U.S. Customs and Border Protection

Slip Op. 11–34

HYOSUNG CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Richard W. Goldberg,
Senior Judge
Court No. 10–00114
PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record is denied and the final results of the administrative review are sustained.]

Dated: March 31, 2011

Troutman Sanders LLP (*Don B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*), for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*L. Misha Preheim*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Aaron Kleiner*), Of Counsel, for the Defendant.

Wiley Rein LLP (*Alan H. Price*, *Timothy C. Brightbill*, *Christopher B. Weld*, and *Tessa V. Capeloto*), for the Defendant-Intervenor.

OPINION

Goldberg, Senior Judge:

Introduction

Hyosung Corporation ("Hyosung") contests the International Trade Administration of the U.S. Department of Commerce's ("Commerce") final results of the antidumping duty administrative review covering certain cut-to-length carbon-quality steel plate ("CTLP") from Korea. *See Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part*, 75 Fed. Reg. 10,207 (Dep't Commerce Mar. 5, 2010) ("*Final Results*").

Background

In February 2009, Commerce published a notice of opportunity to request an administrative review of CTLP from Korea for the

2008–2009 period. *Notice of Opportunity to Request Administrative Review*, 74 Fed. Reg. 6,013 (Dep't Commerce Feb. 4, 2009). Nucor Corporation, a U.S. producer of CTLP, requested review of Hyosung, Daewoo International Corporation ("Daewoo"), Hyundai Mipo Dockyard Company Limited ("Hyundai"), and JeongWoo Industrial Machine Company Limited ("JeongWoo"). Dongkuk Steel Mill Company Limited ("DSM"), a Korean producer of CTLP, requested review of itself.

In March 2009, Commerce initiated a review of Hyosung, DSM, Daewoo, Hyundai, and JeongWoo. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 Fed. Reg. 12,310 (Dep't Commerce Mar. 24, 2009) ("*Initiation Notice*"). The *Initiation Notice* stated that companies that did not have exports, sales, or entries of the subject merchandise during the period of review ("POR") could submit a no-shipments letter to Commerce within thirty days of publication of the notice. Hyosung did not submit a no-shipments letter. The *Initiation Notice* also stated that Commerce might limit the number of respondents for individual examination based upon import data from U.S. Customs and Border Protection ("CBP").

Accordingly, Commerce requested from CBP a report showing entries of CTLP during the POR. The CBP data revealed that DSM made [[ ]] of CTLP and that Hyosung and the other respondents [[ ]]. *See* Mem. to the File: CBP Data, A580–836, AR 2/1/2008–1/31/2009 (Apr. 1, 2009), Admin. R. Conf. Doc. 1. On March 31, 2009, Commerce informed the parties that it intended to select a respondent for individual examination based upon the CBP data and placed the data on the record for comment. *See*, *e.g.*, Letter to Law Firm of Kelly Drye and Warren Regarding Respondent Selection, A-580–836, AR 2/1/20081/31/2009 (Mar. 31, 2009), Admin. R. Pub. Doc. 10. In response, DSM withdrew its request for review of itself. Nonetheless, on April 21, 2009, Commerce issued a memorandum informing parties that DSM had been selected for examination. *See* Respondent Selection Mem., A-580–836, AR 2/1/2008–1/31/2009 (Apr. 21, 2009), Admin. R. Conf. Doc. 2 at 4. Commerce later rescinded its review of DSM. *Notice of Rescission of Administrative Review*, 74 Fed. Reg. 27,015 (Dep't Commerce June 5, 2009).

In May 2009, Commerce informed respondents[1] that it would select a respondent for individual examination based on quantity-and-value ("Q&V") questionnaires. *See* Mem. Regarding Issuance of Quantity-and-Value Questionnaires, A-580–836, AR 2/1/2008–1/31/2009 (May

[1] Hyosung, Hyundai, Daewoo, and JeongWoo

7, 2009), Admin. R. Pub. Doc. 30 at 1. Commerce transmitted Q&V questionnaires via Federal Express ("FedEx") and facsimile to Hyosung and placed the related documentation on the record. *See* Mem. Regarding Release of Quantity-and-Value Questionnaire, A-580–836, AR 2/1/2008–1/31/2009 (May 12, 2009), Admin. R. Pub. Doc. 32. The questionnaire contained instructions regarding where to submit the filing, the number of copies to submit, and the manner in which to submit the filing. Responses were due May 18, 2009, and Commerce warned that untimely responses would not be considered in the review. Commerce did not receive a timely response from Hyosung.

In September 2009, Commerce published the preliminary results of the review, applying an adverse facts available ("AFA") rate of 32.70 percent to Hyosung. *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 74 Fed. Reg. 48,716 (Dep't Commerce Sept. 24, 2009) ("*Preliminary Results*"). Commerce explained that it applied an AFA rate because of Hyosung's lack of response. The 32.70 percent AFA rate was the highest product-specific margin calculated in the 2006–2007 administrative review of CTLP from Korea. *See Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Administrative Review in Part*, 72 Fed. Reg. 65,701 (Dep't Commerce Nov. 23, 2007), unchanged in final results, *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part*, 73 Fed. Reg. 15,132 (Dep't Commerce Mar. 21, 2008). Commerce corroborated the rate using transaction-specific margins calculated for a cooperative respondent in the 2007–2008 administrative review. *See* Mem. Regarding Placement of Dongkuk Steel's 2007–08 Data on the Admin. R., A-580–836, AR 2/1/2008–1/31/2009 (Sept. 18, 2009), Admin. R. Conf. Doc. 4.

On October 1, 2009, one week after publication of the *Preliminary Results*, Hyosung responded to the Q&V questionnaire via facsimile declaring that it [[ ]] during the POR. The questionnaire was dated May 26, 2009, the date on which Hyosung claims it initially transmitted that response by facsimile. Commerce did not accept the response because it was untimely and failed to satisfy a number of the regulatory requirements.

In March 2010, Commerce published the *Final Results*, maintaining the AFA rate for Hyosung, as set forth in the *Preliminary Results*. Commerce explained that it does not rescind reviews on the basis of CBP data alone. Commerce further reasoned that because Hyosung's

response to the Q&V questionnaire was neither timely nor filed in accordance with Commerce's regulations, it was not considered in determining the antidumping rate. *See* Issues & Decision Mem., A-580–836, AR 2/1/2008–1/31/2009 (Mar. 1, 2010) Admin. R. Pub. Doc. 65 at 8. ("*I&D Memo*").

Jurisdiction and Standard of Review

This Court has jurisdiction pursuant to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c) (2006).

This Court must "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)). "Substantial evidence" means "more than a mere scintilla" and has been characterized as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). When reviewing agency determinations, findings, or conclusions for substantial evidence, this Court determines whether the agency action is reasonable in light of the entire record. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

Discussion

Hyosung challenges: (A) Commerce's rejection of its tardy response to the Q&V questionnaire; (B) its application of AFA; and (C) the AFA rate assigned as unsupported by substantial evidence and not in accordance with law. The Court addresses each argument in turn and, for the reasons below, Hyosung's arguments fail and its motion for judgment on the agency record is denied.

A. Commerce's Determination Not to Accept Hyosung's Untimely and Improperly Filed Questionnaire Response Is Supported by Substantial Evidence and Otherwise in Accordance with Law

It is clear that "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370–71 (2007) (quoting *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002)), *aff'd*, 300 Fed. Appx. 934 (Fed. Cir. 2008). Commerce's policy of setting time limits is both reasonable and necessary for it to complete its work. *Id.*

Hyosung claims that Commerce's rejection of Hyosung's untimely and improperly filed response was unreasonable and hence unsup-

ported by substantial evidence. In support, Hyosung argues that it was not familiar with Commerce's procedures, was not represented by counsel, Commerce did not follow-up with Hyosung regarding its failure to respond, and Hyosung made repeated, good-faith attempts to cooperate. Hyosung's arguments are unpersuasive.

Commerce reasonably determined that Hyosung's untimely submission failed to satisfy a number of Commerce's regulatory requirements. Hyosung submitted its response on October 1, 2009, "more than four months after the May 18, 2009 deadline, more than two months after the regulatory deadline (July 18, 2009) for respondents to submit new factual information in an administrative review for purposes of issuing the final results in accordance with 19 C.F.R. § 351.301(b)(2), and a week after the publication of the *Preliminary Results*." *See I&D Memo* at 8. It is correct that Commerce may, for good cause, extend the time limit established for submission of the requested information. *See* 19 C.F.R. § 351.302(b). However, in order for Commerce to grant an extension of time, the party requesting an extension must do so in writing before the applicable time limit expires, including reasons for its request. *See* 19 C.F.R. § 351.302(c). Hyosung failed to request an extension.

Even if Hyosung initially transmitted its response on May 26, 2009, as it contends, that submission was past the deadline, and Commerce had discretion to reject it then because Commerce will not consider or retain in the official record of the proceeding any untimely filed information. *See* 19 C.F.R. § 351.302(d)(1)(i). Instead, Commerce will return untimely information. *See* 19 C.F.R. § 351.302(d)(2). Commerce rejects untimely information because, as Commerce explained, "[a]llowing parties to submit responses to [Commerce's] requests for information at whatever time is most convenient for [respondents] would amount to relinquishing [Commerce's] authority to establish due dates for submissions and it would thus impair [Commerce's] ability to satisfy the statutory timeframe in which to complete an administrative review." *I&D Memo* at 9. Hyosung also claims, without supporting legal authority, that Commerce should have followed-up with Hyosung regarding its failure to respond on time. However, Commerce is not obligated to do so.

Furthermore, once Hyosung finally submitted its response to the questionnaire, it contained a number of deficiencies.[2] Hyosung asserts that Commerce was required to notify Hyosung of any deficien-

[2] For example, Hyosung failed to submit the response to Commerce's physical address, as required by 19 C.F.R. § 351.303(b). It failed to submit the required number of copies and serve all interested parties with copies, as required by 19 C.F.R. § 351.303(c)(1) and § 351.303(f). It failed to format properly its submission, as required by 19 C.F.R.§351.303(d).It failed to translate documents into English, as required by 19 C.F.R. §

cies in its submission relying on section 782(d) of the Tariff Act of 1930, 19 U.S.C. § 1677m(d) (2006).[3] However, the statute provides:

> If the administering authority . . . determines that a response to a request for information under this title does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, **to the extent practicable**, provide that person with an opportunity to remedy or explain the deficiency **in light of the time limits established** for the completion of investigations or reviews . . . .

Id. (emphases added). Moreover, if further information is submitted in response to a deficiency and that response is not submitted within the applicable time limits, the administering authority may disregard all or part of the original and subsequent responses. 19 U.S.C. § 1677m(d)(2). Because Hyosung did not request an extension, and its response was not submitted within the applicable time limit, it was reasonable for Commerce to reject Hyosung's response and not afford Hyosung an opportunity to remedy the deficiency. In other words, given the deadline established and the tardiness of Hyosung's submission, it was reasonable for Commerce to conclude that it was not practicable to permit Hyosung to submit corrected information.[4]

Thus, Commerce's determination not to accept Hyosung's untimely and improperly filed Q&V questionnaire response is supported by substantial evidence and otherwise in accordance with law.

351.303(e), and it failed to include the required certification of accuracy, as required by 19 C.F.R. § 351.303(g), among various other deficiencies.

[3] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

[4] 19 U.S.C. § 1677m(e) provides that "the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if
(1) the information is submitted by the deadline established for its submission,
(2) the information can be verified,
(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
(5) the information can be used without undue difficulties."
This section is inapplicable in this case as all of the conditions must be met in order for Commerce to be precluded from declining to consider information. The information Hyosung submitted does not satisfy all of the requisite conditions.

B. Commerce's Determination to Assign Hyosung a Dumping Rate Based on Adverse Facts Available Is Supported by Substantial Evidence and Otherwise in Accordance with Law

During an antidumping review, Commerce may rely upon facts available if necessary information is not available on the record or an interested party or any other person fails to provide such information by the deadlines for submission of the information or in the form and manner requested. 19 U.S.C. § 1677e(a). Furthermore, when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

Hyosung argues that it was irrational and unlawful for Commerce to continue its review of Hyosung given the record evidence [[ ]] and Hyosung's eventual response [[ ]]. Hyosung further contends that Commerce's application of AFA was irrational and unlawful because Hyosung made repeated, good-faith efforts to comply. These claims are meritless.

First, Commerce "**may** rescind an administrative review, in whole or only with respect to a particular exporter or producer, if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise . . . ." 19 C.F.R. § 351.213(d)(3) (emphasis added). Thus, Commerce is not obligated to rescind the review, but it **may** if it determines that a particular company did not have entries, exports, or sales.

Here, Commerce could not conclusively determine that Hyosung [[ ]] during the POR. Commerce did not receive a no-shipments letter from Hyosung within thirty days of publication of the *Initiation Notice*. Furthermore, as Commerce explained, CBP data alone is not a conclusive statement of whether a respondent had shipments because it does not capture all entries, such as those not made electronically. Thus, Commerce sent a Q&V questionnaire to Hyosung (and other respondents) requesting information on their entries, exports, or sales. It was incumbent on Hyosung to supply the requested information because it has the burden of evidentiary production, as it possesses the necessary information. *See Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (stating that the "burden of production should belong to the party in possession of the necessary information"). Nonetheless, Hyosung did not supply the requested information. Accordingly, pursuant to 19 U.S.C. § 1677e(a), Commerce proceeded with the review on the basis of facts available.

Furthermore, Commerce applied an adverse inference because Hyosung did not act to the best of its ability in complying. *See* 19 U.S.C. § 1677e(b). Hyosung had two opportunities to inform Commerce that it did not have shipments. However, Hyosung did not submit a no-shipments letter, did not request an extension of time to respond to the Q&V questionnaire, did not contact Commerce for clarification of the questionnaire because of its alleged unfamiliarity with Commerce's procedures, and failed to respond to the Q&V questionnaire in a timely fashion. Thus, Commerce reasonably determined that Hyosung had failed to act to the best of its ability in complying with its request for information.

Therefore, Commerce's determination to assign Hyosung an AFA rate is supported by substantial evidence and otherwise in accordance with law.

C. The AFA Rate Commerce Assigned Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Hyosung argues that the AFA rate assigned to it is not grounded in commercial reality, is punitive, and is unsupported by substantial evidence. This Court disagrees and finds that Commerce reasonably selected and corroborated the AFA rate it assigned to Hyosung.

As previously mentioned, during an antidumping review, when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). The antidumping duty rate under such circumstances, an AFA rate, may be based on information obtained from: "(1) the petition, (2) a final determination in the investigation under this title, (3) **any previous review** under section 751 [19 U.S.C. § 1675] or determination under section 753 [19 U.S.C. § 1675b], or (4) any other information placed on the record." *Id.* (emphasis added). In addition, Commerce's regulations provide that Commerce may rely upon information from a prior review as AFA. 19 C.F.R. § 351.308(c)(1).

Pursuant to its statutory and regulatory authority, Commerce selected the AFA rate it assigned to Hyosung based on information from a previous review. 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.308(c)(1). Specifically, Commerce selected an AFA rate of 32.70 percent the

highest product-specific antidumping rate calculated for a cooperative respondent in the 2006–2007 administrative review of CTLP from Korea.[5]

When Commerce "relies on secondary information rather than on information obtained in the course of an investigation or review," Commerce shall "corroborate that information from independent sources" reasonably at its disposal. 19 U.S.C. § 1677e(c). In accordance, Commerce corroborated the 32.70 percent AFA rate using transaction-specific margins drawn from a cooperative respondent in the 2007–2008 administrative review. *See* Mem. Regarding Placement of Dongkuk Steel's 2007–08 Data on the Admin. Record, A-580–836, AR 2/1/2008–1/31/2009 (Sept. 18, 2009), Admin. R. Conf. Doc. 4.

Hyosung's argument that the AFA rate is excessive and does not relate to commercial reality because it is higher than the rate of another company in a prior review is unpersuasive. "Commerce need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question." *KYD, Inc. v. United States*, 607 F.3d 760, 765–66 (Fed. Cir. 2010) (rejecting an importer's claim that the AFA rate applied was neither reliable nor relevant because the rate was much higher than the dumping margin applied to other companies). As the Federal Circuit explained, "the fact that current dumping margins for other companies in the same industry are lower than the rate applied" to the respondent in question "does not invalidate Commerce's determination." *Id.* at 766.

In fact, when a respondent fails to cooperate, Commerce may draw an adverse inference and assign it the highest calculated rate. *See id.* at 765–66; *see also Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990). There is a "common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less." *Rhone Poulenc*, 899 F.2d at 1190. Therefore, "it is within Commerce's discretion to presume that the highest prior margin reflects the current margins." *See Ta Chen Stainless Steel Pipe, Inc. v. United*

[5] In the 2006 2007 POR,Commerce relied upon this rate as AFA for an uncooperative respondent, Tae Chang Steel. *See Certain Cut to Length Carbon Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Administrative Review in Part*, 72 Fed. Reg. 65,701 (Dep't Commerce Nov. 23, 2007), unchanged in final results, *Certain Cut to Length Carbon Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part*, 73 Fed. Reg. 15,132 (Dep't Commerce Mar. 21, 2008).

States, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (citing *Rhone Poulenc*, 899 F.2d at 1190). Since Hyosung did not cooperate, Commerce acted within its discretion and assigned it the highest calculated rate from a previous review.

Hyosung argues that, in contrast to *KYD* where Commerce presumed that a prior dumping margin imposed on an exporter in an earlier review continues to be valid if the exporter fails to cooperate in a subsequent review, Hyosung never participated in a prior review and had never been assigned a dumping rate. According to Hyosung, these factual distinctions render *KYD* inapposite. However, the fact that Hyosung did not participate in a prior review, and thus never assigned a rate, does not make *KYD* inapplicable. Notably, in *KYD*, the court did not state that the highest calculated rate applicable must be the highest rate calculated for the particular respondent. "[A]n uncooperative party may be assigned the 'highest verified margin' of the cooperating companies, even though it was 'highly likely that the real dumping margin [for the party] would be well under' the AFA rate." *KYD*, 607 F.3d at 766 (citing *F.Lii de Cecco di Filippo Fara S. Martina S.p.A. v. United States*, 216 F.3d 1027, 1029, 1033–34 (Fed. Cir. 2000)); *see also*, *Shanghai Taoen Int'l Co. v. United States*, 29 CIT 189, 195–99, 360 F. Supp. 2d 1339, 1345–48 (2005) (upholding a 223.01 percent AFA rate because there was no prior dumping margin for the company and it was the highest rate determined in the current or any previous segment of the proceeding and reflected recent commercial activity by a different exporter of the same goods from the same country). Thus, Commerce's selection of the highest margin of a cooperating company was appropriate.

Commerce reasonably corroborated that rate by using transaction-specific margins drawn from a cooperative respondent in the 2007–2008 administrative review. *See KYD*, 607 F.3d at 766 (expressly upholding the same corroboration methodology where an uncooperative company failed to provide Commerce with any sales data). Notably, the corroborating margins were both higher than and close to the 32.70 percent AFA rate applied to Hyosung. *See id.* (finding the AFA rate well grounded because the "transaction-specific margins for cooperative companies" were both higher than and close to the AFA rate applied, and therefore, Commerce had a sufficient basis for concluding that the AFA rate was reliable).

In sum, because there was no prior dumping margin for Hyosung, Commerce reasonably selected a product-specific dumping margin for a cooperative respondent during a recent review, and corroborated the rate using transaction-specific margins from the preceding administrative review. Therefore, the Court rejects Hyosung's claim

that the margin does not relate to commercial reality.[6] Also, despite Hyosung's contentions, the rate is not punitive because "the antidumping laws are remedial," and "an AFA dumping margin determined in accordance with the statutory requirements is not a punitive measure . . . ." *Id.* at 767–68 (citations omitted).

In light of the foregoing, Commerce's determination to assign Hyosung an AFA rate of 32.70 percent is supported by substantial evidence and otherwise in accordance with law.

Conclusion

Commerce's rejection of Hyosung's untimely response, its application of AFA, and the AFA rate assigned are supported by substantial evidence and otherwise in accordance with law.

For the foregoing reasons, Hyosung's motion for judgment upon the agency record is denied and judgment is entered in favor of the United States.

Dated: March 31, 2011
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
Senior Judge

Slip Op. 11–54

NSK CORPORATION, et al., Plaintiffs, and FAG ITALIA S.P.A., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00334

[6] Hyosung's reliance on *Gallant Ocean Co., Ltd. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010) is misplaced. In *Gallant Ocean*, Commerce applied an AFA rate drawn from an antidumping petition that was approximately ten times higher than the average margins for cooperating respondents. *Gallant Ocean*, 602 F.3d at 1323 24. The Federal Circuit found that Commerce "incorrectly presumed that the adjusted petition rate was reliable in the face of much more reliable information" and that the "adjusted petition rate did not . . . represent commercial reality." *Id.* at 1323. The court noted that "[i]nstead of relying on the adjusted petition rate, Commerce should have relied on more reliable 'facts otherwise available' such as the representative dumping rates of similarly sized and similarly situated exporters in the original investigation and in the administrative review." *Id.* at 1324.

Here, Commerce did not rely on a petition rate, but rather, used a rate drawn from product specific sales data for a cooperative respondent in the 2006 2007 administrative review. Moreover, in *Gallant Ocean*, there was a significant discrepancy between the AFA rate assigned and the dumping margins determined for cooperative respondents during the same period of review. *Id.* at 1323 24. Here, since there were not any cooperative respondents in the 2008 09 POR, there is no indication that the AFA rate is unreflective of margins during the POR.

[The court denies The Timken Company's motion to stay.]

Dated: May 13, 2011

Crowell & Moring LLP (*Matthew P. Jaffe*, *Robert A. Lipstein*, and *Carrie F. Fletcher*), for Plaintiffs NSK Corporation, NSK Ltd., and NSK Europe Ltd.

Sidley Austin LLP (*Neil R. Ellis* and *Jill Caiazzo*), for Plaintiffs JTEKT Corporation and Koyo Corporation of U.S.A.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Max F. Schutzman* and *Andrew T. Schutz*), for Plaintiff-Intervenors FAG Italia S.p.A., Schaeffler Group USA, Inc., Schaeffler KG, The Barden Corporation (U.K.) Ltd., and The Barden Corporation.

Steptoe & Johnson (*Herbert C. Shelley* and *Alice A. Kipel*), for Plaintiff-Intervenors SKF Aeroengine Bearings UK and SKF USA, Inc.

United States International Trade Commission, *James M. Lyons* (General Counsel), *Neal J. Reynolds* (Assistant General Counsel for Litigation), and *David A.J. Goldfine*, Office of the General Counsel, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart*, *Eric P. Salonen, Elizabeth A. Argenti*, and *Philip A. Butler*), for Defendant-Intervenor The Timken Company.

OPINION & ORDER

BARZILAY, Judge:

I.
Introduction

On April 26, 2011, Defendant-Intervenor The Timken Company ("Timken"), with the consent of Defendant United States, moved to stay the court's final judgment in *NSK Corp. v. United States*, Slip Op. 11–43, 2011 WL 1491346 (CIT Apr. 20, 2011), which sustained the U.S. International Trade Commission's negative injury determination on antidumping duty orders covering the subject merchandise from Japan and the United Kingdom, pending a final decision on appeal at the Federal Circuit. Specifically, Timken alleges that it will suffer irreparable harm in the upcoming third sunset review in the absence of the orders, that a revocation of the orders would run afoul of the statutory scheme, and that public interest favors a stay. Timken Mem. of P. & A. 4–21. To avoid potentially improvident agency action, the court granted Timken's motion in part and temporarily stayed the effect of the judgment until all parties could fully comment on the issue. *NSK Corp. v. United States*, Consol. Court No. 06–00334 (CIT Apr. 28, 2011) (order granting temporary stay). Plaintiffs JTEKT Corporation, Koyo Corporation of U.S.A., NSK Corporation, NSK Ltd., and NSK Europe Ltd. (collectively, "Plaintiffs") subsequently have filed a joint response, wherein they contend that the U.S. Department of Commerce ("Commerce") has a clear statutory duty to revoke the antidumping duty orders and that Timken failed to sufficiently demonstrate the four factors to grant a stay of the court's final judgment. Pls.' Joint Opp'n 4–22. Today, the court granted

Timken leave to file a reply. *NSK Corp. v. United States*, Consol. Court No. 06–00334 (CIT May 13, 2011) (order granting leave to file reply). In that document, Timken more thoroughly discusses the four factors needed to earn a stay. *See generally* Timken Reply Mem. Because Timken fails to satisfy the applicable test, the court lifts the temporary stay and orders revocation of the relevant antidumping duty orders.

To succeed in its claim, Timken must prove the following: "(1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) [that] the public interest would be better served by the relief requested; and (4) [that] the balance of hardship on all the parties favors [the movant]." *GPX Int'l Tire Corp. v. United States*, 32 CIT ___, ___, 587 F. Supp. 2d 1278, 1284 (2008) (citation omitted). First, Timken has not shown that it likely will suffer the requisite "presently existing, actual" irreparable harm, *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983), but instead posits only a speculative injury in an agency proceeding that has not yet commenced. Moreover, Timken fails to meaningfully discuss the second prong, offering substantial evidence arguments best suited for merit briefs on appeal at the Federal Circuit, *see* Timken Reply Mem. 5–11, and thus does not demonstrate that it has at least "a fair chance of success on the merits." *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1347 (Fed. Cir. 2005). Thirdly, Timken's request would have the court ignore the clear language of the relevant statute, 19 U.S.C. § 1675(d)(2) (explaining that Commerce must revoke antidumping duty order absent affirmative injury determination), and to grant such a demand would run against the public interest. *See Neenah Foundry Co. v. United States*, 24 CIT 33, 43, 86 F. Supp. 2d 1308, 1317 (2000). Finally, the court does not view the balance of the hardships to weigh in favor of Timken. A stay would deny Plaintiffs the statutory relief provided by Congress and subject their imports from Japan and the United Kingdom to an undue financial burden when no valid orders exist, whereas in the absence of a stay Timken would still enjoy the continued suspension of imports entered into the United States prior to the relevant negative determination dates. Therefore, upon review of the documents submitted by the parties on the issue of a stay, the court's previous opinions, and all other pertinent papers, the court hereby

ORDERS that Timken's motion is **DENIED**;

ORDERS that the temporary stay issued on April 28, 2011 is **VACATED**; and further

ORDERS that Commerce shall revoke the antidumping duty orders covering subject merchandise from Japan and the United Kingdom and take all necessary action to effect the court's final judgment

issued on April 20, 2011 by comporting with the relevant statutes and precedents of this Court and the Federal Circuit.

Dated: May 13, 2011
New York, NY

/s/ *Judith M. Barzilay*
JUDITH M. BARZILAY, JUDGE

Slip Op. 11–55

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and TARGET CORPORATION, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 10–00247

Held: Plaintiff's Motion for Judgment on the Agency Record is granted because the Final Scope Ruling issued by the Department of Commerce was not supported by substantial evidence and is not in accord with the law.

Dated: May 17, 2011

Wiley Rein, LLP, (*Adam H. Gordon*, *Lori E. Scheetz*, *Robert E. DeFrancesco, III*) for Mid Continent Nail Corporation, Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*David D'Alessandris*); *Brian Soiset*, Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for the United States, Defendant.

Jochum, Shore, & Trossevin, PC, (*Marguerite E. Trossevin* and *James J. Jochum*) for Target Corporation, Defendant-Intervenor

OPINION

TSOUCALAS, Senior Judge:

INTRODUCTION

This matter comes before the Court upon the Motion for Judgment on the Agency Record filed by Plaintiff, Mid Continent Nail Corporation ("Mid Continent Nail") on November 23, 2010 pursuant to Rule 56.2 of the Rules of the United States Court of International Trade. Mid Continent Nail challenges a determination by the United States Department of Commerce ("Commerce") that steel nails imported as components of household tool kits fall outside the scope of an antidumping duty order on certain steel nails from the People's Republic of China ("PRC"). *See Final Scope Ruling - Certain Steel Nails from the People's Republic of China ("PRC"), Request by Target Corporation*

(Aug. 10, 2010), Public Rec. 27, ("*Final Scope Ruling*").[1] Mid Continent Nail argues that the *Final Scope Ruling* is not supported by substantial evidence and is otherwise not in accord with law primarily because its analysis focused on the household tool kits rather than the steel nails contained therein. Additionally, Mid Continent Nail asserts that Commerce failed to properly conduct the analysis required in scope inquiries under 19 C.F.R. § 351.225, and seeks a remand of this matter for further proceedings. Defendant, United States ("Government"), and Defendant-Intervenor, Target Corporation ("Target"), oppose remand of this matter arguing that Commerce conducted a sufficient scope analysis, and that its determination was supported by substantial evidence and otherwise in accord with the law.

For the reasons set forth below, the Court finds that Commerce's determination was unsupported by substantial evidence and not in accord with the law and remands this matter for proceedings consistent with this opinion.

BACKGROUND

On August 1, 2008, Commerce issued an order imposing an antidumping duty on steel nails from the PRC. *See Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44,961 (Aug. 1, 2008) ("*Final Order*"). The scope of the merchandise covered by the *Final Order* is as follows:

> The merchandise covered by this proceeding includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt,

[1] Hereinafter all documents in the public record will be designated "PR" and all documents in the confidential record designated "CR."

> needle, chisel, and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this proceeding are currently classified under the Harmonized Tariff Schedule of the United States ("HSTUS") subheadings 7317.00.55, 7317.00.65 and 7317.00.75.
>
> Excluded from the scope of this proceeding are roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails. Also excluded from the scope of this proceeding are corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side. Also excluded from the scope of this proceeding are fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30. Also excluded from the scope of this proceedings are thumbtacks, which are currently classified HTSUS 7317.00.10.00. Also excluded from the scope of this proceeding are certain brads and finish nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive. Also excluded from the scope of this proceeding are fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.
>
> While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Final Order, 73 Fed. Reg. at 44,961 - 44,962.[2]

Target imports household tool kits from the PRC. The tool kits contain tools such as hammers, measuring tapes, screwdrivers, and wrenches. *See* Letter from Jochum, Shore & Trossevin to the Secretary of Commerce, Re: Certain Steel Nails from the People's Republic of China: Scope Ruling Request Regarding Household Tool Kits (Dec. 11, 2009) ("Scope Ruling Request" or "Request"), PR 1 at 2–3, CR 1 at

[2] This scope language is substantially similar to the scope language that was proposed in the antidumping petition. *Final Scope Ruling* at 5.

2–3. Of relevance to this matter, the tool kits also include a plastic container holding approximately fifty one-inch brass coated steel nails. *Id.* at 2–3, 6. On December 11, 2009, Target requested a ruling from Commerce that these tool kits are outside the scope of the *Final Order*.

In making its Request, Target conceded that if the nails contained in the tool kits were considered on their own they would be subject to the *Final Order*. Scope Ruling Request at 5. It argued, however, that Commerce should focus its scope analysis not on the nails alone, but on the entire tool kit. Target based this argument, first, on the *Final Order's* silence regarding coverage of nails packaged with non-subject items. Second, Target relied on prior scope rulings that considered items containing both subject and non-subject goods, otherwise known as "mixed-media" items or sets. *See* Government's Mem. in Opp'n to Pl.'s Mot. for J. upon the Agency R. ("Gov.'s Opp'n") at 10. In these earlier rulings, Commerce focused its scope inquiry on the mixed-media item rather than the subject good contained within it because the subject good was a minor component of the mixed-media item, consumable, and easily replaced with non-subject merchandise. Scope Ruling Request at 5.

Target stated that when using the approach enunciated in these prior scope rulings, Commerce subjected the mixed-media item to analysis under the factors set forth in 19 C.F.R. § 351.225(k)(2)[3] ("(k)(2) factors"). Addressing each of the (k)(2) factors in turn, Target argued that the physical characteristics, advertising and display methods, purchaser expectations, ultimate use, and different channels of trade in which subject nails and the tool kits are sold show that the tool kits are distinct enough from subject nails to be outside the scope of the *Final Order*.

Mid Continent Nail, a domestic manufacturer of nails and original petitioner in the antidumping proceedings, *see Final Order*, 73 Fed.

[3] In relevant part, 19 C.F.R. § 351.225(k) provides as follows:

> **(k)** . . . [I]n considering whether a particular product is included within the scope of an order . . ., the Secretary will take into account the following:
>
> **(1)** The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
>
> **(2)** When the above criteria are not dispositive, the Secretary will further consider:
>
> (i) The physical characteristics of the product;
>
> (ii) The expectations of the ultimate purchasers;
>
> (iii) The ultimate use of the product;
>
> (iv) The channels of trade in which the product is sold; and
>
> (v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(1)-(2) (2010). The (k)(2) factors are also known as the *Diversified Products* factors because prior to codification, they were recognized by this court in *Diversified Products Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).

Reg. at 44,962 n. 3, opposed Target's Scope Ruling Request. *See* Letter from Wiley Rein to the Secretary of Commerce, Re: Certain Steel Nails from the People's Republic of China: Opposition to Target Corporation's Request to Exclude Steel Nails Packaged With Non-Subject Merchandise From the Scope of This Order (Dec. 22, 2009), PR 2. Mid Continent Nail argued that it is impermissible to bypass the factors set forth in 19 C.F.R. § 351.225(k)(1) ("(k)(1) factors") and begin with the (k)(2) factors, as advocated by Target. Proper adherence to case precedent and weighing of the sources identified by the (k)(1) factors, Mid Continent Nail continued, would show that steel nails imported in mixed-media sets remain subject to the *Final Order* despite being packaged with non-subject items.

Mid Continent Nail first pointed to the scope language of the *Final Order* itself. It argued that the *Final Order*'s silence regarding nails packaged in tool kits was irrelevant to the nails' inclusion because the *Final Order* clearly includes all steel nails matching a broad physical description unless those nails fit within an articulated exclusion. PR 2 at 5–8. As seen above, there are six exclusions from the *Final Order*'s scope: roofing nails, corrugated nails, thumb tacks, small finishing nails, and certain nails used in either powder- or gas-actuated tools. *See Final Order*, 73 Fed. Reg. at 44,961 - 44,962. The scope language excludes no nails based on their packaging or inclusion in a mixed-media set. Mid Continent Nail also argued that prior scope ruling precedent supported including subject nails within the scope even though they were packaged in a set with non-subject goods. PR 2 at 10–14.

Finally, Mid Continent Nail noted that during the antidumping proceedings, Stanley Fastening Systems, LP ("Stanley"), an importer of nail gun sets comprised of a nail gun, nails, and a carrying case, sought a determination that the nails in its sets were outside the scope langauge. *See* PR 2 at 8–9, PR 6, Att. 1. The domestic manufacturers who filed the antidumping petition ("Petitioners") responded in opposition stating

> [T]hey intend and have always intended these proceedings to cover all certain steel nails exhibiting the physical characteristics described in the written scope description, whether imported alone or as part of a set of goods including non-scope merchandise. To the extent the Department [of Commerce] wishes to add clarifying language to the written description of the scope concerning this matter, Petitioners have no objection.

See Letter from Kelley Drye Collier Shannon to the Secretary of Commerce, Re: Certain Steel Nails from the People's Republic of

China (Aug. 9, 2007), PR 2, Ex. 3 at 6 ("Petitioners' Scope Letter"). No objections were filed to the Petitioners' Scope Letter; however, Commerce did not add the suggested clarifying language to the *Final Order*.[4]

Commerce issued the *Final Scope Ruling* on August 10, 2010 excluding the steel nails contained in the tool kits. First, Commerce stated that it had examined the (k)(1) factors and concluded that they were not dispositive as to whether the *Final Order* 's scope applied to "brass coated steel nails in household tool kits." *Final Scope Ruling* at 5. Commerce proceeded to an analysis of the merchandise under the (k)(2) factors. *Id.* It commenced this analysis by stating that it had "examined each of the household tool kits *as a set* containing both brass coated nails and other items." *Id.* (emphasis added). As a basis for its decision to focus its examination in this manner, Commerce stated:

> While we acknowledge that Target's brass coated steel nails would meet the physical requirements of steel nails that fall within the scope of the *Order* if they were imported without any of the other tool kit components, we also take into consideration that they were imported in household tool kits containing non-subject merchandise. Thus, the proper focus of the analysis is on the nails as contained in the household tool kits.

Id.[5]

Based on its analysis of the (k)(2) factors, Commerce concluded that the six tool kits containing steel nails fall outside the scope of the *Final Order*. Mid Continent Nail initiated this action seeking review of Commerce's determination on August 25, 2010.

---

[4] In *Certain Steel Nails from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination*, 73 Fed. Reg. 3928, 3929 n. 6 (Jan. 23, 2008), Commerce discussed Stanley's request, but noted only that it decided not to modify the *Final Order*'s scope to exclude certain trademarked items. Commerce never addressed its decision not to amend the scope to clarify whether nails meeting the scope language's physical description remain subject even when packaged with non-subject merchandise.

[5] Commerce's characterization of the particular products it examined varied throughout the *Final Scope Ruling*, e.g., "toolkits," *id.* at 7, "tool kits as a set containing both brass coated nails and other items," id. at 5, "nails as contained in the household tool kits." *Id.* However, it is clear from Commerce's analysis, and the fact that the nails on their own are subject to the *Final Order*, that upon deciding not to conduct an inquiry on the nails as advocated by Mid Continent Nail, Commerce conducted its inquiry on the tool kits as advocated by Target.

JURISDICTION

The Court has jurisdiction over this matter pursuant to Section 516(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006),[6] and 28 U.S.C. § 1581(c) (2006).

STANDARD OF REVIEW and LEGAL STANDARD

The Court will uphold a scope determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accord with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "The court gives significant deference to Commerce's interpretation of its own orders, but a scope determination is not in accordance with the law if it changes the scope of an order or interprets an order in a manner contrary to the order's terms." *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004). In other words, while Commerce "enjoys substantial freedom to interpret and clarify its antidumping duty orders . . . it may not change them." *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); *see also Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) ("The language of the order determines the scope of an antidumping duty order.").

Notwithstanding this primacy, antidumping orders sometimes employ general language when defining the scope of the merchandise covered. *See* 19 C.F.R. § 351.225(a); *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002). This general language can render the order's scope ambiguous, and interpretive aids become necessary. In these instances, Commerce interprets the order pursuant to 19 C.F.R. § 351.225, the regulation governing the initiation and prosecution of scope inquiries. Section 351.225(d) directs Commerce to first utilize the (k)(1) factors to determine whether a particular product falls within the scope of the order at issue. When the (k)(1) factors "are not dispositive" regarding an order's scope, Commerce is then directed to consider the (k)(2) factors. 19 C.F.R. § 351.225(k)(2).

ANALYSIS

As noted above, in the *Final Scope Ruling* Commerce analyzed the tool kits containing steel nails under the (k)(2) factors after deter-

[6] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition.

mining that the (k)(1) sources were not dispositive. *Final Scope Ruling* at 5. Commerce's entire (k)(1) analysis reads as follows:

> Pursuant to 19 CFR 351.225(k)(1) and as stated above, the Department [of Commerce] first examined the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the ITC, and the initial investigation in examining Target's scope request. On March 18, 2010, we initiated a formal scope inquiry of Target's brass coated steel nails in household tool kits, finding that the descriptions of the merchandise contained in the petition, the determinations of the Secretary and ITC, and the initial investigation were not dispositive in this case. Therefore, we have examined Target's brass coated steel nails in household tool kits pursuant to the criteria set forth in section 351.225(k)(2) of the Department's regulations to determine if they are covered by the scope of the *Order*.

Final Scope Ruling at 5.

This perfunctory recitation by Commerce failed to address several significant items that should have been considered before turning to the (k)(2) factors. For example, Commerce failed to address the Petitioners' Scope Letter which made clear the Petitioners' intention that their proposed scope language would include subject goods packaged with non-subject items. This failure alone renders the *Final Scope Ruling* unsupported by substantial evidence. *See Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000) ("It is . . . well-established that Commerce's total failure to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion renders the Department's determination unsupported by substantial evidence.").

More significantly, it is clear that Commerce commenced its analysis with its focus already on the tool kits, and not the steel nails. Commerce never addressed in any substantive way, however, its decision to examine the tool kits rather than the steel nails.[7] It simply stated that the tool kits would be examined because the nails were packaged therein with non-subject merchandise. *See Final Scope Ruling* at 5. A more thorough explanation was necessary. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its expla-

[7] It is worth noting that Commerce was not required to focus its inquiry on the tool kits simply because Target framed its Request in that manner. *See Walgreen Co. of Deerfield v. United States*, 620 F.3d 1350, 1355 (Fed. Cir. 2010) (noting that such a rule would allow importers to frame their scope ruling requests in order to eliminate dispositive use of the (k)(1) factors).

nations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").

Properly addressing this issue is especially important in mixed-media cases like this one because the scope inquiry steps set forth above presuppose a "product" to which they are being applied. If there is a dispute regarding what that product is, therefore, resolving that dispute is one of the most important steps Commerce makes during the inquiry. Here, the decision to examine the tool kits proved outcome determinative because there was universal agreement that the nails considered on their own were subject to the *Final Order*. In deciding that its inquiry would focus on the tool kits, Commerce addressed none of the parties' arguments on this issue and did not expressly rely on the *Final Order*, prior scope rulings, or other basis. A ruling from Commerce with such infirmities will normally not be affirmed. *See USX Corp. v. United States*, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987) ("The court cannot defer to a decision which is based on inadequate analysis or reasoning."). However, because the *Final Order* and its prior scope rulings provide possible paths for Commerce's decision to examine the tool kits, the Court takes up each in turn.

1. The Final Order

Target and Mid Continent Nail are correct that the *Final Order* is silent regarding coverage of nails packaged with non-subject items. However, this silence does not amount to an ambiguity. The *Final Order* gives a specific description of the broad range of nails falling within its scope. It continues by setting forth six types of nails excluded from that scope. None of these exclusions turn on whether the nails are packaged with non-subject items, or whether they are a minor part of the overall item in which they are packaged. The only conclusion warranted by the *Final Order* 's language, then, is that packaging does nothing to change the scope's broad coverage of steel nails.

Target argues that this case "is not a packaging case," because it concerns unique products - tool kits. *See* Target's Resp. in Opp'n to Pl.'s R. 56.2 Mot. for J. upon the Agency R. ("Target's Opp'n) at 19. It further states that Commerce alone can determine whether the product presented for examination is a separate item, unique from the subject good. *Id.* (*citing Walgreen*, 620 F.3d at 1355). First, Target overstates the unique nature of the tool kits. The tool kits are a collection of tools that will be used by the consumer as tools, and nails that will be used by the consumer as nails. Second, while it is true that Commerce defines the product under review when necessary,

Walgreen is clear that this determination must "take into account the unique language of the *Final Order*" at issue in the case. *Walgreen*, 620 F.3d at 1355. Here, deciding that the nails' inclusion in tool kits created a new product and ultimately excluding the nails from the *Final Order* 's scope was an unreasonable interpretation of the *Final Order*. By focusing its inquiry on the tool kits and excluding the otherwise subject nails packaged therein, Commerce effectively created a seventh exclusion to the *Final Order*, namely an exclusion of steel nails packaged with non-subject items in tool kits.

In so doing, Commerce ran afoul of the well-established prohibition against altering scope language ex post facto. *See Ericsson*, 60 F.3d at 782. If Commerce intended to exclude nails imported as components of mixed-media sets from the scope of the *Final Order*, the time to establish that exclusion was during the antidumping investigation. "It is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders." *Duferco*, 296 F.3d at 1097. Commerce undertook this responsibility here, as it always does, with informed input from those most knowledgeable and with the greatest interest in the proceedings, namely industry members who manufacture and import the nails in question. Stanley's request regarding its nail gun sets, and the Petitioners' Scope Letter in response, put Commerce on notice that subject nails were likely to be imported with non-subject items, and that the Petitioners believed this fact irrelevant to whether those nails remained within the scope of the *Final Order*. Resolution of this issue could easily have been provided for one way or the other in the *Final Order*. Instead, Commerce issued a *Final Order* that encompasses a broad range of steel nails regardless of whether they are imported in mixed-media sets. This unambiguous scope may not be changed now by means of the *Final Scope Ruling*.

The Government and Target argue that the tool kits at issue should not be automatically encompassed within the *Final Order*'s scope simply because the *Final Order* did not expressly exclude them. *See* Gov.'s Opp'n at 13 (*citing Duferco*, 296 F.3d at 1096); Target's Opp'n at 18 n.11 (*citing Toys "R" Us v. United States*, 32 CIT __, __, Slip Op. 08–79 (July 16, 2008) (not published in the Federal Supplement)). This argument, however, states the matter backwards. The tool kits are important not because of what they are, but because of what they contain - subject steel nails. Importation of those nails provides the basis for this case; in fact, it was the reason Target sought a scope ruling to begin with. It is not surprising that household tool kits are outside the scope of an order related to steel nails. The nails themselves, however, are subject to the *Final Order*, and it is left only to

determine whether the *Final Order*, or some other lawful source, provide a basis for excluding them because they are packaged in tool kits.

As already stated, the *Final Order* provides no such basis. While the *Final Order* 's unambiguous inclusion of the nails would normally be the end of the Court's analysis, the role Commerce's prior scope rulings may have played in its decision should be reviewed. This scrutiny is warranted because it is unclear how the procedures described in those rulings operate in conjunction with the language of the final orders, and an issue exists regarding whether Commerce is authorized to use such procedures at all.

2. Prior Scope Rulings

As relied on by the parties during the scope inquiry, Commerce has previously considered scope ruling requests involving mixed-media items. The relevant rulings all involved similar circumstances: an item or set being imported included a subject good, but the antidumping order at issue was silent regarding coverage of the item or set. In response to these circumstances, Commerce has adopted two different tests utilizing two different sets of factors allowing it to determine the product under examination. The test used is normally outcome determinative as to whether Commerce ultimately finds coverage of the subject good.

In the scope rulings relied on by Target, Commerce focused its inquiry on the entire mixed-media item or set rather than the subject good alone and found no scope coverage. *See Certain Lined Paper Products from the People's Republic of China - Davis Group of Companies Corp. Scope Ruling Request*, (Feb. 21, 2008) (concluding that padfolios containing subject lined paper pads were outside the scope of the order) ("*Davis Scope Ruling*"); *Final Scope Ruling Antidumping Duty Order on Certain Lined Paper Products from the People's Republic of China, Request by Avenues in Leather, Inc.*, (May 8, 2007) (same); *Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) - Request by Fiskars Brands, Inc.*, (June 3, 2005) (concluding that compasses containing subject pencils were outside the scope of the order) ("*Fiskars Scope Ruling*"); *Final Scope Ruling - Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) - Request by Target Corporation*, (Mar. 4, 2005) (concluding that art sets containing subject pencils and other non-subject art supplies were outside the scope of the order) ("*Clip N' Color Scope Ruling*").

In these scope rulings, Commerce considered the item or set as a whole after concluding that the subject good contained therein was

"not a substantial component of the set," *Clip N' Color Scope Ruling* at 5, was "consumed" during use, *Fiskars Scope Ruling* at 6, or could be "replaced" with another, presumably non-subject, good. *Davis Scope Ruling* at 6. Notably, Commerce identified none of these factors (i.e., minor component, consumable, replaceable) in the language of the antidumping order at issue.

In the scope rulings relied on by Mid Continent Nail, Commerce decided to examine the subject good regardless of the other items with which it was packaged, and concluded that the subject good remained subject to the antidumping order. *See Final Scope Ruling: Antidumping Duty Order on Certain Tissue Paper from the People's Republic of China*, (Sept. 19, 2008) (concluding that tissue paper contained in a gift bag set was subject to the order) ("*Walgreen Scope Ruling*"); *Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People's Republic of China*, (Aug. 8, 1990) (concluding that porcelain-on-steel cookware imported as part of a camping set was subject to the order) ("*Texsport Scope Ruling*").

In the *Walgreen Scope Ruling*, Commerce analyzed subject tissue paper contained in gift bags and concluded that the tissue paper was "not a component of a unique set but merely subject merchandise packaged with non-subject merchandise." *Walgreen Scope Ruling* at 11. Relying on the *Texsport Scope Ruling*, Commerce stated that it evaluated the subject tissue paper apart from the other items with which it was packaged because the items "could be used independently of one another and at different times." *Id.* Commerce also stated that "[b]ecause the tissue paper at issue included in these sets can be used independently, the question of whether or not the tissue paper is 'significant' with regard to the other products in the gift bag sets . . . is irrelevant to the Department's analysis in this case." *Id.* at 11–12.

In this case, Commerce appears to have followed the rulings cited by Target. However, if Commerce had instead applied the *Walgreen Scope Ruling* approach, it is likely that the subject nails would have been examined and found within the *Final Order*'s scope because they can be "used independently" of the other items in the tool kits and "at different times." In fact, the nails appear to better satisfy these conditions than did the tissue paper at issue in *Walgreen*.

Such inconsistency in agency procedure is not permitted. It is true that Commerce has not given a general definition or test for what constitutes a mixed-media set, and that Commerce must issue each scope ruling based upon the facts and circumstances of the specific

case before it. *See Walgreens*, 620 F.3d at 1355. However, to the extent that Commerce develops a procedure for defining the particular product to be examined in scope proceedings, such procedure must remain consistent and any deviations must be explained. *See SFK USA, Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) ("When an agency changes its practice, it is obligated to provide an adequate explanation for the change.").

An additional problem exists when Commerce uses criteria other than the antidumping order to determine the particular product under examination in scope proceedings. Specifically, Commerce has cited no authority allowing it to consider factors other than the *Final Order* or the provisions of 19 C.F.R. § 351.225 when defining the particular product to be examined in scope inquiries. However, statutory authority is necessary when an agency takes action to administer a statutory schemes over which it has oversight. *See Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004) (*citing Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

This much is clear: a party seeks a scope ruling in a mixed-media case because it is importing an item containing goods subject to an antidumping order. As stated above, it is Commerce, and not the party seeking the scope ruling, that decides where the scope inquiry should be focused. *See Walgreen Co. of Deerfield*, 620 F.3d at 1355. The factors to be utilized in making this decision are not expressly provided for in 19 C.F.R. § 351.225, but the question itself remains governed by the principle that in scope proceedings, Commerce may interpret its orders but is not at liberty to change them. *See Ericsson GE Mobile Commc'ns*, 60 F.3d at 782. Therefore, regardless of the test employed, examining mixed-media items or sets instead of the subject goods they contain when such an approach is not warranted by the antidumping order may not be in accord with the law. However, since the *Final Scope Ruling* provided no statutory, regulatory, or other legal basis for this practice, the Court concludes that remand on this issue is appropriate so that Commerce can identify not only a test it will employ consistently, but the legal justification for employing such a test at all.

CONCLUSION

The Court concludes that the *Final Scope Ruling* is unsupported by substantial evidence and otherwise not in accord with the law. Commerce failed to articulate the reasons it examined the tool kits instead of the nails contained therein. Commerce also gave inadequate con-

sideration to the language of the *Final Order* and undertook an analysis under 19 C.F.R. §351.225(k)(2) prematurely. Furthermore, to the extent Commerce relied on procedures set forth in its prior scope rulings in deciding to examine the tool kits rather than the nails contained therein, it failed to articulate the factors of the test it followed or the legal authorization for employing such a test.

In accordance with the above, this case is remanded to Commerce for further proceedings consistent with this opinion.

Dated: May 17, 2011
New York, New York

/*s*/ *NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 11–56

SHAH BROTHERS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Chief Judge
Court No. 10–00205

[Defendant's motion to dismiss Count 3 and Count 4 of Plaintiff's Amended Complaint granted.]

Dated: May 17, 2011

Stein Shostak Shostak Pollack & O'Hara (*Elon A. Pollack*, *Bruce N. Shulman*, and *Juli C. Schwartz*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke* and *Edward F. Kenny*) for the Defendant.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This case concerns the U.S. Customs and Border Protection's ("Customs" or "CBP" or "the government") classification of Plaintiff Shah Bros.' imported merchandise, a smokeless tobacco product called "gutkha," that is subject to taxes as well as tariffs under the Harmonized Tariff Schedule of the United States ("HTS") 2403.99.[1] The facts at issue here are similar to those in *Shah Brothers v. United States*, Slip Op. 10115, Court No. 09–00180, issued on October 6, 2010, which

[1] Under the HTS, smokeless tobacco is further classified as chewing tobacco (2403.99.2030) or snuff (2403.99.2040). 26 U.S.C. §§ 5701(e), 5702(m)(1)-(3)(2006).

involved different entries of the same merchandise. *See Shah Brothers v. United States*, __ CIT __, 751 F. Supp. 2d 1303 (2010)("*Shah Bros. I*").

The issues in the two cases are also almost identical. *See* Amend. Compl. ¶ 54 (alleging that the cases "involve[ ] identical issues"). In both cases, Plaintiff's complaints challenge CBP's classification and taxation of Plaintiff's gutkha (Counts 1 and 2), as well as the Alcohol and Tobacco Tax and Trade Bureau's ("TTB") "erroneous administration and enforcement" in the classification and taxation of said goods (Counts 3 and 4).

In *Shah Bros. I*, the government confessed judgment with regard to the classification and taxation of the goods, and the court dismissed the action with regard to TTB, concluding that jurisdiction pursuant to 28 U.S.C. § 1581(a) provided the appropriate remedy where Customs, not TTB, both administers and enforces the classification and taxation of Plaintiff's goods. *Shah Bros. I* at 1314–15.

Following the analysis in *Shah Bros. I*, the government now asks the court to dismiss Counts 3 and 4 of Plaintiff's amended complaint in this action for lack of subject matter jurisdiction.

Plaintiff contends that, unlike the situation in *Shah Bros. I*, jurisdiction over Counts 3 and 4 exists in this action because a recent amendment to 19 U.S.C. § 1514 divests Customs of final authority regarding tax collection, rendering section 1581(a) unavailable.

Because the court concludes that the amendment at issue does not alter Customs' responsibility as the final agency decision-maker, the court grants the government's request.

BACKGROUND

Shah Bros. I [2]

Gutkha, a "smokeless tobacco," is subject both to import tariffs in accordance with the HTS and to federal Internal Revenue excise taxes in accordance with 26 U.S.C. § 5701(e). Title 26 defines "smokeless tobacco" as "any snuff or chewing tobacco." 26 U.S.C. § 5702(m)(1).[3] Although the tariff rate for snuff and chewing tobacco is the same, the excise tax for snuff is higher than that for chewing tobacco. *See id.* at § 5701(e).

Customs is responsible for collecting both the tariffs and the excise

[2] Familiarity with the court's decision in *Shah Bros. I* is presumed. Some facts are summarized here for the reader's convenience.

[3] Title 26 also defines "chewing tobacco" as "any leaf tobacco that is not intended to be smoked." 26 U.S.C. § 5702(m)(3).

taxes. *See* 6 U.S.C. § 215(1); 27 C.F.R. § 41.62; Treas. Order 100–16 (May 15, 2003). Nonetheless, in classifying smokeless tobacco either as chewing tobacco or snuff, Customs considers determinations made by the TTB.

In *Shah Bros. I*, Shah Bros. classified its gutkha as "chewing tobacco" under HTSUS Subheading 2403.99.2030. *Shah Bros. I* at 1306. Customs changed the gutkha tariff classification and then liquidated the merchandise as "snuff," under HTSUS 2403.99.2040. *Id.* In response, Shah Bros., after using the statutory protest procedures, filed an action in this court challenging the government's decision. The government confessed judgment, agreeing to re-liquidation of the entries as chewing tobacco under HTS Subheading 2403.99.2030, and the court, in January 2010, entered judgment and ordered the re-liquidation of the entries. Def.'s Partial Mot. to Dismiss 3 ("Def.'s Mot. to Dismiss").

Following the court's entry of judgment, Shah Bros. then filed an amended complaint, alleging jurisdiction under 28 U.S.C. §§ 1581(i)(1) and (i)(4), [4] and claiming economic harm as a result of TTB and CBP's actions. Specifically, Shah Bros. challenged TTB's administration and enforcement of the relevant regulations and procedures in determining the classification of imported gutkha, claiming that TTB and Customs acted arbitrarily and contrary to law. The court dismissed for lack of jurisdiction, concluding that CBP, not TTB, administers and enforces the taxes at issue here. Therefore, Plaintiff's proper relief followed the statutory protest procedures, and since jurisdiction under 28 U.S.C. § 1581(a) was available and adequate, the court lacked jurisdiction under section 1581(i).

In addition to the entries in the prior lawsuit and the entries at issue here, other of Plaintiff's gutkha entries are currently subject to seizure and judicial forfeiture. Amend. Compl. ¶ 56.

---

[4] In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for--

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i).

Shah Bros. II

The merchandise at issue in this matter was entered in 2009 under Entry No. BGG-5253247–6. CBP classified this entry as "snuff" under HTS Subheading 2403.99.2040, assessing a tax of $1.51/lb. Plaintiff timely protested Customs' decision and the protest was denied. Amend. Compl. ¶ 57. Plaintiff then filed its complaint in this action, alleging jurisdiction under both section 1581(a) and 1581(i), and again challenging both CBP's denial of the protest as well as TTB's alleged actions. In its amended complaint,[5] Plaintiff claimed that an amendment to 19 U.S.C. § 1514 now requires the court to review TTB's decisions, thus rendering *Shah. Bros. I* inapplicable as of April 2009, when the amendment was enacted. Amend. Compl. ¶ 9.

Plaintiff alleges that the statute, as amended, excludes tax assessment decisions from review by protest, thus precluding Plaintiff from exercising jurisdiction under 1581(a), and leaving 1581(i) jurisdiction as the only remaining avenue for judicial relief.

STANDARD OF REVIEW

Whether jurisdiction exists is a question of law. *Sky Techs. LLC v. SAP AG*, 576 F.3d 1374, 1378 (Fed. Cir. 2009). In resolving such a question, where the Defendant has moved to dismiss part of Plaintiff's action for lack of jurisdiction, the court accepts as true all factual allegations Plaintiff asserts, construing all material facts in the complaint in Plaintiff's favor. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999). Nonetheless, Shah Bros., "[the] party seeking the exercise of jurisdiction in its favor[,] has the burden of establishing that [ ] jurisdiction exists." *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)).[6]

[5] Plaintiff filed its complaint before the court issued its decision in *Shah Bros. I*, but filed its amended complaint after that decision.

[6] As a consequence, "[i]f a motion to dismiss for lack of subject matter jurisdiction [ ] . . . challenges the truth of the jurisdictional facts alleged in the complaint, the [ ] court may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988). Nonetheless, it remains Plaintiff's burden to present evidence to establish jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) ("if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof." (citation omitted)); *Ritchie*, 170 F.3d at 1099 ("a [plaintiff's] allegations alone do not conclusively establish standing. If challenged, the facts alleged which establish standing are part of the [plaintiff's] case, and [ ] . . . must be affirmatively proved." (citation omitted)).

DISCUSSION

Shah Bros. I controls the result here. Here, as in *Shah Bros. I*, CBP's actions are reviewable under section 1581(a), which provides an available and adequate remedy.

As noted above, while Plaintiff concedes that the issues here are "identical" to those in *Shah Bros. I*, it contends that a 2009 amendment to 19 U.S.C. § 1514 divests Customs of final authority regarding tax collection, rendering section 1581(a) unavailable by impairing the court's ability to review TTB's "substantive" decisions. Amend. Compl. ¶¶ 9, 28. The court disagrees.

The 2009 amendment does not alter CBP's authority to assess and collect taxes; rather, the amendment only affects the statute of limitations regarding tax collection. 19 U.S.C. § 1514 itself concerns protests of Customs' decisions, including classification and taxation. As the government correctly explains, the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA"), which, in February 2009 amended 19 U.S.C. § 1514, "did not change the substance of the types of protestable actions." Def.'s Reply in Supp. of Partial Mot. to Dismiss 2. Rather, the amendment changed only the statute of limitations for the assessment and collection of taxes for tobacco products. The relevant portion of the statute currently reads:

> Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds), *and section 6501 of title 26 (but only with respect to taxes imposed under chapters 51 and 52 of such title)*... decisions of the Customs Service ... shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section...

19 U.S.C. § 1514(a) (emphasis added to reflect the amended section).[7]

The exception added to the statute, for "section 6501," refers to 26 U.S.C. § 6501, concerning limitations on assessment and collection of taxes under the Internal Revenue Code ("IRC"). Under section 6501, taxes must be assessed within three years after a return is filed. 26 U.S.C. § 6501(a). The exception is limited to Chapter 52 of the IRC,

[7] "(1) IN GENERAL.--Section 514(a) of the Tariff Act of 1930 (19 U.S.C. 1514(a)) is amended by striking 'and section 520 (relating to refunds)' and inserting 'section 520 (relating to refunds), and section 6501 of the Internal Revenue Code of 1986 (but only with respect to taxes imposed under chapters 51 and 52 of such Code)'." Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111–3, § 702(c)(1),123 Stat. 8, 110 (2009); *see also* TTB Federal Excise Tax Increase and Related Provisions, available at *http://www.ttb.gov/main_pages/schip-summary.shtml* (last visited April 15, 2011).

which concerns tobacco products, and thus, after the 2009 amendment, these tobacco products, along with the distilled spirits delineated under chapter 51 of the IRC, are now subject to section 6501. This change allows for a three-year statute of limitations for the assessment of taxes on such tobacco products.

The plain language of Section 6501 – which provides, in relevant part, that "any tax imposed by this title shall be assessed within 3 years after the return was filed . . . ." 26 U.S.C. §6501(a)– does not alter the protestability of Customs' assessment.

The legislative history confirms that the amendment changes only time limitations. Previously, there was a one-year time limit regarding these tobacco taxes; the 2009 amendment replaces the one-year limit with a three-year time limit previously applied to distilled spirits. A Congressional description of the provisions of the 2009 amendment explains the changes, clearly indicating that these changes address the applicable statute of limitations:

> [t]he provision clarifies the tax and customs law in the area of alcohol and tobacco products by providing that, notwithstanding customs law, *the general statute of limitations* for assessment under the Code (sec. 6501) applies with respect to taxes imposed under chapters 51 (relating to distilled spirits, wines, and beer) and 52 (relating to tobacco products and cigarette papers and tubes) of the Code.

Joint Comm. on Taxation, DESCRIPTON OF THE REVENUE PROVISIONSOF THE CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT OF 2009 11 (JCX-109) (Comm. Print Jan. 13, 2009), *available at www.jct.gov* (last visited Apr. 15, 2011)(emphasis added).

Despite the language of the amendment, and the legislative history it reflects, Plaintiff contends that the plain language of the statute and amendment dictate that the tobacco tax assessment is not a final Customs decision, thus triggering 1581(i) jurisdiction since 1581(a) becomes unavailable if the tax assessment is now non-protestable. Pl.'s Br. in Opp'n to Def.'s Mot. to Dimiss at 6–7 ("Pl.'s Br."). Plaintiff also argues that even if the language is not clear, the "statutory scheme as a whole" supports a view that if Congress meant to amend only time limits, the amendment would have fallen under § 1514(c)(3), and that legislative history and the heading of the amendment are not as persuasive as the placement of the amendment under § 1514(a). *Id.* at. 7–8. Again the court disagrees.

Neither the language of the amendment itself nor the legislative history surrounding it make any mention of Customs' authority to

assess such taxes or of granting TTB any additional authority. Rather, the amendment is a procedural alteration; it is not a substantive change in the law.

It follows that Customs' authority regarding the issues here remains as it was in *Shah Bros. I*. So too does the court's lack of jurisdiction to review Counts 3 and 4 of Plaintiff's amended complaint, because these counts concern TTB's alleged actions, which are not final authority with regard to the issues presented.[8] Plaintiff's adequate 1581(a) remedy thus remains, and 1581(i) jurisdiction is inapplicable.

Therefore, the jurisdictional issues presented in this case remain identical to the issues in *Shah Bros. I*. With regard to the classification and taxation of Plaintiff's goods, however, because issue preclusion does not apply to classification cases, each entry is treated *de novo* in ensuing litigation before the court as to those entries. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 233–34 (1927) ("[T]he finding of fact and the construction of the statute and classification thereunder as against an importer [is] not res judicata in respect of a subsequent importation involving the same issue of fact and the same question of law."); *Avenues in Leather, Inc. v. United States*, 317 F.3d 1399, 1403 (Fed. Cir. 2003) ("Under the public policy adopted by the Supreme Court in *Stone & Downer*, each new entry is a new classification cause of action, giving the importer a new day in court."); *Schott Optical Glass v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984) ("The opportunity to relitigate applies to questions of construction of the classifying statute as well as to questions of fact as to the merchandise." (citation omitted)). Therefore, because these counts concern CBP's protestable decisions, the court has jurisdiction over and will review Counts 1 and 2 of Plaintiff's amended complaint.

CONCLUSION

Accordingly, upon consideration of Defendant United States' Partial Motion to Dismiss Counts 3 and 4 of Plaintiff's Amended Complaint, Defendant's motion is hereby GRANTED.

Dated: May 17, 2011
New York, N.Y.

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

[8] *See Shah Bros. I* at 1310–12.

Slip Op. 11–57

UNITED STATES OF AMERICA., Plaintiff, v. AMERICAN HOME ASSURANCE CO., Defendant.

Before: Richard K. Eaton, Judge
Court No. 09–00401

[Plaintiff's and defendant's cross-motions to stay denied.]

Dated: May 17, 2011

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Edward F. Kenny*); Office of Chief Counsel, International Trade Litigation, United States Customs and Border Protection (*Brandon T. Rogers*), of counsel, for plaintiff United States of America.

Steptoe & Johnson LLP (*Herbert C. Shelley* and *Mark F. Horning*) for defendant American Home Assurance Co.

OPINION

Eaton, Judge:

INTRODUCTION

Before the court are the parties' cross-motions to stay these proceedings. Plaintiff the United States of America (the "Government"), on behalf of United States Customs and Border Protection ("Customs"), seeks to stay its response to defendant American Home Assurance Co.'s ("AHAC") motion for summary judgment pending the completion of discovery. AHAC, in turn, seeks to stay the completion of discovery pending the court's decision on its motion for summary judgment.

Although the parties' respective motions seek only to stay parts of these proceedings, they raise a significant issue concerning the effect, if any, of Customs' failure to provide a surety with notice of a suspension of liquidation. Specifically, the issue presented is whether Customs' failure to provide AHAC with notice of the suspension of liquidation of the entries subject to the surety's bond, as required by 19 U.S.C. § 1504(c) (2006), invalidates the suspension of liquidation. For the reasons set forth below, the court holds that it does not. Based on this holding, the court denies both parties' motions to stay.

BACKGROUND

By its complaint, the Government seeks to recover in excess of $3.5 million on bonds executed by AHAC to secure the payment of antidumping duties by Pan Pacific Products, Inc. ("Pan Pacific") on 119 entries of merchandise imported into the United States from the

People's Republic of China ("PRC") between May 2001 and March 2002. The parties do not dispute the basic facts relating to the entries at issue.

The first 103 of these entries were made between May 30, 2001 and January 23, 2002, and were subject to the Department of Commerce's (the "Department" or "Commerce") third administrative review of the antidumping duty orders of preserved mushrooms from the PRC for the period of review ("POR") February 1, 2001 through January 31, 2002. *See* Certain Preserved Mushrooms from the PRC, 68 Fed. Reg. 41,304 (Dep't of Commerce July 11, 2003) (final results of administrative review). The remaining sixteen entries were made between February 1, 2002 and March 10, 2002, and were subject to Commerce's fourth administrative review of preserved mushrooms from the PRC for the POR February 1, 2002 through January 31, 2003. *See* Certain Preserved Mushrooms from the PRC, 69 Fed. Reg. 54,635 (Dep't of Commerce Sept. 9, 2004) (final results of administrative review).

Upon the request for an administrative review for each POR, liquidation of the entries subject to each review, including Pan Pacific's, was suspended. *See* 19 U.S.C. § 1675(a)(2)(C); *Canadian Wheat Bd. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1329, 1334 n.6 (2009), *aff'd,* No. 2010–1083, Slip Op. (Fed. Cir. Apr. 19, 2011) (noting that a request for administrative review suspends liquidation pending the outcome of the review); 19 C.F.R. § 351.212(c)(1) (2010). It is undisputed that Customs failed to provide the statutory notice of those suspensions to Pan Pacific's surety, AHAC. *See generally* Pl.'s Mot. for Stay ("Pl.'s Mot."), ECF No. 27.. Some years later, when Customs was unable to obtain payment of antidumping duties from Pan Pacific, it demanded payment from AHAC. *See* Compl. at exhibits D, E, and F, ECF No. 2. When AHAC refused to pay, the Government commenced this action. *See* Summons (Sept. 18, 2009), ECF 1.

Among other affirmative defenses raised in its answer, AHAC asserts that Customs' claims are barred by the six year statute of limitations set forth in 28 U.S.C. § 2415(a) (2006). On January 11, 2011, AHAC moved for summary judgment on this basis. *See generally* Def.'s Mem. of Law in Supp. Mot. Sum. J. ("SJ Mot."), ECF No. 26.

On February 9, 2011, the Government moved to stay its response to AHAC's motion for summary judgment, asserting that it needed to conduct further discovery before it could adequately respond. Pl.'s Mot. 5–6. The Government claims that it needs additional time to address AHAC's affirmative defense that it has been materially prejudiced by Customs' failure to provide notice of the suspensions. There-

fore, the Government maintains that it "must complete discovery before we can satisfactorily address all the relevant issues . . . that are implicated by AHAC's motion for summary judgment." Pl.'s Mot. 6. The Government seeks to stay the proceedings even though the affirmative defense of prejudice, found in the answer, is not specifically referenced in AHAC's summary judgment motion. Pl.'s Mot. 5–6; Am. Ans. 11, ECF No. 25; *see generally* SJ Mot.

On February 11, 2011, AHAC filed its own motion, seeking to stay discovery pending the outcome of its motion for summary judgment. Def.'s Mot. to Stay Disc. ("Def.'s Mot.") 1, ECF No. 28. Oral argument was held on April 19, 2011.

DISCUSSION

The Government argues that, if Customs' failure to notify AHAC can invalidate the suspensions at all, it can only be upon AHAC showing that it was prejudiced by the lack of notice. The Government, therefore, seeks to stay its response to AHAC's motion for summary judgment in order to complete discovery regarding the prejudice, if any, suffered by AHAC as a result of Customs' failure to provide the required notice. Pl.'s Mot. 5–6.

AHAC counters that discovery should be stayed as a matter of judicial economy because "[t]here are 'substantial grounds' and a 'foundation in law' for concluding that the Government's claims are barred by the statute of limitations." Def.'s Mot. 5. The theory underlying AHAC's statute of limitations defense, and its motion for summary judgment, is that Customs' failure to notify the surety that liquidation of the entries at issue was suspended invalidated the suspensions as a matter of law. Based on this contention, AHAC reasons "[t]hat lack of notice caused these entries to be deemed liquidated one year after entry pursuant to 19 U.S.C. § 1504(a)(1)(A)." Def.'s Mot. 3. According to the surety, this alleged deemed liquidation occurred more than six years prior to the commencement of this action and, thus, the Government's claim is barred by the six year statute of limitations. *See* SJ Mot. 5–6; Def.'s Mot. 3.

I. Arguments of the Parties

The parties agree that the statute of limitations on the Government's claims runs from the date of liquidation. The parties disagree, however, as to when liquidation occurred. According to the Government, it occurred between September and December 2003, following Commerce's actual liquidation of the entries upon the completion of its administrative reviews. Thus, the Government argues that liquidation occurred less than six years prior to the commencement of this action. *See* Compl. ¶¶ 12–15.

AHAC insists, however, that liquidation of the entries was never suspended and that, as a result, the entries were deemed liquidated pursuant to 19 U.S.C. § 1504(a) one year after the date they entered the United States. According to AHAC, all of the deemed liquidations would have occurred no later than March 2003 and, thus, beyond the six year statute of limitations. Def.'s Mot. 3.

The Government disputes AHAC's statute of limitations claim. The plaintiff asserts that the lack of notice to AHAC did not affect the validity of the suspensions because suspension happens as a matter of law, regardless of whether notice is provided to the surety. Pl.'s Mot. 3. The Government further argues that Customs' failure to provide notice to AHAC did not thereafter automatically invalidate the suspensions of liquidation because § 1504(c) does not provide for a consequence for failure to comply with the notice requirement, making the statutory directive to provide notice directory, not mandatory. Pl.'s Mot. 5; *see also Alberta Gas Chems., Inc. v. United States,* 1 CIT 312, 315–16, 515 F. Supp. 780, 785 (1981) ("It is settled that '[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and specifies a consequence for failure to comply with the provisions*.'") (citations omitted).

In the alternative, the Government argues that, if lack of notice could vitiate the suspensions, under the rule of prejudicial error, the suspensions would only be invalid if AHAC could demonstrate that it was prejudiced by notice not being provided. Pl.'s Mot. 5–6. Accordingly, the Government argues that it needs further discovery on the issue of prejudice to adequately respond to AHAC's summary judgment motion. Pl.'s Mot. 5–6.

AHAC counters that a stay is appropriate to avoid the undue waste and expense that would result from conducting discovery when it is likely that this matter will be resolved in AHAC's favor by summary judgment. The surety maintains that no showing of prejudice is required for it to succeed on its summary judgment motion. For AHAC, the fact that it was not given notice rendered the suspensions invalid, ab initio, resulting in deemed liquidations one year after the entries were made. "Therefore, irrespective of the reason for a suspension, once entries are deemed liquidated, the statute of limitations begins to run if the requisite notice has not been given to a relevant party." Def.'s Mot. 5. Thus, AHAC argues that it is appropriate for the court to stay discovery pending resolution of its dispositive motion because discovery will be shown to be unnecessary. Def.'s Mot. 9–10.

II. Analysis

A. The effect of notice on the validity of suspension

As noted above, liquidation of the entries was suspended when Commerce received the requests for administrative review for the PORs covering those entries. This suspension was automatic, upon Commerce's receipt of the requests. *See Tembec, Inc. v. United States*, 30 CIT 1519, 1525–26, 461 F. Supp. 2d 1355, 1361 (2006), *and judgment vacated on other grounds*, 31 CIT 241, 475 F. Supp. 2d 1393 (2007); *SSAB N. American Div. v. United States*, 31 CIT __, __, 571 F. Supp. 2d 1347, 1351 (2008); *Alden Leeds Inc. v. United States* , 34 CIT __, __, 721 F. Supp. 2d 1322, 1325–26 (2010). "The purpose of a periodic review is to provide an opportunity to make adjustments to the duties provided in [antidumping and countervailing duty] orders, based on actual experience." *Tembec*, 30 CIT at 1525 n.14, 461 F. Supp. 2d at 1361 n.14. Liquidation is suspended upon a request for administrative review to "enable[ ] Commerce to calculate assessment rates for the subject entries . . . , which are then applied by Customs pursuant to liquidation instructions received from Commerce" after it publishes the final results of the review. *SSAB,* 31 CIT at __, 571 F. Supp. 2d at 1351. "Under this framework Commerce performs the substantive role of determining correct assessment rates, and Customs performs a ministerial role in fulfilling Commerce's liquidation instructions." *Id.* (citing *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994)). It is against this backdrop that the questions regarding the validity of the suspensions, raised by the parties' motions to stay, must be answered.

Whether Customs' failure to notify AHAC of these suspensions rendered them invalid ab initio can be resolved by looking at the plain language of 19 U.S.C. § 1504, which unambiguously provides that notice of a suspension of liquidation is to be provided to a surety *after* a suspension has come about by operation of law. Section 1504 reads, in relevant part:

> (a) Liquidation . . .
>
> *Unless* an entry of merchandise for consumption is . . . *suspended* as required by statute or court order, . . . an entry of merchandise for consumption not liquidated within one year from –(A) the date of entry of such merchandise . . . shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record.
>
> . . . .

(c) Notice of suspension

If the liquidation of any entry is suspended, the Secretary shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record or drawback claimant, as the case may be, and to any authorized agent and surety of such importer of record or drawback claimant.

(emphasis added).

As is demonstrated by the italicized language, suspension of liquidation is a condition precedent to the notice requirement, not vice versa.[1] Accordingly, a surety is not entitled to notice until after liquidation has been suspended. In other words, notice is not a prerequisite to suspension, but is provided as a consequence of a suspension having occurred.

This being the case, the failure to provide notice does not automatically vitiate an otherwise valid suspension of liquidation. In order for a procedural error to invalidate agency action, it must involve a procedural condition precedent to the agency action in question. *See, e.g., Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394–95 (Fed. Cir. 1996) (considering whether "notification reciting a statutory reason for the extension is a condition precedent to an extension of the one-year liquidation period . . . ."); *Guangdong Chems. Imp.& Exp. Corp. v. United States*, 30 CIT 85, 90, 414 F. Supp. 2d 1300, 1306 (2006) (citing *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)) ("The Supreme Court has not held, however, that the courts are required to reverse subsequent agency action on the basis of any procedural misstep, no matter how minute or inconsequential."); *American Nat'l Fire Ins. Co. v. United States*, 30 CIT 931, 941, 441 F. Supp. 2d 1275, 1286 (2006) ("*ANF*") ("[The] failure to give notice of a suspension does not necessarily vitiate a suspension."). As has been seen, the suspension of liquidation following a request for a periodic review occurs by operation of law and is not dependant on the notice provision of § 1504(c). Because it is clear that the giving of notice is not a condition precedent to a suspension of liquidation, the failure to give notice does not prevent an otherwise valid suspension.

As to AHAC's deemed liquidation argument, this Court's holdings in *LG Electronics U.S.A., Inc. v. United States*, 21 CIT 1421, 991 F.

[1] The Customs regulation promulgated to implement this requirement similarly indicates that suspension is a condition precedent to notice. *See* 19 C.F.R. § 159.12(c) ("*If the liquidation of an entry is suspended as required by statute or court order*, . . . the port director promptly shall notify the importer . . . and his agent and surety . . . of the suspension.") (emphasis added).

Supp. 668 (1997) and *Alden Leeds Inc.*, 34 CIT __, 721 F. Supp. 2d 1322 are instructive. In both cases, Customs published notice of deemed liquidation despite liquidation having been suspended. The issue was whether the publication of erroneous notice resulted in a deemed liquidation. In both cases, the Court held that the erroneous notice had no effect on whether a deemed liquidation had, in fact, taken place. *See LG Elecs.*, 21 CIT at 1429, 991 F. Supp. at 676 ("Liquidation is deemed to have occurred by operation of law one year after entry. Exceptions occur in cases of extension, suspension or court order. Here liquidation was suspended. Thus, as a matter of law, no deemed liquidation . . . occurred.") (internal citations omitted); *Alden Leeds*, 34 CIT at __, 721 F. Supp. 2d at 1329.

As the Government points out, these cases establish that a deemed liquidation cannot occur while a suspension of liquidation is in place, and that Customs has no authority to effect a deemed liquidation. *See* Pl.'s Mot. 4 ("As acknowledged in *ANF*, suspension occurs by operation of law, not becasue Customs sends out CF 4333A notices advising importers and/or sureties of suspension.") "Deemed liquidation results from operation of law, and Customs makes no decision and performs no act in order to bring about a deemed liquidation. A suspension of liquidation acts to stop liquidation, including a deemed liquidation, from occurring." *Alden Leeds*, 34 CIT at __, 721 F. Supp. 2d at 1329; *see also Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002) (noting that "in order for liquidation to occur . . . the suspension of liquidation that was in place must have been removed"). Thus, it is clear that AHAC's arguments about the legal consequences of Customs' failure to give the statutorily required notice of suspension are unconvincing.

That is not to say, however, that Customs' failure to provide notice to a surety is necessarily of no consequence. "If, as is often the case, no law or regulation specifies the consequence of non-compliance with a regulation, the court must determine what remedy, if any, should be imposed." *Guangdong Chems*., 30 CIT at 90, 414 F. Supp. 2d at 1306. In other words, although Customs' failure to provide notice does not invalidate the suspensions, if AHAC was actually harmed as a result of Customs' omission, it would be entitled to appropriate relief.

It is for the court to determine the consequence, if any, of an agency's procedural errors by applying principles of "harmless error" or the "rule of prejudicial error." *See Intercargo Ins. Co.*, 83 F.3d at 394 ("It is well settled that principles of harmless error apply to the review of agency proceedings."); *Belton Indus., Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993) ("Because appellees' counsel received actual notice, Commerce's violation did not prejudice appellees. Ac-

cordingly, Commerce's violation was harmless error."); *see also* 5 U.S.C. § 706 (judicial review of agency action is conducted with "due account . . . of the rule of prejudicial error").

Under the rule of prejudicial error, procedural errors are regarded as harmless unless they are prejudicial to the complaining party. *See ANF,* 30 CIT at 942, 441 F. Supp. 2d at 1287 (quoting *Sea-Land Serv., Inc. v. United States,* 14 CIT 253, 257 (1990)). "A party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo*, 83 F.3d at 396.

Whether an error is prejudicial or harmless depends on the facts of a given case. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1704–05 (2009) (finding that courts are to determine whether an agency error is harmless by "case-specific application of judgment, based upon examination of the record."). In the event that AHAC was prejudiced by Customs' failure to provide notice as required by § 1504(c), it may be that it has an affirmative defense to the Government's claims. *See* Am. Ans. 11. Therefore, because allegations of prejudice are not the subject of AHAC's summary judgment motion, but are the subject of the Government's discovery requests, discovery should continue.

B. The parties' respective motions to stay

Based on the foregoing, the parties' respective motions to stay these proceedings are denied. The Government's motion to stay its response to AHAC's motion for summary judgment is denied because AHAC's motion for summary judgment can be readily decided based on the factual record before the court and, therefore, the Government does not require any additional discovery in order to oppose the motion.

AHAC's motion to stay discovery is denied because AHAC is not likely to succeed on the merits of its summary judgment motion and, thus, the facts relating to prejudice will be important to the outcome of this litigation.

A separate order shall be issued.

Dated: May 17, 2011
New York, New York

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