

# U.S. Court of International Trade

Slip Op.18-101

HYUNDAI HEAVY INDUSTRIES, CO. LTD., Plaintiff, v. UNITED STATES,  
Defendant, and ABB INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge

Court No. 17-00054

**PUBLIC VERSION**

[Remanding the U.S. Department of Commerce's decision to use total facts available with an adverse inference.]

Dated: August 14, 2018

*David E. Bond*, White and Case LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *William J. Moran* and *Ron Kendler*.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Christopher Hyner*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*R. Alan Luberda*, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *David C. Smith* and *Melissa M. Brewer*.

## **OPINION**

### **Barnett, Judge:**

Plaintiff, Hyundai Heavy Industries, Co., Ltd. (“Plaintiff” or “HHI”) contests the final results of the U.S. Department of Commerce (“Commerce” or the “agency”) in the third administrative review (“AR 3”) of the antidumping duty order covering large power transformers (“LPTs”) from the Republic of Korea for the period of review August 1, 2014, through July 31, 2015. *Large Power Transformers from the Republic of Korea*, 82 Fed. Reg. 13,432 (Mar. 13, 2017) (final results of antidumping duty administrative review; 2014–2015) (“*Final Results*”), ECF No. 17–2, and accompanying Issues and Decision Mem., A-580–867 (Mar. 6, 2017) (“I&D Mem.”), ECF No. 17–3.<sup>1</sup>

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<sup>1</sup> The administrative record for this case is divided into a Public Administrative Record (“PR”), ECF No. 17–4, and a Confidential Administrative Record (“CR”), ECF No. 17–5. Parties submitted joint appendices containing record documents cited in their briefs. See Public J.A. (“PJA”), ECF No. 44 (Vols. I-III); Confidential J.A. (“CJA”), ECF Nos. 40–1 (Vol. I), 41–1 (Vol. II), 42–1 (Vol. III), 43–1 (Vol. IV), 45–1 (Vol. V), 46–1 (Vol. VI), 46–2 (Vol. VII). References are to the confidential versions of the relevant record documents, unless stated otherwise.

## BACKGROUND

Commerce initiated AR 3 on October 6, 2015. *Initiation of Anti-dumping and Countervailing Duty Admin. Reviews*, 80 Fed. Reg. 60,356, 60,358 (Dep't Commerce Oct. 6, 2015), CJA Vol. I Tab 5, PJA Vol. I Tab 5, PR 10, ECF No. 40–1. Commerce selected HHI and Hyosung Corporation as mandatory respondents. I&D Mem. at 3. Commerce issued its initial questionnaire to HHI on December 3, 2015. *See* Req. for Information – Antidumping Admin. Review (Dec. 3, 2015) (“Initial Questionnaire”), CJA Vol. I Tab 6, PJA Vol. I Tab 6, PR 21, ECF No. 40–1.<sup>2</sup> Commerce published its preliminary results of review on September 2, 2016. *Large Power Transformers from the Republic of Korea*, 81 Fed. Reg. 60,672 (Dep't Commerce Sept. 2, 2016) (prelim. results of antidumping duty administrative review; 2014–2015) (“Preliminary Results”). For the *Preliminary Results*, Commerce relied on HHI's submitted data and calculated a weighted-average dumping margin of 3.09 percent for HHI. *Id.*, 81 Fed. Reg. at 60,673.

Commerce published the *Final Results* on March 13, 2017. *Final Results*, 82 Fed. Reg. 13,432. For the *Final Results*, Commerce assigned to HHI a final weighted-average dumping margin of 60.81 percent based on total facts available with an adverse inference (referred to as total adverse facts available). *Id.*, 82 Fed. Reg. at 13,432. Commerce's decision to rely on total adverse facts available was based on four findings: (1) HHI failed to report service-related revenues separately from the gross unit price despite repeated requests from Commerce, I&D Mem. at 21–22; (2) HHI failed to include the price of a subject “part” in the price for certain home-market sales despite repeated opportunities to do so, *id.* at 23–26; (3) HHI failed to report separately the prices and costs for accessories, *id.* at 26–27; and, (4) HHI was systematically selective in providing various documents to Commerce and Commerce determined there were discrepancies in HHI's reported data, *id.* at 27–28.

HHI now challenges Commerce's decision to rely on total adverse facts available and each of the four rationales that the agency cited as supporting that decision. The court must determine whether Commerce's individual findings are supported by substantial evidence and whether the agency's resort to total adverse facts available is otherwise in accordance with law.

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<sup>2</sup> Commerce issued supplemental questionnaires to HHI both before and after it published the preliminary results. Further discussion of the supplemental questionnaires and HHI's responses to them is contained in the relevant section of the analysis, *infra*.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii).<sup>3</sup> The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

### LEGAL FRAMEWORK FOR ADVERSE FACTS AVAILABLE

When “necessary information is not available on the record,” or an interested party “withholds information” requested by Commerce, “fails to provide” requested information by the submission deadlines, “significantly impedes a proceeding,” or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce “shall . . . use the facts otherwise available.” 19 U.S.C. § 1677e(a). Commerce’s authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *Id.* Pursuant to § 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory deadlines, provide that respondent “an opportunity to remedy or explain the deficiency.” *Id.* § 1677m(d).

Commerce may not disregard information that is “necessary to the determination but does not meet all the applicable requirements,” when:

- (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
- (5) the information can be used without undue difficulties.

*Id.* § 1677m(e).

<sup>3</sup> Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the United States Code are to the 2012 edition. Citations to 19 U.S.C. § 1677e, however, are to the United States Code 2016 edition, which reflects amendments to § 1677e pursuant to the Trade Preferences Extension Act (“TPEA”), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments affect all antidumping determinations made on or after August 6, 2015, and, therefore, apply to the instant proceeding. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep’t Commerce Aug. 6, 2015).

If, however, Commerce determines that the party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” it “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” *Id.* § 1677e(b). “Compliance with the ‘best of its ability’ standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).<sup>4</sup>

Commerce uses total adverse facts available when “none of the reported data is reliable or usable,” such as when all of the “submitted data exhibit[s] pervasive and persistent deficiencies that cut across all aspects of the data.” *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citing *Steel Authority of India, Ltd. v. United States*, 25 CIT 482, 487, 149 F. Supp. 2d 921, 928–29 (2001)).

## DISCUSSION

### I. Service-related revenue

#### a. Relevant Facts

In Sections B and C of the initial questionnaire, Commerce instructed HHI to “report revenue in separate fields (e.g., ocean freight revenue, inland freight revenue, oil revenue, installation, etc.) and identify the related expense(s) for each revenue.” Initial Questionnaire at JA100059. In response, HHI stated:

[HHI] has reported, since the first administrative review, separate revenue and expenses whe[n] the customer issues a separate purchase order for services that are not part of the original term of sale . . . [HHI] has reported the sales amount from additional purchase orders in the ADDPOPRU field and the associated additional expenses under the separate purchase order in the ADDPOEXPU field. [HHI] did not receive additional purchase orders for home-market sales during the POR . . . .”

Resp. of Hyundai Heavy Industries Co., Ltd. to Section B of the Questionnaire (Jan. 27, 2016) (“HHI’s Sec. B Resp.”) at B-4, CJA Vol. I Tab 8, CR 152–156, PJA Vol. I Tab 8, PR 91–94, ECF No. 40–1; see also Resp. of Hyundai Heavy Industries Co., Ltd. to Section C of the

<sup>4</sup> *Nippon Steel* predates the amendments made to 19 U.S.C. § 1677e by the TPEA; however, the relevant statutory language discussed in that case remains unchanged. Compare 19 U.S.C. § 1677e(b)(2012), with 19 U.S.C. § 1677e(b)(1)(2016).

Questionnaire (Jan. 27, 2016) (“HHI’s Sec. C Resp.”) at C-3, CJA Vol. I Tab 9, CR 152–156, PJA Vol. I Tab 9, PR 91–94, ECF No. 40–1 (cross-referencing its response to Section B of the questionnaire). HHI explained that its reporting methodology was based on Commerce’s “conclusion” in the original investigation:

[Commerce] found that [HHI] correctly had reported its gross unit price and properly did not separate, for example, freight where there were no ‘separate arrangements on behalf of the customer’ and where [HHI] had not ‘sought reimbursement for that cost.’ . . . [Commerce] recognized that its practice is to separate revenue and expenses ‘that are not included in the term of sale.’

HHI’s Sec. B Resp. at B-3 (citing Issues and Decision Mem., A-580–867 (Jul. 11, 2012) (“Initial Investigation I&D Mem.”) at Comment 4, accompanying *Large Power Transformers from the Republic of Korea*, 77 Fed. Reg. 40,857 (Dep’t Commerce July 11, 2012) (final determination of sales at less than fair value). HHI reasoned that the prices of its services are not separable from the price of the subject merchandise. *See id.* at B-4 (“[W]he[n] it is required, installation and supervision are not separable from the LPT itself.”). HHI’s response asserted that Commerce has distinguished “separately provided and charged services from those within the terms of sale” in prior proceedings. *Id.* at B-3 (citing Issues and Decision Mem., A-100–001 (Aug. 31, 2009) at Comment 12, accompanying *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom*, 74 Fed. Reg. 44,819 (Dep’t Commerce Aug. 31, 2009) (final results of antidumping duty admin. reviews and revocation of an order in part).

Following this initial response, Commerce asked HHI to “clarify whether HHI or Hyundai USA received revenue related to international freight, inland freight, oil, installation, or any other expenses on U.S. sales. If so, please report this revenue in a field separate from the related expense.” Suppl. Questionnaire for Hyundai Heavy Industries Co., Ltd., and Hyundai Corp. USA’s Questionnaire Resps. (July 27, 2016) (“July 27, 2016 Suppl. Questionnaire”) at 7, CJA Vol. I Tab 13, CR 266, PJA Vol. I Tab 13, PR 169, ECF No. 40–1. HHI responded in two parts. In the first part, HHI stated: “In accordance with [Commerce’s] review and treatment of [HHI’s] sales documentation in prior segments of this proceeding, [HHI] did not receive separate revenue related to international freight, inland freight, oil, installation, or any other expenses on home-market sales or U.S.

sales.” See Resp. to the Second Suppl. Sections A, B, C and D Questionnaire (Aug. 10, 2016) (“HHI’s Aug. 10, 2016 Suppl. Resp.”), at 11, CJA Vol. I Tab 14, CR 299–313, PJA Vol. I Tab 14, PR 179–179, ECF No. 40–1. HHI further indicated that it reported its service revenues in accordance with Commerce’s conclusions in prior reviews. See *id.* at 11–12 (“In those instances whe[n] HHI received a purchase order for a separate service, [HHI] reported the sales revenue and corresponding expenses separately in accordance with [Commerce’s] requirements[.]”).

In the second part of its response, HHI included Attachment 2S-17, which Commerce found to be relevant to HHI’s revenue reporting. See Resp. to Questions 8, 16, 25, 26 and 28 of the Second Suppl. Sections A, B, C and D Questionnaire (Aug. 18, 2016) (“HHI’s Aug. 18, 2016 Suppl. Resp.”), Attach 2S-17, CJA Vol. I Tab 15, CR 300313, PJA Vol. I Tab 15, PR 189–190, ECF No. 40–1. Attachment 2S-17 included sales documentation that contained separate service line-items with a corresponding price, and those price amounts were higher than the expenses that HHI reported in its sales database. See I&D Mem. at 20 & nn.105–106 (citing HHI’s Aug. 18, 2016 Suppl. Resp., Attach 2S-17; HHI’s Aug. 18, 2016 Suppl. Resp., Attach 2S-26, CJA Vol. VI Tab 4, CR 299–315, PJA Vol. II Tab 4, PR 189–190, ECF No. 46–1).

Commerce sent a second supplemental questionnaire to HHI after it issued the *Preliminary Results*. See Suppl. Questionnaire for Hyundai Heavy Industries Co., Ltd., and Hyundai Corp. USA’s Questionnaire Resps. (Oct. 7, 2016) (“Oct. 7, 2016 Suppl. Questionnaire”), CJA Vol. I Tab 16, CR 346, PJA Vol. I Tab 16, PR 213, ECF No. 40–1. Therein, Commerce cited ABB Inc.’s (“ABB”) argument that HHI had received service-related revenue, and instructed HHI to report such expenses and revenues:

“In its September 13, 2016 comments, Petitioner asserts [that] HHI incurred expenses and obtained revenues for separately-negotiated services and non-subject merchandise for [certain]<sup>5</sup> sales. . . . Please revise your U.S. sales database to report all such expenses and revenues for these sales in separate fields.”

*Id.* at 6. Commerce also stated: “If, in your opinion, there were no additional expenses or revenues related to a sale, please comment on each of the items cited by the Petitioner . . . .” *Id.* at 6.

<sup>5</sup> The sales were identified as U.S. sequence numbers (“SEQUs”) 11 and 16. Oct. 7, 2016 Suppl. Questionnaire at 6. SEQU 11 concerned the issue of separately negotiated services, whereas SEQU 16 concerned the issue of non-subject merchandise. See Resp. to Questions 13 and 17 of the Third Suppl. Sections A, B, C, and D Questionnaire (Nov. 10, 2016) (“HHI’s Nov. 10, 2016 Suppl. Resp.”) at 7–8, CJA Vol. II Tab 17, CR 440–449, PJA Vol. I Tab 17, PR 241–250, ECF No. 41–1.

In its response, HHI addressed the particular sales rather than revising the sales database. *See* HHI's Nov. 10, 2016 Suppl. Resp. at 7–8, 11–16. Relevant to the service-related revenue issue, HHI explained that although there were separate line item values for certain services, those values were “not severable from the lump-sum price.” *Id.* at 7–8.<sup>6</sup> HHI went on to state that, notwithstanding its “demonstration [] that HHI did not have any ‘separate’ revenues for separate services or non-subject merchandise,” HHI was providing “a worksheet listing on a category basis the values listed anywhere in the sales documentation for the breakdowns of the price of the LPTs and the corresponding expenses.” *Id.* at 23; *see also id.*, Attach. 3S-46 (the worksheet), CJA Vol. IV Tab 17, PJA Vol. I Tab 17, ECF No. 43–1.

In its *Final Results*, Commerce determined that HHI refused to provide information requested in the initial and supplemental questionnaires, and therefore, “impeded [the] review by failing to act to the best of its ability by failing to provide [Commerce] with the requested information in a timely manner.” I&D Mem. at 22. Commerce’s review of HHI’s sales documents identified separate service line items with corresponding prices, which were higher than HHI’s corresponding reported expenses, supporting Commerce’s concern that HHI could be overstating gross unit prices. *Id.* at 20, 21. Commerce concluded that, “HHI and its customers separately assigned prices for the related services and identified these amounts as separate line items on invoices, separate from the price of the subject merchandise.” *Id.* at 21. Moreover, Commerce stated:

Although these services are required under the terms of sale and are invoiced on a lump-sum basis, as [HHI] argued, we find that [HHI’s] sales documentation specifically indicates that these sales-related services could be negotiable, apart from subject merchandise, since each service is shown/listed with the corresponding amount in purchase orders and/or invoices. In other words, if customers do not like [HHI]’s price for a certain service, they can procure/arrange such service on their own without using [HHI]’s service.

*Id.* at 21. Commerce questioned the reliability of the worksheet provided by HHI, finding it incomplete because it appeared to be missing certain data fields for multiple U.S. sales, such as the related expenses for its claimed revenues. *Id.* According to Commerce, if HHI had “followed [Commerce’s] request to report separately service-related revenues and the related expenses early on . . . [the agency] would have had the time to request additional necessary information

<sup>6</sup> Transportation, offloading, and supervision. *Id.* at 7–8.

(i.e., the missing data) and verify other issues.” *Id.* at 22. Commerce also explained that it had “specifically requested that [HHI] provide this information in the instant review, because [HHI’s] sales documentation identifies separate line items for sales-related services.” *Id.* Those separate line items demonstrated to the agency that the sales-related services could be negotiable, thereby distinguishing this review from prior segments of this proceeding. *See id.*

### **b. Parties’ Contentions**

Plaintiff asserts that Commerce departed from the practice it relied upon in previous segments of the proceeding for determining whether separate service-related revenue existed or should have been reported. *See* Confidential Rule 56.2 Mot. for J. Upon the Agency R. on Behalf of Pl. Hyundai Heavy Industries Co. Ltd. and Mem. of P. & A. in Supp. (“Pl.’s Br.”) at 24–26, ECF No. 26 (referring to Commerce’s application of a “new test”). Plaintiff contends that in so doing, Commerce failed to provide Plaintiff sufficient notice of its change in practice. *See id.* at 24, 29–31. Plaintiff further contends that Commerce did not indicate in the supplemental questionnaires that the agency was changing its approach to service-related revenue or identify a deficiency in HHI’s data. Confidential Am. Reply in Supp. of Pl.’s Rule 56.2 Mot. for J. Upon the Agency R. (“Pl.’s Reply”) at 6–7, ECF No. 38. HHI also argues that the worksheet submitted with its third response provided the information necessary to calculate a dumping margin. *See* Pl.’s Br. at 31–33.

United States (“Defendant” or the “Government”) defends Commerce’s determination on the grounds that “each administrative review is a separate segment of [the] proceeding[] with its own unique facts.” Confidential Def.’s Resp. to Pl.’s Rule 56.2 Mot. for J. Upon the Agency R. (“Def.’s Resp.”) at 16, ECF No. 31 (quoting *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005)). According to the Government, Commerce based its revenue-capping decision in each segment on the record evidence presented in that individual segment. *See id.* at 17. Thus, notwithstanding the agency’s conclusions in prior administrative segments, Commerce reasonably concluded, based on evidence presented in AR 3, that HHI separately negotiated the price for service-related expenses. *See id.* at 18.

ABB argues that Commerce modified its standard antidumping duty questionnaire at the beginning of the review, instructing HHI to separately report its service-related revenue. Confidential Def.-Int.’s Resp. in Opp’n to Pl.’s Mot. for J. on the Agency R. (“ABB’s Resp.”) at 6–7, ECF No. 29. ABB contends that Commerce’s instruction in the



supplemental questionnaire “did not limit reporting of revenues in this review regardless of what it may have done in the prior segments.” *Id.* at 8. ABB characterizes Plaintiff’s arguments concerning Commerce’s alleged use of a new service-related revenue methodology as a challenge to Commerce’s fact-finding authority. *See id.* at 22 (“Contrary to HHI’s claim, Commerce’s right to seek factual information during a proceeding does not constitute a ‘test’ from which the agency must justify a departure.”).

### **c. Analysis**

Antidumping analysis requires Commerce to compare the export price or constructed export price of the subject merchandise with the normal value of the foreign like product. *See* 19 U.S.C. § 1677b(a); *see also* 19 C.F.R. § 351.401(a). Section 1677a(c) provides three instances when Commerce shall increase the export price or constructed export price, and § 1677b(a)(6) provides six instances when Commerce shall increase the normal value. *See* 19 U.S.C §§ 1677a(c), 1677b(a)(6). There is no statutory basis for increasing the export price, constructed export price, or normal value when a service is separately provided and the respondent earns a profit on the provision of that service. *See Sucoctriceo Cutrale Ltda. v. United States*, Slip Op. 12–71, 2012 WL 2317764, at 4 (CIT June 1, 2012) (“Commerce properly determined that it was inappropriate to treat the [service charges] as adjustments to the U.S. price under section 1677a(c)” when those charges were not attributable to the subject merchandise.) Likewise, there is no statutory language requiring export price, constructed export price, or normal value to be adjusted downward for any profit made on the provision of a service when the provision of that service is part of the transaction for the sale of the subject merchandise. *See* 19 U.S.C §§ 1677a(c)-(d), 1677b(1)(6)-(7). Thus, the issue, as framed by Commerce, is whether the gross unit price, as reported by HHI, properly includes the provision of the services in question or, as determined by Commerce, those services were separately negotiable, regardless of whether they were ultimately provided and charged in a single, lump-sum invoice. *See I&D Mem.* at 21 (“[HHI’s] sales documentation specifically indicate[d] that these sales-related services could be negotiable, apart from subject merchandise since each service is shown/listed with the corresponding amount in purchase orders and/or invoices.”).

When Commerce finds that a service is separately negotiable, its practice has been to cap the service-related revenue by the associated

expenses when determining the U.S. price. *Id.* at 18 & n.88 (citations omitted). This court recently acknowledged that Commerce’s revenue-capping practice was previously examined by the court and found to be reasonable. *See ABB, Inc. v. United States*, 41 CIT \_\_\_, \_\_\_, 273 F. Supp. 3d 1200, 1208–09 (2017) (citing *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 36 CIT \_\_\_, \_\_\_, 865 F.Supp.2d 1216, 1248 (2012)). Plaintiff does not challenge Commerce’s capping practice, instead focusing its arguments on the agency’s factual findings. *See* Pl.’s Br. at 25–31; Pl.’s Reply at 2–6.

Substantial evidence supports Commerce’s finding that HHI had separate service-related revenue to report, but failed to do so. *See* I&D Mem. at 21. Although HHI did not issue separate invoices for these services, the record shows that “HHI and its customers separately assigned prices for these services and identified these amounts as separate line items on invoices, separate from the price of the [LPTs].” I&D Mem. at 21 & n.112 (citing HHI’s Nov. 10, 2016 Suppl. Resp., Attach. 3S-35);<sup>7</sup> *see also id.* at 20 & n.105 (citing HHI’s Aug. 18, 2016 Suppl. Resp., Attach. 2S-17); Pl.’s Br. at 10 (asserting that “its sale documents sometimes showed separate prices for services”) (citations omitted).

Moreover, Commerce’s determination that HHI withheld information requested by the agency and significantly impeded the proceeding is supported by substantial evidence. *See* I&D Mem. at 4–5, 21–22. Commerce’s initial questionnaire instructed HHI to report service-related revenue in separate fields and to identify the related expense for each type of revenue. Initial Questionnaire at JA100059. HHI did not report all separately identifiable revenues as requested, instead reporting separate revenue and expenses only for services when the customer issued a separate purchase order because they were not encompassed in the original terms of sale. *See* HHI’s Sec. B Resp. at B-3; HHI’s Sec. C Resp. at C-3. When Commerce requested Plaintiff to clarify whether HHI or its U.S. affiliate received revenue related to freight, oil, installation, or other related expenses on U.S. sales, and, if so, to report this revenue in a separate field along with the related expense, HHI again responded by providing its understanding of the terms “separate revenue.” *See* July 27, 2016 Suppl. Questionnaire at 7; HHI’s Aug. 10, 2016 Suppl. Resp. at 11–12. When Commerce asked Plaintiff in the subsequent supplemental questionnaire to revise its U.S. sales database to report expenses and revenues in separate fields, addressing ABB’s assertions of separately-negotiated services, Plaintiff did not revise its database but rather

<sup>7</sup> Attachment 3S-35 spans CJA Vol. II Tab 17 at JA 100538, ECF No. 41–1, to CJA Vol. IV Tab 17 at JA 103841, ECF No. 43–1.

provided a worksheet purporting to list a breakdown of “the values listed anywhere in the sales documentation” and the corresponding expenses. *See* Oct. 7, 2016 Suppl. Questionnaire at 6; HHI’s Nov. 10, 2016 Suppl. Resp. at 23.

Thus, Commerce asked HHI on three separate occasions to separately report service-related revenue. Twice, HHI did not; and the third time, HHI provided a worksheet which was not responsive in the form or manner requested by Commerce. “The focus of [19 U.S.C. 1677e](a) is respondent’s failure to provide information. . . . The mere failure of a respondent to furnish requested information—for any reason— requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.” *Nippon Steel*, 337 F.3d at 1381 (emphasis omitted).

The court must next consider whether Commerce met its obligations, pursuant to 19 U.S.C. § 1677m(d), to notify HHI of deficiencies in its questionnaire responses. Plaintiff’s arguments that Commerce did not provide HHI with sufficiently detailed notice of deficiencies in its reporting are not persuasive. *See* Pl.’s Br. at 22–23, 32–33. HHI was informed that its reporting of service-related revenue was deficient because Commerce made multiple requests for such information, including an explicit request that HHI revise its sales database to report “all expenses and revenues” in separate fields.<sup>8</sup> Intentional obtuseness on the part of respondent does not obviate Commerce’s multiple requests to HHI for the relevant information.

Substantial evidence also supports Commerce’s decision to apply an adverse inference, which was otherwise in accordance with law. Commerce “may use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available” when the respondent “fail[s] to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b)(1)(A). A respondent fails to cooperate by acting to the best of its ability to comply with a request for information when it has not “put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel*, 337 F.3d at 1382.

<sup>8</sup> While Commerce’s instruction included an alternative by which HHI might explain why it chose not to revise its database, this alternative did not excuse HHI from the reporting burden if Commerce did not accept the explanation and the alternative did not exclude the risk that Commerce would rely on facts available in the absence of time to make another request for the information. Plaintiff was required to prepare an “accurate and complete record in response to questions plainly asked by Commerce.” *Tung Mung Dev. Co., Ltd. v. United States*, 25 CIT 752, 788–89 (2001) (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571–72 (Fed. Cir. 1990)).

As noted, Commerce made multiple requests for HHI's service-related revenue, and each time HHI explained that its reporting relied on prior segments of the proceeding rather than providing the information specific to the current review period as requested by Commerce. The fact that the records of prior segments did not support a conclusion that certain service-related revenues were separately reportable does not excuse HHI from the burden of again establishing, on the record of this review, that such revenues were not separately reportable. As evidenced by the worksheet that HHI ultimately provided, HHI had the ability to provide substantially more information than it initially did, but withheld that information until very late in the review.

HHI argues that its failure to comply with the supplemental questionnaires was informed by, and should be excused by, Commerce's treatment of its service-related revenues in the original investigation and prior reviews of LPTs. *See* Pl.'s Br. at 25–26 (citing Initial Investigation I&D Mem. at 29; Issues and Decision Mem., A-580–867 (Mar. 8, 2016) (“AR 2 I&D Mem.”) at 39–40, accompanying *Large Power Transformers from the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep't Commerce Mar. 16, 2016) (final results of antidumping duty admin. review; 2013–2014). HHI may not, however, rely on Commerce's factual conclusions from prior reviews in the instant review because each review is separate and based on the record developed before the agency in the review. *See, e.g., Jiaxing Bro. Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2014); *Shandong Hua-rong Mach. Co. v. United States*, 29 CIT 484, 491, (2005) (“[A]s Commerce points out, ‘each administrative review is a separate segment of [the] proceeding[] with its own unique facts. Indeed, if the facts remained the same from period to period, there would be no need for administrative reviews.’”) (citation omitted).

In prior segments of the LPTs from Korea proceeding, Commerce made clear that its conclusions were based on the record of each segment. *See* HHI's Aug. 10, 2016 Suppl. Resp. at 11–13 (citing Initial Investigation I&D Mem.; AR 2 I&D Mem.). Tellingly, on three occasions, HHI quoted language from the prior review and the original investigation, indicating that Commerce's results were “[b]ased on the record of the current review,” “based upon its review of record evidence,” or based on what “the record . . . suggest[ed].” *Id.* at 11–13. The burden to build the record in each segment lies with the respondent. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) (“The burden of production [belongs] to

the party in possession of the necessary information.”) (quoting *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (alteration in original)).

Substantial evidence further supports a finding that HHI’s worksheet failed to satisfy the elements of 19 U.S.C. § 1677m(e). As already noted, HHI did not provide the worksheet allegedly containing the service-related revenue until after the *Preliminary Results* were issued. See HHI’s Nov. 10, 2016 Suppl. Resp. at 23; see also *id.*, Attach. 3S-46 (the worksheet). At that point, Commerce determined that it could not verify the worksheet’s information and address various other issues concerning the worksheet at such a late stage of the review. See I&D Mem. at 22 & n.15 (citing Petitioner’s Case Br. (Jan. 5, 2017) at 20–22, CJA Vol. VI Tab 9, CR 463–65, PR 280281, ECF No. 46–1). Further, Commerce also noted that the worksheet was “incomplete” in that it was “missing information for multiple U.S. sales,” casting “serious doubt on the reliability of such information.” *Id.* at 21. These findings are confirmed by the worksheet itself. See HHI’s Nov. 10, 2016 Suppl. Resp., Attach. 3S-46. Thus, substantial evidence supports Commerce’s finding that HHI failed to satisfy the elements of 19 U.S.C. § 1677m(e).

For the foregoing reasons, Commerce’s findings that HHI had service-related revenues, and that HHI failed to report service-related revenues separately from the gross unit price despite repeated requests from Commerce, are supported by substantial evidence.

## II. HHI’s Treatment of a Certain LPT “Part”

### a. Relevant Facts

The scope of the antidumping duty order covers both complete and incomplete LPTs. In its initial questionnaire, Commerce repeated the text of the scope, including the definition of incomplete LPTs as “subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of LPTs.” Initial Questionnaire at JA100062. Commerce instructed Plaintiff to “report the price and cost for ‘spare parts’ and ‘accessories’ to ensure that product matches are based on accurate physical characteristics of the LPTs.” See Resp. of HHI to Section D of the Questionnaire (Feb. 5, 2016) (“HHI’s Sec. D Resp.”) at D-2, CJA Vol. V Tab 22, CR 163–69, PJA Vol. I Tab 22, PR 97, ECF No. 45–1. Commerce found that despite the agency’s clear instructions, HHI failed to report correctly its home-market price because it excluded a certain part from the home-

market gross unit price, thereby understating normal value. *See* I&D Mem. at 23–25.

In a supplemental questionnaire, Commerce instructed HHI to provide complete sales documentation and all sales related documentation for two home-market sales.<sup>9</sup> July 27, 2016 Suppl. Questionnaire at 5. The documentation that Plaintiff submitted in response indicated that HHI “incorrectly identified a certain part required to assemble a complete LPT as non-foreign like product.” I&D Mem. at 24 & n.123 (citing HHI’s Aug. 18, 2016 Suppl. Resp. at 1–3 & Attach. 2S-17).<sup>10</sup>

Commerce issued a second supplemental questionnaire, requesting documents supporting HHI’s sales negotiation process and all expenses concerning these same home-market sales. Oct. 7, 2016 Suppl. Questionnaire at 5. Hyundai again reported the same part as non-subject merchandise. *See* Resp. to the Third Suppl. Sections A, B, C, and D Questionnaire (Oct. 27, 2016), Attach. 3S-7 at JA 300104-JA 300106, CJA Vol. VI Tab 7, CR 347–71, PJA Vol. II Tab 7, PR 225–27, ECF No. 46–1.

In December 2016, ABB raised the issue of HHI’s failure to include the part in the home-market gross unit price in comments to the agency. *See* ABB’s Dec. 2, 2016 Cmts at 10–13. In its response to these comments, HHI failed to address this issue; instead, it waited to raise the issue in its case brief. *See* Def.’s Resp. at 22; Pl.’s Br. at 13. In its case brief, HHI then argued:

At this stage of this review, [HHI] is not permitted to submit rebuttal information to respond to ABB’s argument and is limited to documents on record. With this limitation, the record is ambiguous and does not allow a definitive conclusion regarding whether the items in question are properly included in the gross unit price.

Pl.’s Br. at 13 (quoting HHI Admin. Case Br. (Jan. 5, 2017) at 21, CJA Vol. V Tab 19, CR 462, PJA Vol I Tab 19, PR 279, ECF. No. 45–1). Hyundai proffered a “revised price calculation worksheet” that allegedly included the excluded part with increased gross unit prices for the sales in question. Pl.’s Br. at 13; HHI Admin. Case Br. at 21 & Ex. 2.

Commerce concluded that the excluded part was “required to assemble a complete LPT,” and that Hyundai had incorrectly labeled

<sup>9</sup> Home market sequence numbers 84 and 91. July 27, 2016 Suppl. Questionnaire at 5.

<sup>10</sup> HHI reported the local control panels for main transformers (MT), stand-by auxiliary transformers (SAT), and unit auxiliary transformers (UAT) as non-subject merchandise. *See* HHI’s Aug. 18, 2016 Suppl. Resp., Attach. 2S-17 at JA100160, JA100165JA100167 (referring to this part as “NSM”).

the part as non-subject merchandise in its first and second supplemental questionnaire responses. I&D Mem. at 25. The agency noted while HHI excluded the part from the gross unit prices for the home market sales, it included the same part in the gross unit prices for the U.S. sales, rendering the two prices incomparable. *Id.* Because this issue impacted the vast majority of home market sales for which the agency had examined full documentation, Commerce found that the improper reporting called into question all of the home market sales reporting and, thus, found all of HHI's home market prices unreliable. *Id.* at 26.

### **b. Parties' Contentions**

At the outset, Plaintiff does not specifically challenge Commerce's factual finding that the excluded part was subject merchandise and Plaintiff failed to correctly report it as such. *See* Pl.'s Br. at 34–35. Instead, Plaintiff argues that the sales documentation and revised calculation it provided to the agency as part of its administrative case brief contained all the information necessary to calculate home market prices for the LPTs, inclusive of the part. *See* Pl.'s Br. at 34.<sup>11</sup> Plaintiff avers that “[Commerce] had no grounds to use [facts available]” under these circumstances. Pl.'s Br. at 34.

Defendant argues that HHI's failure to include the particular part in its home-market gross unit price “undermined Commerce's ability to analyze [HHI]’s information” and “Commerce reasonably determined that Hyundai failed to act to the best of its ability to provide necessary requested information.” Def.'s Resp. at 19–20. ABB argues that HHI is attempting to shift the record-building burden to Commerce by “claiming that this issue did not arise until late in the proceeding such that HHI was deprived of the chance to remedy its misreporting,” when the burden to build the record is on the respondent. ABB's Resp. at 36–37.

### **c. Analysis**

Commerce's finding that HHI's failure to report properly its home market sales, inclusive of the price of within-scope parts, warrants the use of adverse facts available is supported by substantial evidence.

First, as noted, Plaintiff does not directly challenge Commerce's factual finding that Plaintiff withheld information, such as the proper reporting of the part in question. Second, Commerce identified the

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<sup>11</sup> The sales documentation included product price and detail for the part in question. *See* HHI's Aug. 18, 2016 Suppl. Resp., Attach 2S-17 at JA100164-JA100168.

problem with HHI's reporting while in the process of reviewing Plaintiff's response to the second supplemental questionnaire, I&D Mem. at 24, and HHI acknowledged that this issue was identified at "a very late stage of the review process," *id.* Plaintiff does not argue that Commerce should have provided it an opportunity to remedy its defect, but argues that Commerce should have utilized the revised calculation worksheet that HHI submitted in its administrative case brief. *See* Pl.'s Br. at 34. Alternatively, Plaintiff argues that Commerce had the necessary documentation to calculate the prices inclusive of the part. *Id.* This argument requires the court to assess whether substantial evidence supports a finding that HHI failed to satisfy the elements of 19 U.S.C. § 1677m(e) regarding the use of certain information.

Commerce declined to rely on the revised calculated worksheet because it "did not have time to confirm or verify the validity of these revisions." I&D Mem. at 25 (discussing in detail the agency's concerns with HHI's reporting and providing specific examples of why it questioned the reliability of HHI's reported home market prices). As discussed above, § 1677m(e) precludes Commerce from disregarding information that is "necessary to the determination" when five criteria are satisfied. 19 U.S.C. § 1677m(e). Having articulated its reasons for why it could not verify the accuracy of this data, 19 U.S.C. § 1677m(e) did not preclude Commerce from disregarding this data.

Finally, the court must assess whether Commerce's analysis of HHI's misreporting of this part supports its determination to draw an adverse inference pursuant to 19 U.S.C. § 1677e(b). "Compliance with the 'best of its ability standard . . . requires that importers . . . have familiarity with all of the records . . . [in their] possession, custody, or control," and that they "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so." *Nippon Steel Corp.*, 337 F.3d at 1382. Here, the court cannot find fault with the agency's conclusion that this issue supports the use of an adverse inference. Record evidence indicates that Plaintiff understood it was required to report the gross unit price to reflect any parts necessary to assemble an incomplete LPT. As Commerce noted, the same part that Plaintiff reported as non-subject merchandise in its home-market sales database was also sold in the United States and properly reported as subject merchandise in the U.S. sales database. *See* I&D Mem. at 25 & n.134 (citing HHI's Nov. 10, 2016 Suppl. Resp., Attach. 3S-35). At no point in its briefing to the court, including in its reply brief after Defendant and Defendant-Intervenor



raised this issue, did Plaintiff acknowledge or address this contradictory treatment of the part in question. *See* Def.’s Resp. at 24; ABB’s Resp. at 36. On this record, it is clear that HHI failed to act to the best of its ability in properly reporting sales of this part.

### III. Accessories

#### a. Relevant Facts

As previously noted, Commerce instructed HHI to “separately report the price and cost for ‘spare parts’ and ‘accessories’ to ensure that product matches are based on accurate physical characteristics of the LPTs.” HHI’s Sec. D Resp. at D-2. Commerce, however, did not define what it meant by “accessories.” *See id.* In its response, HHI reported the price and cost for “spare parts,” that is, “parts that are not needed to assemble an incomplete [LPT,] and noted that “there is no definition of what constitutes ‘accessories.’” *Id.* HHI further stated that components attached to the active part of the LPT are defined as included within the subject merchandise; therefore, it reported the price and cost of those components inclusive with the LPT. *Id.* at D-2—D-3.

Commerce sent a supplemental questionnaire requesting HHI to “confirm that [its] product-specific costs do not include the costs for spare parts and accessories (i.e., non-subject merchandise).” *See* Resp. to the Third Suppl. Sections A, B, C, and D Questionnaire (Oct. 27, 2016) (“HHI’s Oct. 27, 2016 Suppl. Resp.”) at 22, CJA Vol. V Tab 24, CR 349–67, PR 225–27, ECF No. 45–1. In its response, HHI “confirm[ed] that the product-specific costs reported in the cost database do not include costs for non-subject merchandise.” *Id.* In the *Final Results*, Commerce concluded that “[HHI] withheld necessary information that was specifically requested” with respect to “accessories.” I&D Mem. at 27. It reasoned that if HHI “had questions related to the definition of ‘accessories,’ it could have contacted the [agency] to request clarification.” *Id.* Moreover, it found that record evidence, to wit, sales documentation, contradicted HHI’s assertion that it was unaware of the definition of accessories “because sales documentation provided by [HHI] indicates that the industry uses such term and that term is referred to in certain documents provided by [HHI].” *Id.* at 27 & n.139 (citing HHI’s Nov. 10, 2016 Resp., Attach. 3S-35).

#### b. Parties’ Contentions

Plaintiff argues that Commerce was responsible for defining “accessories,” Pl.’s Br. at 38, and states that the documents referenced by the agency did not consistently treat particular products as “accessories,” which “demonstrates [HHI’s] quandary and why [Commerce]

needed to define ‘accessories,’” Pl.’s Reply at 17. Plaintiff also argues that the agency failed to comply with 19 U.S.C. § 1677m(d); that is, to notify HHI of the deficiency and provide it an opportunity to cure the deficiency. *See* Pl.’s Reply at 15–16. Defendant and ABB argue that Commerce did not have the burden to define “accessories” because the burden to build the record is on the respondent; HHI did not request clarification regarding the definition of “accessories”; and HHI knew the definition of “accessories” because its sales documentation uses the term. *See* Def.’s Resp. at 27; ABB’s Resp. at 40.

### c. Analysis

Commerce’s conclusion that “[HHI] withheld necessary information that was specifically requested” with respect to “accessories[.]” I&D Mem. at 27, is unsupported by substantial evidence. Commerce asserted that it instructed HHI to separately report accessories, and HHI failed to do so. *See* I&D Mem. at 26–27; *see also* Def.’s Resp. at 26–27. However, Commerce did not find that any of HHI’s components should have been reported as accessories. *See* I&D Mem. at 26–27. Plaintiff asserted that “all of its ‘accessories’ are in the scope by definition, and, thus properly included in subject merchandise[.]” *Id.* at 26. Commerce made no finding that Plaintiff’s assertion was incorrect. *Id.* at 26–27. Rather, it appears that the agency faulted HHI simply for asserting that it was unaware of how Commerce defined accessories (because Commerce never provided guidance on this definition), rather than for failure to correctly report accessories. Specifically, Commerce stated:

[R]ecord evidence contradicts [HHI’s] assertion that [HHI] has been unaware of the definition of accessories. Specifically, at minimum, [HHI] is aware of what constitutes an accessory, because sales documentation provided by [HHI] indicates that the industry uses such term and that term is referred to in certain documents provided by [HHI].

*Id.* at 27 & n.139 (citing HHI’s Nov. 10, 2016 Suppl. Resp., Attach. 3S-35). Commerce never made a factual finding that any “accessories” referenced in such sales documentation were non-subject merchandise that should have been separately reported as accessories. *Id.* at 26–27.

HHI addressed its concerns regarding a lack of definition for accessories in written submissions before and after Commerce issued the questionnaires requesting this data. *See* Resp. to Petitioner’s Comments on Antidumping Questionnaires (Nov. 20, 2015) at 3–4, CJA Vol. V, Tab 21, PJA Vol. V Tab 21, PR 19, ECF No. 45–1; Rebuttal Br.

of Hyundai Heavy Industries Co., Ltd. (Jan. 11, 2017) at 66, CJA Vol. V, Tab 25, CR 469, PJA Vol. I Tab 25, PR 288, ECF No. 45–1 (arguing that “[b]y definition, [accessories] are subject merchandise and properly included in the transformer” and that “ABB has not demonstrated that any of the “accessories” of which it complains is not attached to, has a function in, or is integral to the transformer”). Additionally, documentation on record shows that there has not been consistent identification of “accessories,” which supports the need for guidance on the term’s meaning. *See* Pl.’s Reply at 17.<sup>12</sup> Without guidance from Commerce regarding the definition of “accessories,” HHI’s interpretation of the term as excluding transformer parts that physically attach to an LPT was reasonable and otherwise appears to comport with the scope of the order and with Commerce’s instructions. *See* Initial Questionnaire at JA100062 (defining the scope of subject merchandise as “consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of LPTs”); HHI’s Oct. 27, 2016 Suppl. Resp. at 22 (“[C]onfirm that your product-specific costs do not include the costs for spare parts and accessories (i.e., non-subject merchandise).”).

ABB argues that “Commerce was not in a position to define accessories as the term applies to HHI’s sales without HHI providing information on how that term was used [with its customers]” and that “it was incumbent on HHI in the first instance to notify Commerce of its commercial practice regarding the treatment of accessories.” ABB’s Resp. at 40 (first alteration in original). However, Commerce did not communicate to HHI that its commercial literature should be the basis of the “accessories” definition. The only guidance Commerce provided to HHI regarding the definition was in the scope of the order and when Commerce compared “accessories” to non-subject merchandise in the second supplemental questionnaire. “If Commerce is to take an action adverse to a party for an alleged failure to comply with an information request, it must fulfill its own responsibility to communicate its intent in that request.” *Prosperity Tieh Enter. Co. v. United States*, 42 CIT \_\_\_, 284 F. Supp. 3d 1364, 1381 (2018).

<sup>12</sup> Compare HHI’s Nov. 10, 2016 Suppl. Resp., Attach. 3S-35 at JA100587–92, CJA Vol. II Tab 17, ECF No. 41–1 (listing “Transformer Monitoring,” “On-line Dissolved Gas & Moisture Monitor,” “Magnetic Liquid-Level Indicators,” “Pressure-Relief Devices,” “Rate-of-Rise Fault Pressure Relay,” “Bladder Integrity Relay,” “Dial-Type Top-Oil Thermometer,” “Dial-Type Winding Thermometer,” and “Transformer Nameplate” as “accessories”), *with id.* at JA 101002–09 (listing “Fault Gas Analyzer,” “LAN Ethernet Switch,” “Fiber Optic Temperature Monitoring/Control & Sensors,” “Top Oil/Winding Temperature Instrument,” “Thermometers,” “Fan And Oil Pump Motors,” “Oil Level Sight Glass,” “Buchholz Relay,” “Fault Pressure Relay,” “Seal-In Relay,” “Rupture Disk Assembly Failure Relay,” “Auxiliary Relays,” “Alarm Contacts,” “Tap-Changer Operator,” “Identification Plates,” and “Valves” as “accessories”).

For the foregoing reasons, Commerce’s conclusion that “[HHI] withheld necessary information that was specifically requested” with respect to “accessories” is unsupported by substantial evidence.

#### **IV. Selective Reporting and Other Discrepancies**

##### **a. Relevant Facts**

In October 2016, Commerce instructed Hyundai to “provide complete sales and expenses documentation (including all sales and expenses related documentation generated in the sales process) for all U.S. [sales].” Oct. 7, 2016 Suppl. Questionnaire at 5 (emphasis omitted). Hyundai responded by providing, *inter alia*, an attachment comprised of over 3,300 pages of sales information. *See* HHI’s Nov. 10, 2016 Suppl. Resp., Attach. 3S-35; *supra* note 7

In the *Final Results*, Commerce determined that HHI selectively reported information in response to Commerce’s October 2016 request, and that there were other discrepancies with this submission that further supported use of adverse facts available. *See* I&D Mem. at 27–28. Commerce found that HHI impeded the review and frustrated the agency’s ability to “satisfy [itself] that the data provided are accurate and reliable.” I&D Mem. at 27. As an example of HHI’s selective reporting, Commerce stated it was missing invoices for certain expenses despite its instruction to HHI “to submit all related documents.” I&D Mem. at 28. Commerce also identified discrepancies in freight and marine insurance values reported to U.S. Customs and Border Protection and to Commerce, brokerage expense issues, and an incorrect allocation of installation costs. *See* I&D Mem. at 28.

##### **b. Parties’ Contentions**

Plaintiff argues that Commerce’s determination lacks specific explanation to support its findings that HHI selectively reported information and that there were discrepancies in the information that HHI provided. *See* Pl.’s Br. at 39–40. Plaintiff also asserts that Commerce’s “request for all U.S. sales and expense documents late in the case was procedurally unfair” because it “denied [HHI] an opportunity to clarify data by prohibiting the submission of new facts.” *Id.* at 40–41. Defendant contends that HHI failed to cooperate to the best of its ability because it did not comply with Commerce’s request for complete sales and expense documentation, namely, by failing to provide invoices. *See* Def.’s Resp. at 30–31. Defendant further contends that HHI could not rely on Commerce’s acceptance of information in the *Preliminary Results* when Commerce requested additional supporting information after the *Preliminary Results*. *Id.* at 31. ABB

avers that Commerce did identify specific deficiencies in the *Final Results*, and Commerce’s findings are supported by substantial evidence. See ABB’s Resp. at 42–43 (citing I&D Mem. at 27–28). According to ABB, HHI’s selective reporting and discrepancies in its data amounts to “willful behavior that does not meet the ‘maximum effort’ standard set in *Nippon Steel*.” *Id.* at 43 (citing *Nippon Steel*, 337 F.3d at 1382).

### c. Analysis

Commerce’s determination that Hyundai impeded the review by selectively reporting incomplete and unreliable documentation to Commerce is unsupported by substantial evidence. “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). To be supported by substantial evidence, Commerce must explain the basis for its decisions sufficiently to make its decisions reasonably discernable to a reviewing court. *NMB Singapore Ltd. v. United States*, 557 F.3d. 1316, 1319 (Fed. Cir. 2009) (citing *NSK Ltd. v. United States*, 481 F.3d 1355, 1359 (Fed. Cir. 2007)).

Commerce’s discussion of HHI’s selective reporting and data discrepancies lacks record citations supporting the agency’s findings. See I&D Mem. at 27–28 & nn.140–41 (citing only the Oct. 7, 2016 Suppl. Questionnaire at 5–6). Commerce’s discussion consists of conclusory statements regarding HHI’s 3,300 pages of sales documentation, without any examples or citations to support those statements. See *id.* at 27–28. As a result, the court cannot reasonably discern how HHI impeded the review because the court cannot determine which transactions were missing supporting documentation, and which particular information Commerce determined was missing when it concluded that HHI’s submission was deficient.

For example, Commerce found that Hyundai “did not provide invoices for many expenses.” *Id.* at 28. The only record evidence that the agency cited as support is Commerce’s supplemental questionnaire dated October 7, 2016. See *id.* at 27–28 nn.140–41 (citing Oct. 7, 2016 Suppl. Questionnaire at 5–6). The questionnaire does not indicate that HHI failed to provide any invoices because it does not include HHI’s responses or identify particular transactions that were not supported by invoices. Commerce also found “other discrepancies on the record” for which it provided no citations to the record or detailed

discussion. *See id.* at 28. The Government cites generally to the extensive attachment and does not explain how the agency determined that the attachment indicates which invoices were missing or otherwise demonstrates discrepancies in HHI's data. *See* Def.'s Resp. at 30 (citing HHI's Nov. 10, 2016 Suppl. Resp., Attach. 3S-35).

ABB cites its own administrative case brief as record evidence supporting the agency's findings. ABB's Resp. at 42 & nn. 11–12 (citations omitted). However, the Issues and Decision Memorandum does not indicate that Commerce relied on ABB's administrative case brief to determine that there was missing documentation or that Commerce agreed with the discrepancies alleged therein. *See* I&D Mem. at 27–28 & nn.140–41. The court may not conclude that Commerce based its findings on ABB's administrative case brief when Commerce made no indication of such in the Issues and Decisions Memorandum. "Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Singapore Ltd.*, 557 F.3d at 1319.

Commerce's Issues and Decision Memorandum, by itself, does not constitute substantial evidence. In the absence of substantial evidence, this conclusion must be remanded. *See Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 285–86 (1974) ("The agency must articulate a rational connection between the facts found and the choice made.") (internal quotation marks and citation omitted).

## CONCLUSION

As previously noted, Commerce based its decision to use total facts available with an adverse inference on four findings: (1) HHI failed to report separately service-related revenues despite repeated requests from Commerce; (2) HHI failed to include the price of a subject part in the gross unit price of certain home-market sales; (3) HHI failed to report separately the price and costs of accessories; and (4) HHI selectively provided (and withheld) sales documents, and there were discrepancies in the reporting. The court has found that two of the four bases for resorting to total adverse facts available were unsupported by substantial evidence; therefore, the court will remand this matter to the agency so that Commerce may reconsider or further explain its decision to use total facts available with an adverse inference.<sup>13</sup>

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<sup>13</sup> At Oral Argument, Defendant and Defendant-Intervenor both suggested that any one or two of the bases cited by Commerce was sufficient to support the agency's decision to rely on total adverse facts available in the *Final Results*. *See* Oral Arg. Tr. at 15–20, ECF No. 51. While the court finds that two of the four bases are supported by substantial evidence, the

In accordance with the foregoing, it is hereby

**ORDERED** that Commerce's *Final Results* are remanded to Commerce so that it may reconsider or further explain its use of total facts available with an adverse inference consistent with this Opinion;

**ORDERED** that Commerce shall file its remand results on or before November 13, 2018; and it is further

**ORDERED** that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

**ORDERED** that any comments or responsive comments must not exceed 5,000 words.

Dated: August 14, 2018

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, JUDGE

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court is unable to affirm the agency's resort to total adverse facts available because the agency made clear that its determination was based on its view of the record "taken as [a] whole." I&D Memo. at 17.

## Slip Op. 18–102

MONDIV, DIV. OF LASSONDE SPECIALTIES INC., Plaintiff, v. UNITED STATES,  
Defendant.

Before: Jennifer Choe-Groves, Judge  
Court No. 16–00038

[Granting Plaintiff’s motion for summary judgment and denying Defendant’s cross-motion for summary judgment.]

Dated: August 16, 2018

*John M. Peterson* and *Russell A. Semmel*, Neville Peterson, LLP, of New York, N.Y., argued for Plaintiff Mondiv, Division of Lassonde Specialties Inc. Of counsel was *Maria E. Celis. Caroline Lemoine*, General Counsel for Industries Lassonde, also appeared.

*Peter A. Mancuso*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Amy M. Rubin*, Assistant Director, International Trade Field Office, and *Stephen A. Josey*, Trial Attorney, Commercial Litigation Branch, Civil Division. Of counsel was *Alexandra Khrebtukova*, U.S. Customs and Border Protection. *Alexander J. Vanderweide*, Trial Attorney, Commercial Litigation Branch, Civil Division, also appeared.

## OPINION

### Choe-Groves, Judge:

This case addresses whether artichoke antipasto and green olive tapenade are “other vegetables prepared or preserved” or “sauces” under the Harmonized Tariff Schedule of the United States (“HTSUS”) (2013). Before the court are cross-motions for summary judgment in this classification dispute. *See* Revised Pl.’s Mot. Summ. J., Oct. 19, 2017, ECF No. 46; Revised Pl. Mem. Supp. Mot. Summ. J., Oct. 19, 2017, ECF No. 47 (“Pl. Br.”); Def.’s Cross-Mot. Summ. J., Nov. 8, 2017, ECF No. 48; Nonconfidential Mem. Supp. Def.’s Cross-Mot. Summ. J. & Resp. Pl.’s Mot. Summ. J., Nov. 8, 2017, ECF No. 48–3 (“Def. Br.”). For the reasons discussed below, the court grants Plaintiff’s motion for summary judgment and denies Defendant’s cross-motion for summary judgment.

Mondiv, Division of Lassonde Specialties Inc. (“Plaintiff” or “Mondiv”) argues that U.S. Customs and Border Protection (“Customs”) improperly denied its protests challenging the classification of its imported artichoke antipasto and green olive tapenade merchandise. *See* Pl. Br. 3–5. Plaintiff contends that all of its products are classifiable under HTSUS Subheading 2103.90.90, which covers “[s]auces and preparations therefore; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard: Other: Other.” *See id.* at 5–16. Plaintiff asserts that certain entries of its products are



entitled to duty-free treatment because products classifiable under HTSUS Subheading 2103.90.90 are eligible for North American Free Trade Agreement (“NAFTA”) Rule of Origin Preference. *See id.* at 33–34.

The United States (“Defendant” or “Government”) maintains that Customs properly classified the imported artichoke antipasto as “other vegetables prepared or preserved” under HTSUS Subheading 2005.99.80, dutiable at 14.9% *ad valorem*, and the imported green olive tapenade as “other vegetables prepared or preserved” under HTSUS Subheading 2005.99.97, dutiable at 11.2% *ad valorem*. *See* Def. Br. 4.

The court held oral argument on April 18, 2018. *See* Oral Argument, Apr. 18, 2018, ECF No. 65. The Government submitted a letter six days after oral argument objecting to Plaintiff’s introduction of certain demonstrative exhibits during oral argument, including jars of salsa, relish, pesto, hummus, and bean dip. Notice of Obj., Apr. 24, 2018, ECF No. 67. The court denies this objection as untimely because Defendant should have raised it during oral argument. Moreover, the court is permitted to consult reliable sources of information, including demonstrative exhibits, in determining the common meaning of a term. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999).

### ISSUES PRESENTED

The court considers two issues:

1. Do the undisputed facts establish that Plaintiff’s artichoke antipasto and green olive tapenade are classifiable as “other vegetables prepared or preserved”?
2. Do the undisputed facts establish that Plaintiff’s artichoke antipasto and green olive tapenade are classifiable as “sauces”?

For the reasons discussed below, the court concludes that (1) Plaintiff’s products are *prima facie* classifiable as “other vegetables prepared or preserved,” (2) Plaintiff’s products are *prima facie* classifiable as “sauces,” (3) Plaintiff’s products are properly classified as “sauces” under the rule of relative specificity, and (4) certain entries of Plaintiff’s products are entitled to duty-free treatment under NAFTA Rule of Origin Preference.

### UNDISPUTED FACTS

The following facts are not in dispute.

## A. Jurisdictional and Procedural Facts

Mondiv is the importer of record for artichoke antipasto and green olive tapenade merchandise imported into the United States between 2013 and 2014. Summons ¶¶ 1, 3–5, Mar. 01, 2016, ECF No. 1 (“Summons”). Customs determined that the artichoke antipasto merchandise was classifiable at a duty rate of 14.9% *ad valorem* under HTSUS Subheading 2005.99.80 as “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Artichokes.” Pl.’s Statement Facts Supp. Mot. Summ. J. ¶ 16, Oct. 19, 2017, ECF No. 46–1 (“Pl. Facts”); Resps. Pl.’s Statement Facts ¶ 16, Nov. 8, 2017, ECF No. 48–1 (“Def. Facts Resp.”); *see also* Summons; Compl. ¶ 27, June 11, 2016, ECF No. 11 (“Compl.”); Answer ¶ 27, Sep. 21, 2016, ECF No. 17 (“Answer”). Customs determined that the green olive tapenade merchandise was classifiable at a duty rate of 11.2% *ad valorem* under HTSUS Subheading 2005.99.97 as “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Other.” Pl. Facts ¶ 9; Def. Facts Resp. ¶ 9; *see also* Summons; Compl. ¶ 26; Answer ¶ 26.

Plaintiff filed timely protests contesting the classification of the artichoke antipasto and green olive tapenade merchandise. *See* Def.’s Nonconfidential Statement Undisputed Material Facts ¶ 3, Nov. 8, 2017, ECF No. 48–2 (“Def. Facts”); Pl.’s Resp. Def.’s Statement Facts ¶ 3, Dec. 13, 2017, ECF No. 56–1 (“Pl. Facts Resp.”). All seven of Plaintiff’s protests were deemed denied by Customs. *See* Summons; Compl. ¶ 5; Answer ¶ 5. Plaintiff filed a claim for preferential duty treatment under NAFTA for artichoke antipasto entered under cover of Entry No. M767443196–2 and green olive tapenade entered under cover of Entry No. M762050259–3. Def. Facts ¶ 5; Pl. Facts Resp. ¶ 5. The entries were liquidated and Mondiv paid all duties, charges, and exactions. Def. Facts ¶ 4; Pl. Facts Resp. ¶ 4. Plaintiff commenced this action thereafter. *See* Summons; Compl.

## B. Facts Regarding Plaintiff’s Products

Plaintiff’s artichoke antipasto consists of quartered artichokes, artichoke juice, canola oil, water, parsley, ground garlic, extra virgin olive oil, salt, white vinegar, dehydrated oregano, and dehydrated basil. Pl. Facts ¶ 10; Def. Facts Resp. ¶ 10. The artichokes are drained and ground into halves, then combined with the other ingredients. Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11. This combination is added to a food processor. Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11. The antipasto is

cooked, packaged, and then rendered commercially sterile after being cooked again in a retort process, with the result sold as-is without the intention that it will undergo further processing by the purchaser. Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11; Def. Facts ¶ 60; Pl. Facts Resp. ¶ 60. The finished product is intended to be chunky with easily visible pieces of artichoke. Def. Facts ¶¶ 13–14; Pl. Facts Resp. ¶¶ 13–14.

Plaintiff's green olive tapenade consists of preserved sliced green olives, diced tomatoes, diced red peppers, water, diced carrots, diced onions, canola oil, ground garlic, Dijon mustard, salt, lemon juice concentrate, Italian seasoning, and dehydrated basil. Pl. Facts ¶ 2; Def. Facts Resp. ¶ 2. The green olive tapenade is prepared by blending the ingredients with salt water and canola oil in a hot food processor and then cooking the mixture. Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3. After cooking, the tapenade is packaged and then rendered commercially sterile after being cooked again in a retort process. Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3. Mondiv does not puree the green olive tapenade to maintain the product's chunky consistency. Def. Facts ¶ 20; Pl. Facts Resp. ¶ 20. The resulting tapenade is sold as-is without the intent of further processing by the purchaser. Def. Facts ¶ 60; Pl. Facts Resp. ¶ 60.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012) and 19 U.S.C. § 1515. The court will grant summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

## ANALYSIS

### A. Legal Framework

A two-step process guides the court in determining the correct classification of merchandise. First, the court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing

*Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the court determines whether the merchandise at issue falls within the parameters of the tariff provision. *See id.* The former is a question of law and the latter is a question of fact. *See id.* “[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis ‘collapses entirely into a question of law.’” *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a)(1). Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, but this presumption does not apply to pure questions of law. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court has an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms, *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005), and therefore must determine “whether the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (“GRIs”) and, if applicable, the Additional U.S. Rules of Interpretation, which are both applied in numerical order. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citing *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001)). GRI 1 instructs that, “for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1. “Absent contrary legislative intent, HTSUS terms are to be ‘construed [according] to their common and popular meaning.’” *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 534 (Fed. Cir. 1994)).

In construing the terms of the headings, “[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Carl Zeiss, Inc.*, 195 F.3d at 1379 (citing *Baxter Healthcare Corp. of P.R.*, 182 F.3d at 1337–38). The court may also consult the Harmonized Commodity Description and Coding System’s Explanatory Notes (“Explanatory Notes”), which “are not legally binding or dispositive,” *Kahrs Intern., Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but “provide a commentary on the scope of each

heading of the Harmonized System” and are “generally indicative of proper interpretation of the various provisions.” H.R. Rep. No. 100–576, 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

## **B. Analysis of the Products Under HTSUS Heading 2005**

The first issue concerns whether Plaintiff’s artichoke antipasto and green olive tapenade products are *prima facie* classifiable under HTSUS Heading 2005 as “other vegetables prepared or preserved.” HTSUS Heading 2005 reads as follows, “[o]ther vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006.” Heading 2005, HTSUS.

The court must assess whether HTSUS Heading 2005 is an *eo nomine* provision or a use provision at the outset, as that distinction guides the analysis. *See Schlumberger Tech Corp.*, 845 F.3d at 1164. An *eo nomine* provision describes articles by specific names, while a use provision characterizes products based on their principal or actual use. *See id.*; *see also R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1354 (Fed. Cir. 2014). The court construes HTSUS Heading 2005 as an *eo nomine* classification provision because it names specific products.

A plain reading of HTSUS Heading 2005 reveals that products classifiable under the heading must satisfy five criteria: they must be (1) “other vegetables,” (2) “prepared or preserved,” (3) “otherwise than by vinegar or acetic acid,” (4) “not frozen,” and (5) “other than products of heading 2006.” Heading 2005, HTSUS. The court begins its analysis with the heading’s terms.

### **1. Other Vegetables**

First, the court examines the term “other vegetables.” Note 3 of Chapter 20 of the HTSUS states that Heading 2005 covers “only those products of chapter 7 . . . which have been prepared or preserved by processes other than those referred to in note 1(a).” Note 3 to Chapter 20, HTSUS. Chapter 7 includes potatoes, tomatoes, onions, shallots, garlic, leeks and other alliaceous vegetables, cabbages, cauliflower, kohlrabi, kale and similar edible brassicas, lettuce (*Lactuca sativa*), chicory (*Cichorium spp.*), carrots, turnips, salad beets (salad beet-root), salsify, celeriac, radishes and similar edible roots, cucumbers, gherkins, leguminous vegetables, asparagus, eggplants, celery, mushrooms, truffles, fruits of the genus *Capsicum* (peppers) and of the

genus *Pimenta* (e.g., allspice), spinach, New Zealand spinach, orache spinach (garden spinach), globe artichokes, olives, pumpkins, squash, gourds (*Curcubita* spp.), jicamas, breadfruit, chayote (*Secchium edule*), okra, fiddlehead greens, sweet corn, fennel, marjoram, parsley, savory, tarragon, capers, bamboo shoots, water chestnuts, wood ears (*Auricularia* spp.), jelly fungi (*Tremella* spp.), cassava (manioc), arrowroot, salep, Jerusalem artichokes, and sweet potatoes and similar roots and tubers with high starch or inulin content. See Chapter 7, HTSUS. Because the controlling chapter note defines the relevant vegetables as those listed in Chapter 7, the court recognizes that these same vegetables are incorporated into HTSUS Heading 2005. To satisfy the first requirement of HTSUS Heading 2005, the vegetable in question must be included in the Chapter 7 list of covered vegetables.

The undisputed facts establish that artichokes and artichoke juice constitute the principal ingredients of the artichoke antipasto. See Pl. Facts ¶ 11; Def. Facts Resp. ¶ 11. Artichokes are listed in HTSUS Chapter 7 and therefore are a covered vegetable of HTSUS Heading 2005. The court concludes that the artichoke antipasto is primarily made of artichoke, a covered vegetable in Chapter 7, and therefore satisfies the first requirement of HTSUS Heading 2005.

The green olive tapenade is a mixture of green olives, tomatoes, red peppers, carrots, and onions, which constitute a combined majority of the product according to undisputed facts. See Pl. Facts ¶ 3; Def. Facts Resp. ¶ 3. Olives, tomatoes, peppers, carrots, and onions are listed in HTSUS Chapter 7 and are covered vegetables of HTSUS Heading 2005. The court determines that Plaintiff's green olive tapenade is made of covered vegetables in Chapter 7, and therefore satisfies the first requirement of HTSUS Heading 2005.

## 2. Prepared or Preserved

Second, the court examines the terms “prepared or preserved.” The text of HTSUS Heading 2005 does not define the phrase “prepared or preserved,” thus the court looks to common dictionary definitions. *Oxford Dictionary* defines “prepare” as to “[m]ake (food or a meal) ready for cooking or eating.” *Prepare*, *Oxford Dictionary*, available at <https://en.oxforddictionaries.com/definition/prepare> (last visited Aug. 7, 2018). *Merriam-Webster Dictionary* defines “prepare” as “to make ready beforehand for some purpose, use, or activity – *prepare* food for dinner.” *Prepare*, *Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/prepare> (last visited Aug. 7, 2018). *Merriam-Webster Dictionary* defines “prepared” as “subjected to a special process or treatment.” *Prepared*, *Merriam-Webster Dic-*

tionary, available at <https://www.merriam-webster.com/dictionary/prepared> (last visited Aug. 7, 2018). The second definition for “preserved” is to “[t]reat (food) to prevent its decomposition.” *Preserve, Oxford Dictionary*, available at <https://en.oxforddictionaries.com/definition/preserve> (last visited Aug. 7, 2018). *Merriam-Webster Dictionary* defines “preserve” as “to keep or save from decomposition” or “to can, pickle, or similarly prepare for future use.” *Preserve, Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/preserved> (last visited Aug. 7, 2018). The court concludes that the terms “prepared or preserved” within the context of HTSUS Heading 2005 mean that the food must be ready for cooking or eating, or treated to prevent its decomposition.

The undisputed facts establish that Plaintiff made its artichoke antipasto and green olive tapenade according to specific recipes that created sterilized, ready to eat products. Pl. Facts ¶ 3, 11; Def. Facts Resp. ¶ 3, 11; Def. Facts ¶ 60; Pl. Facts Resp. ¶ 60. Because the artichoke antipasto and green olive tapenade are sterilized to prevent decomposition and are ready for cooking or eating as-is out of the jar, the court concludes that the products are prepared and preserved within the meaning of HTSUS Heading 2005.

### 3. Otherwise Than by Vinegar or Acetic Acid

Third, HTSUS Heading 2005 requires that the preparation or preservation be completed “otherwise than by vinegar or acetic acid.” Preservation by means of vinegar or acetic acid is commonly referred to as pickling. See *Fennema’s Food Chemistry* 821 (Srinivasan Damodaran & Kirk L. Parkin eds., 5th ed. 2017); *Encyclopedia of Food Sciences and Nutrition* 6003 (Benjamin Caballero et al. eds., 2nd ed. 2003). The third requirement of Heading 2005 requires that the product be prepared or preserved by means *other* than pickling. Culinary reference books discuss numerous ways to prepare or preserve food that do not involve pickling. For example:

Thermal processing of food materials is one of the most widely used methods of food preservation. Foods may be thermally processed using *numerous heating systems such as retorts (batch or continuous)*, direct heating systems (steam injection or steam infusion), indirect heating systems (tubular heat exchangers, shell and tube heat exchangers, plate heat exchangers, scraped surface heat exchangers), volumetric heating systems (microwave or ohmic heating), and combinations of these.

Prabhat Kumar & K.P. Sandeep, *Thermal Principles and Kinetics*, in *FOOD PROCESSING: PRINCIPLES AND APPLICATIONS* 17, 17

(Stephanie Clark, Stephanie Jung & Buddhi Lamsal eds., 2nd ed. 2014) (emphasis added). The court concludes that the third factor of HTSUS Heading 2005 requires that the food must be prepared or preserved by a method other than pickling.

The undisputed facts confirm that Plaintiff prepared its artichoke antipasto and green olive tapenade products using a retort process for sterilization. Pl. Facts ¶¶ 3, 11; Def. Facts Resp. ¶¶ 3, 11. As noted above, a retort process uses thermal systems for preservation. The undisputed facts establish that neither the artichoke antipasto nor the green olive tapenade are prepared or preserved using vinegar or acetic acid. Pl. Facts ¶ 18; Def. Facts Resp. ¶ 18. The court concludes that Plaintiff's artichoke antipasto and green olive tapenade are not prepared or preserved using vinegar or acetic acid and therefore satisfy the third requirement of HTSUS Heading 2005.

#### **4. Not Frozen**

Fourth, HTSUS Heading 2005 requires that the product is “not frozen.” The Explanatory Notes to the HTSUS define “frozen” as when a “product has been cooled to below the product’s freezing point until it is frozen throughout.” General Explanatory Note to Chapter 7, HTSUS; *see also* Explanatory Note to Heading 2004, HTSUS (“The frozen vegetables of this heading are those which fall in heading 20.05 when not frozen . . . . The term ‘frozen’ is defined in the General Explanatory Note to Chapter 7.”). The court will apply the common meaning of not frozen for the fourth requirement of HTSUS Heading 2005.

The undisputed facts confirm that neither the artichoke antipasto nor the green olive tapenade were frozen within the meaning of HTSUS Heading 2004. Pl. Facts ¶ 20; Def. Facts Resp. ¶ 20. The court concludes that Plaintiff's artichoke antipasto and green olive tapenade products satisfy the fourth requirement under HTSUS Heading 2005.

#### **5. Other Than Products of Heading 2006**

Fifth, HTSUS Heading 2005 specifies that the tariff heading encompasses products “other than products of heading 2006.” Heading 2006 covers “[v]egetables, fruit, nuts, fruit-peel and other parts of plants preserved by sugar (drained, glacé or crystallized).” Heading 2006, HTSUS. The decisive characteristic of HTSUS Heading 2006 is preservation using sugar. The court construes the meaning of Heading 2005 to require that classifiable products are not preserved by sugar.



The undisputed facts confirm that neither Plaintiff's artichoke antipasto nor green olive tapenade were preserved by sugar within the meaning of Heading 2006. *See* Pl. Facts ¶ 18; Def. Facts Resp. ¶ 18. The court finds that both products satisfy the fifth requirement under HTSUS Heading 2005.

To summarize, in order to be classifiable under Heading 2005, the court interprets the terms of the tariff heading to require that the subject entries must be (1) vegetables listed in Chapter 7; (2) ready for cooking or eating, or treated to prevent its decomposition; (3) preserved by a means other than pickling in vinegar or acetic acid; (4) not frozen; and (5) not preserved with sugar. For the foregoing reasons, the court finds that Plaintiff's artichoke antipasto and green olive tapenade are *prima facie* classifiable under HTSUS Heading 2005.

## 6. Substantial Transformation

Plaintiff contends that its artichoke and olive products were substantially transformed so as to remove them from Heading 2005. Under the substantial transformation doctrine, a product can differ so significantly that it can no longer be properly classified within the provision. *See R.T. Foods*, 757 F.3d at 1356; *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). In determining whether a product has undergone a substantial transformation, the court may examine factors such as the design, use, and function of the merchandise. *See R.T. Foods*, 757 F.3d at 1356 (citing *CamelBak*, 649 F.3d at 1367).

With respect to Plaintiff's artichoke antipasto and green olive tapenade products, Plaintiff argues that the extensive processing and addition of numerous ingredients to the vegetables changes the essential character of the vegetables in these products, making them more than mere "prepared or preserved" vegetables under HTSUS Heading 2005. *See* Pl. Br. 16. Examining the design, use, and function of the products under the applicable legal standard, the court finds that the cooking, sterilizing, chopping, and adding of vinegar, oil, garlic, salt water, parsley, oregano, basil, and other ingredients provide seasonings and flavors, but do not change their essence from predominantly artichoke and olive products to make them new items. *See CamelBak*, 649 F.3d at 1367; *see also Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439–41 (Fed. Cir. 1998) ("finding that pureed tomato product was not substantially transformed by the addition of incidental ingredients that do not affect the essential character of the product"). The court concludes that Plaintiff's products are essentially seasoned, chopped, and processed artichokes and

olives, albeit with added spices and oils to give the products a finished, distinct flavor, texture, and use, and have not been substantially transformed to render the products not properly classifiable under HTSUS Heading 2005.

To summarize, the court concludes that the artichoke antipasto and green olive tapenade products were made from: (1) covered vegetables, (2) prepared or preserved, (3) otherwise than by vinegar or acetic acid, (4) not frozen, and (5) not preserved using sugar. The court finds that the essential nature of the artichoke and olive products were not transformed into new and completely different products. The artichoke antipasto and green olive tapenade are *prima facie* classifiable, therefore, under HTSUS Heading 2005.

### **C. Analysis of the Products Under HTSUS Heading 2103**

The second issue under consideration is whether Plaintiff's artichoke antipasto and green olive tapenade are classifiable as "sauces" under HTSUS Heading 2103. HTSUS Heading 2103 reads as follows, "[s]auces and preparations therefore; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard." Heading 2103, HTSUS.

The court considers "sauces" under HTSUS Heading 2103 an *eo nomine* classification provision because it names a specific product. The court begins its analysis with the meaning of the heading's term. "Sauce" is not defined within HTSUS Heading 2103, thus the court consults various informative sources to ascertain the meaning of the tariff heading. *Merriam-Webster Dictionary* defines "sauce" as "1. a condiment or relish for food, especially a fluid dressing or topping; 2. something that adds zest or piquancy." *Sauce, Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/sauce> (last visited Aug. 7, 2018). The *American Heritage Dictionary of the English Language* defines "sauce" as: "1. A flavorful liquid or semisolid condiment or mixture of ingredients served as a topping or other accompaniments of food . . . 3. Something that adds zest, flavor, or piquancy." *Sauce, American Heritage Dictionary of the English Language*, available at <https://ahdictionary.com/word/search.html?q=sauce> (last visited Aug. 7, 2018). *The Professional Chef* by the Culinary Institute of America defines "sauce" as "a liquid accompaniment to food, used to enhance the flavor of the food." The Culinary Institute of America, *The Professional Chef* 1185 (8th ed. 2006). Based on these reference sources, the court determines that the term "sauce" used in HTSUS Heading 2103 denotes a mixture of ingredients in liquid or semisolid form that adds flavoring to food.

The Explanatory Notes for HTSUS Heading 2103 provide further guidance, noting that, “Sauces are normally added to a food as it cooks or as it is served. Sauces provide flavor, moisture, and a contrast in texture and colour. They may also serve as a medium in which food is contained, for example, the velouté sauce of creamed chicken.” Explanatory Note to Heading 2103(A), HTSUS. The Explanatory Note supports the court’s interpretation of “sauce” under HTSUS Heading 2103.

The court’s inquiry focuses on whether Plaintiff’s artichoke antipasto and green olive tapenade are mixtures of ingredients in liquid or semisolid form that add flavoring to food.

First, with respect to whether the products are a mixture of ingredients in liquid or semisolid form, the undisputed facts establish that the artichoke antipasto and green olive tapenade are chunky mixtures of ingredients with discernable pieces of vegetables. Pl. Facts ¶ 13; Def. Facts Resp. ¶ 13; Def. Facts ¶¶ 13–14, 19; Pl. Facts Resp. ¶¶ 13–14, 19. The court finds that “chunky” mixtures are semisolid in form, rather than liquid or solid. Because the undisputed facts establish that both products are chunky mixtures of ingredients, the court finds that the artichoke antipasto and green olive tapenade satisfy the “semisolid” requirement to be a sauce under HTSUS Heading 2103.

Second, with respect to whether the artichoke antipasto and green olive tapenade add flavoring to food, the ingredients suggest that the products contribute flavor when added to food. It is undisputed that the artichoke antipasto consists of quartered artichokes, artichoke juice, canola oil, water, parsley, ground garlic, extra virgin olive oil, salt, white vinegar, dehydrated oregano, and dehydrated basil. Pl. Facts ¶ 10; Def. Facts Resp. ¶ 10. The Parties do not dispute the ingredients of the artichoke antipasto. The court finds that these combined ingredients in Mondiv’s artichoke antipasto, namely quartered artichokes, artichoke juice, canola oil, parsley, ground garlic, extra virgin olive oil, salt, white vinegar, dehydrated oregano, and dehydrated basil, together impart flavor when added to food. The court concludes, therefore, that the undisputed facts establish that Mondiv’s artichoke antipasto satisfies the second requirement that the product must add flavoring to food to be considered a sauce under HTSUS Heading 2103.

It is undisputed that Plaintiff’s green olive tapenade consists of preserved sliced green olives, diced tomatoes, diced red peppers, water, diced carrots, diced onions, canola oil, ground garlic, Dijon mustard, salt, lemon juice concentrate, Italian seasoning, and dehydrated basil. Pl. Facts ¶ 2; Def. Facts Resp. ¶ 2. The Parties do not dispute

the ingredients of the green olive tapenade. The court finds that these ingredients in Mondiv's green olive tapenade, namely preserved sliced green olives, diced tomatoes, diced red peppers, diced carrots, diced onions, canola oil, ground garlic, Dijon mustard, salt, lemon juice concentrate, Italian seasoning, and dehydrated basil, together impart flavor when added to food. The court concludes, therefore, that the undisputed facts establish that Mondiv's green olive tapenade satisfies the second requirement that the product must add flavoring to food to be considered a sauce under HTSUS Heading 2103.

The court concludes that Plaintiff's artichoke antipasto and green olive tapenade products are *prima facie* classifiable as sauces under HTSUS Heading 2103 because both products are mixtures of ingredients in semisolid form that add flavoring to food.

#### **D. Analysis Under GRI 3(a)**

Plaintiff's artichoke antipasto and green olive tapenade products are *prima facie* classifiable under both HTSUS Headings 2005 and 2103. According to GRI 3(a), when a product is *prima facie* classifiable under two or more headings, the "heading which provides the most specific description shall be preferred to headings providing a more general description." GRI 3(a); *see also Orlando Food Corp.*, 140 F.3d at 1441. Under the rule of relative specificity, the court looks to the heading which is more difficult to satisfy and that describes the article with the greatest degree of accuracy and certainty. *Orlando Food Corp.*, 140 F.3d at 1441. The requirements of the sauce provision are more difficult to satisfy because preparing a sauce involves some degree of processing or adding ingredients. The sauce provision requires processing of ingredients to make a liquid or semisolid substance, and requires the addition of numerous ingredients that together would enhance the flavor of food. For these reasons, the court concludes that under the rule of relative specificity, HTSUS Heading 2103 for sauces is more specific than HTSUS Heading 2005 for prepared and preserved vegetables. Mondiv's products are properly classified under the HTSUS Heading 2103 as "sauces."

#### **E. Analysis Under GRI 6**

After the proper heading of the product is determined, the court utilizes GRI 6 to determine the appropriate subheading. GRI 6 states, "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings . . . on the understanding that only subheadings at the same level are comparable." GRI 6; *see also Well Luck Co., Inc. v. United States*, 887 F.3d 1106, 1117 (Fed. Cir. 2018).

The products are classifiable under HTSUS Heading 2103. Based on the ingredients, neither the artichoke antipasto nor the green olive tapenade are classifiable under the six-digit subheadings encompassing “soy sauce,” “tomato, ketchup and other tomato sauces,” or “mustard flour and meal and prepared mustard.” See Subheadings 2103.10, 2310.20, 2310.30, HTSUS. The court turns to HTSUS Subheading 2103.90, which covers “other.” See *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (stating that when a product is not classifiable under a specific subheading, it is proper to use the heading’s “basket” provision); *Well Luck Co.*, 887 F.3d at 1117 (explaining that a product that is not classifiable under a specific subheading is properly classified under the “[o]ther” subheading). HTSUS Heading 2103.90 lists several categories on the eight-digit level. The court finds that none of the eight-digit subheadings cover the subject merchandise and that the “Other” provision of HTSUS Heading 2103.90.90 is applicable. The court concludes that both the artichoke antipasto and green olive tapenade are properly classifiable under HTSUS Subheading 2103.90.90.

#### **F. Duty-Free Treatment Under NAFTA Rule of Origin Preference**

Under the NAFTA Preference Rule of Origin in the HTSUS, certain products are entitled to duty-free treatment if they originate in Canada. See General Note 12, HTSUS. The provision states, in relevant part:

(b) For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as “goods originating in the territory of a NAFTA party” only if—

. . . .

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

. . . .

(A) . . . each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s), and (t) of this note or the rules set forth therein . . . .

General Note 12(b)(ii)(A), HTSUS (emphasis omitted).

Plaintiff asserts that Entry Nos. M762050259–3 and M767443196–2, entered at the Port of St. Albans, Vermont, are entitled to duty-free treatment as NAFTA-originating products. *See* Pl. Br. 33. The court finds that Plaintiff’s two entries are entitled to duty-free treatment under NAFTA Rule of Origin Preference because the goods were subject to a change in tariff classification under the HTSUS. Defendant agrees that if the court finds that Plaintiff’s products are classifiable under HTSUS Heading 2103, then the products entered at the Port of St. Albans, Vermont are entitled to duty-free treatment. *See* Oral Argument at 1:20:02–1:20:26, Apr. 18, 2018, ECF No. 65. The court concludes that Entry Nos. M762050259–3 and M767443196–2 are entitled to duty-free treatment under NAFTA Rule of Origin Preference.

### CONCLUSION

For the foregoing reasons, the court concludes that:

1. The undisputed facts establish that Plaintiff’s artichoke antipasto and green olive tapenade products are *prima facie* classifiable as “other vegetables prepared or preserved” under HTSUS Heading 2005;
2. The undisputed facts establish that Plaintiff’s artichoke antipasto and green olive tapenade products are *prima facie* classifiable as “sauces” under HTSUS Heading 2103. Under the rule of specificity, Plaintiff’s products are properly classified as “sauces” under HTSUS Heading 2103;
3. Plaintiff’s products are properly classifiable under HTSUS Subheading 2103.90.90. The court grants Plaintiff’s motion for summary judgment and denies Defendant’s cross-motion for summary judgment;
4. The court concludes that certain entries of Plaintiff’s products are eligible for duty-free treatment under NAFTA.

Judgment will be entered accordingly.

Dated: August 16, 2018  
New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 18–103

CONSOLIDATED FIBERS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 14–00222

[Denying defendant’s motion for an amendment of the court’s previous opinion]

Dated: August 16, 2018

*Jason M. Kenner*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant United States. With him on the motion were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director.

**OPINION AND ORDER****Stanceu, Chief Judge:**

Defendant United States (the “Government”) moves pursuant to USCIT Rule 59(e) for amendment of the court’s opinion in *Consolidated Fibers, Inc. v. United States*, 41 CIT \_\_, 2017 WL 5665031 (Ct. Int’l Trade Nov. 27, 2017) to remove certain language it characterizes as an erroneous statement of the standard for awards under the Equal Access to Justice Act (“EAJA”). Def.’s Mot. to Amend Decision 1–2 (Dec. 27, 2017), ECF No. 38 (“Mot. to Amend”). The court denies the motion.

**I. BACKGROUND**

In *Consolidated Fibers, Inc. v. United States*, 41 CIT \_\_, 2017 WL 5665031 (Ct. Int’l Trade Nov. 27, 2017), the court denied the application of plaintiff Consolidated Fibers, Inc. (“Consolidated Fibers”), filed June 15, 2016, for an award of attorneys’ fees under the EAJA in the amount of \$30,980.18. *See* Pl.’s App. For Attys’ Fees and Other Expenses 3 (June 15, 2016), ECF No. 33 (“Pl.’s EAJA App.”). The court rejected plaintiff’s argument that an administrative decision taken by U.S. Customs and Border Protection (“Customs”) to deny the protest of Consolidated Fibers contesting the reliquidation, at a higher rate of duty, of an entry of merchandise made by Consolidated Fibers had not been substantially justified and thereby entitled plaintiff to an EAJA award. The court’s opinion in *Consolidated Fibers* provides detailed background information, which is summarized herein.

Consolidated Fibers made an entry of polyester staple fiber (“PSF”) from Korea on December 7, 2005, depositing estimated antidumping duties at the rate of 7.91% *ad val.* At the time of entry, PSF from Korea was subject to an antidumping duty order. The exporter of the

merchandise was a reviewed exporter/producer in a periodic administrative review of the antidumping duty order and, as a result of the review, liquidation of the entry was administratively suspended pursuant to 19 U.S.C. § 1675.<sup>1</sup>

On January 14, 2008, following the publication of the final results of the administrative review, the U.S. Department of Commerce issued liquidation instructions directing Customs to assess antidumping duties at the rate of 48.14% *ad val.* on shipments of PSF from Korea produced or exported by Dongwoo Industry Co., the exporter of the merchandise on the entry at issue in this litigation. Over three years later, on May 6, 2011, Customs posted a bulletin notice of liquidation pursuant to 19 C.F.R. § 159.9(c)(2)(ii)<sup>2</sup> announcing that the entry had been deemed liquidated on June 10, 2008 at the entered antidumping duty rate of 7.91% *ad val.* See 19 U.S.C. § 1504(d). Customs then took action to reliquidate the entry on July 22, 2011, assessing antidumping duties at the 48.14% *ad val.* rate. On November 14, 2011, Consolidated Fibers protested the decision to reliquidate the entry, and Customs denied the protest on May 21, 2014. Plaintiff contested the denial of the protest in this Court, commencing an action on September 19, 2014.

After defendant moved, on December 21, 2015, for entry of confession of judgment, the court entered a judgment ordering Customs to reliquidate the entry at the entered antidumping duty rate of 7.91% *ad val.* and pay with interest “the duty refunds payable by reason of this judgment.” Judgment (May 16, 2016), ECF No. 31. Plaintiff filed its EAJA application on June 15, 2016, pursuant to 28 U.S.C. § 2412 and USCIT Rule 54.1, claiming entitlement to an award of attorneys’ fees and other expenses it incurred in the course of the protest and litigation and arguing that the position taken by the Government was not “substantially justified.” Pl.’s EAJA App. 3–4. Because the Government did not take any position in litigation before the court, the court limited its consideration of the EAJA application to whether the Government’s position at the administrative level was substantially justified. Specifically, the court considered the position taken by Customs in denying Consolidated Fibers’s protest.

In its protest, Consolidated Fibers claimed that Customs lacked authority to reliquidate the entry because the entry had been deemed liquidated six months after the publication of the final results of the relevant administrative review, pursuant to 19 U.S.C. § 1504(d). The protest did not, however, account for an amendment to section 501 of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1501, which expressly

<sup>1</sup> Citations to the U.S. Code are to the 2006 edition.

<sup>2</sup> Citations to the Code of Federal Regulations are to the 2011 edition.



provided that Customs may reliquidate entries deemed liquidated under section 504 of the Tariff Act, 19 U.S.C. § 1504, within 90 days from the date on which notice of the original liquidation is given or transmitted to the importer. Because Customs reliquidated the entry on July 22, 2011—within 90 days of posting notice of the deemed liquidation on May 6, 2011—the grounds stated in the protest were not consistent with the relief requested, i.e., reliquidation at the original 7.91% *ad val.* rate.<sup>3</sup> See 19 U.S.C. § 1501; 19 C.F.R. § 159.9(c)(2)(ii). Reasoning that the Customs “ruling correctly responded to the sole protest ground Consolidated Fibers presented,” the court stated that it was “unable to conclude that Customs took a position that was not ‘substantially justified’” and declined to award attorneys’ fees and other expenses to plaintiff under the EAJA. *Consolidated Fibers*, 41 CIT at \_\_, 2017 WL 5665031 at \*5–6.

While not disagreeing in general with the court’s disposition of the EAJA application, defendant requests that the court amend its opinion in *Consolidated Fibers* to delete a sentence discussing the Government’s burden of demonstrating that its position was “substantially justified” for purposes of the EAJA. Mot. to Amend 1–2.

## II. DISCUSSION

A decision to alter or amend a prior decision is not lightly taken. As opinions of this Court have noted with respect to judgments, “[t]he major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice.” *Puerto Rico Towing & Barge Co. v. United States*, 38 CIT \_\_, \_\_, 2014 WL 5394314 at \*1 (Ct. Int’l Trade Oct. 24, 2014) (quoting *Ford Motor Co. v. United States*, 30 CIT 1587, 1588, 2006 WL 2789856 at \*1 (2006)) (internal quotation marks omitted). “A court should not disturb its prior decision unless it is manifestly erroneous.” *Papierfabrik August Koehler SE v. United States*, 39 CIT \_\_, \_\_, 44 F. Supp. 3d 1356, 1357 (2015) (internal citations omitted). Rather, “[a] motion to amend a judgment should be granted if the ‘movant demonstrate[s] that the judgment is based on manifest errors of law or fact.’” *Id.* (quoting *Union Camp Corp. v. United States*, 23 CIT 264, 270, 53 F. Supp. 2d 1310, 1317 (1999)).

<sup>3</sup> The court also noted that “Consolidated Fibers could have raised a protest ground that was at least plausible by arguing that the bulletin notice was not issued within a ‘reasonable period’ as required by 19 C.F.R. § 159.9(c)(2)(ii) and therefore did not constitute effective ‘notice of the original liquidation’ for purposes of 19 U.S.C. § 1501.” *Consolidated Fibers*, 41 CIT at \_\_, 2017 WL 5665031 at \*4. Consolidated Fibers did not raise this objection in its protest. In its complaint, plaintiff included a claim challenging the timeliness of the bulletin notice provided by Customs, but the Government never took a contrary position on the issue. *Id.*, 41 CIT at \_\_, 2017 WL 5665031 at \*4 n.5.

The specific language of *Consolidated Fibers* at issue is the following, for which the Government requests deletion:

To meet its burden, the government must “show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts.” *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original) (footnote omitted).

Mot. to Amend 1 (quoting *Consolidated Fibers*, 41 CIT at \_\_\_, 2017 WL 5665031 at \*2). Such a deletion, the motion argues, is necessary because “the citation to *Gavette* may suggest that the Government’s burden is higher than it actually is.” Mot. to Amend 2. According to the motion, “[t]hat the proper standard for analyzing substantial justification for EAJA purposes is the reasonable basis in law and fact standard from *Pierce* and not the ‘clearly reasonable’ standard from *Gavette* was recently confirmed by the U.S. Court of Appeals for the Federal Circuit.” *Id.* at 1–2 (citing *Int’l Custom Products, Inc. v. United States*, 843 F.3d 1355, 1359 (Fed. Cir. 2016)). The Government argues, further, that “[w]hile the citation to *Gavette* may be viewed as harmless error given the Court’s ultimate conclusion that the Government had satisfied its burden, the inclusion of citations to both *Pierce* and *Gavette* makes it difficult to discern whether the standard applied was the proper *Pierce* standard or the higher *Gavette* standard.” *Id.* at 2.

Defendant relies on the opinion of the Court of Appeals for the Federal Circuit (“Court of Appeals”) in *Int’l Custom Products*, 843 F.3d at 1359, which affirmed a decision of this Court granting an EAJA award. In doing so, the Court of Appeals commented that this Court “erred by reciting in the standard of review section of its opinion the ‘slightly more’ and ‘clearly’ standards, which the Supreme Court rejected in *Pierce*.” *Id.* Although this is not the holding of the case (which affirmed this Court’s ordering the EAJA award, rejecting the government’s argument that the citation to a “clearly” standard “infected” the analysis, *see id.*, 843 F.3d at 1360), the court appreciates the Government’s point that the language it seeks to have deleted from the court’s opinion possibly could be interpreted as contemplating a standard more demanding than that of *Pierce*. Nevertheless, the court concludes that it should not amend its opinion in *Consolidated Fibers*, for three reasons.

First, the *Consolidated Fibers* opinion when read as a whole cannot correctly be interpreted to mean that the court, in rejecting the motion for an EAJA award, failed to apply the correct legal standard as elucidated in *Pierce*. As defendant notes, the opinion in

*Consolidated Fibers* set out the *Pierce* standard (immediately preceding the discussion of the *Gavette* language excerpted above), as follows:

The term “substantially justified” means “justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. That is no different from [a] reasonable basis in both law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks and citations omitted).

*Consolidated Fibers*, 2017 WL 5665031 at \*2.

Second, the language in *Int’l Custom Products* on which defendant relies being *dicta*, and the decision not having been issued *en banc*, the Court of Appeals in that case cannot be said to have overturned *Gavette*. At most, *Int’l Custom Products* might be interpreted as calling *Gavette*’s formulation into question rather than overturning it. Therefore, the court’s mere citing, and quoting language from, *Gavette*, without more, falls short of qualifying as a legal error justifying the unusual step of amending an opinion.

Finally, a reading of *Consolidated Fibers* as a whole does not support the Government’s argument that it is “difficult to discern whether the standard applied was the proper *Pierce* standard or the higher *Gavette* standard.” Nowhere does the opinion in *Consolidated Fibers* state or imply that the court was applying a standard more stringent than the reasonableness standard explicated in *Pierce*, and the discussion of *Pierce* therein is inconsistent with such a notion. In contrast, the Court of International Trade’s opinion in *Int’l Custom Products* not only cited *Gavette* but also stated that “the standard for substantial justification is ‘slightly more stringent’ than a simple reasonableness standard.” *Int’l Custom Products*, 39 CIT at \_\_, 77 F. Supp. 3d at 1325 (citing *Spencer v. NLRB*, 712 F.2d 539, 558 (D.C. Cir. 1983)). This indication that the government was required to make a showing greater than “simple reasonableness,” rather than the citation to *Gavette* standing alone, supported the reasoning of the Court of Appeals in identifying an error in the opinion of this Court in *Int’l Custom Products*.

### III. CONCLUSION

Upon consideration of the Government’s Motion to Amend Decision (Dec. 27, 2017), ECF No. 38 and all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that the Government’s Motion to Amend Decision (Dec. 27, 2017), ECF No. 38 be, and hereby is, denied.

Dated: August 16, 2018  
New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU, CHIEF JUDGE

## Slip Op. 18–104

DIS VINTAGE, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 16–00085

[Dismissing action for lack of subject matter jurisdiction]

Dated: August 21, 2018

*Joshua A. Levy*, Marlow, Adler, Abrams, Newman & Lewis, P.A., of Coral Gables, FL, for plaintiff. With him on the brief was *Peter S. Herrick*.

*Amy M. Rubin*, Assistant Director, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Monica P. Triana*, Trial Attorney. Of counsel on the brief was *Sheryl A. French*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

**OPINION****Stanceu, Chief Judge:**

In this action to contest the denial of its administrative protest by U.S. Customs and Border Protection (“Customs” or “CBP”), plaintiff Dis Vintage, LLC (“Dis Vintage”) contests the tariff classification Customs determined upon liquidation for certain imported articles that plaintiff alleges are “worn” clothing eligible for duty-free tariff treatment. Before the court is defendant’s motion to dismiss this action for lack of subject matter jurisdiction. Because less than the full amount of the duties and charges owing had been paid at the time plaintiff commenced this action by filing the summons, the court rules that it lacks subject matter jurisdiction and grants defendant’s motion.

**I. BACKGROUND**

Unless otherwise stated, the jurisdictional facts stated in this Opinion are not in dispute.

The entry at issue in this case is Entry No. AFP-1304309–5 (the “Entry”), made at the Port of Miami on April 12, 2013. On June 21, 2013, Customs liquidated the Entry, classifying the merchandise under subheading 6110.30.30 (“Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other”), Harmonized Tariff Schedule of the United States (“HTSUS”), and assessed duty at the rate of 32% *ad val.* On the same day, Customs issued Bill No. 464482210 to Dis Vintage for \$9,247.29, comprised of \$9,202.56 in duties and \$44.73 in pre-liquidation interest. Dis Vintage filed a protest on July 18, 2013 and mailed a request for accelerated disposition by certified mail to Customs on November

16, 2015. Plaintiff claimed that the merchandise should be classified under subheading 6309.00.00, HTSUS (“Worn clothing and other worn articles”), free of duty. The protest was deemed denied on December 16, 2015.

As of April 4, 2016, Bill No. 464482210 remained unpaid. On or around that date, Customs mailed Dis Vintage a “notice of debt,” dated April 4, 2016, identifying a “Full Amount Due Upon Receipt” of \$10,031.01 and an “Amount Due After 4–05–16 (including interest)” of \$10,057.08. *See* Def.’s Mem. in Supp. of Mot. to Dismiss for Lack of Jurisdiction at Attach. 2 (July 8, 2016), ECF No. 6 (“Def.’s Br.”). Dis Vintage received the notice of debt on April 11, 2016 and mailed to Customs a check in the amount of \$10,031.01, dated April 11, 2016. Pl.’s Resp. in Opp’n to Def.’s Mot. to Dismiss for Lack of Jurisdiction 2 (Aug. 16, 2016), ECF No. 10 (“Pl.’s Resp.”). On May 9, 2016, Customs issued another notice of debt stating that the amount owing on the Entry was \$26.16, representing an unpaid balance of \$26.07 plus an additional \$0.09 in late payment interest. Def.’s Br. at Attach. 3. Dis Vintage alleges that it received this second notice of debt on May 16, 2016, four days after the May 12, 2016 filing of the summons commencing this action. Pl.’s Resp. 2–3. Customs received the remaining amount due of \$26.16 on June 1, 2016. Def.’s Br. 6. Plaintiff did not file another summons.

Defendant filed its motion to dismiss on July 8, 2016. Def.’s Mot. to Dismiss for Lack of Jurisdiction (July 8, 2016), ECF No. 6; Def.’s Br. Plaintiff responded on August 16, 2016. Pl.’s Resp. On August 31, 2016, defendant filed its reply. Def.’s Reply to Pl.’s Opp’n to Mot. to Dismiss for Lack of Jurisdiction (Aug. 31, 2016), ECF No. 14. Plaintiff filed a motion for leave to file a sur-reply on September 9, 2016. Pl.’s Mot. for Leave of Ct. to File Sur-Reply (Sept. 9, 2016), ECF No. 15. Granting this motion, the court considers Plaintiff’s Sur-Reply to Defendant’s Reply to Plaintiff’s Opposition to Motion to Dismiss for Lack of Jurisdiction (Sept. 9, 2016), ECF No. 15 (“Pl.’s Sur-Reply”).

## II. DISCUSSION

Plaintiff alleges that the court has jurisdiction over this action according to 28 U.S.C. § 1581(a),<sup>1</sup> which grants this Court exclusive jurisdiction of any civil action commenced to contest the denial of a protest under section 515 of the Tariff Act of 1930 (the “Tariff Act”). Compl. ¶ 2 (May 13, 2016), ECF No. 4; *see* 28 U.S.C. § 1581(a). “To invoke the Trade Court’s jurisdiction under subsection (a) [of § 1581], an aggrieved importer must first file a protest under 19 U.S.C. § 1514, which the United States Customs and Border Protection . . . then

<sup>1</sup> All citations to the United States Code herein are to the 2012 edition.

denies. Once Customs denies that protest, the importer must then pay ‘all liquidated duties, charges, or exactions’ owed before commencing suit in the Trade Court.” *Int’l Custom Prod., Inc. v. United States*, 791 F.3d 1329, 1332 (Fed. Cir. 2015) (citations omitted); *see* 28 U.S.C. § 2637(a) (“A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced . . .”). A suit to challenge the denial of a protest filed under section 515 of the Tariff Act must be commenced within 180 days after either: (i) the date of mailing of notice of denial of a protest, or (ii) the date of denial of a protest by operation of law. 28 U.S.C. § 2636(a).

Here, there can be no dispute that plaintiff filed a timely protest under 19 U.S.C. § 1514 or that plaintiff’s protest was denied. The Entry was liquidated on June 21, 2013 and plaintiff filed its protest on July 18, 2013. *See* 19 U.S.C. § 1514(c)(3) (providing, *inter alia*, that a protest must be filed within 180 days of the date of liquidation). Plaintiff mailed to Customs a request for accelerated disposition, pursuant to 19 U.S.C. § 1515(b) and 19 C.F.R. § 174.22, on November 16, 2015. Customs neither allowed nor denied the protest, in whole or in part, within 30 days of plaintiff’s mailing the request for accelerated disposition. The protest, therefore, was deemed denied on December 16, 2015. *See* 19 U.S.C. § 1515(b); *see also* 19 C.F.R. § 174.22(d). Plaintiff timely commenced its action by filing its summons with the Clerk of this Court pursuant to USCIT Rule 3 on May 12, 2016—within the 180-day limitation imposed by 28 U.S.C. § 2636(a). Therefore, the jurisdictional question presented is whether plaintiff can be found to have satisfied the requirement of 28 U.S.C. § 2637(a) that, in a suit contesting the denial of a protest under section 515 of the Tariff Act, 19 U.S.C. § 1515, “all liquidated duties, charges, or exactions have been paid at the time the action is commenced.” 28 U.S.C. § 2637(a).

In its complaint, plaintiff originally asserted that it had paid “all liquidated duties and fees required in this action for Entry No. AFP-1304309–5.” Compl. ¶ 3. The complaint was filed on May 13, 2016—three days before plaintiff alleges it received from Customs the May 9, 2016 notice of debt, which specified that plaintiff owed an additional \$26.16. *See* Pl.’s Resp. 2–3. In its response to defendant’s motion to dismiss, plaintiff acknowledges that “Plaintiff did not pay the outstanding duties and interest of \$26.16 prior to filing the summons.” *Id.* at 7.

*A. Payment of all Duties, Charges, or Exactions as of the Time an Action is Commenced is a Condition of the Exercise of the Court's Jurisdiction under 28 U.S.C. § 1581(a)*

The requirement of 28 U.S.C. § 2637(a) that “all liquidated duties, charges, or exactions have been paid at the time the action is commenced” is a jurisdictional requirement and, accordingly, is not a requirement that may be waived by the court. *See Int'l Custom Prod., Inc.*, 791 F.3d at 1335–38 (explaining that satisfaction of 28 U.S.C. § 2637(a)'s payment requirement is a condition of the government's waiver of sovereign immunity); *Nature's Farm Prod., Inc. v. United States*, 819 F.2d 1127, 1128 (Fed. Cir. 1987) (affirming the dismissal of an action brought under 28 U.S.C. § 1581(a) where plaintiff had not paid the duties and charges owed prior to commencing the action because plaintiff “did not comply with the jurisdictional requirement of 28 U.S.C. § 2637(a)” (emphasis added)). The statutory language “at the time the action is commenced” is unambiguous in the factual context of this case and may not be interpreted so as to enlarge impermissibly the jurisdictional grant Congress has established. *See Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992) (instructing that jurisdictional statutes must be strictly construed and that a court cannot, “even in the interest of justice, extend [its] jurisdiction where none exists”).

*B. Upon Commencement of this Action, Not All Duties, Charges or Exactions Had Been Paid*

Plaintiff does not argue that all duties and fees had been paid at the time of filing of the summons. *See* Pl.'s Resp. 7. Nonetheless, it is incumbent upon the court to determine all jurisdictional facts. The April 4, 2016 notice of debt stated that the “Full Amount Due Upon Receipt” was \$10,031.01 and that the “Amount Due After 04–05–16 (including interest)” was \$10,057.08. *See* Def.'s Br. at Attach. 2 (the April 4 notice of debt). Dis Vintage received the notice of debt on April 11, 2016 and mailed a check in the amount of \$10,031.01, dated that same day. Pl.'s Resp. 2.

The April 4, 2016 notice of debt was ambiguous. It informed Dis Vintage that \$10,057.08 was the “Amount Due After 04–05–16 (including interest),” but it also stated that the amount of \$10,031.01 was the “Full Amount Due Upon Receipt.” Def.'s Br. at Attach. 2 (emphasis added). Based on the latter, it could be argued that Dis Vintage satisfied the jurisdictional requirement of 28 U.S.C. § 2637(a) by paying the \$10,031.01 amount, the “Full Amount Due Upon Receipt,” on the same day it received the notice of debt, thereby complying fully with the payment terms as Customs had communicated



them. Were such to be found, the subsequent notice of debt, issued May 9, 2016, would be invalid and of no consequence. Therefore, the jurisdictional fact the court first must resolve is whether Dis Vintage actually did pay the full amount owing when it sent Customs a check for \$10,031.01 on the day it received the notice of debt. The court concludes that it did not.

Dis Vintage received two notices of debt in 2016 prior to the April 4 notice. The first notice of debt, dated January 25, 2016, stated that the “Full Amount Due Upon Receipt” was \$9,981.80 and the “Amount Due After 02–05–16 (including interest)” was \$10,006.38. Pl.’s Resp. at Ex C. The next notice of debt, dated February 29, 2016, stated that the “Full Amount Due Upon Receipt” was \$10,006.38 and the “Amount Due After 03–06–16 (including interest)” was \$10,031.01. Def.’s Br. at Attach. 1. That the notices of debt show interest accruing in 30-day increments was not a matter of discretion on the part of Customs. In section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d), Congress provided that “[i]f duties, fees, and interest determined to be due or refunded are not paid in full . . . , any unpaid balance shall be considered delinquent and bear interest by 30-day periods.” 19 U.S.C. § 1505(d). Here, interest was added, and the amounts owing increased commensurately, on February 5, March 6, and April 5, 2016. The February 29 notice, for example, showed that a new amount, with additional interest included, would be due on the day that was 30 days after March 6, 2016, i.e., April 5, 2016. The February 29 notice accorded with the April 4 notice in setting the date of April 5 as the last date on which the amount owing would remain at \$10,031.01. In considering the jurisdictional facts established by the various notices of debt, and not only the April 4 notice, the court must conclude that the actual amount owing on April 11, 2016 was \$10,057.08, not the \$10,031.01 that Dis Vintage paid, which was \$26.07 less than the full amount. As the notices showed, the \$10,057.08 amount would be current until the end of the relevant 30-day period, which occurred on May 5, 2016. Consistently, the notice of debt dated May 9, 2016 stated that the “Full Amount Due Upon Receipt” was \$26.16 and the “Amount Due After 06–04–16 (including interest)” was \$26.24. Def.’s Br. at Attach. 3. Thus, the next 30-day period ended on June 4, 2016 (30 days from May 5, 2016). Dis Vintage paid the amount of \$26.16 within that period (payment having been received by Customs on June 1, 2016), satisfying in full its payment obligations on Entry No. AFP 1304309–5.

The jurisdictional problem in this case arises because Dis Vintage made the final payment of \$26.16 *after* filing its summons on May 12, 2016. Plaintiff had 180 days following the deemed denial of the pro-

test to file its summons. That period did not end until June 13, 2016. At the time of making its final payment on June 1, 2016, Dis Vintage, therefore, could have obtained judicial review of the protest denial by commencing a new action but did not do so.

*C. Plaintiff Has Not Established the Elements of Equitable Estoppel*

A plaintiff has the obligation of demonstrating that a court has subject matter jurisdiction over its action. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 182 (1936) (“It is incumbent upon the plaintiff properly to allege the jurisdictional facts . . . .”). Plaintiff has failed to do so in this instance.

Dis Vintage argues that it must be excused from the requirement to satisfy the payment condition of 28 U.S.C. § 2637(a) because Customs failed to provide proper notice of the amount owing on the Entry, as required by its own billing regulations. *See* Pl.’s Resp. 3–8. Although plaintiff does not expressly so state, its notice argument essentially is grounded in the doctrine of equitable estoppel. With respect to this doctrine, the Supreme Court has held that courts do not possess the power to create an equitable exception to a jurisdictional requirement. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that the Court of Appeals for the Sixth Circuit lacked jurisdiction over an untimely appeal because “the timely filing of a notice of appeal in a civil case is a jurisdictional requirement” and “this Court has no authority to create equitable exceptions to jurisdictional requirements”).<sup>2</sup>

Here, even were the court to assume, *arguendo*, that conceivably there could be a circumstance under which an equitable exception to the requirement of 28 U.S.C. § 2637(a) might be found to exist, it also would conclude that this case does not present such a circumstance. Under any equitable estoppel claim, a party must show that: (1) the party against whom equitable estoppel is asserted engaged in misleading conduct; (2) the party asserting equitable estoppel relied on the misleading conduct; and (3) that party suffered injury due to this reliance. *See, e.g., Mabus v. Gen. Dynamics C4 Sys., Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011). Dis Vintage has not pleaded facts sufficient to establish these elements.

<sup>2</sup> In contrast, the Supreme Court has allowed the consideration of equitable factors (“equitable tolling”) in actions untimely brought against the government where the Supreme Court has determined that the relevant statute of limitations was not jurisdictional. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990). Those cases, however, have no bearing on the present action because, unlike the statutes at issue in *Irwin* and in *Kwai Fun Wong*, 28 U.S.C. § 2637(a) is a jurisdictional requirement. *See Int’l Custom Prod., Inc. v. United States*, 791 F.3d 1329, 1335–38 (Fed. Cir. 2015).

Dis Vintage argues that the Customs regulations required Customs to provide it a bill every 30 days but that Customs in fact sent out a bill every 35 days. *See* Pl.'s Resp. 3–6 (citing 19 C.F.R. § 24.3a(d)). Plaintiff submits that it was not on notice of the amounts that it owed due to the failure of Customs to comply with this notice requirement. According to Dis Vintage, “for the importer to ‘be notified’ by Customs for purposes of the billing regulations, Plaintiff *must actually receive notice* of any outstanding amounts owed *every 30 days* after the date of issuance of Customs bill.” Pl.'s Resp. 4. Plaintiff argues, further, that because it was not on notice of its outstanding duties as a result of Customs’s alleged failure, the court should waive the condition of § 2637(a) and not permit the agency’s improper actions to deprive the plaintiff of judicial review. Pl.'s Resp. 6–8. Plaintiff’s view is that § 2637(a) must be interpreted to require Customs to provide adequate notice to the plaintiff of its obligations, in the absence of which § 2637(a) cannot be invoked to effect dismissal of the action. Pl.'s Resp. 8.

Plaintiff does not establish a causal connection between its allegation that Customs did not comply with the 30-day requirement in § 24.3a(d) and its own failure to ensure that all duties, charges, and exactions had been paid at the time an action is commenced. What is more, the undisputed jurisdictional facts demonstrate that Dis Vintage was placed on actual notice that payments were owing on the Entry.

In support of its jurisdictional argument, plaintiff quotes certain email communications between its counsel, Mr. Levy, and Customs officials that occurred in April and May of 2016 and that concerned the payment status pertaining to the Entry. *See* Pl.'s Sur-Reply at Ex. A. According to plaintiff, on April 29, 2016, Mr. Levy emailed Ms. Kristen Geroff, a Customs official, asking her to confirm that “CBP has received and processed our client’s payment for this bill [i.e., Bill No. 464482210].” *Id.* Twenty-nine minutes later, Ms. Geroff confirmed that “the payment has been received and will be applied shortly.” *Id.* On May 5, 2016, Mr. Levy emailed Ms. Geroff asking her to confirm that “CBP has applied our client’s payment for this duty bill as described below.” *Id.* Apparently due to a lack of response, Mr. Levy emailed Ms. Geroff again on May 9, 2016 to “confirm payment has been applied for DIS Vintage’s duty bill” because “[w]e want to file a summons as soon as possible, and need to know Customs has formally accepted the payment in its system.” *Id.* Mr. Edward Barnett, a “Lead Staff Accountant” at Customs, replied three minutes later, stating that “\$10,031.01 was applied to bill #46448221 [*sic*],

entry #AFP-13043095 on April 25, 2016.” *Id.* Plaintiff argues that in this exchange Customs was “not completely transparent” and accuses Customs of not being “open and honest about the bill’s ‘open’ status,” on the premise that in responding to plaintiff’s emails Customs failed to alert plaintiff that it had an outstanding balance. *Id.* at 3.

Plaintiff’s arguments about a lack of transparency on the part of Customs do not make out a case of equitable estoppel because neither of the two responses Mr. Levy received from Customs stated that all charges owing on Entry No. AFP-1304309–5 had been paid in full. The May 9, 2016 response from Mr. Barnett stated that \$10,031.01 was applied on April 25, 2016 to the bill pertaining to the Entry. This came in response to Mr. Levy’s request that Customs “confirm payment has been applied for DIS Vintage’s duty bill” because “[w]e want to file a summons as soon as possible, and need to know Customs has formally accepted the payment in its system.” Pl.’s Sur-Reply at Ex. A. Mr. Barnett, who is identified in his email signature as the Lead Staff Accountant, did not provide, and reasonably could not have been expected to provide, legal advice on what must be paid prior to the filing of a summons. In any event, on May 16, 2016, a week after its counsel received Mr. Barnett’s communication, Dis Vintage received actual notice that Customs considered a specific amount, \$26.16, to have remained owing on Entry No. AFP-1304309–5, for May 16, 2016 is the date upon which Dis Vintage received the May 9, 2016 notice of debt sent by Customs. Plaintiff does not dispute that it actually owed Customs the amount stated in that notice, \$26.16, and as the court discussed previously, that amount actually *was* owing. Dis Vintage also knew on the date it received the May 9 notice (May 16, 2016) that four days earlier, on May 12, 2016, it had filed its summons to commence this action. Despite having actual notice of these controlling facts, Dis Vintage did not avail itself of the opportunity to commence another action by filing a new summons once the full amount of duties, charges, or exactions had been paid, an event that occurred on June 1, 2016.

Plaintiff does not argue that it was misled by the ambiguity in the April 4, 2016 notice of debt that the court discussed previously, but even were plaintiff to make this argument, the court could not exercise jurisdiction on the basis of the flaw consisting of the ambiguity in that notice. Any confusion on the part of Dis Vintage as to whether Dis Vintage’s payment in response to the April 4 notice was sufficient to satisfy fully the payment obligations on Entry No. AFP 13043095 was removed by the subsequent, i.e., May 9, 2016, notice of debt. That notice placed Dis Vintage on notice that Customs still considered money to be owing on the Entry.

Because Dis Vintage fails to satisfy the traditional elements of equitable estoppel, the court need not consider the more general question of whether a claim of equitable estoppel could even be made against the government. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422–23 (1990) (in which the Supreme Court left “for another day whether an estoppel claim could ever succeed against the Government” but also noted that “we have reversed every finding of estoppel that we have reviewed”). Nor need the court consider what additional criteria would have to be met when it is the government that is sought to be estopped. As the Supreme Court has instructed, “the government may not be estopped on the same terms as any other litigant” and, were estoppel to be available at all, some form of affirmative misconduct would need to be shown in addition to the traditional requirements of estoppel. See *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). The undisputed facts do not come close to establishing that Customs engaged in any form of affirmative misconduct.

In conclusion, plaintiff has not demonstrated grounds upon which equitable estoppel could suffice, even were the court to assume, *arguendo*, that equitable estoppel could apply in a circumstance involving a jurisdictional requirement. Plaintiff’s factual allegations do not amount to an assertion that any government official incorrectly advised it that all payment obligations as to the Entry had been satisfied. Nor does plaintiff allege that any government official made a misrepresentation that could have caused Dis Vintage to conclude that it need not satisfy the payment requirement of 28 U.S.C. § 2637(a) as of the time of commencing this action. There is no indication that a government official advised Dis Vintage that, in the circumstance presented, Dis Vintage need not commence a new action. Finally, facts have not been established to show that any lack of notice resulted in plaintiff’s failure to ensure that all payments had been made at the time the action was commenced.

### III. CONCLUSION

For the reasons discussed above, the court concludes that it lacks subject matter jurisdiction. Judgment dismissing the action will enter accordingly.

Dated: August 21, 2018

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU CHIEF JUDGE

## Slip Op. 18–105

PORSCHÉ MOTORSPORT NORTH AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge  
Court No. 16–00182

[On classification and liquidation of various automotive replacement and repair tools, parts and accessories, plaintiff's motion for summary judgment denied, defendant's cross-motion for summary judgment granted in part and denied in part.]

Dated: August 22, 2018

*Carl D. Cammarata*, Law Offices of George R. Tuttle, A.P.C., of Larkspur, CA, for the plaintiff.

*Stephen A. Josey*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. On the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director.

## OPINION

**Musgrave, Senior Judge:**

Before the court are cross-motions for summary judgment on three separate entries of “automotive replacement and repair tools, parts and accessories” from Canada in 2014. The articles number approximately 10,000 for each entry, upon which the plaintiff, Porsche Motorsport North America, Inc. (“PMNA”), claimed the articles entitled to duty free treatment under subheading 9801.00.85.00 of the Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “[p]rofessional books, implements, instruments, and tools of trade, occupation, or employment, when returned to the United States after having been exported for use temporarily abroad, if imported by or for the account of the person who exported such items”. The defendant's U.S. Customs and Border Protection (“CBP”) ultimately classified the articles under various dutiable tariff provisions of the HTSUS. Briefing of the respective motions does not dispose of the case.

*I. Background*

In order to enhance the Porsche brand, PMNA states that it desired to provide “emergency” support for race teams during three of the Canadian 2014 Porsche GT3 Cup Challenge races in case of accidents or unexpected breakdowns of Porsche automobiles. *See, e.g.*, Pl's Resp. at 7–8; Pl's Br. at Ex. 6 (Declaration of Robert Resetar), ¶¶11–13. That support involved trucking a trailer loaded with various automobile parts and certain tools, nuts and bolts across the northern U.S. border prior to, and back across after, each of three of

the GT3 Cup races. Those parts were made available not for sale to the general public but only to racing teams if needed for emergency repairs during races, according to PMNA. Sold parts were not subsequently returned to PMNA.

For each run into Canada, PMNA filed “Certificates of Registration” (CBP Form 4455) with CBP, and on each form it indicated a rough idea of its intent to provide support for each particular GT3 race (*see infra*; *see, e.g.*, Pl’s Br. at 32), together with manifests listing quantities, descriptions, values, *et cetera* of each of the various automotive and non-automotive parts (*e.g.*, desks, chairs, monitors, radios and radio station, fire suits, *etc.*) in the form of spreadsheets. Each Form 4455 also listed the total respective values and quantities exported.

Upon re-entry into the United States, the same manifests attached on the Form 4455s were also, apparently, attached as declarations of the automotive parts being re-entered into the United States. *See* KB5-5376882-5 dated 05/22/2014 (“Entry One”), KB5-5378599-3 dated 06/23/2014 (“Entry Two”), and KB5-5381385-2 dated 09/01/2014 (“Entry Three”). It came to light that PMNA had, in fact, sold some of the parts it had exported during each of the three races, and during the course of litigation PMNA provided a letter dated June 2017 to clarify discrepancies between the export-registered and the import-declared entered merchandise.<sup>1</sup> As mentioned, CBP had earlier classified the merchandise under various HTSUS provisions and assessed duties, fees and interest, so PMNA filed two protests to cover the three entries involved, which were ultimately denied, and PMNA paid CBP the assessed and the claimed liquidated duties, fees, and interest in the total amount of \$122,605.12, as follows:

- Entry One: \$36,930.40, plus interest and fees of \$2,592.65, for a total payment of \$39,523.05;
- Entry Two: \$40,488.92, plus interest and fees of \$2,629.78, for a total payment of \$43,118.70; and

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<sup>1</sup> For Entry One, PMNA stated 146 items had actually been sold during the Porsche GT3 Cup Challenge to race teams and 10,312 inventory items were returned to the United States. *See* List of Sold Items, Def’s Ex. 7; June Letter ¶ I.I.B.2, Def’s Ex. 8. PMNA also listed 537 items for Entry One that it claimed had been exported from either the United States or Germany to Canada and then had been either sold in Canada or returned to the U.S. in the truck/trailer. June Letter ¶ I.I.B.2. For Entry Two, PMNA stated 106 items had been sold to the race teams and 10,374 inventory items were returned to the United States. *See* Def’s USCIT Rule 56.3 Statement of Fact ¶ 30; List of Sold Items; June Letter ¶ I.I.B.2. For Entry Three, PMNA stated 212 items had been sold to the race teams and 10,469 inventory items were returned to the United States. *See* Def’s USCIT Rule 56.3 Statement of Fact ¶ 40; List of Sold Items; June Letter ¶ I.I.B.1&3. PMNA also listed 244 items that it claimed had been exported either from the United States or Germany to Canada and then had been either sold in Canada or returned to the U.S. in the truck/trailer.” *Id.*

- Entry Three: \$38,675.28, plus interest and fees of \$1,288.09, for a total payment of \$39,963.37.

Uncontested is PMNA's fulfillment of the prerequisites for initiating this action, *cf.* 28 U.S.C. §2637(a) *with* Comp. & Ans. ¶¶ 3–6, and therefore jurisdiction here is proper pursuant to 28 U.S.C. §1581(a). Seeking refund of the above amount(s), PMNA's complaint disputes (1) the customs duty classification of its automobile parts, accessories, and tools (collectively referred to as "inventory items") which its broker entered into the United States after PMNA had made the items available for sale at certain Porsche GT3 races in Canada<sup>2</sup> as well as (2) the liquidation process, the contention on this second point being that in the absence of proper notice to extend their dates of liquidation, two of the entries should be held deemed liquidated as claimed at entry by operation of law. *See* 19 U.S.C. §1504(a)(1); 19 C.F.R. §159.11. *But see* 19 C.F.R. §159.12.

## II. Legal Standards

At this stage, a denial of a protest under section 515 of the Tariff Act of 1930 is considered *de novo*. *See* 28 U.S.C. §2640(a)(1). The duty of the court is "to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original). Generally speaking, the court employs a two-step process to determine the proper classification of imported merchandise. The first step is to determine the meaning of relevant tariff provisions, a question of law. The second step is to determine whether the "nature" of the merchandise falls within the properly-construed tariff provision, a question of fact. *See, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998).

In that process, the decision of CBP in the classification of merchandise under the HTSUS is presumed correct by statute. 28 U.S.C. § 2639(a)(1). The statutory presumption does not apply to pure questions of law. *Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). Pertinent to such analysis, CBP classification rulings are to be accorded a measure of deference in proportion to their "power to persuade". *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). And if, when all is said and done, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law", summary judgment is appropriate. USCIT R. 56(c).

<sup>2</sup> *See* Deposition of Plaintiff's USCIT Rule 30(b)(6) Representative, Robert Resetar (Resetar Dep.), Def. Ex. 1, 28:22–29:07.



### III. Discussion

The plaintiff requests oral argument. There are several obvious problems with the parties' motions for summary judgment that oral argument would not overcome. That request can therefore be, and it hereby is, denied.

#### A. Notices for Extension of Liquidation

PMNA contends two of its entries should be deemed liquidated by operation of law in accordance with 19 U.S.C. §1504, which provides in pertinent part:

##### (a) Liquidation

(1) Entries for Consumption. Unless an entry of merchandise for consumption is extended under subsection (b) of this section or suspended as required by statute or court order, except as provided in section 1675(a)(3) of this title, an entry of merchandise for consumption not liquidated within 1 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 by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

PMNA advances two arguments on deeming two of its entries liquidated. It first avers that CBP failed to timely issue notices of extension of liquidation within the required one year period. The relevant CBP regulation, 19 C.F.R. §159.11, provides in part:

(a) Time limit generally. Except as provided in §159.12, an entry not liquidated within 1 year from the date of entry of the merchandise, . . . will be deemed liquidated by operation of law at the rate of duty, value, quantity, and amount of duties asserted by the importer at the time of filing an entry summary for consumption in proper form, with estimated duties attached, or a withdrawal for consumption in proper form, with estimated duties attached. . . .

(b) Applicability. The provisions of this section and §159.12 will apply to entries of merchandise for consumption or withdrawals of merchandise for consumption made on or after April 1, 1979.

PMNA contends that the question of whether CBP issued timely notices involves a disputed question of fact, which it purports to reserve pending disposition of the instant motion. Specifically, for Entry One, PMNA states that while it did receive a notice of extension, it is dated December 12, 2015, which is not within one year of

the May 22, 2014 date of entry for Entry One. For Entry Two, PMNA claims it did not receive a notice of extension at all. The defendant disputes those assertions, claiming CBP did timely and properly issue notices of extension on January 15, 2015, and it cross-moves for summary judgment on this issue, arguing that this issue can be resolved now, because “there is no evidence that supports PMNA’s claim on this point.” Def’s Br. at 19.

PMNA responds that it also provided evidence to support its claim in the form of PMNA’s customs manager’s deposition testimony to the effect that Porsche and its related companies searched their records and could find no CBP notices of extensions for any of the three subject entries other than the notice for Entry Two. Pl’s Resp. at 23 (citation omitted). The defendant replies that it is still entitled to the presumption of regularity on this issue and that PMNA’s evidence is insufficient to overcome dismissal of its claim of untimeliness. Def’s Br. at 20–23 (reviewing record of deposition testimony on “Extension Suspension History”). The court disagrees, as the date of “12–12–15” on the notice of extension for Entry One shown among the papers speaks for itself: if it is not clerical error then it is belated notice. In conjunction with PMNA’s other arguments and papers on the subject, this presents more than a mere “bald assertion”<sup>3</sup> or “uncorroborated affidavit”<sup>4</sup> of the issue, it amounts to a disputed material fact necessitating trial. Cf. *Frontier Ins. Co. v. United States*, 25 CIT 717, \_\_\_, 155 F. Supp. 2d 779, 787–88 (2001); *A.N. Deringer, Inc. v. United States*, 20 CIT 978 (1996) (trial of issue of whether notices of extensions of liquidation were sent and received). While the defendant in order to support its position also characterizes in detail aspects of PMNA’s witnesses’s deposition testimony on the issue of nonreceipt, ultimately these matters involve findings of fact, which are not made on summary judgment.

PMNA also contends in its motion for summary judgment that CBP failed to advise it, as importer, of the “reason” for the extension of liquidation on the notice of such extension, in accordance with 19 U.S.C. §1504, such that the importer will be advised if the problem involves a question of classification, value, country of origin, admissibility, *et cetera*, as implied by 19 C.F.R. §159.12 (“Extension of time for liquidation”), which provides in part:

<sup>3</sup> *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999).

<sup>4</sup> *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1241 (Fed. Cir. 2002) (uncorroborated affidavit accusing government officer of bad-faith threats, drafted six years after alleged coercion, held not clear and convincing to rebut the presumption of regularity).

(a) Reasons—(1) Extension. The port director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if: . . .

(i) Information needed by CBP. Information needed by CBP for the proper appraisal or classification of the merchandise is not available, or . . .

(b) Notice of extension. If the port director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly will notify the importer or the consignee and his agent and surety on CBP Form 4333-A, appropriately modified, that the time has been extended and the reasons for doing so.

(c) Notice of suspension . . .

(d) Additional extensions—(1) Information needed by CBP. If an extension has been granted because CBP needs more information and the port director thereafter determines that more time is needed, he may extend the time for liquidation for an additional period not to exceed 1 year provided he issues the notice required by paragraph (b) of this section before termination of the prior extension period.

The defendant also cross-moves for summary judgment on this issue of the “reason” for the notice of extension of liquidation. Def’s Br. at 27–30. The notice of extension for Entry One that PMNA received provided, in addition to indicating the entry number: “The period to liquidate this entry has been extended for a period not to exceed one year, pursuant to 19 USC § 1504(b) and 19 CFR § 159.12(a)(1).” See, e.g., Pl’s Br. at Ex. 8. PMNA argues the defendant admits, through its deposed witness, “that no reason was given on the notices of extensions other than to cite the law and regulations.” Pl’s Br. at 22. The current state of the law, however, is that the failure to include a reason for an extension on such notice constitutes harmless error and does not invalidate the extension notice. *Intercargo Insurance Co. v. United States*, 83 F.3d 391, 394–96 (Fed. Cir. 1996). The court assumes it has not been CBP’s practice to perpetuate “harmless” errors after the decision in *Intercargo*, because wilful perpetuation of error cannot be regarded as harmless, but on the papers at bar, it is implicit from the statute and regulation referenced on the extension notice to PMNA for Entry One that the reason for the extension was that CBP did not have complete information to make a determination on PMNA’s classification claims, which as mentioned in similar circumstances the appellate court deemed merely harmless error. On this issue, the defendant is entitled to summary judgment.

## B. Subheading 9801.00.85.00 and the “Nature” of the Imported Merchandise

With respect to the plaintiff’s substantive motion for summary judgment, the identification of the merchandise remains imprecise, as the defendant points out.<sup>5</sup> *See, e.g.*, Def’s Br. 5–10, citing, *inter alia*, *Group Italglass U.S.A., Inc. v. United States*, 16 CIT 763, 765, 798 F. Supp. 727, 728 (1992). *Cf.* June Letter *with* Entry Summaries. PMNA responded to the defendant’s cross-motion by submitting unauthenticated exhibits that it contends identify the merchandise at issue. Pl’s Resp. 20–21. There is presently no indication that these exhibits would be admissible at trial,<sup>6</sup> and the defendant further points out they contain information that conflicts with other evidence submitted for consideration.<sup>7</sup> The court cannot make an informed

<sup>5</sup> The defendant also points out that the “hand tools” PMNA exported and reimported into the United States were not individually declared on the entry documents, as PMNA considered them to be part of its truck/trailer, and therefore CBP did not classify the items or assess duties on them. Def’s Br. at 4–5 (citations omitted). As a further side note, appropriate here, the defendant complains PMNA failed to provide a separate statement of material facts as to which there are no genuine issues to be tried as required by USCIT Rule 56.3, but instead provided a “concise statement of facts” consisting of both numbered and unnumbered paragraphs within the body of its opening brief, which clearly does not comport with the court’s rules. Also, in its response brief PMNA submitted an attachment entitled “Plaintiff’s Reply to Defendant’s Response to Plaintiff’s Statement of Facts” that the defendant points out is not permitted by USCIT Rule 56.3, which requires a party to respond to an opposing party’s statement of facts but does not provide for a party to reply to the opposing party’s responses or present argument in the required submissions. USCIT Rule 56.3(a),(b). Any “reply” arguments should be included in a reply brief. As such, because PMNA’s “reply” to the defendant’s response to its “concise statement of facts” is beyond what the court’s rules permit, the defendant asks that the document should be stricken, or at least disregarded by the court. The objection is here duly noted and PMNA’s reply has been disregarded.

<sup>6</sup> As the defendant argues, the exhibits are not admissible as there are no attached declarations or affidavits from anyone with personal knowledge attesting to the veracity of the information contained therein. Def’s Reply at 6, referencing Fed. R. Evid. 802, 901 (hearsay rule and rule discussing the requirements to authenticate evidence). Nor does PMNA explain how the exhibits were prepared beyond the general statement that it is a “schedule . . . that deducts all of the items listed on Defendant’s Exhibit 7 from the items listed on the corresponding Customs Entry and/or Certificate of Origin”, *id.* at 6–7, referencing Pl’s Resp. 22–23, and there is no oath from PMNA confirming that this is a complete and accurate list of the entered merchandise, *id.* at 7.

<sup>7</sup> According to the defendant, with respect to Entry No. KB5–5378599–3 PMNA disclosed in its June Letter that 10,374 items were “exported from the United States to Canada . . . but were not sold in Canada and were returned to the United States,” even though only 10,322 items were listed on the Certificate of Registration, and of those, PMNA states that 106 of those items were sold while PMNA’s inventory trailer was in Canada. June Letter, Def. Ex. 8; Lists of Sold Inventory Items, Def. Ex. 7. The defendant states that a comparison of these documents reveals that there are at least 10 items listed on Exhibit 2B that were not listed on the June 19, 2014 Certificate of Registration. Exhibit 2B states that 105 items were sold in Canada, even though PMNA previously provided a list of 106 such items. Lists of Sold Inventory Items, Def. Ex. 7. Finally, according to Exhibit 2B, PMNA’s ending inventory quantity for this entry was 10,227 item, but PMNA has not explained or reconciled this figure with the statement in its June Letter that there were “10,374 items that the customs broker should have used when making entry.” June Letter ¶ II.B.

determination regarding the propriety of a particular tariff provision without knowing exactly what it is being asked to classify. *See, e.g.*, Def's Reply at 5–7. The plaintiff's substantive motion for summary judgment is thus premature.

Furthermore, both parties' motions reveal fundamental disagreement over not only the proper delineation of the ambit of subheading 9801.00.85.00, but also over the "nature" of the article(s) claimed for classification in that tariff provision, *i.e.*, the ultimate question of fact. *See, e.g., Orlando Food Corp., supra.* Both motions must therefore be denied. The parties agree that for articles to be classifiable under subheading 9801.00.85.00 they must be (1) professional implements, instruments, or tools of a (2) trade, occupation, or employment (3) returned to the United States after having been exported for use temporarily abroad and (4) imported by or for the account of the person who exported such items. The defendant's position, in the context of that general latitude, is that the entries consist of a bunch of loose automobile parts being shipped across the border for sale, like a kiosk. It argues that "the vast majority of inventory items were not 'books, implements, instruments, or tools;' were not used in PMNA's trade, occupation, or employment; and had not been 'exported for use temporarily abroad.'" Def's Br. at 12–13; Def's Reply at 8. Further, it contends that the inventory items were not exported with any expectation that they would actually be "used" to effect a repair and then re-imported. But the validity of that position depends upon what "use" means in the context of the tariff provision and also what PMNA's "trade" or "occupation" encompasses.

PMNA implies the "for use" requirement of subheading 9801.00.85, HTSUS, covers its "temporary inventory" of parts that might be needed during a race. Its intent, PMNA contends, was to bring "all" the repair parts back into the United States except for "those relatively few" parts needed by race teams that would actually need to be sold to them in an emergency. *See* Pl's Br. at 18–19 (citations omitted); *see also* Pl's Resp. 5–6. *Cf.* Pl's Br. at 30 ("whereas although [PMNA] uses the parts as temporary inventory abroad, the Porsche teams use the needed parts abroad"). PMNA thus regards the "tools of the trade" clause as describing "those things that one needs to do one's job", and it offers, broadly speaking, that its "job" does include providing support for its global brand through exactly this kind of "temporary inventory" provision for the Porsche GT3 races. *See* Pl's Br. at 26–27 (providing various common online lexicographic definitions of "implements", "instruments", "tools of the trade", "occupation" and "employ-

ment”). *Cf.* Resetar Dep. at 28:22–29:07 (alluding to necessity of supporting the Porsche brand). PMNA argues that the fact that it went through the laborious process of providing Forms 4455 in the first instance, prior to exportation, is *prima facie* evidence of intent to “use” the items abroad (in accordance with PMNA’s interpretation of that term) before importing them back into the United States. Pl’s Br. at 32.

PMNA supports this tools of the trade “kit” argument with three CBP rulings. The first ruling stands for the proposition that the “plain language” of subheading 9801.00.85 only requires that the merchandise be (1) exported for temporary use abroad and (2) imported (after being exported) by or for the account of the person who originally exported the merchandise, and that while temporary use is a requirement of that provision, “[t]here is no requirement that the merchandise be used abroad by the person who exported it.” Pl’s Br. at 27–28, quoting HQ 562318 (Aug. 27, 2002).

The other two customs duty rulings, N013373 (June 29, 2007) and N013372 (July 3, 2007), both considered the classification of “kits” for expedited repairs of an aircraft or engine. For the first ruling, the airline company that sought the ruling stated that its kits are assembled “on a non-routine basis” but for the second ruling described its kits as “used in the normal course of business.” *Cf.* N013373 with N013372. “These kits may consist of tools, equipment such as an aircraft engine hoist or sling, spare parts for an aircraft, spare parts for aircraft engines, items such as lubricants and gloves to support the repair and consumable parts such as nuts and bolts.” N013373. “When a specific repair is required at an international location, the kit to support the repair is exported, the repair work is performed and the kit is imported back into the United States. The contents of the kits will vary based on the required type of repair.” *Id.*

For these “non-routine maintenance toolkit[s]”, CBP advised that 9801.00.85, HTSUS, is the applicable classification. Likewise, for “airline maintenance toolkit[s]” consisting of “tools, equipment, spare parts for an aircraft, spare parts for an aircraft engine and spare parts for support equipment and/or consumable spare parts”, to wit, “KIT9476 a fan blade change kit and KIT9289 a wheel change equipment kit” that are “used in the normal course of business”, CBP advised that 9801.00.85, HTSUS, is the applicable classification. N013372. Given the foregoing, therefore, PMNA argues that the only difference between the items at issue in these New York rulings and the items at issue here are that its articles are car “repair items”:

The facts stated in [N013373] are that when a specific repair is required at an international location, the kit to support the

repair is exported; the repair work is performed; the parts needed for the repair are utilized; and the remaining parts in the kit that were not needed for the repairs are imported back into the U.S. The contents of the kit vary based on the required type of repair. CBP ruled that the kit containing the unneeded items was properly classifiable under subheading 9801.00.85.00, HTSUS, when imported back into the United States.

Pl's Br. at 29.

Regarding CBP Ruling N013372, PMNA emphasizes "CBP ruled that even though some of the spare parts and consumable parts were removed from the kit and used to repair the airplane or its engine, the remaining items were determined to be classifiable under subheading 9801.00.8500, HTSUS, when they were imported back into the U.S." *Id.* at 31. PMNA thus contends that its entire trailer "kit" vis-a-vis the Porsche GT3 races is similar to the American Airlines kits that CBP ruled classifiable under subheading 9801.00.85, and that while those airplanes are designed to fly properly, as with any mechanical device sometimes repairs are necessary:

[T]he race cars Porsche produces are designed to race properly but sometimes repairs are necessary. Porsche makes its Porsche repair parts available to its racing teams for only emergency repairs needed during a race, such as to replace a part damaged during a collision. To make them available, Porsche exported the subject Porsche repair parts in its Porsche truck/trailer for use temporarily in Canada, as inventory for availability for those emergency repairs. Porsche intended to return all the Porsche repair parts back to the United States except for those few that might be urgently needed by the teams.

Pl's Br. at 33.

The defendant dismisses the two New York rulings as "sparse on detail". It agrees they cover toolkits that were exported to perform a "specific repair" while abroad but did not consist of items to be offered for sale while abroad. It stresses the fact that several items were, in fact, sold from PMNA's trailer, and also the fact that PMNA's customers may have used purchased inventory items to perform specific tasks is immaterial, as those items were not reimported and are not at issue:

PMNA's trailer was akin to a mobile store, not a repair kit. The kits at issue in the cited rulings were not available for sale. Rather, they were used to complete a specific task (repairing the

airplane), and then returned to the United States. *PMNA's merchandise was not exported for the purpose of completing a task; it was exported to be offered for sale.*

Def's Br. at 17 (italics added). And therein lies the rub, which is a material fact in dispute.

The tariff provision at issue appears to provide no indication of "specificity" apart from the implicit "use" of the "tools" of a "professional." Even if the tariff provision were limited to a "specific" repair, as the parties theorize, the arguments thus far do not foreclose consideration of whether automobile parts that are made available only to the racing teams of a professional automobile race to address the advent of specific part need(s) that arise during such race constitutes a "specific" repair need.

PMNA also adds that the tariff provision does not "preclude" sales of some of the exported items, Pl's Br. at 33, but for that matter subheading 9801.00.85.00 would not necessarily so preclude. The ambit of that subheading depends upon what the "temporary use" of "tools of the trade" encompasses for purposes of tariff classification.

On that point, the defendant also contends (or agrees) that PMNA's lexicographic definitions of instruments, implements, *etc.*, refer to items used to complete or effect some task, Def's Br. 11–12,<sup>8</sup> and the defendant insists that

PMNA's statements that it was in the business of "supporting" race teams, by making an "emergency repair kit or inventory" "available" tiptoes around the reality of the situation. PMNA "supported" the race teams by making "emergency" inventory items *available for purchase.*

*Id.* at 11 (italics in original). *See also, e.g., id.* at 10 ("PMNA disputes our characterization of its occupation or employment as that of a sales company that makes spare parts available for purchase to race teams during race events") (citation omitted). But, as PMNA argues, there is nothing plain or inherent in the argued tariff provision that circum-

<sup>8</sup> *See also Ayers v. United States*, 48 Cust. Ct. 336 (1962), quoting *Webster's* (*see infra*) definitions of the term "implement," to wit:

1. That which fulfills or supplies a want or use; esp., an instrument, tool, or utensil used by man to accomplish a given work; as the implements of trade, of husbandry, or of war.

2. A constituent part; an element Obs. & R.

3. Scots Law. Fulfillment, performance.

Syn. implement, tool, utensil, instrument agree in suggesting relatively simple construction and personal manipulation. Implement and tool are often interchangeable.

But implement is the broader term, frequently implying that by which any operation is carried on: tool commonly suggests the implements of a craftsman or laborer[.]

48 Cust. Ct. at 338 (bracketing added).



scribes, let alone addresses, any “consideration” (*i.e.*, sale) for any “use”, howsoever “temporary”, of the “tools of the trade”.

“Temporary use” might or might not encompass “that use which is pertinent to the race event itself”, regardless of whether any sold part stays with the race team after the race. Indeed, in N013372 and N013373, the “remainder” of the kit(s) reimported into the U.S. were apparently allowed duty-free entry despite the apparent fact that the parts that were actually replaced were not reimported along with the rest of the kit.<sup>9</sup> These rulings do not appear to be unreasonable interpretations of subheading 9801.00.85.00, HTSUS. The question of moment, thus, appears to be whether “temporary *use*” encompasses “temporary *availability*,” of automobile parts in furtherance of the Porsche brand, to professional race teams in case of “emergency,” whatever that is supposed to mean in this context.

Deployed as nominative in subheading 9801.00.85.00, HTSUS, *Webster’s* defines “use” broadly as follows (*italics in original*):

1. Act of employing anything, or state of being employed; application; employment; as, the *use* of pen; his machines are in *use*.

Books can never teach the *use* of books . . . *Bacon*

2. The fact of being used or employed habitually; useage; as, the wear and tear resulting from ordinary *use*.

3. a. Continued or repeated exercise or employment; as, a habit is strengthened by *use*. b. A practice, habit, or custom; esp., a custom prevailing from a certain group, district, country, etc.; as, it was not the *use* of farmers to make friends quickly

How weary, stale, flat, and unprofitable,

Seem to me the *uses* of this world! . . . *Shak.*

4. Occasion or need to employ; necessity; — often with for; as, no further *use* for a book. “I have *use* for it” *Shak.*

5. Method or way of using; as, he knew the *use* of various herbs in the neighborhood for concocting remedies.

6. Quality of being suitable for employment; capability of being used or of service to promoting an end; usefulness; utility; advantage; as, there is no small *use* in anger; also, the end served; the purpose or object; as, he put his knowledge to good *use*.

‘T is use alone that sanctifies expense . . . *Pope.*

<sup>9</sup> For that matter, if the *damaged* part that was replaced by a particular kit was then reimported along with the rest of the kit (*e.g.*, for refurbishment), the rulings give no indication of any apparent test of the country of origin of the damaged part.

7. Function; particular service; As, everything in nature seems to have its *use*.

8. Common occurrence; ordinary experience. *Rare*.

O Caesar! these things are beyond all *use*.

\* \* \*

Syn. — Use, Usefulness, Utility. Use, as here compared (see Habit), is very general in sense, and occurs chiefly in certain familiar phrases; as, to be of *use*; there's no *use* in that; what's the *use*? Usefulness is employed chiefly of things in the concrete; Utility is more general and abstract; as the *usefulness* of a tool, the *utility* of an invention. But the two words are often interchangeable.

*Webster's New International Dictionary* 2806 (Unabridged, 2d ed. 1956).

The *Oxford English Dictionary* definitions of the nominative of "use" are similar. Among those are the following (*italics in original; examples omitted*).

I. Act of using, or fact of being used.

1. a. The act of employing a thing for any (esp. a profitable) purpose; the fact, state, or condition of being so employed; utilization or employment for or with some aim or purpose, application or conversion to some (esp. good or useful) end.

2. a. In various prepositional phrases (with *in, to, out of, for, of*).  
b. *in the use of*, making use of. *Obs.*

3. In special senses: a. The act of using or fact of being used as food, etc.; consumption. . . .

4. *Law*. a. The act or fact of using, holding, possessing land or other property so as to derive revenue, profit, or other benefit from such.

. . .

II. Habit of using.

7. a. With *the*. The habitual, usual, or common practice; continual, repeated, or accustomed employment or exercise; habit, custom. (Cf. 9.)

8. A custom, habit, or practice.'

9. a. Without article. Accustomed practice or procedure; habit, usage, custom, wont. (Cf. 7.) Also (*b*) coupled with synonymous term, esp. *wont*.

. . .

d. Ordinary or usual experience. *Obs.* . . .

10. *Const. of*. a. Opportunity, occasion, habit, or practice of using. Chiefly *to have the use of*.

b. The power of using some faculty, etc.; ability to use or employ.

...

IV. Purpose served by the thing used.

16. a. A purpose, object, or end, esp. of a useful or advantageous nature.

...

c. The provision, supplying, or maintenance of something. *Obs. rare.*

17. The fact or quality of serving the needs or ends of a person or persons.

...

20. a. The character, property, or quality which makes a thing useful or suitable for some purpose; capability for securing some end; usefulness, utility; advantage, benefit.

b. In the phr. *to or of (no, little, etc.) use.*

...

21. a. Need or occasion for using or employing; necessity, demand, exigency. Freq. *to have use for (or of).*

XIX *The Oxford English Dictionary* 350–52 (2d ed. 1989).

These latter definitions are noteworthy. In accordance with the foregoing, in arguing that its trailer is a “kit” of replacement parts that it makes “available” for the GT3 races in cases of “emergency” in order to support its global brand, PMNA raises a claim of “use” that would at least appear theoretically to be encompassed by certain of the above definitions, and therefore, *prima facie*, encompassed by subheading 9801.00.85.00, HTSUS. Nonetheless, PMNA’s contention also requires findings of fact that remain in dispute. That is, for the sake of arguing whether the “nature” of the imported articles does or does not meet the conditions of subheading 9801.00.85.00, the parties make assumptions as to that ultimate fact, in order to accord with their respective constructions of the terms giving rise to those conditions. But the “nature” of the imported article(s) actually remains in dispute, as whether the articles at bar are or are not “tools of the trade” returned to the United States after having been exported for “temporary use” abroad cannot be “found” on summary judgment.

In passing, the court notes an anomaly that the papers do not address. Both parties argue for all-or-nothing: either duty-free under subheading 9801.00.85.00, or dutiability under other tariff provisions covering the subject automobile parts. PMNA’s three trips into Canada occurred over a relatively short span of time, between May 22, 2014 and September 1, 2014. While it is clear that the composition

of the parts contained on PMNA's trailer varied somewhat, the extent of that variation is unclear, in particular what parts remained with the trailer throughout, *i.e.*, in-between those trips. And *cf.* 19 U.S.C. §1313(j)(2) & 19 C.F.R. §191.32 (substitution drawback). If PMNA, after the parties sort out the foregoing, is unable to persuade through trial or otherwise that it is ultimately entitled to judgment in its favor on its classification claim and that the defendant is not entitled to the duties, fees and interest paid on Entry One, that does not, *ipso facto*, necessarily mean that the defendant is also entitled to duties, fees and interest on Entry Two or Entry Three.

"[D]ouble taxation . . . is not a preferred result." *Atlas Copco, Inc. v. United States*, 10 CIT 790, 792–93, 651 F. Supp. 1446, 1448 (1986), citing, *inter alia*, citing, *Tennessee v. Whitworth*, 117 U.S. 129, 137 (1885); *see also Werner & Pfleiderer Corp. v. United States*, 17 CIT 916, 918 (1993). Double taxation may be said to exist when both taxes have been imposed in the same year, for the same purpose, upon property owned by the same person, and by the same taxing authority. *See Czarnikow-Rionda Co. v. United States*, 328 F. Supp. 487, 493 (Cust. Ct. 1971), *aff'd*, 468 F.2d 211 (C.C.P.A. 1972). The court has drawn no conclusions as to whether the entries at bar are or are not to be classified in subheading 9801.00.85.00, but the parties should bear the foregoing in mind as they consider the alternatives and return to negotiations to move the case forward.

### *Conclusion*

In consideration of the foregoing, and in furtherance of its case, the plaintiff shall file a status report on behalf of the parties on or before September 28, 2018.

**So ordered.**

Dated: August 22, 2018

New York, New York

*/s/ R. Kenton Musgrave*

R. KENTON MUSGRAVE, SENIOR JUDGE