Decisions of the United States Court of International Trade

(Slip Op. 02–142)

KAO HSING CHANG IRON & STEEL CORP., PLAINTIFF, AND ACI CHEMICALS, INC., AND YU DIN STEEL CO., LTD., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Consolidated Court No. 00–00026

[United States Department of Commerce antidumping determination remand results sustained; action dismissed.]

(Dated December 6, 2002)

Miller & Chevalier, Chartered (F. David Foster and *Kristen S. Smith),* for Plaintiff.
Holland & Knight, LLP (Frederick P. Waite and *Kimberly R. Young),* for Plaintiff-Intervenors.
Robert D. McCallum, Jr., Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau,* Assistant Director, International Trade Section, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Claudia Burke); Philip Curtin,* of counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.
Schagrin Associates (Roger B. Schagrin), for Defendant-Intervenor.

MEMORANDUM OPINION

EATON, *Judge:* This matter is before the court on the motion of Plaintiff Kao Hsing Chang Iron & Steel Corporation ("KHC") for judgment upon the agency record pursuant to USCIT R. 56.2. By its motion KHC contests the results issued by the United States Department of Commerce ("Commerce") in its sixth administrative review of the antidumping order covering carbon steel pipes from Taiwan contained in *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 69,488 (Dec. 13, 1999), *amended by Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan; Amended Final Results of Antidumping Duty Administrative Review,* 65 Fed. Reg. 5,310 (Feb. 3, 2000). The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2000).

On May 30, 2002, this court remanded this action to Commerce in order for it to "conduct further proceedings * * * including consulting with KHC to develop an acceptable method for providing missing production quantity data for KHC's [cost of production and constructed value] databases." *Kao Hsing Chang Iron & Steel Corp. v. United States,* 26 CIT ____, ____, Slip Op. 02–48 at 14 (May 30, 2002). Commerce released its remand results on September 27, 2002. *See Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan Final Results of Redetermination Pursuant to Court Remand Kao Hsing Chang Iron & Steel Corp. v. United States, Court No. 00–10026* (Sept. 27, 2002) *("Remand Results").*

In complying with the court's order, Commerce "issued to KHC a supplemental questionnaire eliciting the missing information, to be accompanied, like all questionnaire responses, by supporting worksheets, contemporary financial statements and computer-readable data files." *Remand Results* at 2. On June 26, 2002, prior to the deadline for submission of information, KHC requested an extension of time as it was "now preparing the requested information [which was] still not complete" and because it was experiencing difficulties compiling the requested data in computer-readable format due to its "sales/cost data discs [being] soaked * * * by heavy rainstorms * * *." *Id.* at 3. On July 8, 2002, KHC submitted "a brief response which offered no pertinent information, in any format, despite its June 26 statement that it was 'now preparing the requested information.'" *Id.* Commerce deemed this submission "deficient" because "it did not provide any [usable] information in place of the still unreported costs and quantities." *Id.*

On July 18, 2002, Commerce issued KHC a second supplemental questionnaire by which it "again solicited information from KHC such as would permit it to develop an 'acceptable method for providing missing production quantity data for KHC's [cost of production and constructed value] databases.'" *Id.* In this supplemental questionnaire, Commerce requested:

> 1) an explanation and proposed use of the summary cost and production data which KHC submitted on July 8, 2002; 2) a request for legible, computer-ready data, supported by "complete and verifiable tables and narrative to tie them to [KHC's] cost response and financial statements"; 3) a request for revised data with supporting worksheets; 4) confirmation and documentation of destruction caused by "heavy rains," with independent corroboration; 5) explanation of why no back-up data exists; and 6) explanation of KHC's failure to mention in its June 26 extension request that data were destroyed * * *.

Id. KHC submitted its response to this supplemental questionnaire on July 31, 2002, which stated in part that KHC did not "understand the statements about KHC needing to provide additional data." *Id.* at 4. After reviewing this submission, Commerce found it to be "deficient in virtually all respects" in that KHC did not provide the specific data requested, did not provide data it assured Commerce it would provide,

failed to submit data in the correct computer-readable form, and failed to provide supporting documentation. *Id.*

As a result of its review of the submitted information, Commerce determined that the use of facts available was warranted for the missing data because "in response to the first or second questionnaires, or at any point, KHC could have finally provided legible versions of the missing data, with the supporting worksheets and computer-readable versions which the Department had all along requested." *Id.* at 4 (citing 19 U.S.C. § 1677e(a)(1) (2000), 19 C.F.R. § 351.308(a) (2002)). Commerce made the additional finding that KHC had "failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* at 5 (citing 19 U.S.C. § 1677(e)(b), 19 C.F.R. § 351.308(a)). Commerce explained:

> KHC's failure to provide the requested information necessitates the use of an adverse inference with respect to the missing cost and production data. The Department considers KHC's misrepresentations regarding the availability and utility of its data and its refusal to resubmit the proposed surrogate data in an appropriate form or with appropriate supporting documentation a failure to comply to the best of its ability.

Id. at 6 (citation omitted). In selecting adverse facts, Commerce stated:

> [T]he Department sought to ensure that it did not apply adverse facts of an unduly punitive nature, since in the review KHC otherwise complied with the Department's questionnaires. For these remand results the Department at first performed extensive re-coding of the cost test portion and related segments of the analysis program, substituting the weight-averaged costs of groups of similar products, rather than the highest reported costs of groups of similar products, for the missing data. By this means the Department confirmed that the cost averages it used in the review as substitutes for the unreported data are in fact the least adverse of the partial adverse facts available on the record.

Id. at 6–7 (citation omitted). Using this methodology Commerce found that "[t]here is no change in the remand results from the amended final results." *Id.* at 7.

KHC then submitted comments in response to the *Remand Results*. *See Comments of Kao Hsing Chang Iron & Steel Corp. on Final Results of Redetermination Pursuant to Court Remand* (Oct. 22, 2002). While KHC objects to certain portions of the *Remand Results,* it states that "in view of Commerce's efforts at recoding to ensure the use of least adverse facts available, and KHC's determination that it can devote no further resources to this matter, KHC will not dispute the remand results." *Id.* at 3. In response to KHC's comments, the Government urges the court to enter final judgment on this matter. *See Defendant's Rebuttal to Comments of Kao Hsing Chang Iron & Steel Corp. on Final Results of Redetermination Pursuant to Court Remand,* 1–2 (Nov. 4, 2002).

DISCUSSION

The court will sustain Commerce's determinations contained in the *Remand Results* unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(A). Under this standard Commerce "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)).

Here, Commerce has complied with the court's remand order of May 31, 2002 by attempting to develop an acceptable method for supplying missing data for KHC's cost of production and constructed value databases. In addition, Commerce has examined the data provided by KHC and adequately articulated its reasons for applying facts available and adverse facts available. *See* 19 U.S.C. § 1677e (authorizing use of facts available where interested party or other person fails to cooperate, and use of adverse inferences where interested party or other person fails to act to the best of its ability); *Ferro Union, Inc. v. United States,* 23 CIT 178, 196–98, 44 F. Supp. 2d 1310, 1327–28 (1999). Indeed, at no point does KHC make a serious effort to refute Commerce's contentions that it failed to respond adequately or cooperate with Commerce's attempts to supply missing cost of production and constructed value information. In addition, KHC's claim that it did not "understand" what information was being requested of it is impossible to credit since the object of its motion was to gain KHC the opportunity to submit the missing cost of production and constructed value data in conformity with Commerce's requests. Therefore, as Commerce has complied with the court's remand instructions, articulated a rational connection between the facts found and the choices made, and as KHC does not dispute the *Remand Results,* the court hereby sustains the *Remand Results* and dismisses this action. Judgment shall be entered accordingly.

(Slip Op. 02–143)

DRUSCO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00208

[Disgorgement of investment income claim based on improper collection of Harbor Maintenance Tax dismissed.]

(Dated December 6, 2002)

Peter S. Herrick for plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson* and *Paul G. Freeborne)* for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on defendant's USCIT Rule 12(b)(5) motion to dismiss. Plaintiff entered into a consent judgment which finally settled all of its claims based on the unconstitutional imposition on its exports of the Harbor Maintenance Taxes ("HMT") in the amount of $299,250.46 under 26 U.S.C. § 4461 (1994). Having waived all of its claims based on the covered quarterly payments in exchange for a specific refund and having consented to judgment, it is bound, just as the plaintiffs were in *Hohenburg Bros. Co. v. United States,* 301 F. 3d 1299 (Fed. Cir. 2002). *See* Drusco's consent judgment at ¶ 9.[1]

Pursuant to the consent judgment, Drusco is to receive interest on the $299,250.46 if *"International Business Machine Corp. v. United States,* No. 94–10–00625, finally resolve[s] that interest is owing on HMT payments." Drusco's consent judgment at ¶ 6. To date, that case has not resulted in a ruling in favor of interest. *See International Business Machines Corp. v. United States,* 201 F.3d 1367,1375 (Fed. Cir. 2000) (finding no statutory right to interest), *cert. denied* 531 U.S. 1183 (2001), and *International Business Machines Corp. v. United States,* Slip Op. 02–17, No. 94–10–00625 (Ct. Int'l Trade February 21, 2002) (final order finding no interest owing on either statutory or constitutional grounds), *appeal docketed,* No. 02–1356 (Fed. Cir. April 29, 2002). If that case ever results in an award of interest, Drusco will receive interest. There is nothing left of these HMT claims to be litigated.

As Drusco may not litigate any claim related to the $299,250.46 in HMT payments it made, its claim for disgorgement of investment income the United States earned on its HMT payments may no longer be litigated.

This action shall be dismissed.

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[1] Paragraph 9 of the consent judgment provides:

> Upon entry of judgment, *plaintiff releases, waives, and abandons all claims against the defendant,* its officers, agents, and assigns, arising out of all HMT export payments for the non-severed quarters identified in the attached Harbor Maintenance Tax Payment Report, including, but not limited to, all claims for costs, attorney fees, expenses, compensatory damages, and exemplary damages. Defendant releases, waive[s], and abandons all claims, other than fraud, that it may have against plaintiff, or its officers, agents, or employees arising out of all HMT export payments for the non-severed quarters identified in the attached Harbor Maintenance Tax Report.

Id. (emphasis added).

(Slip Op. 02–144)

SCHULSTAD USA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–09–01572

[On classification of frozen Danish foodstuff, judgment for the defendant.]

(Decided December 9, 2002)

Hodes Keating & Pilon (Lawrence R. Pilon and *Jessica T. DePinto)* for the plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Aimee Lee);* and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service *(Chi S. Choy),* of counsel, for defendant.

OPINION

AQUILINO, *Judge:* To bake, or not to bake, in the state of Denmark, that is the trans-Atlantic question that underlies this test case within the meaning of USCIT Rule 84(c). The decision not to fire up the oven over there has not left the U.S. Customs Service cool to imposing duties on the *danish* upon entry over here, which imposts have been protested and then sued upon by the plaintiff importer.

I

The duties assessed upon the entries that are the predicate of this action were 8.8 and 8.2 percent *ad valorem* per subheading 1901.90.90 of the Harmonized Tariff Schedule of the United States ("HTSUS"), depending on the year of arrival. The plaintiff continues to pray for entry duty free under subheading 1905.90.10.41 ("Frozen: * * * Pastries, cakes and similar sweet baked products; puddings").

Following its answer to the complaint, the defendant has interposed a motion for judgment on the pleadings or, in the alternative, for summary judgment pursuant to USCIT Rule 12(c). The plaintiff has filed papers in opposition to that motion. Thereafter, it sought and obtained leave to file its own cross-motion for summary judgment upon condition that the parties confer and file herein either a stipulation or statement(s) within the meaning of CIT Rule 56(h). They have complied by filing a Joint Statement of Undisputed Material Facts, paragraphs 9–12 of which describe the subject merchandise as consisting of "ingredients such as unbleached flour, eggs, leaven, fats, fruit, sugar, milk and bakery improvers", as being "frozen and unbaked", that is, "pre-proofed, prefilled, flash frozen and ready for oven baking"; as being available in "five flavors: apple crown, vanilla crown with hazelnuts, raspberry crown, cinnamon swirl and cheese plait"; and as "imported in bulk packages consisting of 48 units per case for 'classic' and 100 units per case for 'mini'", each case "also contain[ing] two icing bags for use as pastry topping."

In their joint statement, the parties stipulate that in this case "there are no material facts as to which there exists a genuine issue to be tried

and the issues are amenable to resolution through dispositive motions" within the meaning of USCIT Rule 56. Upon review of their written submissions, this court concurs.

The crux of this test case is interpretation of the HTSUS on its face, issue(s) of law that can be resolved without trial. And the court has jurisdiction pursuant to 28 U.S.C. §§ 1581(a), 2631(a) *et seq*.

II

Plaintiff's entries were classified (and thereafter liquidated) by Customs as "food preparations of flour * * * not elsewhere specified or included[]; * * * other * * * other * * * other * * * other * * * other * * * other", HTSUS subheading 1901.90.90. In denying plaintiff's protest thereof, the Service referred to its Headquarters Ruling HQ 089810 (Nov. 7, 1991) to the effect that,

> [s]ince the articles are unbaked and will only be baked after importation, we do not believe that they would be considered products of the type specified in heading 1905, HTSUSA, at the time of importation.[1]

The defendant further reasons now that the words "and similar baked products" in plaintiff's preferred HTSUS subheading 1905.90.10.41, *supra,* make it "evident that the items preceding the[m] * * * must be in fact baked prior to importation in order to fit within this provision." Memorandum in Support of Defendant's Motion for Judgment, p. 7. And it emphasizes that,

> through plaintiff's own representations, * * * the imported merchandise here is not subject to baking prior to its importation. In fact, the merchandise is designed to be baked after importation. According to the information submitted in Schulstad's protest with attached marketing materials, the imported merchandise is preproofed[], flash frozen Danish pastry that are ready to bake in any commercial oven.

Id. at 8.

The plaintiff replies that those words "and similar baked articles" do

> not exclude unbaked pastries from the subheading because the[y] * * * do[] not clearly modify all the articles enumerated before or after it. The subheading also provides for "puddings" which are not baked.

Plaintiff's Response to Defendant's Motion for Judgment, p. 3. It also argues that "the merchandise is an incomplete pastry and as such would still be classifiable under Heading 1905." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 10.

A

The HTSUS (1997) contains General Rules of Interpretation, which govern this action as follows:

> 1. * * * [F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or

[1] Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment, Exhibit A, p. 1.

chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. * * *

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * *, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials * * *, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

* * * * * * *

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

And these rules are to be applied in the following manner:

* * * [A] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for

> the merchandise. *See* GRI 1, 6. Furthermore, when determining which heading is the more specific, and hence the more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings. *See* GRI 1, 3.

Orlando Food Corp. v. United States, 140 F.3d 1437, 1440 (Fed.Cir. 1998).

B

The merchandise at issue herein falls within the ambit of HTSUS Chapter 19 (Preparations of Cereals, Flour, Starch or Milk; Bakers' Wares) (1997). And the headings of that chapter posited by the parties as dispositive[2] provide *in haec verba*:

> 1901 Malt extract; food preparations of flour, meal, starch or malt extract, not containing cocoa or containing less than 40 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included[.]
>
> 1905 Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products[.]

To compare the language of these headings in accordance with *Orlando Food Corp. v. United States, supra,* seems, at first blush, to favor the plaintiff. If not a "pastry", then perhaps plaintiff's product is simply an "other bakers' ware[]". If the latter, instructive (though not conclusive[3]) Explanatory Note 19.01 (II)(e) indicates that heading 1901 **excludes**[4] "[f]ully or partially cooked bakers' wares, the latter requiring further cooking before consumption **(heading 19.05)**." On the other hand, Explanatory Note 19.01 (II) indicates that

> heading [1901] covers a number of food preparations with a basis of flour or meal, of starch or of malt extract, which derive their essential character from such materials whether or not these ingredients predominate by weight or volume.

Moreover, the foodstuffs of this heading "may be * * * in the form of * * * doughs" and "may also constitute intermediate preparations for the food industry."

However helpful these particular notes, disposition of this matter must ultimately derive from definition of the terms at issue—in their enacted context. And it is well-settled that when terms of a tariff schedule are not defined either directly therein or in its legislative history, the

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[2] Perusal of chapter 19 does not detect another heading therein that better could be construed to classify plaintiff's goods.

[3] *See, e.g., Midwest of Cannon Falls, Inc. v. United States,* 122 F.3d 1423, 1428 (Fed.Cir. 1997); *Structural Industries, Inc. v. United States,* 26 CIT ____, ____, Slip Op. 02–141, p. 5 n. 1 (Dec. 4, 2002).

[4] Emphasis in original.

correct meaning is the common meaning understood in trade and commerce. *E.g., Schott Optical Glass, Inc. v. United States,* 67 CCPA 32, 34, C.A.D. 1239, 612 F.2d 1283, 1285 (1979). *Cf. C.J. Van Houten & Zoon v. United States,* 11 CIT 409, 410, 664 F.Supp. 514, 516 (1987)(the "common meaning of the words appl[ies] unless Congress clearly indicated that a commercial designation is to prevail").

(1)

Pastry has been defined by The Oxford English Dictionary, p. 325 (2d ed. 1989) as the

> collective term for articles of food made of paste * * * or of which paste forms an essential part; now only applied to such articles when baked, as pies, tarts, etc.

The American Heritage Dictionary, p. 1325 (3d ed. 1996) similarly refers to pastry as

> [d]ough or paste consisting primarily of flour, water, and shortening that is baked and often used as a crust for foods such as pies. * * * Baked sweet foods made with pastry: *Viennese pastry.*

Another lexicon offers as its primary definition "sweet baked goods made of dough or having a crust made of enriched dough". Webster's Third New International Dictionary, p. 1653 (1993).

Urged by the plaintiff is the concept that

> "pastry" encompasses more than baked articles. Baking does not form the essential part of the pastry. The term "pastry" is actually derived from the Old French "paste," meaning a dough used in making rich pastry. * * * Thus it is the "paste" or dough which forms the essential part of the pastry.[5]

The plaintiff also advocates the adoption of a commercial definition, which is a

> **rich dough** made from flour and salt and water and some form of shortening (butter, goose fat, margarine, lard, or a hydrogenated vegetable shortening). Most pastry dough is unleavened but there are exceptions as with **Danish pastry.** * * *[6]

And it claims to quote from The International Dictionary of Desserts, Pastries and Confections, p. 95 (1995), which describes Danish pastry as a

> yeast risen, butter- and egg-enriched, **sweet pastry dough** made using the same techniques as puff pastry and croissants. The dough is rolled out into a large rectangle and the butter is placed on a half or a third of it. The dough is folded over, rolled out, and folded again. Repeating the process several times results in hundreds of flaky layers of dough. **The pastry dough is made into sweet rolls of**

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[5] Plaintiff's Response to Defendant's Motion for Judgment, p. 4 (footnote and citation omitted).

[6] Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 8, quoting Bartlett, The Cook's Dictionary and Culinary Reference: A Comprehensive, Definitive Guide to Cooking and Food, p. 340 (1996) (emphasis added by plaintiff).

> **various shapes with different fillings, such as fresh and dried fruits, cheese, nuts, almond paste, custard, or jam.** Often, Danish pastry is iced after baking.[7]

These definitions pressed by the plaintiff, self-evidently, stick to "dough" or "pastry dough", not the preferred edible delicacy that can arise therefrom. Moreover, since Congress has not specified that a commercial definition control, without baking plaintiff's product, as imported, cannot and therefore would not satisfy the common understanding and immediate expectation of Danish *pastry.*

(2)

The plaintiff argues in the alternative that its goods are classifiable as "bakers' wares" under HTSUS heading 1905[8]. Unlike pastry and the plural thereof, those wares are not referenced in the subheading(s) which the plaintiff claims should, in the end, govern this matter. Be that as it may, the plaintiff points out that its merchandise is sold to commercial bakeries, and it refers to Explanatory Note 19.05(A) to the effect that heading 1905 covers all bakers' wares, the

> most common ingredients of [which] are cereal flours, leavens and salt but they may also contain other ingredients such as gluten, starch, flour of leguminous vegetables, malt extract or milk, seeds such as poppy, caraway or anise, sugar, honey, eggs, fats, cheese, fruit, cocoa in any proportion, meat, fish, bakery "improvers", etc. Bakery "improvers" serve mainly to facilitate the working of the dough, hasten fermentation, improve the characteristics and appearance of the products and give them better keeping qualitites. The products of this heading may also be obtained from a dough based on flour, meal or powder of potatoes.

A number of these substances are found in plaintiff's product, as entered. *See, e.g*., Plaintiff's Motion for Summary Judgment, Affidavit of Bob Krieger, para. 6; Joint Statement of Undisputed Material Facts, para. 12. According to Mr. Krieger, plaintiff's general manager and president, "the actual total pastry preparation period [in Denmark is] 3,077.5 minutes, including the 48 hours of core freezing after production and before shipping"[9] to the United States, with the frozen product arriving "mixed, laminated, layered (turned), shaped, filled and proofed."[10] The court accepts these and all of the other representations of Mr. Krieger's affidavit, including his final one that, after arrival here,

[7] Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 9 (emphasis added by plaintiff).

[8] That heading and the proffered subheading are found in the governing HTSUS (1997) in the following format:

1905		Bread, pastry, cakes, biscuits and other bakers' wares * * *:
*		* * * * * *
1905.90		Other:
1905.90.10		Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionary * * *
		Frozen:
	41	Pastries, cakes and similar sweet baked products; puddings[.]

[9] Plaintiff's Motion for Summary Judgment, Affidavit of Bob Krieger, para. 2.

[10] *Id.,* para. 7.

"they only need to be baked and iced, glazed or powdered."[11] In addition to a lack of any baking over there, the plaintiff does not indicate any foreign cooking of its wares. Hence, the court must also find that plaintiff's frozen mass of pastry ingredients arrives over here completely uncooked. *See generally* Plaintiff's Motion for Summary Judgment, Affidavit of Michael Washer. Ergo, the exclusion of fully or partially cooked bakers' wares' coverage by HTSUS heading 1901 (in favor of heading 1905) suggested by Explanatory Note 19.01 (II)(e), *supra,* does not advance disposition of this action in the direction the plaintiff prefers.

(3)

To repeat, the plaintiff does not dispute the fact that its merchandise is not baked. *E.g.,* Plaintiff's Response to Defendant's Motion for Judgment, p. 3. Indeed, the plaintiff reaffirms that the "crispy, flaky texture, the hallmark of European pastry, is lost if the pastry is frozen *after* it is baked."[12] Stated another way, "[a]uthentic Danish pastry is crispy, tender and slightly flaky"[13], and the court so finds this to be its essential *character* within the meaning of General Rule of Interpretation 2(a), *supra. See, e.g.,* Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 12, 16, 20; Plaintiff's Motion for Summary Judgment, Affidavit of Michael Washer, para. 20; Affidavit of Bob Krieger, para. 3; Exhibit A, second page; Exhibit C; Schulstad USA, *Danish Pastries* (visited Nov. 8, 2002) <http://www.awardsamerica.com/products/schulstad.htm>. Thus, the court can concur in that part of the summary of plaintiff's argument which articulates that,

> [w]hen Schulstad's pastries are imported into the U.S. they have already been mixed, laminated, layered (turned), shaped, filled and proofed. The value has already been imparted to Schulstad's pastry before it arrives in the U.S. and before it is baked. After the products arrive in the U.S. they need only be placed on a baking tray and baked for 18–20 minutes. Baking is the least complex and the last phase of producing the Danish. * * * In fact, baking Schulstad's Danish pastry at the published bake time of 18 minutes represents only .5% of the product's total preparation time.[14]

But the court cannot concur with this summary's premise that "Schulstad's products have the essential character of a pastry even before they are baked."[15] On the contrary, while they doubtless enter the United States possessed of all their essential ingredients prepared with all the skill for which the state of Denmark has long been well-known, clearly, it is that last step of baking—in America—which imparts that essential and savored character of a danish.

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[11] *Id.,* para. 8.

[12] Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 20 (emphasis in original).

> * * * In this case, the named article['s] * * * frozen state is an inventive improvement that enables commercial bakers in the U.S. to produce authentic Danish pastry in a cost efficient manner.

Id. at 20–21.

[13] *Id.* at 20.

[14] *Id.* at 5 (citations omitted).

[15] *Id.*

III

Since the parties have not persuaded the court what Congress could have (or may have) intended or contemplated with the inclusion of "Frozen * * * Pastries" in HTSUS subheading 1905.90.10.41, *supra,* and, while the goods at issue in *Danish Bakers, Inc. v. United States,* 53 Cust.Ct. 168, 169, C.D. 2490 (1964), were frozen, unbaked turnovers subject to classification under then-applicable, different tariff schedules, which merchandise that court found "could best be imported in the frozen form; * * * perhaps only in that form", this court discerns no basis to distinguish the holding of *Danish Bakers* that, nevertheless, frozen foodstuff cannot be classified with baked articles if not in fact baked before freezing. Here, this means that plaintiff's entered frozen mass of fully prepared pastry ingredients does land in the food "basket" provision of HTSUS heading 1901, which is what the U.S. Customs Service came to conclude.

Judgment for the defendant will enter accordingly.

(Slip Op. 02–145)

SHINYEI CORP. OF AMERICA, PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Court No. 94–05–00271

(Dated December 10, 2002)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("Remand Results") in *Shinyei Corp. of America v. United States,* 2002 Ct. Intl. Trade LEXIS 73, Slip Op. 02–73 (July 25, 2002), and Commerce having complied with the Court's Remand Order, and no responses to the Remand Results having been submitted by plaintiff, it is hereby

ORDERED that the Remand Results filed by Commerce on October 21, 2002, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 02–146)

UNITED STATES OF AMERICA, PLAINTIFF *v.* YUCHIUS MORALITY CO., LTD. AND INTERCARGO INSURANCE CO., DEFENDANTS

Consolidated Court No. 96–02–00608

(Dated December 11, 2002)

JUDGMENT

AQUILINO, JR., *Judge:* The plaintiff having commenced this case pursuant to 19 U.S.C. §1592 and 28 U.S.C. §1582 for recovery of unpaid duties and collection of penalties in connection therewith; and the court having conducted a trial of the issues; and defendant Intercargo Insurance Company having thereafter entered into an agreement with the plaintiff, settling in full the government's claims against it; and the court having thereafter decided all of the remaining claims per slip opinion 02–124, 26 CIT ____ (Oct. 18, 2002); and that slip opinion 02–124 having awarded the plaintiff the unpaid duties and penalties in connection therewith and having also granted defendant Intercargo Insurance Company judgment on its cross-claim against defendant Yuchius Morality Company, Ltd., including recovery of reasonable attorneys' fees and expenses and costs; and that slip opinion 02–124 having directed the parties to settle and submit a proposed final judgment in conformity therewith; and defendant Intercargo Insurance Company having duly served and filed a Detailed Accounting of Attorneys' Fees and Expenses incurred in this matter; and the parties having filed a proposed judgment in connection with slip opinion 02–124; and the court having questioned the content(s) thereof; and the plaintiff United States' Notice of Revisions to the Proposed Order of Judgment having been filed upon a representation of consent thereto by defendant Yuchius Morality Company, Ltd.; Now therefore, in conformity with the court's slip opinion 02–124 (and with its previous slip opinion 99–79, 23 CIT 544 (1999) filed herein), it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff recover from defendant Yuchius Morality Company, Ltd. $271,306.00 in unpaid duties and $642,612.00 in penalties, together with $276,162.51 in prejudgment interest on those unpaid duties; and it is further hereby

ORDERED, ADJUDGED and DECREED that defendant Intercargo Insurance Company recover from defendant Yuchius Morality Company, Ltd. the face amount of its bond, $50,000.00, plus $32,567.45 in reasonable attorneys' fees, expenses and costs incurred by defendant Intercargo Insurance Company in this matter.