U.S. Customs and Border Protection

Slip Op. 11–66

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

Court No. 08–00216

MEMORANDUM & ORDER

[Motions for judgment on agency record granted; remanded to International Trade Administration.]

Dated: June 14, 2011

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

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

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

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

MEMORANDUM & ORDER

AQUILINO, Senior Judge:

This case contests two aspects of *Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 31,961 (Dep't of Comm. June 5, 2008) ("*Final Results*"), covering a 2005–2006 period of review ("POR").

The court's jurisdiction is pursuant to 19 U.S.C. §1516a(a)(2)(A) and 28 U.S.C. §§ 1581(c) and 2631(c).

I

Moving for judgment on the agency record, the plaintiff United States Steel Corporation ("USSC") and the intervenor- plaintiff Nucor Corporation initially contend the International Trade Administra-

tion, U.S. Department of Commerce ("ITA") erred in dating certain exports of Essar Steel Limited from India to the United States. The defendant also perceives inadequacy and requests remand in order to "reevaluate record evidence and change or more fully explain" its position on the issue. Defendant's Response to . . . Motions for Judgment Upon the Administrative Record ("Gov't Br."), p. 2. *See id*. at 16.

Because the request does not involve a change in or interpretation of policy and does not appear frivolous or in bad faith, *cf*. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001), remand appears appropriate and is therefore hereby ordered.

II

USSC and Nucor also claim it was unreasonable for ITA to have adjusted Essar's U.S. sales price contrary to section 772(c)(1)(B) of the Tariff Act of 1930, as amended, *i.e*., by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. §1677a(c)(1)(B). *See* 73 Fed.Reg. at 31,964 and Issues and Decision Memorandum to *Final Results* ("DecMemo") at comment 18. *Cf*. Public Record Document ("PDoc") 184. Their claim concerns the "Advance Licence" program of the Government of India ("GOI"), pursuant to which, as revealed in the administrative record, a company may be authorized to import certain quantities of raw materials for further processing without payment of import duties thereon upon condition that proper documentation is provided to establish exportation within the time specified by the license of the required amount of further processed goods, at which point the non-collection of duties becomes final. *See, e.g.*, Essar's Supplemental Questionnaire Response ("SQR") at Ex. 16B, pp. 65–68, and Ex. 16C, p. 1, PDoc 90. The critical point, USSC and Nucor argue, is that, if no such proof is provided to GOI, the relevant processor remains liable for the uncollected import duties.

A

Essar claimed an adjustment for duty drawback and "reported in its U.S. sales the advance license number corresponding to each commercial invoice[.]" Essar's Questionnaire Response ("QR") at C-33, PDoc 50, Confidential Record Document ("ConfDoc") 9. It provided the following for support: (1) a copy of a publication announcing the per-kilogram input amount(s) for "standard input output norm C-495" ("SION"), pertaining, *inter alia*, to subject merchandise, and a copy of relevant GOI law and regulation on its advance license pro-

gram; (2) copies of advance licenses issued to Essar under that program; (3) bills supporting an ITA finding of entry into GOI customs of, *inter alia*, material imported pursuant to the licenses (said bills bearing handwritten numbers or notes evidently correlative to the SION calculus); and (4) a table of the amount of duty drawback Essar had purportedly received during the POR pursuant to the advance license program. *See id*. at C-33, C-34, & Ex. C-13 (A, B & C), PDoc 50, ConfDoc 9; Essar's SQR at 19, Ex. 16 (A, B & C), Ex. 17, & Ex. 18, PDoc 90, ConfDoc 33. Based upon that information, Essar claimed a certain license-specific duty saving from each commercial invoice in its U.S. sales listing but claimed none from a fourth license it contended was yet to be utilized during the POR. Essar's QR at C-33, PDoc 50, ConfDoc 9. *See* Defendant-Intervenor Essar Steel Limited's Response to . . . Motions for Judgment on the Agency Record Pursuant to Rule 56.2, p. 15.

In its preliminary results, ITA found Essar had failed to provide sufficient evidence to show it had received "rebates" from the GOI as duty drawback and rejected the duty-drawback adjustment request. *See* Preliminary Results Calculation Memorandum, p. 2, PDoc 131. Essar argued in its brief to the agency, *inter alia*, that ITA had misapprehended GOI's advance license program as a program of direct rebate upon export whereas the program actually involves non-collection of import duty on a contingent basis, and that it, Essar, had in fact provided sufficient evidence to meet the requirements for adjustment. *See* Essar's Case Brief, pp. 2–6, PDoc 162. Responding, USSC and Nucor contended Essar had failed to establish entitlement thereto, in significant part because it did not prove full compliance with the advance license program's post-export requirements. *See, e.g*., Rebuttal Brief on Behalf of USSC, pp. 1–6, PDoc 170.

In the *Final Results*, ITA agreed it had mistakenly believed Essar's duty-drawback-adjustment claim had been based upon a different drawback program and acknowledged that GOI's advance license program could meet its test for a drawback adjustment. *See* DecMemo at comment 18. ITA then

> re[-]analyzed the record evidence . . . and found that Essar's advance license program used SION (the standard the GOI uses to calculate the quantity of imports that are eligible for duty drawback based on a specified quantity of exports), and that this meets the requirements of the Department's two-prong test: 1) the import duties and rebates are directly linked to, and are dependent upon, one another, and 2) the company claiming the adjustment can demonstrate that there are sufficient raw material imports to account for the duty drawback received on

> exports of the manufactured product.[1] . . . Essar's reported SION of import duties and rebates were directly linked to, and are dependent upon, one another.

Id. (footnotes omitted and referencing, *inter alia*, Essar's QR at Ex. C-13 (generally) & Essar's SQR at Ex. C-18).

B

USSC and Nucor do not contest ITA's test *per se*, which has been upheld in other circumstances, *e.g*., *Carlisle Tire & Rubber Co. v. United States*, 11 CIT 168, 657 F.Supp. 1287 (1987), rather the finding that Essar met its requirements. That is, while in accordance with law within the meaning of 19 U.S.C. §1516a(b)(1)(B)(I), the finding is not supported by the requisite substantial evidence[2] on the agency record.

The defendant posits that the two prongs of the duty drawback test "focus first 'on the drawback program itself' and second on 'the specific application of the drawback program to the firm claiming the adjustment.'" Gov't Br., p. 10, quoting *Far East Machinery Co. v. United States*, 12 CIT 428, 431, 688 F.Supp. 610, 612 (1988). It contends ITA properly found the test satisfied in this instance in light of the evidence of Essar's subject merchandise exports in its U.S. sales database linked to the company's advance license and import data via the relevant SION used by GOI for the advance license program. *Id*., referencing DecMemo at comment 18, citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from India*, 66 Fed.Reg. 50,406 (Dep't of Comm. Oct. 3, 2001).

Given that the second prong's concern is only with respect to imported material input amounts, however, the first prong cannot reasonably be focused solely upon "the drawback program itself" — in disregard of a claimant's specific compliance with program requirements. *See*, *e.g*., *Rajinder Pipes Ltd. v. United States*, 23 CIT 656, 70 F.Supp.2d 1350 (1999) (party must show the link between its duty-free imports and its exports as part of first prong of drawback adjust-

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[1] *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed.Reg. 61,716 (Dep't of Comm. Oct. 19, 2006).

[2] "Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966).

ment test). In the context of a rebate program, the proper "payment" of import duty must still be proved, or any linking of a "rebate" will be problematic. *See, e.g., Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 132 F.Supp.2d 1087 (2001). Similarly, the mere finding of validity on a "non-collection"-duty-drawback program without proof of a respondent's full compliance therewith would not amount to substantial evidence on the record to support imputing a "link" between such respondent's exports and duty-free imports.

The SION formula may be considered necessary but is insufficient, on its own, to prove "duty-free" importation linked to exportation for purposes of U.S. antidumping law. SION simply equates input for a given output. SION's bare existence in the record, in the absence of proof of compliance with GOI's post-export requirements or official excuse of contingent liability for GOI customs duty on the imported input(s), cannot reasonably be concluded to amount to substantial evidence on the record of definitive lack of such liability.

The defendant argues, nonetheless, there is nothing in the statute or in the two-prong test requiring submission of export documentation to establish entitlement to the duty-drawback adjustment. Gov't Br., p. 12, referencing *Rajinder*, 23 CIT at 665, 70 F.Supp.2d at 1358 ("in making its adjustment determinations on non-collection programs, Commerce has applied the same two-prong duty drawback test as it has in standard rebate programs"). The defendant further argues the court must defer to ITA's conclusions if the evidence supports them, and it implies the agency's previous grant of the duty-drawback adjustment to Essar in the original investigation was a factor in ITA's decision in this matter. *See id*. at 12–13, referencing, *inter alia*, *Certain Hot-Rolled Carbon Steel Flat Products from India*, supra. *See* DecMemo at comment 18.

The first point may be so, but this memorandum is not intended to delimit what would properly satisfy the two-prong test. The general rule, however, is that an agency's decisions must be consistent, or reasonably explained for deviation. *E.g*., *Secretary of Agric. v. United States*, 347 U.S. 645 (1954). The fact that Essar may have satisfied the duty-drawback test in the original investigation does not answer whether it also did so during the administrative review at bar. *See*, *e.g., Alloy Piping Products, Inc. v. United States*, 33 CIT ___, Slip Op. 09–29 at 22, 2009 WL 983078 at *9 (April 14, 2009) ("different data compiled in different periods of review . . . have no legal effect on the administrative review" under consideration), *appeal docketed*, No. 2010–1288 (Fed.Cir. April 6, 2010).

Based on the present record, USSC and Nucor now cast reasonable doubt on how ITA reached its conclusion. The plain language thereof

appears simply to have assumed that Essar's liability for import duties incurred during the POR was no longer conditional. At first blush, that might have appeared not unreasonable[3], but assumption is not substantial evidence. *Compare Jinan Yipin Corp. v. United States*, 31 CIT 1901, 1933, 526 F.Supp. 2d 1347, 1375 (2007) (rejecting ITA's determination based on "mere assumptions, which find no apparent support in record evidence") *with Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 790–91 (1999)(an administrative inference must evince "some likelihood" of truth from the record, not mere possibility).

Essar had the burden of establishing entitlement to the duty-drawback adjustment. *See*, *e.g., Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed.Cir. 1996). There is nothing of record, however, to suggest that subsequent collection of deferred import duties by GOI for any non-compliance of the requirements of the advance license program was precluded, *de jure or de facto*, simply by reason of export to the United States. If there is such proof of permanent excuse, or removal by affirmative action *vis-à-vis* GOI or otherwise, of Essar's contingent liability for import duties, it is not obvious from this administrative record. For example, as USSC and Nucor argued, there is no apparent proof of export submitted to the relevant Regional Authority within two months from expiration of the export obligation period, as required under the GOI program, nor does the record encompass any shipping bills bearing a relevant advance license number or evince that export itself could not have occurred except in compliance with the advance license program. *See* Essar's SQR at Exhibit 16B ("Handbook of Procedures-(Vol. I)", 9/1/2004--3/31/2009, Min. of Comm. and Indus., Dept. of Comm., GOI), p. 58 (shipping documents "should be" endorsed with advance license file or authorization number "to establish co-relation of exports . . . with Authorization issued") and p. 65 ("Monitoring of Obligation")[4].

Certainly, process matters, and ITA is required to address all relevant argument, 19 U.S.C. §1677f(i)(3)(A), but its DecMemo to the *Final Results* herein inadequately addresses USSC's and Nucor's relevant concern(s) over whether the agency duty-drawback adjustment test may lawfully be interpreted not to require proof or corrobo-

[3] It appears undisputed that the record would support finding that import duties on input(s) were not paid, and that export of subject merchandise embodying transformed input(s) of the same class or kind (whether or not consisting of those duty-deferred imports) to the United States did occur.

[4] *Cf. Rajinder Pipes Ltd. v. United States*, 23 CIT 656, 659–60 and 70 F.Supp.2d 1350, 1358, n. 3 (1999) (describing a program involving a "duty exemption entitlement certificate" book purportedly submitted to GOI customs officials upon export).

ration of the complete removal of contingent liability for deferred import duties under the GOI advance license program (via compliance, *e.g.*, with GOI's post-export requirements under Indian law). *Cf.* 19 U.S.C. §1677a(c)(1)(B) ("by reason of the exportation of the subject merchandise to the United States").

III

In view of the foregoing, plaintiff's and intervenor-plaintiff's motions for judgment on the agency record should be, and they hereby are, granted to the extent of remand of the *Final Results* to ITA to clarify or reconsider its analysis of the intervenor-defendant's entitlement to duty-drawback adjustment within the meaning of 19 U.S.C. §1677a(c)(1)(B). Specifically, if ITA's position on remand is that the evidence of record proves Essar's contingent liability for deferred import duties has been removed or permanently excused, the remand results shall clarify why that is so, or ITA may reconsider the issue of Essar's eligibility for duty-drawback adjustment altogether, should that be determined necessary on remand -- and in light of this decision.[5]

The defendant may have until August 5, 2011 to carry out that analysis and report the results thereof to the court and the parties, which may comment thereon on or before September 2, 2011.

So ordered.

Dated: New York, New York
June 14, 2011

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

[5] Although not relevant to this memorandum, this court considers exhaustion arguments inapplicable with respect to USSC's and Nucor's point regarding inconsistency in the *Final Results* as compared with ITA's pronouncement in *Certain Hot-Rolled Carbon Steel Flat Products from India*, 73 Fed.Reg. 40,295 (Dep't of Comm. July 14, 2008) (final results), Issues and Decision Memorandum at comment 22 ("India does not have an effective system in place during the POR for regularly monitoring and updating the accuracy of SIONs"), the companion countervailing-duty administrative review of hot rolled steel from India, involving overlapping review periods, and issued approximately one month after the *Final Results* herein. *See, e.g., China Steel Corp. v. United States*, 28 CIT 38, 59, 306 F.Supp.2d 1291, 1310 (2004) (on challenge to basis for corroboration, exhaustion inapplicable where ITA did not explain its basis until final determination).

Slip Op. 11–67

PAPIERFABRIK AUGUST KOEHLER AG and KOEHLER AMERICA, INC., Plaintiffs, and MITSUBISHI INTERNATIONAL CORPORATION, MITSUBISHI HITECH PAPERFLENSBURG GMBH, and MITSUBISHI HITECH PAPER BIELEFELD GMBH, Plaintiff-Intervenors, v. UNITED STATES and the UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Pogue, Chief Judge
Court No. 08–00430

ORDER FOR REMAND

This remand order follows the Court of Appeals for the Federal Circuit's opinion in *Papierfabrik August Koehler AG v. United States*, No. 2010–1147, 2011 WL 96814 (Fed. Cir. Jan. 11, 2011) (per curiam) ("*Koehler II*"), *reh'g and reh'g en banc denied*, __ F.3d __, 2011 WL 1898188 (Fed. Cir. May 19, 2011) (per curiam). In *Koehler II*, the Court of Appeals vacated and remanded this court's previous determinations in *Papierfabrik August Koehler AG v. United States*, __ CIT __, 675 F. Supp. 2d 1172 (2009) ("*Koehler I*").

In *Koehler I*, this court affirmed the United States International Trade Commission's (the "Commission") final results, with respect to subject imports from Germany, in *Certain Lightweight Thermal Paper from China and Germany*, 73 Fed. Reg. 70,367 (ITC Nov. 20, 2008) (final determinations). *Koehler I*, __ CIT at __, 675 F. Supp. 2d at 1191–92. The court held, *inter alia*, that the Commission did not err by denying Plaintiff Papierfabrik August Koehler AG's ("Koehler") request to exclude certain of Koehler's subject merchandise from the Commission's threat of material injury determination. *Id.* at 1183–86.

In *Koehler II*, the Court of Appeals concluded that the Commission erred, in considering Koehler's request, by categorically refusing to examine any "intermediate" dumping margins found for Koehler's subject merchandise that were not published in the Federal Register. *Koehler II*, 2011 WL 96814 at *2–4. Specifically, the Court of Appeals held that the Commission erred by interpreting the scope of its legal authority to foreclose the examination of such data. *See id.* at *3–4 (citing 19 U.S.C. § 1673d(c)(1)(A)[1]; *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989)[2]). Contrary to the Commission's explanation, the Court of Appeals concluded that the Commission is

[1] 19 U.S.C. § 1673d(c)(1)(A) ("[Commerce] shall make available to the Commission all information upon which [Commerce's dumping] determination was based and which the Commission considers relevant to its determination . . . .").

[2] *Koehler II*, 2011 WL 96814 at *4 ("*Algoma* specifically allows for consideration of raw data in computer print outs 'by reasons specific to the particular case . . . .'" (quoting *Algoma*, 865 F.2d at 242)).

legally authorized to consider any information underlying Commerce's dumping determination that the Commission deems relevant to its investigation, and that Commerce is legally obligated to make such information available to the Commission. *Id.* (citing 19 U.S.C. § 1673d(c)(1)(A)). The Court of Appeals accordingly vacated this Court's judgment, and remanded with instructions to remand this case to the Commission for reconsideration. *Id.* at *4.

Therefore, in accordance with the Court of Appeals for the Federal Circuit's decision in *Koehler II*, it is hereby:

ORDERED that the International Trade Commission's determination, in *Certain Lightweight Thermal Paper from China and Germany*, 73 Fed. Reg. 70,367 (ITC Nov. 20, 2008) (final determinations), regarding the threat of material injury from subject merchandise from Germany, is remanded to the Commission for action consistent with the decision in *Koehler II*; and it is further

ORDERED that, on remand, the Commission shall revise its final determination with regard to the threat of material injury from subject merchandise from Germany, in accordance with the decision in *Koehler II*. The Commission shall specifically explain how its decision to deny Koehler's request to exclude a subset of Koehler's subject merchandise from the Commission's threat of material injury determination complies with the Court of Appeals' interpretation of 19 U.S.C. § 1673d(c)(1)(A) and the decision in *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989); and it is further

ORDERED that the Commission shall file its remand results, and serve the parties with same, by August 16, 2011. All parties may file and serve responses thereto by September 15, 2011. All parties may file and serve a reply to any response by September 30, 2011.

Dated: June 15, 2011
New York, N.Y.

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

Slip Op. 11–68

UNITED STATES OF AMERICA, Plaintiff, v. TREK LEATHER, INC., and HARISH SHADADPURI, Defendants.

Before: Nicholas Tsoucalas,
Senior Judge
Court No. 09–00041

[Granting Plaintiff's Motion for Summary Judgment in part. Denying Defendant's Cross Motion for Summary Judgment.]

Dated: June 15, 2011

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Scott A. MacGriff*); *Mary McGarvey-Depuy*, Office of the Associate Chief Counsel, United States Customs and Border Protection, Of Counsel, for Plaintiff.

Galvin & Mlawski (*John Joseph Galvin*), for Defendants.

OPINION

Tsoucalas, Senior Judge:

I. Introduction

Plaintiff United States Customs and Border Protection[1] ("the Government" or "CBP") commenced this action against Trek Leather, Inc. ("Trek"), and Harish Shadadpuri ("Mr. Shadadpuri") for unpaid customs duties and civil penalties for violating section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2003).[2] Currently before the Court are the Government's motion for summary judgment and the defendants' cross-motion for partial summary judgment pursuant to Rule 56 of the United States Court of International Trade. In accordance with the decision rendered at oral argument on May 31, 2011, and based upon all the evidence in the record, the Court grants the Government's motion for summary judgment on Count II of the Complaint finding that both the defendants are liable, jointly and severally, for gross negligence under 19 U.S.C. § 1592(a). The Court denies judgment on Count I and III of the Complaint as moot. Lastly, the Court denies the defendants' cross motion in its entirety.

II. Background

Trek was the importer of record for seventy-two entries of men's suits between February 2, 2004, and October 8, 2004. Mr. Shadadpuri is the president and sole shareholder of Trek. Pltf's Stmnt of Uncontested Fcts ("Uncontested Fcts") at 1.[3] Mr. Shadadpuri is the president and 40% shareholder of non-party Mercantile Electronics, LLC, the consignee of the subject goods. *Id.*

Mr. Shadadpuri, through his corporate entities, purchased fabric

[1] The United States Customs Service was renamed the United States Bureau of Customs and Border Protection effective March 1, 2003. *See* Homeland Security Act of 2002, Pub.L. No. 107–296 §1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R.Doc. No. 108–32, at 4 (2003).

[2] All further citations to the Tariff Act of 1930 are to the relevant provisions of the Title 19 of the United States Code, 2003 edition.

[3] While the defendants do not agree with every fact set forth in Plaintiff's Uncontested Facts, all references to that document herein are uncontested by all parties.

assists[4] and provided them to manufacturers abroad. *Id.* These manufacturers then incorporated the assists in the production of the men's suits at issue which were ultimately imported into the United States. *Id.* In August of 2004, CBP Import Specialist Dianne Wickware ("IS Wickware") investigated the defendants' activities and found that their entry documentation consistently failed to include the cost of fabric assists in the price actually paid or payable for the merchandise, thereby lowering the amount of duty paid to CBP by the importer ("the 2004 Investigation"). *Id.* at 3.

This was not the first time that Mr. Shadadpuri failed to include assists in entry declarations. In 2002, CBP investigated Mr. Shadadpuri's filed entries for another company he owned, Mercantile Wholesale, Inc. ("the 2002 Investigation"). *Id.* at 2. Mr. Shadadpuri was also the president and 40% shareholder of Mercantile Wholesale, Inc. During the 2002 Investigation, IS Wickware found that Mercantile Wholesale, Inc. "consistently failed to include the cost of the fabric assists and trim in the price actually paid or payable for the merchandise on its entry documentation." Declaration of Dianne Wickware at 2. IS Wickware explained the term "assist" to Mr. Shadadpuri and advised him that "assists are dutiable and that the value of the fabric assists must be included on the importation documentation." *Id.* at 2–3. After the 2002 Investigation, IS Wickware noted that Mercantile Wholesale, Inc. paid $46,156.89 in unpaid duties after admitting they failed to add the value of the assists in the price actually paid or payable for the merchandise. *Id.* at 3. No action was filed as a result of the 2002 Investigation.

In November, 2004, IS Wickware informed Mr. Shadadpuri that he did not declare the value of the fabric assists when importing the men's suits. *Id.* IS Wickware told Mr. Shadadpuri that the assist "should have been included in the price actually paid or payable for this merchandise for the purposes of calculating duty. [IS Wickware] said, 'You know you should have declared this,' to which he responded, 'I know.'" *Id.* at 3–4. Neither Mr. Shadadpuri nor Trek have paid the balance of the remaining duties owed to the Government in the amount of $45,245.39. Uncontested Fcts at 5.

In this action, the Government claims the defendants are liable for damages in the amount of $2,392,307.00 for fraudulently, knowingly,

[4] In relevant part, 19 U.S.C. § 1401a(h)(1)(A) provides as follows:

> (1)(A) The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.

19 U.S.C. § 1401a(h)(1)(A).

and intentionally understating the dutiable value of the imported merchandise by failing to add the value of the fabric assists to the value of the imported men's suits. Compl. at 3–4. Alternatively, the Government alleges the defendants were grossly negligent for their actions and seek imposition of a civil penalty in the amount of $534,420.32. *Id.* at 4. As an additional alternative, the Government alleges a negligence theory of liability and seeks penalties in the amount of $267,310.16. *Id.* at 4–5. Plaintiff further seeks a judgment for unpaid customs duties in the amount of $45,245.39. *Id.* at 5. At oral argument on May 31, 2011, Trek conceded liability for gross negligence but denied committing intentional fraud. Mr. Shadadpuri denies all counts of the Complaint.

JURISDICTION AND STANDARD OF REVIEW

On a motion for summary judgment, the Court evaluates "the pleadings, the discovery and disclosure materials on file, and any affidavits" in order to determine whether there is any "genuine issue as to any material fact" and, if none exists, whether the "movant is entitled to judgment as a matter of law." USCIT R. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A factual dispute is material if it could affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence should be viewed in the light most favorable to the non-moving party and all doubts resolved in its favor. *See Mazak Corp. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1352, 1356 (2009). The Court determines all issues *de novo* under 19 U.S.C. § 1592(e)(1) and jurisdiction is pursuant to 28 U.S.C. § 1582.

III. Analysis

A. Intentional Fraud

There exists a question of fact as to whether the defendants intentionally committed fraud under 19 U.S.C. § 1592(a). The Government claims intent can be imputed from the record evidence. However, Mr. Shadadpuri contends it was an error and that he did not intentionally omit the assists. Examination Before Trial of Harish Shadadpuri at 80. "Intent is a factual determination particularly within the province of the trier of fact." *Allen Organ Co. v. Kimball Int'l, Inc.*, 839 F.2d 1556, 1567 (Fed. Cir. 1988). Therefore, the Court cannot grant the Government's motion for summary judgment as to the fraud count of the Complaint.

B. Gross Negligence

Defendants are liable for gross negligence under 19 U.S.C. § 1592(a),[5] if the violation "results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. pt. 171, App. B(C)(2)(2003). Turning to the facts before the Court, the defendants do not dispute that Mr. Shadadpuri, through his corporate entities, paid for and provided the fabric assists to the manufacturers, who then incorporated these assists into the finished suits. *See* Uncontested Fcts at 1–2. The declared value on the entries failed to reflect the cost of the dutiable fabric assists, and the entries filed for the suits were, therefore, false. In addition to being false, the omissions were also material because it "has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: . . . (2) determination of an importer's liability for duty. . . ." 19 C.F.R. pt. 171, App. B(B) (2003). "Understated prices in customs entry documents are material because they alter the appraisement and liability for duty of entered merchandise." *United States v. Menard, Inc.*, 16 CIT 410, 417, 795 F. Supp. 1182, 1188 (1992). Therefore, the omissions on the entry documents were both material and false.

Trek conceded gross negligence at oral argument on May 31, 2011 as well as in their documents. *See* Defendants' Memorandum in Opposition to Pl.'s Mot. For Summ. Judgement and in Support of Defendants' Cross-Motion for Partial Dismissal at 7 ("Defendants' failure to ensure that the value of material assists were included in dutiable value may have been occasioned by negligence or, indeed, grounded on reckless disregard or inattention to consequences.").

Mr. Shadadpuri contends that he cannot be personally liable for gross negligence because he did not act intentionally as an aider or abetter under 19 U.S.C. § 1592(a)(1)(B). However, Mr. Shadadpuri is also a member of the class of "persons" subject to liability under 19 U.S.C. § 1592(a). This section is not limited to importers of record. Any "person" who engages in the behavior prohibited by 19 U.S.C. § 1592(a) is liable thereunder regardless of whether that "person" is the

[5] Section 1592(a) reads, in part,

> [N]o person, by fraud, gross negligence, or negligence–- (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of–- (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or (ii) any omission which is material, or (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. 1592(a).

importer of record or not. "The language of section 1592 leaves room for those other than the importer of record to be held accountable for violations." *United States v. Matthews*, ___ CIT ___, ___, 533 F. Supp. 2d 1307, 1313 (2007); *see also United States v. Golden Ship Trading*, 22 CIT 950, 953 (not reported in F. Supp. 2d) (1998) ("The plain language of the statute itself, which uses the term 'person' rather than 'importer,' refutes [this] contention."). Mr. Shadadpuri is personally liable under the statute because "[t]he plain language, which proscribes negligent false entries by a person, does not recognize an exception for negligent corporate officers . . . . [A] corporate officer who is negligent can be held liable under § 1592(a)." *Id.* at 956. Moreover, at oral argument, the defendants conceded it was Mr. Shadadpuri who had the responsibility and obligation to examine all appropriate documents including all assists within the entry documentation and to forward these assists to his customs broker. Lastly, Trek's admission of gross negligence directly implicates Mr. Shadadpuri. Gross negligence requires knowledge of or wanton disregard for offender's obligations. Trek's gross negligence, therefore, could not have been conceded but for the direct involvement of Mr. Shadadpuri, the sole shareholder of Trek and the only person who had knowledge of the statutory obligation due to his involvement in the 2002 Investigation, to which Trek was not a party. It is Mr. Shadadpuri who is the common denominator in both the 2002 and the 2004 investigations. Therefore, Mr. Shadadpuri can also be found personally liable under 19 U.S.C. § 1592(a).

The Court finds that the Government has clearly and convincingly demonstrated that the defendants violated 19 U.S.C. § 1592(a). Specifically, (i) the defendants imported men's suits into the United States via false entry documents omitting the values of dutiable fabric assists; (ii) these omissions materially interfered with CBP's ability to properly assess duties on these imports; (iii) the defendants are both persons subject to liability; and (iv) the defendants were grossly negligent in their duties and responsibilities when they transmitted these entry documents to CBP with the omitted material information despite the awareness of their duty to declare assists.

There is no issue of material fact in dispute that might affect the outcome of the case under governing law. As such, based on all the evidence in the record and the defendants' admissions at oral argument on May 31, 2011, summary judgment is hereby granted to the Government on Count II of the Complaint. The defendants acted with gross negligence in violation of 19 U.S.C. § 1592(a) and are subject to penalties under 19 U.S.C. § 1592(c)(2).

IV. Assessment of Damages

A. Recovery of Unpaid Duties

The "language and structure of § 1592 indicates that subsection (d) is not limited to only importers and their sureties, but is intended to apply to further the mandatory recovery of unpaid duty from any party liable under subsection (a)." *See United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1346 (Fed. Cir. 2009). Accordingly, both defendants are liable for unpaid duties jointly and severally.

As a result of the defendants' violation of 19 U.S.C. § 1592(a), the Government is entitled to lost duties in the amount that would have been assessed had the defendants properly included the fabric assists in the value declared. Accordingly, CBP is entitled to $45,245.39 from the defendants in unpaid customs duties.

B. Civil Penalties

Under 19 U.S.C. § 1592(c)(2), "[a] grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed-- (A) the lesser of-- (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived. . . ." 19 U.S.C. § 1592(c)(2).

Therefore, the penalty in this action may not exceed $534,420.32. The Court begins the penalty assessment on a clean slate without presuming that the maximum penalty should apply. *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946, 83 F. Supp. 2d 1307, 1312 (1999). The Court "possesses the discretion to determine a penalty within the parameters set by the statute." *United States v. Modes, Inc.*, 17 CIT 627, 636, 826 F. Supp. 504, 512 (1993). In making this determination, the defendants' degree of culpability is to be considered. *See United States v. Thorson Chem. Corp.*, 16 CIT 441, 452, 795 F. Supp. 1190, 1199 (1992). In evaluating such culpability, the Court may consider both mitigating and aggravating factors in order to determine the appropriate penalty amount. *See Matthews*, __ CIT at __, 533 F. Supp. 2d at 1316. Here, the defendants have failed to make a good faith effort to comply with the statute. Also, they were previously investigated and found liable for the identical violation herein. The nature and circumstances of this violation is particularly grave given their awareness of their statutory obligations. Therefore, based on the factors enunciated in *Complex Mach. Works Co.*, *supra*, the Court finds the defendants liable, jointly and severally, in the amount of $534,420.32.

CONCLUSION

For the foregoing reasons, the Court determines that Trek and Mr. Shadadpuri committed gross negligence, in violation of 19 U.S.C. § 1592(a) by importing men's suits into the United States by means of material false entry documents with wanton disregard for and indifference to their obligations under the statute. Accordingly, the defendants are jointly and severally liable for (1) restoration of lawful customs duties under 19 U.S.C. § 1592(d) in the amount of $45,245.39, plus pre judgment interest from the date of liquidation and post judgment interest; and (2) civil penalties under 19 U.S.C. § 1592(c)(2) in the amount of $534,420.32 plus interest.

Dated: June 15, 2011
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 11–69

SHINYEI CORPORATION OF AMERICA, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 08–00191
Public Version

[In Customs reliquidation matter Plaintiff's motion for summary judgment granted. Defendant's motion for summary judgment denied.]

Dated: June 15, 2011

Charles H. Bayar for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); *Edward N. Maurer*, International Trade Litigation, U.S. Customs and Border Protection, of counsel for the defendant.

OPINION

Restani, Judge:

INTRODUCTION

This matter is before the court on Plaintiff Shinyei Corporation of America ("SCA") challenge to the U.S. Customs and Border Protection's ("Customs") denial of protest. SCA moved for summary judg-

ment and the Defendant United States ("the Government") cross-moved for summary judgment. The former is granted and the latter is denied.

BACKGROUND[1]

The entries at issue, Japanese ball bearings, were made in 1993 and 1994 and were subject to antidumping duty cash deposit rates of either 9.22% or 13.11%.[2] Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Br.") 9. SCA deposited estimated antidumping duties. *Id.* at 9. In March 14, 2001 Liquidation Instructions, Message 1073202, the United States Department of Commerce ("Commerce") instructed Customs:

> FOR ALL SHIPMENTS OF BALL BEARINGS AND PARTS THEREOF FROM JAPAN PRODUCED BY NANKAI SEIKO CO., LTD. (SMT), EXPORTED BY, IMPORTED BY, OR SOLD TO (AS SHOWN ON THE COMMERCIAL INVOICE OR CUSTOMS DOCUMENT) THE FIRMS LISTED BELOW, AND ENTERED OR WITHDRAWN FROM WAREHOUSE FOR CONSUMPTION DURING THE PERIOD 05/01/1993 THROUGH 04/30/1994, ASSESS AN ANTIDUMPING LIABILITY EQUAL TO THE PERCENTAGE OF THE ENTERED VALUE LISTED BELOW.[3]

Pl.'s Mot. for Summ. J. Ex. 14.[4] SCA purchased the subject goods from Shinyei Kaisha ("SK"), its parent. Invoices[5] between SK and SCA

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[1] SCA makes numerous procedural challenges relating to the Government's presentation of its case. Largely they appear ill-founded, but as SCA has prevailed on substance they are ultimately harmless.

[2] Cash deposit rates were published in two final results of the administrative review of an antidumping duty order covering ball bearings and parts thereof. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360, 28,361 (Dep't Commerce June 24, 1992); *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729, 39,730 (Dep't Commerce July 26, 1993).

[3] The March 14, 2001 Instructions then assessed duties on certain ball bearings sold to certain U.S. customers, including those at issue here, [[ ]] Pl.'s Br. 10.

[4] SCA and the Government agreed to refer to the relevant language, "as shown on the commercial invoice or customs document," as the "Evidence Restriction." Pl.'s Br. 10; Def.'s Mem. in Supp. of Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Br.") 2 n.2.

[5] The SK Invoices stated for each line item of the subject merchandise: brand name and type of subject merchandise, manufacturer's name and address, quantity of subject merchandise, the product number assigned, the outside diameter and net weight of the subject merchandise, and the unit price for each item in U.S. dollars. Pl.'s Mot. for Summ. J. Ex. 1–11; Pl.'s Br. 7. The SK Invoices include no direct reference to the two U.S. customers at issue. *See* Pl.'s Mot. for Summ. J. Ex. 1–11.

reviewed by Customs did not list a U.S. end customer in a way readily decipherable by Customs through review of entry documents, Customs did not liquidate the subject merchandise in question according to Message 1073202. Def.'s Br. 3. On April 4, 2002, in its Clean-Up Liquidation Instructions, Message 2092207, Commerce instructed Customs:

> IF YOU ARE STILL SUSPENDING LIQUIDATION ON ANY ENTRIES OF AFBS FROM JAPAN DURING THE PERIOD 5/1/1993 THROUGH 4/30/1994 AFTER APPLYING ALL OF THE ABOVE LIQUIDATION INSTRUCTIONS, YOU SHOULD NOW LIQUIDATE SUCH ENTRIES AT THE DEPOSIT RATE REQUIRED AT THE TIME OF ENTRY OF THE MERCHANDISE.

Pl.'s Mot. for Summ. J. Ex. 15.[6] Customs then liquidated the subject goods in question at the deposit rates of 9.22% and 13.11%. Pl.'s Br. 9, 11.

SK, the importer's parent company, had purchased the subject merchandise from Nankai Seiko Co., Ltd. ("SMT"). Pl.'s Br. 5–6. When packaging the goods, SMT marked the cartons in which the goods were packaged with a three letter acronym indicating the U.S. customer. *Id*. SCA imported and entered the goods. *Id.* At entry, Customs was presented with the SK Invoice to SCA, which did not plainly list the two ultimate U.S. Customers. *See* Pl.'s Mot. for Summ. J. Ex. 1–11. After entry, SCA obtained SCA-to-customer invoices reflecting the post-entry sale of the subject goods to the two specific U.S. customers at issue. Pl.'s Br. 6. These are referred to as the "DC Invoices" in the briefing.[7] *See* Pl.'s Br. 8.

In August 2007, SCA timely protested to Customs that the subject merchandise in question was ultimately sold to U.S. customers listed in Message 1073202 and therefore Customs should reliquidate those entries at the lower rate required by that message. Customs denied

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[6] Commerce has no way of knowing what Customs actually did at liquidation. This instruction tells Customs what to do for entries which were not covered by previous instructions. As the entries at issue were covered by previous instructions, this message by its terms does not apply. In any case, the Government does not argue that even if SCA had made clear at entry that the sales were made to the specified customers, that because the government had not liquidated the entries at the time of the second message, reliquidation in accordance with the earlier instruction was impossible. The Government seems to accept that if all the relevant documentation were presented at the time of entry, the first message would control.

[7] The DC Invoices stated for each line item of the subject merchandise: brand name and type of subject merchandise, U.S. customer's name and address, SMT's name and address, the quantity of subject merchandise, the product number assigned by SMT or the U.S. customer, and the unit price for each item in U.S. dollars. Pl.'s Mot. for Summ. J. Ex. 1–11; Pl.'s Br. 8–9.

SCA's protest under 19 U.S.C. § 1515, presumably because the papers presented at entry did not identify to Customs a U.S. customer listed in Message 1073203. Pl.'s Br. 12. The denial itself refers only to the later Clean-Up Instructions from Commerce. SCA moved for summary judgment. The Government cross-moved for summary judgment.

STANDARD OF REVIEW & JURISDICTION

Jurisdiction lies under 28 U.S.C. § 1581(a) (protest denial jurisdiction). Summary judgment is appropriate if the moving party is entitled to judgment as a matter of law and no genuine issue of material fact exists. CIT R. 56(c); *Marriott Int'l Resorts, L.P. v. United States*, 586 F.3d 962, 968 (Fed. Cir. 2009). Customs' denial of protests are reviewed de novo. 28 U.S.C. § 2640(a)(1); *Jazz Photo Corp. v. United States*, 502 F. Supp. 2d 1277, 1293 (CIT 2007); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) (any presumption of correctness is irrelevant where there is no factual dispute between the parties, because the court is required to decide the legal issues)[8]

DISCUSSION

I. Commerce's Instructions Do Not Prohibit Customs From Examining Post-Entry Invoices at Protest

SCA alleges that the terms "sold" and "the commercial invoice" in the SMT Instructions as applied to these entries refer to sales after entry and documents generated after entry. Pl.'s Br. 13. Specifically, SCA argues that Customs' interpretation of the SMT Liquidation Instructions, as referring only to sales made and commercial invoices generated prior to entry date, violates statutory provisions requiring covered entries to be liquidated in accordance with the original review results or judicial review. Pl.'s Br. 14. This claim would have merit if the Government adhered to it but the Government has made clear that it is not claiming that post-entry sales may not be consid-

[8] The Government claims that Customs receives *Skidmore* deference for its interpretation of liquidation instructions. Def.'s Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. ("Def.'s Resp. Br.") 2 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Commerce's instructions themselves do not receive deference. *Jilin Henghe Pharm. Co. v. United States*, 342 F. Supp. 2d 1301, 1305 (CIT 2004), *judgment vacated as moot*, 123 Fed. App'x 402 (Fed. Cir. 2005). The instructions must reflect antidumping duty review results. Customs has no role in the antidumping process, so no deference is afforded to Customs' interpretation of instructions outside its expertise. In any case the instructions are clear.

ered.[9] Oral Argument, *Shinyei Corp. of Am. v. United States*, No. 08–00191 (CIT May 26, 2011). The Government argues rather that the importer must make the fact of the post-entry sales clear to Customs in its entry documents. *Id.*

We start with the proposition that Customs must interpret Commerce's instructions precisely as Customs' role in the process should be ministerial: Customs should do no more than enact the intentions of Commerce. *Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d 1273, 1281 (CIT 2007) (citing *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994)). First, nothing in the fragment, "SOLD TO (AS SHOWN ON THE COMMERCIAL INVOICE OR CUSTOMS DOCUMENT) THE FIRMS LISTED BELOW," limits "sold" and "commercial invoice" to a specific time frame. Assuming it could do so without running afoul of the protest statute and decades of law interpreting it, if Commerce wished to limit the time frame for submission of documentation, Commerce would have added the words "as presented at the time of entry." Commerce did not place such a limitation in the instructions, and probably could not lawfully do so.

Next, even if Customs did not have the relevant information at entry to determine whether or not the goods were ultimately sold to the specific U.S. customers listed in the instructions from Commerce, Customs apparently had that information at the time of protest. [10] Customs must look to reality at protest, correcting any mistakes made at entry regardless of the record evidence at time of entry. *See* 19 U.S.C. § 1514; *United States v. C. J. Tower & Sons of Buffalo, Inc.*, 499 F.2d 1277, 1280 (C.C.P.A. 1974) (assuming the importer was permitted to submit post-entry evidence to Customs but permitting the importer to submit such evidence before the Customs Court to correct a mistake of fact made at entry). It would be illogical for Customs not to look at evidence which is available at protest, only to trigger a court review where the evidence would be examined. *See ITT Corp. v. United States*, 24 F.3d 1384, 1394 (Fed. Cir. 1994) ("the statutory scheme for review of Customs' denial of a [reliquidation request] contemplated the evaluation of evidence beyond that considered by Customs" and evidence at trial "is not limited to merely that

[9] Such an interpretation would be inconsistent with 19 U.S.C. § 1677a(b) which recognizes that some sales used to calculate U.S. price in making the antidumping comparison may occur after entry.

[10] The protest submitted to the court reflects that the actual documentation was to be provided after the protest was recorded. The Government does not allege that SCA did not or was not willing to submit the invoices at that time.

which is contained in the administrative record before Customs"); *C. J. Tower*, 499 F.2d at 1280.[11]

Here, Customs, for good reason or not, was incorrect in determining that the subject goods were not sold to certain U.S. customers and thus were not covered by the first message. *See* Pl.'s Mot. for Summ. J. Ex. 1–11. Because Customs made an error, in the sense of liquidating the entries in a manner that conflicted with Commerce's instructions, which in turn implement the antidumping review results, the statute requires Customs to correct the mistake at protest. *See* 19 U.S.C. § 1514(a); *Ford Motor Co. v. United States*, 157 F.3d 849, 857 (Fed. Cir. 1998) (finding that protesters can correct errors made not only by employees of Customs but also by employees of the importer, thus implying that Customs must consider additional documentation submitted by the importer at protest). The Government is incorrect that antidumping duties lead to a narrowing of protest rights. There are not two protest procedures, one for ordinary duties and one for unfair trade duties. There is one procedure. 19 U.S.C. § 1514(a). Thus, Customs erred in not considering additional documents at protest to demonstrate the correct amount of duties owed.

The Government claims that requiring Customs to look at invoices not extant at the time of entry would create an incalculable administrative burden. Def.'s Br. 14.[12] Customs, however, need not necessarily expand its review at entry as the right of protest permits correction of any error. Protest under 19 U.S.C. § 1514 is the principal means by which importers may challenge an erroneous decision of Customs. *See* 19 U.S.C. § 1514(a); *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365 (1998) (holding that a protest under 19 U.S.C. § 1514 "is an essential prerequisite when one challenges an actual Customs decision"). Resolving errors of this nature at protest puts to rest the Government's concerns regarding the administrative burden at entry, Def.'s Br. 14–16, and possible statutory time frame violations,[13] Def.'s Resp. Br. 11.

The Government also claims that its actions in the instant case were purely ministerial. Def.'s Br. 7. Presumably it means that to do

[11] These decisions refer to the now repealed 19 U.S.C. § 1520(c), which provided a longer time for correction of mistakes of fact than for protesting other errors. There is now one time period for filing protests based on mistake of law or fact. *See* 19 U.S.C. 1514(a)&(c) (2004).

[12] *See supra*, n. 9.

[13] The Government also has 19 U.S.C. § 1504(b)(1) at its disposal to prevent deemed liquidation at entry rates for delayed liquidation, permitting the Government to "extend the period in which to liquidate an entry if . . . the information needed for the proper appraisement or classification of the imported or withdrawn merchandise . . . or for ensuring compliance with applicable law, is not available to the Customs Service." 19 U.S.C. § 1504(b)(1). It need not use this authority, however. It may simply liquidate as best it can and place the burden on the importer to prove its claim at protest.

more than it did would invade Commerce's provision. Specifically, the Government states that Customs merely complied with Customs' practice since 2000, which has been and continues to be to review only those documents in existence at the time of entry, excluding post-entry invoices, thereby standardizing the review of every entry. Def.'s Br. 2–3, 9; Def.'s Cross-Mot. for Summ. J. Amdur Decl. ¶ 9–10, 12. Thus, the Government contends, Customs merely read the liquidation instructions to be in compliance with its regulations. Def.'s Br. 10.[14] Ministerial duty—which gives rise to a ministerial act—"is one in respect to which nothing is left to discretion." *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866). Here, Customs interpreted Commerce's instructions, rather than automatically appling an antidumping duty rate. The act of interpretation is not purely ministerial. *Mitsubishi Elec.*, 44 F.3d at 977 ("Customs cannot modify . . . [Commerce's] determinations, their underlying facts, or their enforcement." (Internal quotation marks omitted)). Deciding that its policies and regulations should be read expansively to override Commerce's instruction was a Customs decision. Because Customs, in essence, modified Commerce's instructions, Customs' actions are not ministerial.

II. DC Invoices Show Subject Goods Sold to Relevant U.S. Customers

Both parties contend that no genuine issue of material fact exists for the purposes of granting its motion. Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ¶ 6; Mem. of Law in Opp'n to Def.'s Cross-Mot. for Summ. J. and in Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. ("Pl.'s Resp. Br.") 8, 10. SCA alleges that the DC Invoices submitted at protest demonstrate that the goods were sold to specific U.S. customers.[15] This

[14] The Government also alleges that 19 C.F.R. § 142.3 provides for identification of merchandise that enters the United States having been sold. *See* Def.'s Br. 12 (citing 19 C.F.R. § 142.3(6). To the extent the Government relies on its own regulations to argue that "commercial invoice" in Commerce's instructions means only the invoice provided at the time of entry, Def.'s Br. 7–8, it errs. The relevant regulation only shows that entry documentation requires inter alia "a commercial invoice." *See* 19 C.F.R. § 142.3. It does not limit the documentation that can be filed with a protest under 19 C.F.R. § 174.11 et seq.

[15] SCA alleges, in the alternative, the court should find that the markings on the side of the cartons and the U.S. Customer's post office box number on the SK Invoices were sufficient for Customs to find that the subject goods were sold to the relevant U.S. customers at the time of entry. Pl.'s Resp. Br. 23 n.19. As this matter is resolved on the evidence of the DC Invoices, the court need not decide whether Customs erred in not interpreting the markings on the packages, or whether SCA failed in some duty to provide the code. If a proper protest is made, all mistakes may be fixed, those of Customs and those of the importer. The court need not decide who should have done what.

claim has merit and at oral argument the Government made clear that even under the court's view of Customs' duty at protest no issue of material fact exists.

The DC Invoices clearly show that each of the entries protested were sold to a U.S. customer listed in Message 1073202. Because SCA made its claim clear at protest and Customs should have examined the additional invoices at protest, if they were presented, and the court may do so now, and because no genuine issue of material fact exists, the court grants summary judgment in favor of SCA.

CONCLUSION

For the above reasons, the court concludes that SCA's motion for summary judgment is **GRANTED** and the Government's cross-motion for summary judgment is **DENIED**. The entries shall be liquidated at the rates ordered by Commerce in Message 1073202 and refund made, with interest, as provided by law. Judgment shall enter accordingly.

Dated: This 15th day of June, 2011.
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI
JUDGE