Slip Op. 04–93

NORTH DAKOTA WHEAT COMMISSION, U.S. DURUM GROWERS ASSOCIATION, and DURUM GROWERS TRADE ACTION COMMITTEE, Plaintiffs, v. UNITED STATES, Defendant, and CANADIAN WHEAT BOARD, Defendant-Intervenor.

Court No. 03–00838

[Defendant's Motion to Dismiss is granted.]

Decided: July 29, 2004

Robins, Kaplan, Miller & Ciresi, LLP (*Charles A. Hunnicutt*), for Plaintiff.

James M. Lyons, Acting General Counsel, Office of General Counsel, United States International Trade Commission, (*Michael Diehl*), Attorney-Advisor, for Defendant.

Steptoe & Johnson LLP, Richard O. Cunningham, Edward J, Krauland, (*Matthew S. Yeo*), *Tina Potuto Kimble*, for Defendant-Intervenor.

OPINION

BARZILAY, JUDGE: In this case, the court is called upon to decide whether plaintiffs, the North Dakota Wheat Commission, U.S. Durum Growers Association, and Durum Growers Trade Action Committee ("plaintiffs") have failed to establish jurisdiction in this court as defendant, the United States International Trade Commission ("Commission"), argues in its motion to dismiss. Specifically, the government argues that the North Dakota Wheat Commission commenced the present action[1] during a time expressly prohibited by section 516a(a)(5) of the Tariff Act of 1930 (19 U.S.C. § 1516a(a)(5)).

[1] The petition was originally filed by the North Dakota Wheat Commission and the U.S. Durum Growers Association. The Durum Growers Trade Action Committee was added as a petitioner by amendment.

I. Background

On September 13, 2002, the North Dakota Wheat Commission and the U.S. Durum Growers Association filed a petition with the Department of Commerce ("Commerce") and the Commission alleging that a domestic industry was being materially injured and threatened with material injury by reason of imports of durum wheat from Canada that were being subsidized and sold at less than fair value. In October, 2002, Commerce initiated both countervailing duty and antidumping investigations of certain hard red spring and durum wheat from Canada. Commerce initiated four specific and separate investigations: one countervailing duty and antidumping investigation for each type of wheat. In November 2002, the Commission made a preliminary determination that there was a reasonable indication that an industry in the United States was materially injured by reason of subject imports of durum wheat from Canada. *Durum and Hard Red Spring Wheat from Canada*, Inv. Nos. 701–TA–430A and 430B and 731–TA–1019A and 1019B (Preliminary), USITC Pub. 3563 (Dec. 2002). Commerce subsequently made a final affirmative determination in all four investigations. 68 Fed. Reg. 52,747 (Sept. 5, 2003) (final CVD determination), 68 Fed. Reg. 52741 (Sept. 5, 2003) (final less than fair value determination). On October 23, 2003, the Commission issued its final determination, finding that the domestic industry was being materially injured by subsidized imports from Canada of hard red spring wheat, but was not being materially injured or threatened with material injury by subsidized imports of durum wheat from Canada. *Durum and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 6,070 (Oct. 23, 2003); *Durum and Hard Red Spring Wheat from Canada*, Inv. Nos. 701–TA–430A and 430B and 731–TA–1019A and 1019B (Final), USITC Pub. 3639 (Oct. 2003). Twenty-nine days later, on November 21, 2003, plaintiffs filed a summons with the court, challenging the Commission's determination and commencing the instant litigation.

Pursuant to USCIT R. 12(b)(1), defendant moves to dismiss for lack of subject matter jurisdiction, arguing that plaintiffs commenced the present action during a time expressly prohibited by 19 U.S.C. § 1516a(a)(5)[2]. Specifically, defendant argues that section

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[2] Section 1516a(a)(5) states

(a) Review of determination . . .

(5) Time limits in cases involving merchandise from free trade area countries.

Notwithstanding any other provision of this subsection, in the case of a determination to which the provisions of subsection (g) apply, an action under this subsection shall not begin to run, until the day specified in whichever of the following subparagraphs applies:

(A) For a determination described in paragraph (1)(B) or clause (i), (ii) [negative final determinations by the Commission], or (iii) of paragraph (2)(B), the 31st day after the date on which notice of the determination is published in the Federal Register.

1516a(a)(5) creates a 30 day "time window" within which a party must file a summons seeking judicial review of a Commission determination involving imports from a free trade area country. Defendant further contends that this "window" opens on the 31st day after publication of the Commission's order in the Federal Register and closes on the 60th day after publication. Thus, commencement of judicial review is prohibited up to the 31st day. Because the plaintiffs commenced this action on November 21, 2003, defendant argues, it was commenced before the time window for doing so began and therefore within the prohibited period.

Plaintiffs respond by arguing that the court should be guided in its interpretation of section 1516a(a)(5) by this Court's recent decision in *Bhullar v. United States*, 27 CIT ___, 259 F. Supp. 2d 1332 (2003), *aff'd* 2004 U.S. App. LEXIS 3995 (March 2, 2004) (UNPUBLISHED)[3]. Plaintiffs argue that according to this Court's decision in *Bhullar*, a summons must be filed within 31 days after notice is published in the Federal Register. Plaintiffs further argue that the Commission, in *Bhullar*, argued that a plaintiff was required to commence an action no later than 31 days after notice of the antidumping or countervailing duty determination is published in the Federal Register.[4] Plaintiffs contend that this Court granted the Commission "deference" when it ruled that plaintiffs are required to timely commence an action under section 1516a(a)(5) within 31 days after publication of the notice in the Federal Register, and that they followed the Commission's "clearly stated interpretation of the statute" by filing within that period.

Plaintiffs argue in the alternative that according to the language of the statute, because neither the United States nor Canada had standing to request binational panel review of the Commission's negative determination, 19 U.S.C. § 1516a(g)[5] does not apply and therefore, section 1516a(a)(5)(A) is inapplicable. Instead, plaintiffs

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[3] Plaintiffs, throughout their briefs in this matter, repeatedly fail to indicate that the Federal Circuit's opinion affirming *Bhullar* was issued as unpublished, and thus may not be cited as precedent. To the contrary, plaintiffs consistently cite to this opinion as controlling precedent in this case.

[4] Plaintiffs submit to the court, attached to their brief in opposition to defendant's motion to dismiss, a copy of the briefs in the *Bhullar* case. What the Commission argued in *Bhullar* is irrelevant to this case, and, in any event, the government is free to change its opinion regarding the interpretation of laws and to mend in subsequent proceedings any mistakes previously made.

[5] 19 U.S.C. § 1516a(g) states

(g) Review of countervailing duty and antidumping duty determinations involving free trade area country merchandise.

(1) Definition of determination. For purposes of this subsection, the term "determination" means a determination described in—

(A) paragraph (1)(B) of subsection (a), or

argue, section 1516a(a)(2)[6], which requires commencement of an action within 30 days after publication in the Federal Register, is controlling.

Finally, plaintiffs argue that should the court find that section 1516a(a)(5)(A) applies and prohibits commencement of an action during the first 30 days after publication in the Federal Register, the court should apply the principle of equitable tolling in this instance.

II. Analysis

A. Statute

Section 1516a(a) of Title 19 provides for judicial review of Commission determinations in countervailing duty and antidumping duty proceedings. 19 U.S.C. § 1516a(a). For cases involving merchandise from free trade area countries, as in this case, subsection (5) prescribes a time limit for commencing an action in the Court of International Trade.

> (5) Time limits in cases involving merchandise from free trade area countries. Notwithstanding any other provision of this subsection, in the case of a determination to which the provisions of subsection (g) apply, an action under this subsection may not be commenced, and the time limits for commencing an action under this subsection shall not begin to run, until the day specified in whichever of the following subparagraphs applies: . . .
>
> > (A) For a determination described in paragraph (1)(B) or clause (i), (ii) [negative final determinations by the Commission] or (iii) of paragraph (2)(B), the 31st day after the date on which notice of the determination is published in the Federal Register.

19 U.S.C. § 1516a(a)(5)(A). As plaintiffs point out, section 1516a(a) is predicated on the applicability of subsection (g). Subsection (g) applies to the review of countervailing duty and antidumping duty determinations involving free trade area merchandise, and provides for exclusive review of determinations by binational panels – if bina-

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(B) clause (i), (ii), (iii), or (vi) of paragraph (2)(B) of subsection (a), if made in connection with a proceeding regarding a class or kind of free trade area country merchandise, as determined by the administering authority.

[6] 19 U.S.C. § 1516a(a)(2) states

(2) Review of determinations on record.

(A) In general. Within thirty days after—

(i) the date of publication in the Federal Register of– . . .

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B). . .

tional panel review is requested pursuant to article 1904 of the North American Free Trade Agreement ("NAFTA"), with certain exceptions not relevant here. 19 U.S.C. § 1516a(g). Subsection (g) provides for binational panel review where it has been requested, but does not, as plaintiffs assert, require that it be requested in order for subsection (a)(5) to apply. Moreover, discussing this same provision in the U.S.- Canada Free Trade Agreement – NAFTA's predecessor – the Senate report on the implementing legislation noted that

> the Agreement provides that . . . judicial review may not be commenced until the time for requesting a panel under the Agreement has expired. To preclude this possibility, section 401(a) amends section 516a(a) by adding a new paragraph (5) that prohibits the commencing of an action under section 1516a(a) *until* the 31st day after publication of the appropriate notice in the Federal Register . . . Thus, the normal 30-day period for filing a summons (and 30 days thereafter, a complaint) would *begin* to run on such 31st day.

S. REP. NO. 100–509, at 33–34 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2395, 2428 (emphasis added). Thus, the statute lays out a series of steps that may be taken with respect to review of a Commission determination. Under this scheme, commencement of an action in the Court of International Trade is precluded until the time to request a binational panel has expired. Specifically, NAFTA parties agreed to replace judicial review of certain determinations with binational panel review where binational panel review has been requested. A request for binational panel review must be made within 30 days following the date of publication of the final determination which, in the United States, refers to publication of the Commission's determination in the Federal Register. *See* NAFTA Art. 1904:4; 19 U.S.C. § 1516a(g)(2). Thus, the United States agreed to "amend its statutes or regulations to ensure that . . . domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel . . . has expired." *See* NAFTA Art. 1904:15(c). Therefore, as section 1516a(a)(5) indicates, time limits for commencing an action in the Court of International Trade shall not begin to run until the 31st day after the date of publication in the Federal Register of notice of the final determination. NAFTA Annex 1904.15, U.S. Schedule at ¶ 9. The statutory scheme contains no requirement that the parties actually invoke binational panel review and none has been cited to the court from other sources.

Thus, because the instant action concerns review of countervailing duty and antidumping duty determinations involving free trade area merchandise, namely Canadian wheat products, subsection (g) ap-

plies.[7] Therefore, section 1516a(a)(5) applies as well. According to the facts at hand, notice of the Commission's determination was published in the Federal Register on October 23, 2003. 68 Fed. Reg. 60,707 (Oct. 23, 2003). Under the statute, commencement of an action in the Court of International Trade was prohibited and the time limits for commencing an action did not begin to run until the 31st day after the date on which notice of the determination was published in the Federal Register. In this case, that date would have been November 23, 2003, which fell on a Sunday. Thus, the earliest day plaintiffs could have filed was November 24, 2003. *See* USCIT R. 6(a). The North Dakota Wheat Commission filed its summons commencing the present action on November 21, 2003, on the 29th day after publication in the Federal Register. 28 U.S.C. § 2632(c); 19 U.S.C. § 1516a(a)(2); USCIT R. 3. Therefore, the action was commenced during the prohibited period.

B. Case law

Plaintiffs point to this Court's recent decision in *Bhullar* in support of the proposition that they had until the 31st day after publication in the Federal Register to commence this action – rather than being precluded from commencing until the 31st day after publication. 259 F. Supp. 2d at 1332. In *Bhullar*, a *pro se* plaintiff filed a complaint in the Court of International Trade over four months after publication of the Commission's final antidumping and countervailing duty determinations in the Federal Register. The government moved to dismiss for lack of jurisdiction on several grounds, including standing, untimeliness, and the fact that a binational panel review was pending. This Court held that in addition to lacking standing to bring the action, the plaintiff failed to meet the statutory timeliness requirements, and also that a NAFTA binational panel had exclusive review of the determinations in that case. On the timeliness issue, this Court held that filing a summons and complaint four months after publication in the Federal Register is prohibited by section 1516a. This holding is consistent with the court's present interpretation of section 1516a(a)(5). That the Commission took a different position in its briefs before this court in *Bhullar* – an entirely unrelated action predicated on facts entirely distinct from those presently at bar, is of no consequence. The government, like all other parties that come before this Court, is free to change its position on its interpretation of the law, and is also able to correct its past mistakes.[8] In affirming this Court's dismissal of the Plaintiff's

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[7] Because the court finds that subsection (g) is applicable to the facts at hand, plaintiff's alternative argument that section 1516a(a)(2) controls does not apply.

[8] The government, in its Reply Brief, states that in making its argument that the summons was untimely in the *Bhullar* case, the Commission's counsel inadvertently truncated the language of 19 U.S.C. § 1516a(a)(5), and the mistake was carried through papers in

case in *Bhullar*, the Court of Appeals for the Federal Circuit, in an unpublished and nonprecedential opinion, held that this Court correctly dismissed because the complaint could not lie after invocation of the binational NAFTA review process. 2004 U.S. App. LEXIS 3995 at 4. It specifically did not address the other grounds raised by the government, including timeliness. *Id*. ("Because the complaint cannot lie after invocation of the binational NAFTA review process, we need not recite other grounds, namely timeliness . . .").

Plaintiffs further argue that this Court in *Bhullar* granted the Commission deference in interpreting a statute that it administers and therefore, they (plaintiffs) should be able to rely on the Commission's erroneous prior interpretation of section 1516a(a)(5) that an action must be commenced within 31 days after publication in the Federal Register. To dismiss this action in light of *Bhullar*, plaintiffs argue, would be "extraordinarily prejudicial," as it would apply a new and different interpretation of the statute in question. To the contrary, where a statute is clear on its face, the Court does not give deference to the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). This Court, in Bhullar, held that commencement of an action over four months after publication in the Federal Register is untimely. 259 F. Supp. 2d at 1342. In doing so, however, this Court, apparently relying on government counsel's erroneous guidance, miscited the statute and stated that "[p]ursuant to § 1516a(a)(5)(A), Plaintiff is required to file its summons and complaint within 31 days after the publication in the Federal Register of the final determinations of which Plaintiff seeks review." 259 F. Supp. 2d at 1342. Plaintiffs claim to have relied on this erroneous statement to their detriment in timing their filing of the instant case. This is truly unfortunate. However, the government's previous contrary arguments before this Court notwithstanding, the statute is clear on its face, and the court must be guided by its plain meaning.

C. Equity

Plaintiffs argue that if the court does not deny the government's motion to dismiss based on the statute or case law, it should apply the doctrine of equitable tolling and allow the case to go forward. When looking to apply equitable principles in suits against the government, the court must begin with the fundamental maxim that as a sovereign the United States is immune from legal action in the courts except to the extent that it waives such immunity. *United*

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that case subsequently filed with this Court and the Federal Circuit. *Deft.'s Reply to Pl.'s Resp. in Opp. to Deft.'s Mot. to Dismiss*, 10. Pointing out that although there was no advantage gained by that mistake because even under the correct statutory language the Plaintiff's summons was still very untimely, the Commission's attorney in that case and the International Trade Commission General Counsel's Office indicate that they take responsibility for and sincerely regret the oversight. *Id*.

States v. Mitchell, 445 U.S. 535, 538 (1980). Furthermore, a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed'" *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The Supreme Court has held that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990). Thus, per *Irwin*, the court must inquire into the language of the statute to ascertain whether Congress intended the equitable tolling doctrine to apply. *See Irwin*, 498 U.S. at 95–96; *see also, e.g. United States v. Brockamp*, 519 U.S. 347, 353 (1997) (analyzing the language of statutory time limitations, comparing "ordinary limitations statutes," which use fairly simple language that can plausibly read as containing an implied equitable tolling exception, with "highly detailed technical ones," that cannot easily be read as containing implicit exceptions).

As discussed above, section 1516a explicitly prohibits the commencement of an action in the Court of International Trade during the 30 days following publication of the Commission's final determinations in the Federal Register. It states that

> an action under this subsection may not be commenced, and the time limits for commencing an action under this subsection shall not begin to run, until . . . the 31st day after the date on which notice of the determination is published in the Federal Register.

19 U.S.C. § 1516a(a)(5)(A). Moreover, Congress purposefully amended relevant statutes and regulations to ensure that domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel has expired. *See* NAFTA Art. 1904(15)(c), (i). As also discussed above, the 30 day period corresponds directly to time limits under NAFTA for binational panel review that this court has no ability to alter. Thus, to read an equitable tolling provision into the statute would potentially imply an exception for tolling in virtually all time limitations throughout the statute, as well as in the NAFTA regulations – a kind of tolling for which the court has found no precedent. *Cf. Brockamp*, 519 U.S. at 353 (holding that a statute's technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute).

Furthermore, *Irwin* makes clear that equitable tolling is extended "only sparingly," and where "the complainant has been induced or tricked by his adversary's misconduct . . ." 498 U.S. at 96; *see also Frazer v. United States*, 288 F.3d 1347, 1353–54 (2002) ("equitable tolling is available only when the lateness is attributable, at least in

part, to misleading governmental action"). Plaintiffs characterize the Commission's arguments in *Bhullar*, that a summons and complaint must be filed within 31 days after publication in the Federal Register, as the agency's interpretation of section 1516a. Although they argue that the Commission failed to timely notify the Court of its mistake in interpreting the statute, plaintiffs do not indicate that they had been induced to file their summons on the 29th day after publication by any trickery or government misconduct. Furthermore, there is no support for the proposition that the government's misreading of the statute and argument in one case constitute trickery or misconduct to plaintiffs – parties in a case entirely unrelated to the lawsuit in question.

Finally, plaintiffs fail to establish that they acted diligently. *Cf. Former Employees of Sonoco Products Co. v. Elaine Chao*, 27 CIT ___ , 273 F. Supp. 2d 1336, 1341 (2003) (requiring a party seeking to apply the doctrine of equitable tolling to show that it exercised due diligence in preserving its legal rights), *aff'd*, 2004 U.S. App. LEXIS 12071. Courts have found due diligence where a party made reasonable and sustained attempts to resolve questions or ambiguities and reasonably attempted to comply with the statutory time limits. *See Former Employees of Quality Fabricating, Inc. v. United States Sec. of Labor*, 27 CIT ___ , 259 F. Supp. 2d 1282, 1286 (2003). There is no indication that plaintiffs attempted to resolve any apparent discrepancy between the clearly stated statutory time limits and the contradictory language in *Bhullar*. Neither is there any indication of any communication between plaintiffs and the Commission regarding the statutory language. Furthermore, plaintiffs, being represented by able counsel, are aware that where a statute is unambiguous on its face, it is controlling. Thus, the court is unable to apply the principle of equitable tolling in this instance and to establish a new interpretation of section 1516a(a)(5)(A) for future actions, as plaintiffs request.

III. Conclusion

For the foregoing reasons, the International Trade Commission's motion to dismiss is hereby GRANTED.

Slip Op. 04–95

ORLANDO FOOD CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 02–00593

[Plaintiff's Motion for Summary Judgment/Judgment on the Pleadings is denied. Defendant's Cross-Motion for Summary Judgment and or Judgment on the Pleadings is granted.]

Decided: August 3, 2004

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*Steven P. Florsheim*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge; *Jack S. Rockafellow*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice; *Edward N. Maurer*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, for Defendant

OPINION

WALLACH, Judge:

I
Introduction

This matter is before the court on cross-motions for summary judgment, pursuant to USCIT R. 56, by Plaintiff, Orlando Food Corp. ("Orlando"), and Defendant, United States. At issue is the interest accrued from the United States Customs Service's[1] ("Customs") assessment of 100% *ad valorem* duties on Plaintiff's importation. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1999). For the foregoing reasons, Plaintiff's Motion for Summary Judgment/Judgment on the Pleadings ("Plaintiff's Motion") is denied and Defendant's Cross-Motion for Summary Judgment and or Judgment on the Pleadings ("Defendant's Cross-Motion") is granted.

II
Background

On July 14, 1989, Plaintiff imported Entry No. 788–1003306–4, which consisted of a single entry of a canned tomato product.[2] The merchandise in Entry No. 788–1003306–4 was entered under Sub-

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[1] Now the United States Bureau of Customs and Border Protection.

[2] This case involves the same importer and goods that were in issue in the *Orlando* cases. Familiarity with those decisions is presumed. *See Orlando Food Corp. v. United States*, 21 CIT 187, *aff'd on other grounds*, 140 F.3d 1437 (Fed. Cir. 1998).

heading 2002.10.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1989), which provided for "Tomatoes, prepared or preserved otherwise than by vinegar or acetic acid: Tomatoes, whole or in pieces," but was subject to duty at the rate of 100% *ad valorem* set forth in Subheading 9903.23.15, which provided for "Articles the product of the European Community . . . : Tomatoes, prepared or preserved (except paste) otherwise than by the processes specified in chapters 7 or 11 or in heading 2001 (provided for in subheading 2002.10.00, 200.90.00 or 2103.20.40)" in lieu of the rate set forth in Subheading 2002.10.00.

The entry was liquidated "as entered," with the merchandise classified under Subheading 2002.10.00 as "Tomatoes, whole or in pieces" and assessed the duty at 100% *ad valorem* pursuant to Subheading 9903.23.15. Plaintiff did not protest the initial liquidation of Entry No. 788–1003306–4. Plaintiff challenged this classification on entries that it had protested to Customs in *Orlando Food Corp. v. United States*, 21 CIT 187 (1997) ("*Orlando I*"), *aff'd on other grounds*, 140 F.3d 1437 (Fed. Cir. 1998) ("*Orlando II*"). Plaintiff challenged Customs' classification and the court held that the correct classification was 2103.90.60, dutiable at a rate of 7.5%.[3] After Plaintiff prevailed, it sought and received legislative redress for its entries that had not been protested. Plaintiff's Motion at 4. As a result of Plaintiff's efforts, Congress passed the Tariff Suspension and Trade Act of 2000, Pub. L. 106–476, § 1408(a)[4], 114 Stat. 2101, 2148

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[3] In *Orlando II*, the government appealed this court's decision that the product was classifiable under HTSUS, Subheading 2103.60.90, "Sauces and preparations therefor: Other" The Federal Circuit affirmed, however, it arrived at its decision by a different method than did the trial court. The Federal Circuit's decision did not affect the substantive outcome.

[4] Sec. 1408 Certain Entries of Tomato Sauce Preparation in its entirety states:

(a) In General — Notwithstanding section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) or any other provision of law and subject to the provisions of subsection (b), the United States Customs Service shall, not later than 180 days after the receipt of the request described in subsection (b), liquidate or reliquidate each entry described in subsection (d) containing any merchandise which, at the time of the original liquidation, was classified under subheading 2002.10.00 of the Harmonized Tariff Schedule of the United States (relating to tomatoes, prepared or preserved) at the rate of duty that would have been applicable to such merchandise if the merchandise had been liquidated or reliquidated under subheading 2103.90.60 of the Harmonized Tariff Schedule of the United States (relating to tomato sauce preparation) on the date of entry.

(b) Requests — Reliquidation may be made under subsection (a) with respect to an entry described in subsection (d) only if a request therefor is filed with the Customs Service within 90 days after the date of the enactment of this Act and the request contains sufficient information to enable the Customs Service to locate the entry or reconstruct the entry if it cannot be located and to confirm that the entry consists of tomato sauce preparations properly classifiable under subheading 2103.90.60 of the Harmonized Tariff Schedule of the United States.

(c) Payment of Amounts Owed — Any amounts owed by the United States pursuant to the liquidation or reliquidation of an entry under subsection (a) shall be paid not later than 180 days after the date of such liquidation or reliquidation.

(Nov. 9, 2000). The Act required Customs to reliquidate the entry at issue according to HTSUS subheading 2103.90.60, which the courts had found applicable in the previous *Orlando* cases. Customs reliquidated the entry at issue, however, it did not pay interest on those duties.

III
Arguments

Plaintiff argues that it is entitled to interest on the refunded amount of duties it received. It claims that Customs is legally obligated to pay interest when, either upon liquidation or reliquidation, Customs has determined that an importer is owed a refund for an overpayment of estimated duties.

Defendant claims that the issue is whether Plaintiff is entitled to interest on duties refunded pursuant to special legislation enacted in the Tariff Suspension and Trade Act of 2000. Defendant's Cross-Motion at 1–2. It argues that Customs may not legally pay interest on refunds of duties made pursuant to § 1408 of the Tariff Suspension and Trade Act of 2000. *Id*. at 5.

IV
Applicable Legal Standards

The court reviews Customs' denial of a protest *de novo. See Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456 (1996). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The movant bears the burden of producing evidence showing the lack of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Precision Specialty Metals, Inc. v. United States*, 182 F. Supp. 2d 1314, 1318 (2001). In determining if a party has met its burden, the court does not "weigh the evidence and determine the truth of the matter," but rather the court determines "whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. The court views the evidence in the light most favorable to the non-moving

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(d) Affected Entries — The entries referred to in subsection (a) are as follows:

Entry Number	Entry Date
. . .	
788–1003306–4	07/14/89

party and draws all inferences in the nonmovant's favor. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

When examining the government's statutory interpretation, if the relevant statute is clear on its face, the court must follow Congressional intent, regardless of the government's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The deference to an agency administering its own statute varies with the surrounding circumstances and the courts must look to the agency's care, consistency, formality, expertise, and persuasiveness in ruling on the agency's interpretation. *See United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). "Agency interpretations which lack the force of law are 'entitled to respect . . . but only to the extent that those interpretations have the "power to persuade."' " *Precision*, 182 F. Supp. 2d at 1318–1319 (citing *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621,(2000)) (internal citations omitted).

V
Discussion

Plaintiff claims that the Government must afford interest on its entry of goods that was reliquidated under § 1408 of the Tariff Suspension and Trade Act of 2000. Defendant conversely argues that the Government has no such obligation.

A party suing the Government faces the initial burden of showing that a waiver of sovereign immunity was expressed unequivocally in the statutory text at issue. *See, e.g., United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992). When a court examines a purported waiver of sovereign immunity, it must "[construe] ambiguities in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995). The conditions under which the Government consents to be sued are limited, and no exceptions to those conditions are implied. *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981). Accordingly, the legislative history of the statute at issue cannot supply a waiver that does not appear explicitly in its text. *Nordic Vill.*, 503 U.S. at 37.

"In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314–15, 106 S. Ct. 2957; 92 L. Ed. 2d 250 (1986). In *Shaw*, the Supreme Court stated that "[t]his requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim." *Id.* (internal citations omitted). Furthermore, the Court explained that for well over a century, the Supreme Court, agencies,

and Congress "consistently have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." *Id*. This "no-interest rule" thus requires the court "to construe waivers of sovereign immunity strictly in favor of the sovereign." *Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002); *see Shaw*, 478 U.S. at 318; *see, e.g.*, *Williams*, 514 U.S. at 531. An awarding of interest can only occur when the U.S. Code unambiguously allows it. *Lena v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996).

Plaintiff asks the court to require the government to afford it interest on goods reliquidated under § 1408(a), which requires that Customs "liquidate or reliquidate" the subject entry "at the rate of duty that would have been applicable to such merchandise if the merchandise had been liquidated or reliquidated under subheading 2103.90.60. . . ." Section 1408 "essentially requires Customs – upon request of the importer – to liquidate or reliquidate specified entries as if they had originally been entered under the classification held correct by the court in *Orlando*." Defendant's Cross-Motion at 2–3. Plaintiff argues that 19 U.S.C. § 1505 (2000) applies and that interest accrued from the date it made its deposit.[5] Plaintiff claims that "Congress explicitly and unambiguously waived immunity for inter-

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[5] 19 U.S.C. § 1505 provides:

(a) Deposit of estimated duties, fees, and interest. Unless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the Customs Service at the time of making entry, or at such later time as the Secretary may prescribe by regulation, the amount of duties and fees estimated to be payable thereon. Such regulations may provide that estimated duties and fees shall be deposited before or at the time an import activity summary statement is filed. If an import activity summary statement is filed, the estimated duties and fees shall be deposited together with interest, at a rate determined by the Secretary, accruing from the first date of the month the statement is required to be filed until the date such statement is actually filed.

(b) Collection or refund of duties, fees, and interest due upon liquidation or reliquidation. The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

(c) Interest. Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation. The Secretary may prescribe an alternative mid-point interest accounting methodology, which may be employed by the importer, based upon aggregate data in lieu of accounting for such interest from each deposit data provided in this subsection.

est awards on 'excess monies deposited' in the Mod Act, 19 U.S.C. §§ 1505(b) and (c), which became effective December 8, 1993." Plaintiff's Motion at 5. Plaintiff claims that "it deposited more duties on the subject entry than was required by law, and did so pursuant to a misclassification that the Government subsequently rectified by the Trade Act of 2000." *Id.* at 7.

Section 1505(b) "unambiguously waives sovereign immunity only for interest awards on 'excess moneys deposited.' " *Hartog Foods*, 291 F.3d at 792. Section 1505(c) "explains how to calculate interest on the 'excess moneys deposited.' " *Id.* This statute, however, does not define "excess moneys deposited." *See id.* The court in *Hartog Foods* explained that "[t]he Oxford English Dictionary defines 'excess' as 'beyond the usual or specified amount; beyond what is necessary, proper or right.' " *Id.* (citing Oxford English Dictionary (2d ed. 1989)). The court stated that the dictionary definition was consistent with the interpretation of 19 U.S.C. § 1520(a)(1) (2000), which "authorizes refunds on 'excess deposits' 'whenever it is ascertained on liquidation or reliquidation of an entry or reconciliation that more money has been deposited or paid as duties than was required by law to be so deposited or paid.' "[6] *Id.* Ultimately, the court stated that both the case law and the ordinary meaning of "excess" "lead to the same conclusion — 'excess moneys deposited' refers to an overpayment of estimated duties, i.e., the deposit or payment of money beyond legal requirements." *Id.*

Customs determines overpayments at liquidation or reliquidation. 19 U.S.C. § 1505(b); *Hartog Foods*, 291 F. 3d at 792. Thus, overpayment by an importer cannot be determined until the goods are either liquidated or reliquidated. Accordingly, the basis upon which interest might be due must also be determined at liquidation or reliquidation even though a deposit in excess of the amount owed may have occurred at the time of deposit. *See Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997); *Hartog Foods*, 291 F.3d at 792. The importer thus

> makes a payment that is not identified as excess until liquidation or reliquidation. In a typical case, the importer pays estimated duties under a Harmonized Tariff Schedule of the United States (HTSUS) provision only to find — upon correct

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(d) Delinquency. If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) of this section, any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

[6] The Federal Circuit also noted that both §§ 1505 and 1520 are codified under part III, which is entitled "Ascertainment, Collection and Recovery of Duties," subtitle III of the Tariff Act of 1930. 19 U.S.C. §§ 1481 – 1529 (2000). *Hartog Foods*, 291 F.3d at 792.

> classification under a different HTSUS provision – the initial deposit was excessive. In such a case, Customs refunds the difference between the initial deposit and the required amount (i.e., the excess) with interest.

Hartog Foods, 291 F. 3d at 792–93.

Here, however, Congress legislated a special provision, § 1408, in order that Commerce would reliquidate Plaintiff's product under a different subheading of the HTSUS than it had been previously. Section 1408(c) makes no mention of interest upon reliquidation:

> (c) Payment of Amounts Owed — Any amounts owed by the United States pursuant to the liquidation or reliquidation of an entry under subsection (a) shall be paid not later than 180 days after the date of such liquidation or reliquidation.

Section 1408's language, as Defendant points out, should be contrasted with five other sections in the same statute (emphasis added):

> Section 1402(b) Payment of Amounts Owed — Any amounts owed by the United States pursuant to the liquidation or reliquidation of an entry under subsection (a), **with interest** provided for by law on the liquidation or reliquidation of entries, shall be paid by the Customs Service within 90 days after such liquidation or reliquidation.
>
> Section 1403(b) Payment of Amounts Owed — Any amounts owed by the United States pursuant to the liquidation or reliquidation of an entry under subsection (a), **with interest** accrued from the date of entry, shall be paid by the Customs Service within 90 days after such liquidation or reliquidation.
>
> Section 1407(a) In General . . . [T]he Customs Service shall—
>
> . . .
>
> (2) within 90 days after such liquidation or reliquidation, refund any duties paid with respect to such entries, **including interest** from the date of entry.
>
> Section 1412(b) Payment of Amounts Owed — Any amounts owed by the United States pursuant to the liquidation or reliquidation of the entry under subsection (a), **with interest** accrued from the date of entry, shall be paid by the Customs Service within 90 days after such liquidation or reliquidation.
>
> Section 1425(b) Payment of Amounts Owed — Any amounts owed by the United States pursuant to the liquidation or reliquidation of an entry under subsection (a), **with interest** provided for by law on the liquidation or reliquidation of en-

> tries, shall be paid by the Customs Service within 90 days after such liquidation or reliquidation.

While the aforementioned sections specifically contain language that require Customs to pay interest, the remaining §§ 1401–1425 of Subsection B, Chapter 1 Liquidation or Reliquidation of Certain Entries, do not contain similar interest granting language. It should be noted that §§ 1409–1411, which concern tomato products just like § 1408, are among those sections which do not refer to an interest entitlement. Under the canon of *expressio unius est exclusion alterius*[7], the inclusion juxtaposed with the omission of language directing Customs to pay interest in §§ 1401–1425 makes clear that § 1408 does not require Customs to pay Plaintiff any interest. If Congress had intended 19 U.S.C. § 1505's interest bearing provisions to then become operative, as Plaintiff suggests, it would not have been necessary to include the "with interest" language in some sections and not in others.

Overall, "no matter how unusual or compelling the facts of a case, sovereign immunity principles govern and permit interest only if the United States Code has expressly and unequivocally waived sovereign immunity and authorized such awards." *Hartog Foods*, 291 F.3d at 795. While 19 U.S.C. § 1505 requires the payment of interest for "excess moneys deposited," the court must construe the term "strictly" and "cannot broaden the meaning of such term through judicial interpretation." *Id.* If Congress had wished extend the reach of 19 U.S.C. § 1505 to reliquidation under § 1408, it should have explicitly included the requisite language. Section 1408 grants no interest and this court does not intend to broaden its scope: "sovereign immunity and the 'no interest' rule compel great specificity." *See Id.*

VI
Conclusion

For the foregoing reasons, Defendant's Cross-Motion For Summary Judgment And Or Judgment on the Pleadings is granted in full, and Plaintiff's Motion For Summary Judgment/Judgment on the Pleadings is denied.

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[7] The canon is defined as a "maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990).