity for interested parties to request an administrative review for the period of August 1, 2003 through July 31, 2004, specifically alerting them of the *Reseller Policy*. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 69 Fed. Reg. 46,496 (Dep't Commerce Aug. 3, 2004). After timely requests, Commerce initiated an administrative review of Impact Steel Canada Corporation and Impact Steel Canada, Ltd.[2] and the interested producers, Dofasco Inc. ("Dofasco") and Stelco Inc. ("Stelco"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 Fed. Reg. 56,745 (Dep't Commerce Sept. 22, 2004). Plaintiffs subsequently withdrew the request for administrative review, pursuant to 19 C.F.R. § 351.213(d)(1). (Withdrawal of Admin. Rev. Req. (Nov. 12, 2004), *available at* Pls.' Br. at Attach. 2 (P.R. 10).) Pursuant to Plaintiffs' withdrawal letter, Commerce rescinded the administrative review of Impact Steel Canada, Ltd., effective November 12, 2004. *See Notice of Rescission, in Part, of Antidumping Duty Administrative Review: Corrosion-Resistant Carbon Steel Flat Products From Canada*, 70 Fed. Reg. 17,648 (Dep't Commerce Apr. 7, 2005). On February 9, 2005, Commerce sent instructions to United States Customs and Border Protection ("Customs") to liquidate all entries of all firms except for those that requested an administrative review, including Impact Steel Canada, Ltd., Dofasco, and Stelco. (Liquidation Instructions (Feb. 9, 2005), *available at* Pls.' Br. at Attach. 3 (P.R. 23).) Commerce published its final determination of the administrative review on March 16, 2006. *See Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 13,582 (Dep't Commerce Mar. 16, 2006) ("*Final Results*"). On August 17, 2006, Commerce issued instructions to Customs to liquidate Plaintiffs' entries at the

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[2] Plaintiffs note that although the request included the name "Impact Steel Canada, Ltd.," the actual name of the entity is Impact Steel Canada Company. (*See* Pls.' Br. 8 n.3.)

"all-others" rate of 18.71%. (Liquidation Instructions (Aug. 17, 2006), *available at* Pls.' Br. at Attach. 5 (P.R. 104, 105) ("*Liquidation Instructions*").) Plaintiffs subsequently commenced this action to challenge Commerce's *Reseller Policy* and its application in the *Liquidation Instructions*.

STANDARD OF REVIEW

When deciding a motion to dismiss, the court assumes that " 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1052 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Rule 56.1 provides that "in any action in which a party believes that the determination of the court is to be made solely upon the basis of the record made before an agency, that party may move for judgment in its favor upon all or any part of the agency determination." USCIT R. 56.1(a).

DISCUSSION

Plaintiffs challenge Commerce's interpretation of 19 C.F.R. § 351.212, as it relates to entries made in the United States of merchandise purchased from resellers who are unaffiliated with a foreign producer, as set forth in the *Reseller Policy*. Count I alleges that Commerce violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, in issuing the *Reseller Policy*, that the "clarification" is irreconcilably inconsistent with § 351.212(c), and that it is arbitrary, capricious, and contrary to governing law. (*See* Pls.' Br. 10–23; *see also* Pls.' Compl. 7.) Plaintiffs also contend in Count II that the entries had already liquidated by operation of law when the *Liquidation Instructions* were issued,[3] and in Count III that the *Liquidation Instructions* are unlawful because they are not supported by the necessary knowledge determination, as required by the *Reseller Policy*. (*See* Pls.' Br. 23–28; *see also* Pls.' Compl. 7.) Defendant, the United States, challenges the court's jurisdiction to adjudicate Plaintiffs' action, and asserts a statute of limitations bar as well. (Def.'s Combined Mot. to Dismiss & Resp. to Pl.'s Mot. for J. Upon the Agency R. 2 ("Def.'s Br.").)

A. Jurisdiction is proper under 28 U.S.C. § 1581(i) for facial challenges to Commerce's *Reseller Policy*

The court previously addressed, in *Parkdale Int'l, Ltd. v. United States*, 491 F. Supp. 2d 1262 (CIT 2007) ("*Parkdale I*"), and again in *Parkdale II*, 508 F. Supp. 2d at 1338, the question of its jurisdiction

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[3] As will be explained, *see infra* note 6, the court views Count II as another aspect of the claim that the *Reseller Policy* is invalid, as alleged in Count I.

to hear an action such as that alleged in Counts I and II. The court adheres to its conclusion that jurisdiction is proper here under 28 U.S.C. § 1581(i)(4), as this action is an action under the APA challenging the "administration and enforcement" of the antidumping duty laws.

This Court is granted broad residual jurisdiction under 28 U.S.C. § 1581(i) to hear "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs [or] duties . . . on the importation of merchandise for reasons other than the raising of revenue," and for cases challenging Commerce's "administration and enforcement with respect to the matters referred to" in § 1581. 28 U.S.C. § 1581(i)(2), (4) (2000). Section 1581(i), however, " 'may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.' " *Parkdale II*, 508 F. Supp. 2d at 1346 (quoting *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)). In contrast, § 1581(c) grants the court jurisdiction to review "any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]" where a party is contesting "factual findings or legal conclusions" made in a 19 U.S.C. § 1516a(a)(2)(B) listed determination, including those made in a final determination of an administrative review of an antidumping order. 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(A), (B)(iii) (2000).

The government argues that in reality, Plaintiffs are challenging Commerce's decision in its *Final Results*, not Commerce's *Liquidation Instructions*, and therefore, Plaintiffs' claims actually are based on a listed determination under 19 U.S.C. § 1516a(a)(2)(B), which should have been challenged pursuant to § 1581(c). (Def.'s Br. 16–17.) Plaintiffs counter that they are not challenging the final results of the administrative review, but the *Reseller Policy* and its application to the *Liquidation Instructions*. (Pls.' Resp. to Def.'s Mot. to Dismiss and Reply Br. in Supp. of Pls.' Mot. for J. Upon the Agency R. 1–2 ("Pls.' Resp. Br.").)

A court must "look to the true nature of the action . . . in determining jurisdiction." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986)). Here, Plaintiffs' challenges to the *Reseller Policy* in Counts I and II indicate that this is not a case involving a § 1516a determination challenge subject to jurisdiction under § 1581(c). Plaintiffs are contesting the consistency of the *Reseller Policy* with Commerce's regulations, and possibly any procedural errors made in the adoption of the policy. They are not contesting the results of Commerce's administrative review, such as factual determinations or legal conclusions made in the results, but rather the *Reseller Policy* and the *Liquidations Instructions*. As the court emphasized in *Parkdale II*, "Commerce's reference to the mere exist-

ence of the *Reseller Policy* does not render the *Final Results* a final legal determination with respect to all entries of carbon steel flat products from Canada." *Parkdale II*, 508 F. Supp. 2d at 1347.

Additionally, policy concerns also demonstrate why jurisdiction is appropriate under § 1581(i). "Because a claim under the APA accrues at the time of 'final agency action,' 5 U.S.C. § 704, facial challenges to regulations and claims arising from a failure to comply with APA procedures accrue at the time the rule was published, not when the rule is applied to a plaintiff." *Id.* (citation omitted). This encourages early court intervention, allowing for an agency to correct any errors before a new policy has been relied on widely. *See id.* at 1349. Requiring plaintiffs to raise this argument in an administrative review delays such a process, because years could pass before a party chooses to not participate in an administrative review to obtain its own rate, but instead files a case brief challenging the application of the policy. *See id.* Such policy considerations weigh against finding that § 1581(c) jurisdiction covers this type of case. Accordingly, because the court finds no difference between the jurisdictional question at issue in Counts I and II and *Parkdale II*, and it finds the reasoning of *Parkdale II* sound, the court concludes it has jurisdiction as to Counts I and II under 28 U.S.C. § 1581(i).

Defendant asserts that, even assuming § 1581(i) jurisdiction could apply, Plaintiffs' claim that Commerce did not follow required APA procedure is time-barred under the two-year statute of limitations for § 1581(i) cases provided in 28 U.S.C. § 2636(i). (Def.'s Br. 20.) It is not clear, however, whether Defendant is also claiming that Plaintiffs' substantive APA claim is time-barred. If so, this defense fails because Defendant did not raise it in its first pleading before the court. A statute of limitations defense is an affirmative defense which must be made in a defendant's first responsive pleading. USCIT R. 8(d); *see also Parkdale II*, 508 F. Supp. 2d at 1347–48 n.6. Although statutes of limitations that are jurisdictional in nature are excepted from this requirement, the statute of limitations under § 2636(i) has not been treated as jurisdictional. *See Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977–78 (Fed. Cir. 1994); *Parkdale II*, 508 F. Supp. 2d at 1347–48 n.6.

As to the APA procedural claim, because that claim was not made clearly in the complaint, the court cannot find that the government waived its right to assert the statute of limitations bar. Therefore, that claim, having accrued more than two years before the commencement of suit, is barred by the statute of limitations. Nonetheless, because of the lack of clarity in the filings of both parties, in the interest of judicial economy, the court will address the APA procedural claim as well.

In Count III of their complaint, Plaintiffs raise an alternative claim to invalidity of the *Reseller Policy*. They allege that Commerce's *Liquidation Instructions* were unlawful because they were

not supported by a knowledge determination as required by the *Reseller Policy*. (Pls.' Br. 23–26; Pls.' Compl. 7.) As to Count III, it appears to the court that Plaintiffs have failed to allege injury in fact necessary to establish that this claim presents a "case or controversy" within the meaning of Article III of the United States Constitution. *Ontario Forest Indus. Assoc. v. United States*, 444 F. Supp. 2d 1309, 1323 (CIT 2006); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs have not asserted that, assuming the *Reseller Policy* is valid, they have suffered an economic loss or that they were harmed in any way by Commerce's alleged failure to specifically state whether the producers of Plaintiffs' merchandise knew, or should have known, that their merchandise was destined for the United States. That is, they did not assert in their complaint that the resellers were affiliated with the producers or that the producers had the requisite knowledge to entitle the resellers to receive the producer's rate under the *Reseller Policy* and that this lack of a knowledge determination caused harm. In any case, at the very least, Plaintiffs have failed to state a claim upon which relief can be granted as to Count III.[4] Accordingly, under either USCIT R. 12(b)(1) or (5), Count III must be dismissed.

B. Plaintiffs' motion for judgment on the agency record is denied because the *Reseller Policy* is not invalid or contrary to law

As to the merits of Count I, Plaintiffs argue that the *Reseller Policy* substantively alters the plain meaning of 19 C.F.R. § 351.212(c), and thus is inconsistent with the regulation, because it requires entries not subject to a review request to be liquidated at a rate different from the required deposit rate at the time of entry.[5] Plaintiffs assert specifically that if a reseller itself is not named in a request for an administrative review, the reseller's entries are to be automatically liquidated at the cash-deposit rate required at entry under § 351.212(c)(1).[6] (*See* Pls.' Br. 12–13.)

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[4] As a responsive pleading has been filed, Plaintiffs have no automatic right to amend their complaint to remedy deficiencies. USCIT R. 15(a). Accordingly, the court does not reach Defendant's argument that such a claim cannot be raised under 28 U.S.C. § 1581(i).

[5] Plaintiffs have cited to the explanatory language for the regulation and its reference to specific "entries." (Pls.' Br. 12 ("[I]f an entry is not subject to a request for a review, the Department will instruct the Customs Service to liquidate that entry and assess duties at the rate in effect at the time of entry.") (quoting Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,313–14 (Dep't Commerce May 19, 1997) (final rule).) The explanatory language, just as the regulation itself, begs the question. That is, one does not know to which entries this regulation applies. It is only the *Reseller Policy* itself which provides an answer.

[6] Similarly, Plaintiffs claim under Count II that Commerce's rescission of their administrative review, following Plaintiffs withdrawal of their request for review, provided notice to Customs of the lifting of the suspension of Plaintiffs' entries. (Pls.' Br. 26–28.) Plaintiffs contend, therefore, that because they were not covered by any administrative review, their en-

Plaintiffs' argument, however, fails to acknowledge that the *Reseller Policy* addresses a particular situation that is not discussed in § 351.212, specifically, what the rate of liquidation would be for a reseller's entries of a producer's merchandise when (1) the producer's cash-deposit rate was used for the reseller's entries, (2) the producer, but not the reseller, is expressly subject to the administrative review, and (3) the producer did not know at the time of sale that the merchandise was destined for the United States. (Def.'s Br. 23–24.) The *Reseller Policy* defines what is covered by a request for an administrative review, and clearly articulates that the entries of merchandise of the subject producer, including that sold by resellers, are covered by a request for review concerning that producer and are not automatically liquidated.

Contrary to Plaintiffs' assertion, the *Reseller Policy* does not replace the automatic liquidation provision of § 351.212(c)(1) by creating a new system for determining the assessment rate for entries previously subject to the original cash-deposit rate. Rather, the *Reseller Policy* merely fills a gap in the regulation by addressing a situation not specifically addressed therein. *Parkdale II*, 508 F. Supp. 2d at 1353. Specifically, the policy explains how to assess duties on entries that are covered by administrative review requests because an assumption of some level of affiliation between the producer and reseller was made previously, but the entries are not covered by the rates determined for the producer in that review because the "affiliation" assumption does not hold.[7] *Id.* Accordingly, the *Reseller Policy* is not invalid for conflict with the regulation.

Furthermore, any procedural deficiencies with regard to the *Reseller Policy* are harmless. The APA requires for any proposed rulemaking that "notice of [the] proposed rule making [ ] be published in the Federal Register," and that "interested persons [have] an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c) (2007). After considering the relevant information received, the agency must accompany any published rules with "a concise general statement of their basis and purpose." *Id.* § 553(c). Nonetheless, even if the *Reseller Policy* is considered a legislative rule requiring APA notice and comment procedures, and not an interpretative rule excepted

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tries liquidated by operation of law six months after Commerce's rescission. (*Id.* at 27); *see also* 19 U.S.C. § 1504(d). Although Plaintiffs withdrew their administrative review request, entries of Dofasco and Stelco's merchandise continued to be suspended under their respective requests for review until Commerce published its *Final Results*. Thus, assuming the *Reseller Policy* is valid, Plaintiffs' entries for merchandise produced by Dofasco and Stelco were not deemed liquidated by operation of law six months after Commerce's rescission of Plaintiffs' administrative review. Instead, they could be actively liquidated when Commerce published its *Final Results* and provided *Liquidation Instructions* to Customs thereafter.

[7] In this context the court uses "affiliation" as a short hand for the knowledge component of the *Reseller Policy*. This is not a reference to 19 U.S.C. § 1677(33).

from the procedural requirements as asserted by Commerce, any error in not labeling the *Reseller Policy* a "proposed rule" is harmless, if Commerce followed "all material requirements for the publication of a legislative rule." *Parkdale II*, 508 F. Supp. 2d at 1357; *see Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings.").

As detailed in *Parkdale II*, it appears that Commerce satisfied each of these requirements when it issued the *Reseller Policy*: it published notice regarding its *Reseller Policy* in the Federal Register and requested comments, extended the comment period in 1998 and again in 2002, and published its final clarification with detailed responses to all the comments received. *See Reseller Notice*, 63 Fed. Reg. at 55,361; *1998 Comments*, 63 Fed. Reg. at 63,288; *2002 Comments*, 67 Fed. Reg. at 13,599; *Reseller Policy*, 68 Fed. Reg. at 23,954. Additionally, Plaintiffs have not identified any harm that resulted from the procedural deficiency of failing to label the *Reseller Policy* a "proposed rule." *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 40, 41–42 (D.C. Cir. 2005) (concluding that " 'to remand solely because the Commission labeled the action a declaratory ruling [and not a legislative rule] would be to engage in an empty formality' " and that any error would be harmless when it appeared that all APA requirements were satisfied) (quoting *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984)). Consequently, because Plaintiffs have not demonstrated any prejudice as a result, the court finds any procedural error harmless and will not automatically void the *Reseller Policy*.

Finally, the APA requires that any "agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" be held unlawful and set aside. 5 U.S.C. § 706(2)(A). Plaintiffs contend that the *Reseller Policy* is arbitrary, capricious, and contrary to law because it relies on factors Congress did not intend Commerce to consider and fails to consider important concerns identified by Congress in this area. (Pls.' Br. 17–23.)

Plaintiffs contend that 19 U.S.C. § 1675(a)(1) and 19 C.F.R. § 351.212 sought to avoid uncertainty regarding assessment rates, additional reviews, and a greater administrative burden. (Pls.' Br. 18–20 (stating that the amendment to § 1675 was " 'designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority' ") (quoting H.R. Rep. No. 981156, at 181 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 5220, 5298).) Plaintiffs argue that under the current *Reseller Policy*, however, a reseller is more likely to request a review than under Commerce's former practice, because it will be wary that its entries are not covered by the request for an administrative review of its

producer. (Pls.' Br. 20.) Plaintiffs emphasize that the *Reseller Policy* injects uncertainty into the decision making, because resellers no longer know the result of not requesting a review, as was the case when the automatic liquidation of entries was made at the cash-deposit rate. (Pls.' Br. 21.) Defendant counters that any increase in reviews will still be less than the pre-1984 practice of reviewing every producer and exporter each year and that all reviews will necessarily be ones where there is sufficient interest for a party to request a review of a producer or reseller. (Def.'s Br. 27.)

As emphasized in *Parkdale II*, Congress's concern with administrative efficiency is only one of a number of competing policy concerns Commerce needs to consider when it creates assessment rules and regulations, and other concerns, such as preventing "margin-shopping" and promoting accurate margin calculations, should also be considered. *Parkdale II*, 508 F. Supp. 2d at 1354 (citing *Reseller Policy*, 68 Fed. Reg. at 23,957). Commerce acknowledged in its *Reseller Notice* that its *Reseller Policy* was justified despite the fact that it would increase the uncertainty faced by resellers that have not established whether or not they are affiliated with a producer. *See Parkdale II*, 508 F. Supp. 2d at 1355 (citing *Reseller Notice*, 63 Fed. Reg. at 55,364). As discussed in *Parkdale II*, only a reseller who "continues to rely on Commerce's initial assumption that it is affiliated with a given producer" remains vulnerable to an adverse finding, and regardless, is certainly in no worse a position than if "Commerce [had] investigated the reseller in the original investigation." *Id.* Under the *Reseller Policy*, the reseller can diminish this uncertainty by requesting an administrative review of its own entries in order to obtain its own cash-deposit rate and the *Reseller Policy* does not prevent the withdrawal of such a request if no request is made as to the relevant producer. *See id.* Accordingly, Commerce did not rely on factors Congress did not intend for it to consider and did not fail to consider important concerns identified by Congress in this area. Therefore, any uncertainty caused does not render the *Reseller Policy* arbitrary and capricious.

Thus, there is no inconsistency of the *Reseller Policy* with either the governing statute or regulation.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted as to Count III and denied as to Counts I and II. Plaintiffs' Motion for Judgment on the Agency Record is denied as to Counts I and II.

IMPACT STEEL CANADA CORPORATION, ET AL., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge
Court No. 06–00419

JUDGMENT

This case having been submitted for decision and the court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED that Defendant United States' Motion to Dismiss is granted as to Count III and denied as to Counts I and II. Plaintiffs Impact Steel Canada Corporation, Impact Steel Canada Company, and Impact Steel, Inc's. Motion for Judgment on the Agency Record is denied as to Counts I and II. Judgment on Counts I and II is entered for Defendant. Count III is dismissed.

Slip Op. 07–188

UNITED STATES, Plaintiff, v. MARTHA MATTHEWS, A.K.A. MARTHA O'GRADY; NORTH STAR METALS, LLC; AEGIS SECURITY INSURANCE CO.; DANIEL MCGUIRE; and MCGUIRE STEEL ERECTION CORP., Defendants. MARTHA MATTHEWS, A.K.A. MARTHA O'GRADY; NORTH STAR METALS, LLC; DANIEL MCGUIRE; and MCGUIRE STEEL ERECTION CORP., Third-Party Plaintiffs, v. TAE BACK RESOURCES CO., LTD. and HAESUNG CORP., Third-Party Defendants. AEGIS SECURITY INSURANCE CO., Third-Party Plaintiff, v. DANIEL MCGUIRE and MCGUIRE STEEL ERECTION CORP., Third-Party Defendants.

Before: WALLACH, Judge
Consol. Court No.: 04–00162

[Plaintiff's Motions for Summary Judgment are GRANTED.]

Dated: December 28, 2007

Jeffrey S. Bucholz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Steven C. Tosini*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Kevin M. Green*, Assistant Chief Counsel, Bureau of Customs and Border Protection, of Counsel, for Plaintiff United States.

The Law Office of Lawrence W. Hanson, P.C. (*Lawrence W. Hanson*) for Defendants Martha Matthews, aka Martha O'Grady; North Star Metals, LLC; Daniel McGuire; and McGuire Steel Erection Corp.

OPINION

Wallach, Judge

I
INTRODUCTION

Plaintiff United States has filed two separate Motions for Summary Judgment against Defendants Martha Matthews (aka Martha O'Grady), North Star Metals LLC ("North Star"), Daniel McGuire, and McGuire Steel Erection Corp. ("McGuire Steel"), with respect to their liability for penalties and lost duties for seven entries of silicon metal by McGuire Steel, and 89 entries of the same product by North Star, pursuant to 19 U.S.C. § 1592(a) and 19 U.S.C. § 1592(d). This court has jurisdiction pursuant to 28 U.S.C. § 1582. The court heard oral argument on both Motions together. Because Defendants knowingly and purposely misrepresented the country of origin on the entries in question in order to avoid antidumping duties that would have been assessed upon that merchandise by Customs, Summary Judgment for Plaintiff is granted.

II
BACKGROUND

In June of 1991 the International Trade Commission determined that the domestic industry was being materially injured by imported silicon metal[1] from China, and the Department of Commerce issued an antidumping duty order that imposed a 139.49% dumping margin for all Chinese producers and exporters. *Antidumping Duty Order: Silicon Metal from the People's Republic of China*, 56 Fed. Reg. 26,649 (June 10, 1991). The order covered silicon metal "containing at least 96.00 but less than 99.99 percent of silicon by weight." *Id.* This order was in effect throughout the period in which the merchandise at issue was entered into the United States. *See Silicon Metal from the People's Republic of China: Final Results of Expedited Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 35,609 (June 5, 2000).

Martha Matthews and Daniel McGuire imported 96 entries of silicon metal through North Star Metals[2] and McGuire Steel[3] from 1999 through 2001. These silicon entries were exported[4] to the

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[1] Silicon metal is provided for under subheadings 2804.69.10 and 2804.69.50 of the Harmonized Tariff Schedule of the United States ("HTSUS").

[2] Matthews and McGuire were the only two participants in the LLC.

[3] McGuire was the founder, principal, President, and operations officer of McGuire Steel.

[4] On 89 entries, North Star was the importer of record; on the remaining seven, McGuire Steel was the importer of record. First Declaration of Merlin Hymel ¶ 3–9 (February 2, 2007); Third Declaration of Merlin Hymel ¶ 3–91 (April 17, 2007). In both scenarios, Mat-

United States by the Korean Trading Companies Tae Bak Resources Co., Ltd. ("Tae Bak"), and Haesung Corporation ("Haesung"). Plaintiff's Rule 56(h) Statement (April 24, 2007) ("April Statement") ¶ 2. The entry documents submitted to Customs for all entries designated entry type code "01," indicating to Customs that they were not subject to antidumping duties. *Id.* ¶ 7; Plaintiff's Rule 56(h) Statement (February 28, 2007) ("February Statement") ¶ 9. The commercial invoices submitted by North Star and McGuire Steel designated the country of origin as Korea, *even though there was no silicon metal produced in Korea during the period the entries in question were made*. April Statement ¶ 8–9; February Statement ¶ 10–11.

Prior to and during the time that Defendants were making the entries at issue, the following pertinent communications and events occurred:

1. On November 12, 1998, prior to the time period of the imports here at issue, Ken Smigel of LMC Corp. informed Ms. Matthews via facsimile that "Korea is still buying [silicon metal] from China." Matthews Depo. Exhibit 4. Ms. Matthews indicated that her handwriting is on the facsimile. *Id.* at 15:25–16:1.
2. In a letter regarding pricing of silicon metal drafted on November 12, 1998 by Ms. Matthews to Ken Smigel, Ms. Matthews emphasized: "*Confirm* paperwork must say that material is Korea origin – not China." *Id.* Exhibit 5.
3. Ms. Matthews and Mr. McGuire travelled to Korea in November of 1998, at which time they saw only a warehouse and no plants or manufacturing facilities. McGuire Depo. at 5–8, 20:6–24; Matthews Depo. at 24:9, 31:6–8.
4. In response to a complaint made by Ms. Matthews about the composition of a shipment of silicon metal, Tae Bak sent inspection certificates issued by the "Jilin Import & Export Commodity Inspection Bureau of the People's Republic of China," with "Liaonhing Metals & Minerals Import & Export Corp." as the co-signer. Matthews Depo. Exhibit 14 at 2.
5. A printed email message originated from North Star's internet account. Ms. Matthews wrote notes on a copy indicating it was regarding a dispute between Tae Bak, Haesung, and North Star. The email stated, "[w]hatever contract you have with China is your business, not ours. . . ." *Id.* Exhibit 19. The email message was signed "Best Regards, Martha." *Id.*
6. An email message sent on April 12, 1999, from Haesung to Ms. Matthews with respect to "98.5% silicon" provided a shipping schedule and stated, "if we use the same shipping company

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thews acted jointly and together as part of a continuing plan to defraud the United States. See discussion following, pp. 3–5.

from Korea to USA as from China to Korea, it would save much time." *Id.* Exhibit 24 at 13.

7. In a letter to Tae Bak, Ms. Matthews wrote, "some customers will not buy [the material] as they know you have no refining in Korea and it is coming from China." *Id.* Exhibit 38.
8. In August of 1999, Ms. Matthews wrote a letter to Mr. Suh at Tae Bak in which she complained, "about half of the bags had Made in China stenciled on them. WE CAN NOT HAVE MADE IN CHINA ON THE BAGS. Fortunately, customs did not open the containers for clearance, but if they did the material would not be released to us without a 167% tax." *Id.* Exhibit 44; Martin Dec. (stating that these exhibits were seized from Mr. McGuire's office during execution of a search warrant).
9. In July of 2000, M.G. Mayer, North Star's customs broker, received an email message that indicated the shipments of Korean silicon metal were instead of Chinese origin. Piazza Depo. at 29:20–40:8. In response to M.G. Mayer's inquiry, Ms. Matthews wrote a letter to Tae Bak requesting that they "get something that looks official." Matthews Depo. Exhibit 31 at 7. Tae Bak responded with options for responding to M.G. Mayer's inquiry, from which Ms. Matthews chose "[w]e insist that this material is from Korea. We can get certificate origin, as we say that the products was processed here even if raw material is from China," in a handwritten note to Tae Bak. *Id.* Exhibit 42.

In 2003, Customs issued pre-penalty and penalty notices to Ms. Matthews and North Star and Mr. McGuire and McGuire Steel.

III
STANDARD OF REVIEW

In determining the outcome of a motion for summary judgment, the court must examine whether there remain any "genuine issues as to any material fact" in dispute on the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The inquiry into factual matters is only to the extent they are established under the standards articulated in the Federal Rules of Evidence; USCIT R.56(e); the court will then examine whether those facts constitute the essential elements of a claim, and whether either party is entitled to a judgment as a matter of law. Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R.56(c).

IV
DISCUSSION

Plaintiff argues that Defendants are liable for penalties pursuant to 19 U.S.C. section 1592(a), and for lost revenue and prejudgment interest pursuant to 19 U.S.C. section 1592(d). According to Plaintiff, no material factual issues exist concerning Defendants' misrepresentations that the silicon metal was from Korea when it was instead from China, so the court is therefore free to determine liability. Plaintiff's Motion for Summary Judgment ("Plaintiff's First Brief") at 19.

Defendants claim that questions of material fact remain, and therefore summary judgment is not proper. Defendants' Joint Response to Plaintiff's Motion for Summary Judgment at 1 ("Defendants' Response"). Defendants argue that Plaintiff's Motion for Summary Judgment only applies to entries by McGuire Steel, as the importer of record, and does not address the questions of fact relating to the other Defendants. *Id.* at 2. Additionally, Defendants say that material questions of fact exist regarding the joint culpability for those Defendants who were not the importer of record. *Id.* Defendants further argue that material questions regarding the purity of the silicon metal that was imported remain in dispute.[5] *Id.* at 3–4. Further, Defendants say a question of fact remains as to whether the purity of the imported product was ever tested by the government, as the investigating special agent testified that he could not remember if a lab sample was taken. *Id.* at 4. According to Defendants, Plaintiff relies upon a document[6] to establish the purity level of the imported merchandise that only states a purity level without providing adequate support for the assertions. *Id.* at 5. Finally, Defendants argue that the court cannot determine a level of culpability based upon the record to date. *Id.* at 6.

Plaintiff responds that section 1592 is not limited to the importer of record, and furthermore, the Defendants never raised the "joint and several" affirmative defense in their answer and thus have waived it. Reply to Importer-Defendant's Response to Plaintiff's Motions for Partial Summary Judgment ("Plaintiff's Reply") at 2, 5–6. Plaintiff also contends that Defendants' own prior statements demonstrate that the imported silicon metal falls within the antidumping duty order upon silicon metal from China. *Id.* at 9–10. Additionally, Plaintiff argues that Defendants' claim regarding their level of culpability lacks any supporting evidence. *Id.* at 2, 12–13. Plaintiff

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[5] Counsel for Plaintiff and Defendants agree that silicon metal imported from China is subject to antidumping duties if the imported product is between 96% and 99.99% pure. Defendant argues that the actual purity of the imported items remains unproven and contested. Defendant's Brief at 4.

[6] Exhibit 14 of the Martha Matthews Deposition, communication between Mr. Suh and Ms. Matthews.

also notes that Rule 56(h) requires the moving and opposing party to provide statements of uncontroverted facts. Since Defendants provided no such statement, Plaintiff argues that all material facts set forth in its statement should be deemed admitted as provided by Rule 56(h). *Id.* at 2–3.

A
Plaintiff Has Established that 19 U.S.C. § 1592(a) Was Violated

According to 19 U.S.C. § 1592, it is unlawful to enter any merchandise into the United States by means of any document, written or oral statement, or act that is materially false due to fraud, negligence, or gross negligence.[7] 19 U.S.C. § 1592(a)(1)(A); *United States v. Jac Natori Co., Ltd.*, 108 F.3d 295, 298 (Fed. Cir. 1997). In order for a statement, document, or act to be considered material it must "have the tendency to influence Customs' decision in assessing duties." *United States v. Thorson Chem. Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190 (1992). Importers are required by 19 U.S.C. § 1481(a) to submit invoices to Customs that contain a detailed description of the merchandise, as well as any other information Customs may "require as being necessary to a proper appraisement, examination and classification of the merchandise." 19 U.S.C. § 1481(a). 19 C.F.R. § 141 additionally requires that along with a detailed description of the merchandise, the importer must include "the unique identifying number assigned by the Department of Commerce" indicating the country of origin for the goods. 19 C.F.R. § 141.61(c); *see* 19 C.F.R. § 141.86(a)(10). An importer of record or authorized agent must use "reasonable care" in filing entry documents with Customs so that the agency will be able to "properly assess duties on the merchandise." 19 U.S.C. § 1484(a)(1)(B)(i).

In this case the record demonstrates that Martha Matthews represented the imported merchandise was from Korea when in fact she knew it was from China.[8] Defendants Matthews and McGuire do not even attempt to establish that they acted with reasonable care in filing their entries as required by 19 U.S.C. § 1484. In fact, Ms. Mat-

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[7] 19 U.S.C. § 1592(a)(1)(A) reads:

(a) Prohibition.

(1) General rule. Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material.

[8] Defendants do not deny in their memorandum in opposition to the Motion for Summary Judgment that the merchandise was originally from China.

thews actively disguised information indicating the silicon metal was of Chinese rather than Korean origin. *See, e.g.*, Matthews Depo. Exhibit 19 (instructing a contact at Tae Bak, "[w]hatever contract you have with China is your business, not ours. . . ."); *Id.* Exhibit 31 at 7 (attempting to mislead Mr. Smigel regarding the origin of the merchandise). Further, evidence on the record shows that Defendants were aware that antidumping duties would be placed on Chinese silicon metal if the merchandise was represented as or discovered to be such. *Id.* Exhibit 44 (informing Mr. Suh at Tae Bak that if Customs sees Made in China markings on the imported merchandise it will "not be released to us without a 167% tax"). As a result, there is no genuine issue of material fact as to whether 19 U.S.C. § 1592 was violated; Ms. Matthews purposefully misrepresented the country of origin of the silicon metal upon its importation to the United States in violation of the statute.

B

Defendants' Violation was an Act of Fraud

There are three levels of culpability under 19 U.S.C. § 1592: negligence, gross negligence, and fraud. 19 U.S.C. § 1592(a). The standards for establishing the levels of culpability are as follows:

> (e) Court of International Trade proceedings. Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—
>
> (1) all issues, including the amount of the penalty, shall be tried de novo;
>
> (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
>
> (3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
>
> (4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

19 U.S.C. § 1592(e).

Parties must meet their burdens of proof regarding the negligence and gross negligence levels by a preponderance of the evidence. The court may determine liability and assess penalties as a matter of law when the uncontroverted facts support such a determination. *United States v. New-Form Mfg. Co., Ltd.*, 27 CIT 905, 918–19, 277 F. Supp. 2d 1313 (2003).

In cases of purposeful misrepresentation the court has in the past asserted a culpability level of fraud and assessed statutory penalties accordingly. *United States v. Modes Inc.*, 16 CIT 879, 881–83, 804 F. Supp. 360 (1992). Plaintiff has met its burden of establishing fraud by clear and convincing evidence, and statutory penalties are appropriate in this case. As established above, Ms. Matthews' communications with the Korean companies demonstrate beyond refute they were not only aware of the Chinese origin of the silicon metal they were importing and the additional duties that were owed to the United States, but also made specific efforts to disguise the true origin from the government. Customs relied upon Defendants' misrepresentations regarding the country of origin in clearing the merchandise, and as a result the United States was denied revenue it was owed by the importers. There can be no question from this record that Ms. Matthews and Mr. McGuire were acting jointly, pursuant to a common plan, and as agents and representatives of North Star and McGuire Steel. Mr. McGuire and Ms. Matthews, the two principals of the importing companies, visited the Republic of Korea together to view facilities and negotiate with Korean companies for the purchase of silicon metal. McGuire Depo. at 20:6–24; Matthews Depo. at 24:9, 31:6–8. Furthermore, Ms. Matthews communicated with Tae Bak on occasion on behalf of McGuire Steel, informing the Korean company of problems with the merchandise and packaging. Matthews Depo. Exhibit 44, (stating that bags with Made in China markings were unacceptable; the bags referenced in the communication were housed at McGuire Steel's warehousing facility). Defendants are therefore liable for the maximum penalties under 19 U.S.C. § 1592(c) and for the government's lost revenue pursuant to 19 U.S.C. § 1592(d).

C
Defendants are Jointly and Severally Liable for the Violation

Defendants argue in their brief that North Star Metals cannot be held liable on entries for which McGuire Steel was the importer of record. Defendants' Response at 2. Plaintiffs respond that Defendants fail for two reasons: first, the Defendants waived this defense by not raising it in their answer, and second, section 1592 provides for liability for any "person" who commits a violation, not just for importers of record.[9] Plaintiff's Reply at 6.

The language of section 1592 leaves room for those other than the importer of record to be held accountable for violations. 19 U.S.C.

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[9] While Plaintiff may be correct in its assertion that under Rule 8(d) Defendants have waived their right to the affirmative defense that they are not jointly and severally liable, the court resolves the question solely on the evidentiary merits of the case.

§ 1592 (stating that "no person, by fraud, gross negligence, or negligence" may enter merchandise into the United States due to material false statement); *United States v. Priority Prods., Inc.*, 793 F.2d 296 (Fed. Cir. 1986) (finding that Customs' need not include individual corporate officers in pre-penalty and penalty notices for them to be held liable in a suit before the Court of International Trade). This court has consistently allowed corporate officers to be held liable for violations that were committed in the capacity of their employment. *See, e.g.*, *Priority Prods.*, 793 F.2d at 299-301; *United States v. Golden Ship Trading*, 22 CIT 950 (1998) (finding that 19 U.S.C § 1592 does not provide an exception for corporate officers). In this case, Defendants Matthews and McGuire were named in the penalty notices and were acting within the scope of their employment, and therefore fall within the scope of section 1592. Matthews continuously handled communications with the Chinese exporters and Korean "straw men" throughout all 96 importations; McGuire continuously caused McGuire Steel to act as the place and means for fostering the fraudulent importations. See pp. 3-5 supra. Cf. *United States v. Inn Foods, Inc.*, 515 F. Supp. 2d 1347, 1356 (CIT 2007).

The evidence on the record clearly thus demonstrates that Defendants participated jointly in the import of Chinese silicon metals claiming false Korean origin. Considering this evidence on the record of the joint involvement of Mr. McGuire, Ms. Matthews, McGuire Steel, and North Star, the Defendants are held jointly and severally liable for all 96 entries in question.

D
The Entries at Issue Were Subject to the Antidumping Duty Order

Defendants argue that Plaintiff does not provide sufficient evidence that the entries at issue were subject to the antidumping duty order regarding silicon metal from China. Defendants' Response at 3; *see Silicon Metal from the People's Republic of China: Final Results of Expedited Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 35,609 (requiring that the silicon metal contain between 96.00% and 99.99% silicon by weight in order to be subject to the duty). In making this argument they ignore that they, in personal communications and representations to Customs, have identified the merchandise as within the acceptable purity range for the antidumping duty order. *See* Matthews Depo. Exhibits 14, 38; Hymel Dec. I Exhibits. In every entry packet submitted to Customs, Defendants represented through certificate of origin, laboratory report, or invoice that the purity of the silicon metal was at a minimum 96.00%, and often between 99.00% and 99.99%. Hymel Decs. and Exhibits. Additionally, each entry summary placed the merchandise under HTSUS subheading 2804.69.1000 (99.00 to 99.99 percent) or

2804.69.5000 (less than 99.00%), which are the subheadings identified in the antidumping order. *Id.*

These representations by the Defendants are overwhelming evidence showing that the silicon metal in question falls subject to the antidumping duty. They constitute a direct admission of fact, and can only be contravened by evidence creating a genuine issue, something Defendants have totally failed to submit here. *See* USCIT R.56(e) ("when a motion for summary judgment is made as provided for in this rule [through sworn affidavits, depositions, etc.] an adverse party . . . must set forth *specific facts* showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." (emphasis added)). As a result, there is sufficient evidence to conclude that the entries at issue here fall within the range of purity level to which the antidumping duty order applies. Defendants, pursuant to 19 U.S.C. § 1592(d), therefore are liable to the United States for the full amount of duties that would have been assessed upon entry of the merchandise plus interest upon that amount.[10]

E
Damages

1
Duties

According to 19 U.S.C. § 1592(d), "if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." Defendants' violation of section 1592(a) is established above; Plaintiff is thus entitled to lost duties in the amount that would have been assessed under the antidumping duty order, 65 Fed. Reg. 35,609. The order maintains a 139.49% dumping margin for all Chinese producers and exporters entering silicon metal into the United States. 65 Fed. Reg. at 35,609. Defendants therefore owe 139.49% of the total entered value of each of the seven entries for which McGuire Steel was the importer of record,[11] which totals $417,844.00 in duties, plus interest.[12] Defendants also owe 139.49% of the total entered value of each of the 89 entries for

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[10] The antidumping duty statute mandates the assessment of interest in the event of underpayment, and it is within the court's equitable powers to do so. 19 U.S.C. § 1677g; *United States v. Yuchius Morality Co., Ltd.*, 26 CIT 1224, 1240–41 (2002). As there has been no unreasonable delay on the part of the government in bringing this action, Plaintiff is awarded prejudgment interest on its lost revenue. *See Yuchius*, 26 CIT at 1241.

[11] Entry numbers 101–18720670, 101–18954873, 101–19224474, 101–19272515, 101–19391075, 101–19625225, and 101–19659257. The combined total entered value for these

which North Star was the importer of record,[13] which totals $12,417,039.00 in duties, plus interest. As Defendants Matthews, McGuire, North Star, and McGuire Steel are jointly and severally liable, all Defendants are responsible for the duties relating to each of the 96 entries.[14]

2
Penalties

Additionally, penalties may be assessed for violations of 19 U.S.C. § 1592(a). Under section 1592(c), "A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." It is within the court's discretion to "determine a penalty within the parameters set by the statute." *United States v. Modes, Inc.*, 17 CIT 627, 636, 826 F. Supp. 504 (1993). In making this determination, the degree of culpability of Defendants is to be considered. *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946–47, 83 F. Supp. 2d 1307 (1999); *United States v. Thorson Chem. Corp.*, 16 CIT 441, 452, 795 F. Supp. 1190 (1992) ("The degree of culpability is a relevant factor for the Court in assessing a penalty under section 1592."). In this analysis of culpability, both mitigating and aggravating factors may be considered by the court in order to determine the appropriate penalty.[15]

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seven entries was $299,550,00. Hymel Dec. 1 Exhibits 1–7 (providing customs invoices for the entries).

[12] *See supra* note 10.

[13] Entry numbers 101–19746518, 101–19826229, 101–19830759, 101–19907490, 101–19919750, 113–16208625, 113–16208633, 113–16370300, 113–16383402, 113–16545653, 113–16760476, 113–16957361, 113–16959706, 113–16987699, 113–17212519, 113–17227186, 113–17647557, 113–18028203, 113–18200687, 113–18234918, 113–18237119, 113–18669279, 231–32203797, 231–32203805, 551–88324721, 551–88330686, 551–88334357, 551–88334712, 551–88335552, 551–91928278, 551–91929474, 551–91930449, 551–91933518, 551–91940455, 551–91944614, 558–00402004, 558–00407219, 558–00413332, 558–00413340, 558–00419081, 558–00419107, 558–00419180, 558–00425005, 558–00425013, 558–00426904, 558–00426920, 558–00427977, 558–00427993, 558–00431631, 558–00431789, 558–00431805, 558–00434882, 558–00436010, 558–00437067, 558–00439527, 558–00443420, 558–00447033, 558–00449914, 558–00461158, 558–00467643, 558–00467668, 558–00471629, 558–00480091, 558–00487161, 558–00487484, 558–00488359, 558–00508651, 558–00515805, 558–00532487, 558–00532495, 558–00536140, 558–00550224, 558–00553871, 558–00554002, 558–00568218, 558–00569570, 558–00571717, 558–00577920, 558–01586391, 558–01586730, 558–01590443, 558–01593066, 558–01600507, 558–01608369, 558–01608377, 558–01615026, 558–01616495, 558–01616511, and 558–01616529. The combined total entered value for the eighty nine entries was $8,901,741.00. Riemer Dec. II Exhibit 1 (providing the customs invoices for the entries).

[14] Joint and several liability "may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation. . . ." BLACK'S LAW DICTIONARY 933 (8th ed. 1999).

[15] The court in *Complex Machine Works* provided fourteen factors that the court may consider when determining penalties for violations of section 1592. 23 CIT at 949–50. These

Complex Mach. Works, 23 CIT at 947. While the amount of such a penalty is discretionary for the court, id. at 946–47, *Inn Foods, Inc.*, 515 F. Supp. 2d at 1361, where its existence is proved without dispute and without any refutation, and where the Defendants have intentionally chosen to offer no mitigating evidence,[16] the maximum penalty is entirely appropriate.

In this case it is clear that Defendants made no good faith effort to comply with the statute; in fact, they purposely misled Customs in an attempt to avoid antidumping duties on their imported merchandise. The fraud was planned in advance during Matthews' and McGuire's joint trip to Korea and through communications with Korean companies, all with the intent to misrepresent the true country of origin of the materials at issue. In return, Defendants received the economic benefit of avoiding a duty rate of 139.49% on each of its entries. Additionally, Defendants declined to present any evidence in this case to mitigate the evidence of fraudulent intent. For the foregoing reasons, the maximum penalty under 19 U.S.C. § 1592(c) is appropriate. Defendants Matthews, McGuire, North Star, and McGuire Steel are therefore jointly and severally liable for $797,662.00 in penalties reflecting the domestic value of the merchandise imported by McGuire Steel, and $23,000,293.44 in penalties reflecting the domestic value of the merchandise imported by North Star. April Statement ¶ 36 (citing Riemer Dec. II for North Star entries' domestic value); February Statement ¶ 6 (citing Riemer Dec. I for McGuire Steel entries' domestic value).

V
CONCLUSION

For the above stated reasons and given the need for deterrence, see *Inn Foods*, 515 F. Supp. 2d at 1362, the egregious and unremitting nature of Defendants' fraud, and their failure to offer any valid

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factors are as follows: (1) Defendants' good faith effort to comply with the statute; (2) degree of culpability; (3) history of previous violations; (4) the public interest in ensuring compliance with the regulation; (5) the nature of the violation; (6) the gravity of the violation; (7) Defendants' ability to pay; (8) the appropriateness of the size of the penalty in relation to Defendants' businesses, and the potential effect of the penalty on Defendants' ability to continue doing business; (9) that the penalty does not shock the conscience of the court; (10) the economic benefit gained by Defendants due to the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency; (13) whether the protected party has been adequately compensated; (14) such other matters as justice may require. *Id.*

[16] At oral argument, Defendant's counsel made it clear, on questioning by the court, that Defendants had chosen to submit no evidence of the mitigating factors of *Complex Machine Works*, n. 15 *supra*, cognizable under U.S. Court of International Trade Rule 56. They chose instead to argue only that the court "might" believe their oral testimony if it denied summary judgment. That intentional decision to offer no proof does not, of course, "raise any genuine issue as to any material fact" under Court of International Trade Rule 56(c), and it certainly falls within the stricture of Federal Rule of Civil Procedure 56(e)(2) that "if the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

evidence of mitigation, Plaintiff's Motions for Summary Judgment are GRANTED. Unpaid duties and penalties are awarded to Plaintiff as follows: (1) $12,417,039 plus interest as provided by law for unpaid antidumping duties upon the North Star entries; (2) $417,844 plus interest as provided by law for unpaid antidumping duties upon the McGuire Steel entries; (3) a penalty in the amount of $23,000,293.44 with respect to the North Star entries; and (4) a penalty in the amount of $797,662 with respect to the McGuire Steel entries.

UNITED STATES, Plaintiff, v. MARTHA MATTHEWS, A.K.A. MARTHA O'GRADY; NORTH STAR METALS, LLC; AEGIS SECURITY INSURANCE CO.; DANIEL MCGUIRE; and MCGUIRE STEEL ERECTION CORP., Defendants. MARTHA MATTHEWS, A.K.A. MARTHA O'GRADY; NORTH STAR METALS, LLC; DANIEL MCGUIRE; and MCGUIRE STEEL ERECTION CORP., Third-Party Plaintiffs, v. TAE BACK RESOURCES CO., LTD. and HAESUNG CORP., Third-Party Defendants. AEGIS SECURITY INSURANCE CO., Third-Party Plaintiff, v. DANIEL MCGUIRE and MCGUIRE STEEL ERECTION CORP., Third-Party Defendants.

Consol. Court No.: 04–00162
Before: WALLACH, Judge

ORDER AND JUDGMENT

This case having come before the court upon Plaintiff United States' Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motions"), the court having reviewed all papers and pleadings on file herein, having heard oral argument on Plaintiff's Motions by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiffs' Motions be, and hereby are, GRANTED; and it is further

ORDERED ADJUDGED AND DECREED that a final judgment in the amount of $36,632,838.44 plus interest thereon as prescribed by law, be, and hereby is, entered in favor of Plaintiff, United States, and against Defendants Martha Matthews (aka Martha O'Grady), North Star Metals LLC ("North Star"), Daniel McGuire, and McGuire Steel Erection Corp. ("McGuire Steel"), jointly and severally; and it is further

ORDERED ADJUDGED AND DECREED that Plaintiff shall recover unpaid duties and penalties from Defendants Martha Matthews, North Star, Daniel McGuire, and McGuire Steel, jointly and severally, in the amount of: (1) $12,417,039 plus interest as prescribed by law for unpaid antidumping duties upon the North Star

entries; (2) $417,844 plus interest as prescribed by law for unpaid antidumping duties upon the McGuire Steel entries; (3) a penalty in the amount of $23,000,293.44 with respect to the North Star entries; and (4) a penalty in the amount of $797,662 with respect to the McGuire Steel entries.

Slip Op. 07–189

Before: Nicholas Tsoucalas, Senior Judge

AECTRA REFINING AND MARKETING INC., Plaintiff, v. UNITED STATES, Defendant.

Court No.: 04–00354

December 28, 2007

[Held: Plaintiff's Motion for Summary Judgment is denied. Defendant's Motion for Summary Judgment is granted. Judgment entered for the Defendant.]

Phelan & Mitri (*Michael F. Mitri*) for Aectra Refining and Marketing Inc., Plaintiff.
Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director; *Todd M. Hughes*, Assistant Director; Commercial Litigation Branch, Civil Division, United States Department of Justice (Tara K. Hogan); of counsel: *Richard McManus*, Office of the Chief Counsel, United States Bureau of Customs and Border Protection, for United States, Defendant.

OPINION

TSOUCALAS, Senior Judge: This matter is before the court on cross- motions for summary judgment pursuant to USCIT R. 56. Plaintiff Aectra Refining and Marketing Inc. ("Aectra") seeks drawback[1] of Harbor Maintenance Taxes ("HMTs")[2], Merchandise Processing Fees ("MPFs")[3] and Environmental Taxes ("ETs")[4] it paid on imported merchandise designated under the drawback entries at bar and seeks reliquidation of same. Defendant United States Bureau of Customs and Border Protection ("Customs") argues that Aectra's

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[1] "Drawback means a refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise[.]" 19 C.F.R. § 191.2(i).

[2] The HMTs are a tax on port use enacted pursuant to the Water Resources Development Act of 1986, Pub.L. No. 99–662, Title XIV § 1402, 100 Stat. 4266 (1986), 26 U.S.C. § 4461.

[3] The MPFs are a fee assessed on all imports pursuant to19 U.S.C. § 58c(a)(9).

[4] The ETs are an excise tax imposed on crude oil received at a United States refinery and on petroleum products entered into the United States for consumption, use, or warehousing. *See* 26 U.S.C. § 4611.

drawback claim was properly denied and seeks an order dismissing the case.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

STANDARD OF REVIEW

On a motion for summary judgment, the court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id.* Accordingly, the court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Background

Plaintiff Aectra imported certain petroleum products into the United States, then later exported "substitute finished petroleum derivatives." *See* Pl.'s Mot. Summ. J. ("Pl.'s Mot.") at 1. At issue are the ten claims for substitution drawback of finished petroleum derivatives Aectra filed with Customs during the period August 1997 through June 1998. *See* Pl.'s Statement Material Facts ("Aectra's Facts") ¶¶ 1, 2. All ten drawback claims sought drawback of Column I general customs duties only. *See* Pl.'s Mot. at 1.

On or about November 28, 2003, Customs liquidated Aectra's drawback entries and approved drawback refunds for the full amounts requested by Aectra. *See* Aectra's Facts ¶¶ 3, 4. On or about February 2, 2004, plaintiff timely filed a protest pursuant to 19 U.S.C. § 1514 contesting and requesting, for the first time, Customs' failure to issue drawback of the HMTs and MPFs imposed on the merchandise at issue. *See* Appendix Def.'s Resp. Summ. J. at 1. On or about February 6, 2004, Customs denied plaintiff's protest. *See* Aectra's Facts ¶ 9. On or about July 23, 2004, plaintiff commenced the instant action contesting Customs' denial of its protest and requesting drawback of HMTs, MPFs and ETs (collectively "taxes and fee"). *See id.* ¶ 10; Complaint.

II. Statutory Background

Pursuant to subsection 313(p) of the Tariff Act of 1930, as amended ("Act"), 19 U.S.C. § 1313(p), importers of certain petro-

leum products meeting the statutory requirements are entitled to receive drawback of the full amount of duties paid, less one percent, if they export "substitute finished petroleum derivatives." *See* North American Free Trade Agreement Implementation Act ("NAFTA Act"), Pub.L. No. 103–182, 107 Stat. 2192, 2194–95 (1993). As enacted by the NAFTA Act, "[a] drawback entry and all documents necessary to complete a drawback claim . . . shall be filed or applied for, as applicable, within three years after the date of exportation or destruction of the articles on which drawback is claimed." 19 U.S.C. § 1313(r)(1).

In 1999, 19 U.S.C. § 1313(p)(4) was amended so as to provide that the drawback amount payable for non-manufacturing claims shall be that attributable to the imported article under 19 U.S.C. § 1313(j) governing unused merchandise drawback. *See* Miscellaneous Trade and Technical Corrections Act of 1999 ("1999 Trade Act"), Pub.L. No. 106–36, § 2420(d), 113 Stat. 127, 178–79 (1999). At that time, 19 U.S.C. § 1313(j) permitted drawback "[i]f imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation" was either 1) not used within the United States or 2) "commercially interchangeable" with the imported merchandise, before being subsequently exported or destroyed. *See* 19 U.S.C. § 1313(j). The 1999 amendment of 19 U.S.C. § 1313(p)(4) suspended the three-year time limitation tocomplete drawback claims set forth in 19 U.S.C. § 1313(r)(1) for drawback claims filed within six months after the date of enactment, June 25, 1999. *See* 1999 Trade Act, Pub.L. No. 106–36, § 2420(e), 113 Stat. 127, 179 (1999).

In *Texport Oil Co. v. United States* ("*Texport CAFC*"), the United States Court of Appeals for the Federal Circuit ("CAFC") held that the "because of its importation" language of 19 U.S.C. § 1313(j) excluded from drawback taxes and fees that do not discriminate against imports. *See* 185 F.3d 1291 (Fed. Cir. 1999). Thus, the CAFC found that HMTs are applied indiscriminately and are ineligible for drawback, but found that MPFs, which discriminate against imports, are eligible for drawback. *See id.* Subsequent to the 1999 amendment of 19 U.S.C. § 1313(p)(4), this court held in *George E. Warren Corp. v. United States* ("*Warren CIT*"), 26 CIT 486, 201 F. Supp. 2d 1366 (2002), that *Texport CAFC* was controlling in finding that HMTs and ETs were not eligible for drawback. The CAFC affirmed *Warren CIT* finding that a reversal of *Texport CAFC* was not warranted. *See Warren v. United States* ("*Warren CAFC*"), 341 F.3d 1348 (Fed. Cir. 2003).

In December 2004, 19 U.S.C. § 1313(j) was further amended to make eligible for drawback of "duty, tax, or fee" imposed under Federal law "upon entry or importation" to be applicable to any "drawback claim filed on or after [the date of the Act's enactment] and to any drawback entry filed before that date if the liquidation of the en-

try is not final on that date." *See* Miscellaneous Trade and Technical Corrections Act of 2004 ("2004 Trade Act"), Pub.L. 108–429, Title I, § 1557 (a), (b), 118 Stat. 2579 (2004). The legislative history of the 2004 Trade Act reflects Congress' unequivocal intent to overturn *Texport CAFC* by the amendment. *See* S. Report 108–28, at 173 (noting that "allowing for drawback of the[HMTs] is consistent with original Congressional intent").

III. Contentions of the Parties

A. Aectra's Contentions

Aectra argues that it is entitled to drawback refund of HMTs, MPFs and ETs for the drawback entries at issue because it met the statutory requirements for a 1313(p) drawback of substitute finished petroleum derivatives. *See* Pl.'s Mot. at 7. According to Aectra, it followed the applicable administrative procedures for the recovery of the taxes and fee at issue, and timely filed the relevant drawback claims less than three years after the date of export or re-filed during the six-month suspension period provided for in the 1999 Trade Act. *See id.* at 8–9.

To support its claim, Aectra points to the language of the 2004 amendment authorizing 1313(j) drawback refund of taxes and fee *imposed upon importation* rather than *because of importation* applies to any drawback entry "filed before the date of the enactment if the liquidation of the entry is not final on that date." *See id.* at 10. Pursuant to this provision, Aectra contends that the amended 1313(j) is expressly applicable to the drawback entries at issue because their liquidation was not final on the date of the enactment based on timely protest. *See id.* at 10–11.

Aectra concedes that it did not explicitly request the refund of the taxes and fee until the administrative protest filed in February 2004, but nevertheless takes the position that its claims were timely completed within the three-year period. *See id.* at 11–12. Relying on the Court of International Trade's opinion in *Texport Oil Co. v. United States* ("*Texport CIT*"), 22 CIT 118, 1 F. Supp. 2d 1393 (1998), Aectra contends that its initial drawback claims incorporated drawback of taxes and fee. *See id.* at 14. Aectra then cites to *Warren CIT* for the proposition that a drawback claimant that did not initially request a drawback refund of HMTs and ETs need not file a second drawback claim during the six-month "sunset" or "suspension" period provided for in the 1999 amendment. *See id.* 14–16.

Responding to Customs' position that Aectra's failure to include taxes and fee in its calculation of the amount of drawback due demonstrates that its claims cannot implicitly include drawback of taxes and fee, discussed *infra*, Aectra contends that there is no statutory requirement that a drawback claimant calculate the amount of drawback due within the three-year period. *See* Pl.'s Resp. Opp'n Def.'s Cross-Mot. Summ. J. ("Pl.'s Resp.") at 9. Aectra notes that the

requirement for a claimant to submit a calculation of the amount of drawback due is not set out in 19 C.F.R. § 191.51(a)(1), the subsection defining a "complete claim," but in 19 C.F.R. § 191.51(b). *Id.* at 9–10. Aectra thus argues that the three-year time limit applies to (a)(1)'s completion requirement but not to (b)(1)'s calculation requirement. *See id.* at 10.

Moreover, Aectra's reading of 19 C.F.R. 191.51(b) (1998) requires a drawback claimant to calculate the amount of import duties due, not the amounts of taxes and fee. *See id.* at 11–13. Indeed, noting that 19 C.F.R. § 191.51(b) requires a drawback claimant to correctly calculate the amount of drawback due, Aectra contends that if it had included the amounts for taxes and fee in its claims, the amounts would have exceeded 99% of duty paid, which Customs would have deemed incorrect. *See id.* at 13.

Aectra further contends that Customs misinterprets the effective date provision of the 2004 amendment. *See id.* at 17–23. The effective date provision, according to Aectra, specifically provides that the amendment apply "prospectively to filings of future drawback *claims* and retroactively to previously filed drawback *entries* where the liquidation of such entries were not final on the date of enactment." *Id.* at 19. In making that distinction between drawback claims and drawback entries, Aectra states that "Congress intentionally recognized a class of retroactive tax and fee refund requests that were not subject to the three-year rule, namely, those covered under previously filed drawback entries not subject to final liquidation." *Id.* at 22. Aectra explains that "it must be assumed that the 2004 Congress never intended the 3–year rule of 1313(r)(1) would operate as a time bar for the recovery of [taxes and fee] in a drawback claim filed prior to enactment, so long as the liquidation of the drawback entry underlying the claim was not final." *Id.* at 23. In Aectra's view, while the effective date provision of the 1999 amendment permitted claimants to file new 1313 (p) claims for the first time outside the three-year period, the retroactivity of the 2004 amendment is limited to previously filed drawback entries. *See id.*

In any event, Aectra argues that neither 19 U.S.C. § 1313(r)(1) nor the regulation which preceded it, 19 C.F.R. § 191.61, requires that a claimant calculate the amount of drawback due in order to complete a drawback claim. *See id.* at 24–28. As such, Aectra contends that, to the extent the regulation would impose a condition unwarranted by the statute, 1313(r)(1) " 'cannot defeat a right which the act of Congress gives.' " *Id.* at 27. In addition, by requiring that claimants calculate the amount of drawback due, Aectra contends that Customs improperly attempted to delegate a ministerial function. *See id.*

Finally, Aectra contends that Customs' Headquarter Rulings do not support its contention that a change in the amount claimed changes the scope of a drawback claim so as to constitute an amend-

ment subject to the three-year time limitation of 1313(r)(1), and that those Headquarter Rulings are not entitled to *Skidmore* deference on the basis that they are not consistent, thorough or well-reasoned pronouncements of the law and regulations. *See id.* at 29–31.

B. Customs' Contentions

Customs contends that it properly denied Aectra's protest seeking drawback of taxes and fee because Aectra did not request them until more than three years had passed since export. *See* Def.'s Resp. Pl.'s Mot. Summ. J. ("Def.'s Resp.") at 8. Accordingly, Customs contends that Aectra's drawback claims are untimely pursuant to 19 U.S.C. § 1313(r)(1). *See id.* at 9–11.

Customs disputes Aectra's assertion that its initial drawback claims incorporated requests for taxes and fee. *See id.* at 11. According to Customs, Aectra's position is undercut by the requirement set forth in 19 C.F.R. § 191.51(b)(1) requiring drawback claimants to correctly calculate the amount of drawback due. *See id.* at 12. Customs states that Aectra did not include the amounts of HMTs and MPFs due in its calculations, and thus argues that Aectra's claims could not implicitly include drawback of those amounts.[5] *See id.*

Customs also disputes that *Texport CIT* and *Warren CIT* support Aectra's position that its drawback requests implicitly included request for drawback of HMTs and MPFs. *See id.* at 13. Instead, Customs contends that *Texport CIT* is limited to "situations in which the underlying duty drawback claim is denied on other substantive grounds." *Id.* at 14. *Warren CIT* is also inapplicable, according to Customs, because it addressed "whether the drawback claimant's failure to claim explicit amounts of HMT and ET for drawback was a jurisdictional bar to bringing suit in this Court." *Id.* at 15. According to Customs, *Warren CIT* "did not analyze or decide the issue here: whether a drawback claim of HMT and MPF is untimely when it is not filed within three years of export." *Id.*

Customs next argues that Aectra did not and could not "perfect" or "amend" its claim by filing a protest. *See id.* at 16. According to Customs, even if Aectra could, it did not submit with its protest an amended claim or calculation of HMTs and MPFs amounts, and therefore failed to perfect its claim. *Id.* Customs however contends that Aectra could not have perfected or amended its drawback claims by changing the scope of its original claim pursuant to 19 C.F.R. § 191.52(b). *See id.* at 16–17. First, Customs claims that only Customs can initiate the perfection process. *See id.* at 17. Second, Customs contends that addition of more fees and duties to be in-

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[5] Customs notes that Aectra's protest only sought drawback of HMTs and MPFs. Aectra did, however, seek drawback of ETs in its Complaint. Since both the protest and the Complaint were filed beyond the three-year period, the court finds the distinction immaterial to this case.

cluded in the drawback claim is a substantive change and that "Customs has consistently interpreted these regulations to preclude making substantive changes to the drawback claim." *Id.* In support, Customs relies on Headquarter Rulings, which it argues are consistent with the regulations and therefore are owed deference. *See id.* at 17–18.

Customs points to 19 C.F.R. § 191.52(c), which permits a drawback claimant to amend its claim prior to liquidation provided that the amendment is made within three years of the date of exportation or destruction of the articles which are the subject of the original drawback claim. *See id.* at 18. Customs argues that in enacting 19 C.F.R. § 191.52(c) it intended to preclude amendments to drawback claims made outside the three-year period. *See id.* at 19. According to Customs, drawback claims may not be amended once entries have been liquidated, but liquidated claims may be perfected in a protest if made within the three-year period. *Id.* Customs believes this regulation is consistent with the statutory requirement that a complete claim be filed within three years of export. *Id.*

Moreover, according to Customs, the fact that Congress specifically provided for a six-month suspension of the three-year period in enacting the 1999 amendment, but chose not do so in enacting the 2004 amendment evidences Congress' intent not to suspend the three-year time limitation. *See id.* at 21. Customs thus argues that the 2004 amendment permits "drawback claims which had timely included HMT and MPF whose liquidation was not final on [the date of enactment]." *Id.*

IV. Analysis

A. The 2004 Trade Act Did Not Suspend The Time Limit Of 19 U.S.C. § 1313 (r)(1)

The parties apparently do not dispute that § 1557(a) of the 2004 Trade Act amending 19 U.S.C. § 1313(j) made HMTs, MPFs and ETs eligible for drawback. The parties, however, disagree as to whether § 1557(b) of the 2004 Trade Act, the effective date provision, is subject to the three-year time limitation to complete drawback claims as set out in 19 U.S.C. § 1313(r)(1).

The effective date provision, § 1557(b) of the 2004 Trade Act, provides that:

> the amendments made by this section shall take effect on the date of the enactment of this Act, and shall apply to any drawback claim filed on or after that date and to *any drawback entry filed before that date if the liquidation of the entry is not final on that date*. (emphasis added).

Section 1313(r)(1) of Title 19 of the United States Code provides that:

> A drawback entry and all documents necessary to complete a drawback claim, including those issued by the Customs Service, shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction of the articles on which drawback is claimed, except that any landing certificate required by regulation shall be filed within the time limit prescribed in such regulation. Claims not completed within the 3-year period shall be considered abandoned. No extension will be granted unless it is established that the Customs Service was responsible for the untimely filing.

Plaintiff Aectra argues that the plain language of the effective date provision makes the 2004 amendment applicable to the drawback claims at issue because liquidation of those entries were not final as of the date of the enactment. In addition, Aectra argues that the effective date provision is not subject to the three-year time limitation set forth in 19 U.S.C. § 1313(r)(1). Customs contends that the effective date provision must be read in conjunction with 19 U.S.C. § 1313(r)(1).

In construing an act of Congress, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *NTN Bearing Corp. of Am. v. United States*, 26 CIT 53, 102–03, 186 F. Supp. 2d 1257, 1303 (2002) (citations omitted). Rather, "each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole." *NTN Bearing*, 26 CIT at 102–03, 186 F. Supp. 2d at 1303 (*citing In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A. 1982)). Employing this principle, the court finds that, the drawback statute, read as a whole, supports finding that § 1557(b) of the 2004 Trade Act is subject to the three-year time limitation of 19 U.S.C. § 1313(r)(1). The fact that Congress knew how to suspend the time limitation because it did so in enacting the 1999 Trade Act, but chose not to provide for a suspension of the three-year time limitation in enacting the 2004 Trade Act further supports this reading.

Aectra's reliance on *Texport CIT*, 22 CIT 118, 1 F. Supp. 2d 1393, and *Texport CAFC*, 185 F.3d 1291, is misguided. In *Texport CIT*, Customs had denied the importer's drawback claims for import duties. 22 CIT at 126–27, 1 F. Supp. 2d at 1401. "Texport was therefore unable to protest the MPF and HMT fee drawback before Customs as a result of the duty drawback denial." *Id.* Under those particular circumstances, the court found that Texport's claim for HMTs and MPFs were implicit in the original claim. *See id.* In the instant matter, Aectra had only sought drawback of import duties, and Customs had fully liquidated and refunded the full amount of drawback refund sought by Aectra. Nothing prevented Aectra from making a timely request for drawback of taxes and fee. Indeed, Customs liquidated Aectra's drawback entries for the exact amounts Aectra claimed. Aectra then filed a protest seeking drawback refund of

HMTs and MPFs, but failed to do so within the three-year period as provided in 19 U.S.C. § 1313(r)(1). *Texport CIT* and *Texport CAFC* are thus inapplicable to the facts of this case, and Aectra's original drawback claims cannot be read to implicitly include drawback of taxes and fee.

Neither are *Warren CIT*, 26 CIT 486, 201 F. Supp. 2d 1366, and *Warren CAFC*, 341 F.3d 1348, dispositive of the issue. In *Warren CIT*, the court held that it had jurisdiction over an action contesting the denial of a protest even if the drawback claimant had never claimed explicit amounts of HMTs and ETs in its original drawback request. *See Warren CIT*, 26 CIT at 487–89, 201 F. Supp. 2d at 1369–70. Central to the holding of *Warren CIT* was the fact that Congress had enacted the 1999 Trade Act amending 19 U.S.C. § 1313(p) and specifically provided for a six-month suspension of the three-year time limitation to complete drawback claims. *See id.* at 1370. By then "Customs had already ruled on the merits of [Warren's drawback for HMTs and ETs] in denying Warren's protest" and the court determined that "filing a second drawback claim would have been futile." *Id.* Based on the unique circumstances of *Warren CIT*, the court found that the importer had exhausted administrative remedies and that there was an actual controversy fit for judicial review. *See id.* The facts of this case do not warrant such finding.

More importantly, it was unnecessary for the court in *Warren CIT* to consider whether Warren had complied with 19 U.S.C. § 1313(r)(1) since Warren filed its protest requesting drawback of HMTs and ETs well within the three-year time period to complete drawback claims.[6] Accordingly, this court agrees with Customs and finds that *Warren CIT* and *Warren CAFC* are inapplicable to this case. The court therefore holds that § 1557(b) of the 2004 Trade Act is subject to the three-year time limitation of 19 U.S.C. § 1313(r)(1) and finds that cases relied upon by Aectra do not require this court to hold otherwise.

B. The Drawback Regulations At Issue Are Valid

The court next addresses Aectra's claim that it did indeed complete its drawback claims within the three-year period. Noting that the drawback statute does not define what constitutes a completed drawback claim, Aectra cites to 19 C.F.R. § 191.51(a)(1), which provides:

> Complete claim. Unless otherwise specified, a complete drawback claim under this part shall consist of the drawback entry on Customs Form 7551, applicable certificate(s) of manufacture

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[6] Warren imported petroleum products on three different occasions during the period December 1995 to January 1996, and the protest seeking drawback of taxes and fee was filed on January 3, 1997. *See Warren CAFC*, 341 F.3d at 1349.

> and delivery, applicable Notice of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet, unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part.

Aectra contends that it completed its drawback claims because it fulfilled the requirements of 19 C.F.R. § 191.51(a)(1) within the three-year period.

Customs does not dispute that Aectra timely filed the documents delineated in 19 C.F.R. § 191.51(a)(1). However, it contends that Aectra's drawback claims for taxes and fee were incomplete because Aectra failed to comply with 19 C.F.R. § 191.51(b), which provides, *inter alia*, that "[d]rawback claimants are required to correctly calculate the amount of drawback due." Aectra, in turn, responds that the three-year time limitation does not apply to the requirement 19 C.F.R. § 191.51(b) to calculate the amount of drawback due and that, in any event, the regulation improperly imposes an obligation not required by the drawback statute.

In addition, Customs argues that pursuant to 19 C.F.R. § 191.52(c), Aectra cannot amend its drawback claims for taxes and fee beyond the three-year period. Customs states that "[a]s part of protest procedures, a claim may be perfected, but it may not be amended (insofar as amendment would result in a complete claim not being filed within the 3-year time limit)." 63 Fed. Reg. 10970, 10989 (March 5, 1998). Citing HQ 227627 (July 20, 1999), Customs contends that "changing the basis on which drawback is claimed and the amount claimed, is a change in the scope of the claim, is not simply the submission of supporting evidence, and therefore is an untimely amendment of the claim, if done more than three years after the date of exportation or destruction." Thus, Customs argues that Aectra impermissibly attempts to amend its drawback claim beyond the three-year period by way of a protest contrary to 19 C.F.R. § 191.52(c).

First, the court agrees with Customs that the three-year time limitation applies to the requirement of 19 C.F.R. § 191.51(b) to calculate the correct amount of drawback due. Indeed, a reasonable reading of 19 C.F.R. § 191.51 requires that each subsection sets forth a component of a completed claim. Furthermore, 19 C.F.R. § 191.51(e)(1) provides that "[a] completed drawback claim, *with all required documents*, shall be filed within 3 years after the date of exportation or destruction of the merchandise or articles which are the subject of the claim." (Emphasis added). A calculation of the amount of drawback due is certainly one of the documents required to be filed within the three-year period. Because Aectra failed to provide Customs with calculations of the amounts of taxes and fee due in any shape or form within the three-year period, the court finds that it did not timely complete its taxes and fee drawback claims.

Second, the court finds that 19 C.F.R. § 191.51 setting forth the requirements of a complete drawback claim and 19 C.F.R. § 191.52 governing amendment of a drawback claim are valid and are within Customs' statutory powers to promulgate and enforce the drawback statute. Customs is authorized to enact regulations implementing the statute pursuant to 19 U.S.C. § 1624, which provides that

> "[i]n addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provision of this chapter."

In addition, 19 U.S.C. § 1313(l) provides that:

> "[a]llowance of the privileges provided for in thissection shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe, which may include, but need not be limited to, the authority for the electronic submission of drawback entries and the designation of the person to whom any refund or payment of drawback shall be made."

"Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' . . . the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " *Mourning v. Family Publ'g Serv.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 280–281 (1969)). "[A] regulation is reasonably related to the purposes of the legislation to which it relates if the regulation serves to prevent circumvention of the statute and is not inconsistent with the statutory provisions." *Carpenter, Chartered v. Sec'y of Veterans Affairs*, 343 F.3d 1347, 1351–52 (Fed. Cir. 2003) (citing *Thomas Int'l, Ltd. v. United States*, 773 F.2d 300, 304–05 (Fed. Cir. 1985).

The regulations at issue are reasonably related to the purpose of the completion requirement of 19 U.S.C. § 1313(r)(1). The regulations serve to prevent circumvention of the drawback statute's three-year period to complete drawback claims. If drawback claimants were not required to provide all information necessary for Customs to process and liquidate drawback entries, such as the amount of drawback due and any necessary amendments to drawback claims, within the statutory three-year period, then Customs could not effectively carry out its duties. Moreover, the strict time limitation set out in 19 U.S.C. § 1313(r)(1) would be circumvented. In addition, the court finds nothing in the regulations that is inconsistent or contrary to the drawback statute.

CONCLUSION

Based on the foregoing, the court holds that § 1557(b) of the 2004 Trade Act is subject to the three-year time limitation of 19 U.S.C. § 1313(r)(1). Accordingly, Customs properly denied Aectra's protest seeking, for the first time, drawback of taxes and fee more than three years from the date of export or destruction. The court finds no merit to other arguments posed by Aectra. Aectra's motion for summary judgment is denied, and Customs' motion for summary judgment is granted. This case is dismissed. Judgment will be entered accordingly.

Before: Nicholas Tsoucalas, Senior Judge

AECTRA REFINING AND MARKETING INC., Plaintiff, v. UNITED STATES, Defendant.

Court No.: 04–00354

JUDGMENT

This case having been duly submitted for decision and thecourt, after due deliberation, having rendered a decision herein;now, in accordance with said decision, it is hereby

ORDERED, ADJUDGED and DECREED that the United States Bureau of Customs and Border Protection properly denied the protest filed byplaintiff Aectra Refining and Marketing Inc. ("Aectra") requestingdrawback of taxes and fee for the first instance more than three years after the date of exportation or destruction of the articleson which drawback is claimed; and it is further

ORDERED that the defendant United States' cross-motion for summary judgment pursuant to USCIT R. 56 is granted; and it is further

ORDERED that plaintiff motion for summary judgment pursuant toUSCIT R. 56 is denied; and it is further

ORDERED that this case is dismissed.