Slip Op. 06–147

CARPENTER TECHNOLOGY CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 04–00508

[Commerce's determination regarding collapsing sustained.]

Dated: October 5, 2006

Kelley Drye Collier Shannon (*Robin H. Gilbert*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael Panzera*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (Ada E. Bosque), of counsel, for the defendant.

OPINION

Gordon, Judge: Plaintiff Carpenter Technology Corporation moves for judgment upon the agency record pursuant to USCIT R. 56.2, challenging two decisions of the United States Department of Commerce ("Commerce") during an administrative review of an antidumping duty order covering stainless steel bar from India: (1) the collapsing of three foreign producers into a single entity for analyzing and calculating the applicable dumping margin, and (2) the revocation of the antidumping duty order for those same foreign producers. The court has jurisdiction pursuant to Section 516a(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000), and 28 U.S.C. § 1581(c) (2000).

Plaintiff failed to exhaust its administrative remedies on the collapsing issue during the administrative review. The court therefore sustains the Final Results with respect to Commerce's decision to collapse. For reasons not germane to this opinion, the court reserves decision on the issue of revocation.

I. Background

During the administrative review covering the period February 1, 2002 through January 31, 2003, Commerce collapsed three respondents, Viraj Alloys, Ltd., Viraj Forgings, Ltd., and Viraj Impoexpo, Ltd., into a single entity, Viraj. *See Stainless Steel Bar from India*, 69 Fed. Reg. 55,409 (Dep't of Commerce Sept. 14, 2004) (final results admin. review) ("Final Results"). When Commerce collapses two or more entities, it treats them as a "single entity" for the antidumping analysis and margin calculation. 19 C.F.R. § 351.401(f)(1) (2004).

Before Commerce issued the preliminary results, Plaintiff raised the collapsing issue in two submissions. *See* Petitioner's Sept. 11, 2003 Comments on Viraj's Supplemental Questionnaire Responses (Pub. R. Doc. No. 155[1], Pl.'s Reply Br. App. 5) and Petitioner's Dec. 3, 2003 Comments on Viraj's Supplemental Questionnaire Responses (Pub. R. Doc. No. 185, Pl.'s Reply Br. App. 6). In each, Plaintiff sought to discourage Commerce from collapsing the Viraj companies by citing *Slater Steels Corp. v. United States*, 27 CIT ___ , 279 F. Supp. 2d 1370 (Aug. 21, 2003) ("*Slater I*").

Slater I involved an earlier administrative review of the same antidumping duty order applicable in this case and was the first of four opinions to address Commerce's collapsing of the three Viraj respondents in that earlier proceeding.[2] At the time of Plaintiff's two submissions in this case, however, only *Slater I* had been issued. Plaintiff cited the case because the *Slater I* court did not sustain Commerce's collapsing decision, remanding the matter for further consideration. Subsequently, after the *Slater* court failed to sustain Commerce's collapsing of the Viraj companies for the third time, *Slater Steels Corp. v. United States*, 29 CIT ___ , Slip. Op. 05–23 (Feb. 17, 2005), Commerce redid its analysis and margin calculation—collapsing Viraj Forgings and Viraj Impoexpo, while treating Viraj Alloys as a separate entity. This result was ultimately sustained in the *Slater* court's fourth and final opinion. *See Slater Steels Corp. v. United States*, 29 CIT ___ , 395 F. Supp. 2d 1353 (Oct. 20, 2005) (appeal voluntarily dismissed).

Despite Plaintiff's submissions regarding *Slater I*, Commerce went ahead and collapsed the Viraj companies in the preliminary results. *See Stainless Steel Bar from India*, 69 Fed. Reg. 10,666, 10,670–71 (Dep't of Commerce Mar. 8, 2004) (prelim. results admin. review). Following the preliminary results, Plaintiff chose not to address the collapsing issue in its case brief. Commerce then took the same ap-

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[1] References to the public version of the administrative record will be cited as "Pub. R. Doc. No."

[2] The three subsequent *Slater* decisions are *Slater Steels Corp. v. United States*, 28 CIT ____ , 316 F. Supp. 2d 1368 (Mar. 8, 2004); *Slater Steels Corp. v. United States*, 29 CIT ____ , Slip. Op. 05–23 (Feb. 17, 2005); and *Slater Steels Corp. v. United States*, 29 CIT ____ , 395 F. Supp. 2d 1353 (Oct. 20, 2005) (appeal voluntarily dismissed).

proach in the Final Results, collapsing the Viraj companies. Commerce calculated a final dumping margin of 0.00% for the Viraj companies. *Final Results*, 69 Fed. Reg. at 55,411.

In response to Plaintiff's motion for judgment upon the agency record, Defendant argues that Plaintiff failed to exhaust its administrative remedies.

II. Discussion

This court addressed the issue of exhaustion of administrative remedies and collapsing in *Carpenter Tech. Corp. v. United States*, 30 CIT ___ , Slip Op. 06–134 (Sept. 6, 2006), which involved the same plaintiff in this case. In *Carpenter*, the court explained that the Court of International Trade applies the non-jurisdictional exhaustion requirement of 28 U.S.C. § 2637(d) (2000) "where appropriate," and that exhaustion is "generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter*, 30 CIT at ___ , Slip Op. 06–134, at p. 3 (citations omitted).

The plaintiff in *Carpenter* never raised the issue of collapsing on the administrative record, leading to the court's denial of the claim based on plaintiff's failure to exhaust administrative remedies. *Id.*, 30 CIT at ___ , Slip Op. 06–134, at p. 6. The facts here are slightly different with Plaintiff at least raising the issue of collapsing on the administrative record. *See* Petitioner's Sept. 11, 2003 Comments on Viraj's Supplemental Questionnaire Responses (Pub. R. Doc. No. 155, Pl.'s Reply Br. App. 5) and Petitioner's Dec. 3, 2003 Comments on Viraj's Supplemental Questionnaire Responses (Pub. R. Doc. No. 185, Pl.'s Reply Br. App. 6). The result, however, is the same because Plaintiff did not follow-through after the preliminary results and include the collapsing issue in its case brief before the agency.

Commerce's regulation governing case briefs comports well with the twin purposes of exhaustion and also speaks to the facts of this case: "The case brief must present all arguments *that continue* in the submitter's view to be relevant to the . . . final results, including any arguments *presented before* the date of publication of the . . . preliminary results." 19 C.F.R. § 351.309(c)(2) (2004) (emphasis added).

Although Plaintiff advocated against collapsing in its two submissions prior to the preliminary results, Commerce concluded otherwise. At that point, if Plaintiff believed that the collapsing issue was relevant to the Final Results, Plaintiff needed to include that issue in its case brief, as required by the regulation. Commerce would then have known that Plaintiff had not waived the issue. *See Corus Staal BV v. United States*, 30 CIT ___ , ___ , Slip. Op. 06–112, at p. 16 (holding that plaintiff failed to exhaust administrative remedies by failing to include issue in case brief).

In its briefs before this court, Plaintiff has presented extensive factual and legal arguments why Commerce erred in its collapsing decision. Unfortunately, by not briefing the issue before Commerce, Plaintiff deprived the agency of the opportunity to consider these arguments in the first instance. Plaintiff's omission frustrates the twin purposes of the exhaustion requirement, leaving the court in the same position as in *Carpenter*, having to sort through *post hoc* rationalizations of agency counsel, which is A party cannot abandon such an issue before the agency and then expect the not the desired posture for a complex, fact-specific issue like collapsing. *See Carpenter*, 30 CIT at ___ , Slip Op. 06–134, at p. 5.

A party cannot abandon such an issue before the agency and then expect the court to apply the standard of review practically or efficiently—especially when a party seeks to rely on a host of factual and legal arguments spanning other administrative proceedings that the agency has not addressed on the applicable administrative record. To borrow from *Carpenter*:

> It suffices to say that the exhaustion requirement is appropriate in this case. Had plaintiff . . . [briefed] the collapsing issue before the agency, the administrative record would have been more fully developed and adequate for judicial review, the agency would have exercised its primary jurisdiction (without the need to rely on *post hoc* rationalizations of agency counsel), and the court could then have efficiently applied the standard of review to analyze whether the collapsing decision was supported by substantial evidence or otherwise in accordance with law.

Id., 30 CIT at ___ , Slip Op. 06–134, at p. 6.

III. Conclusion

The exhaustion requirement is appropriate in this case, and Plaintiff failed to exhaust its administrative remedies. Accordingly, the court sustains Commerce's decision to collapse the Viraj companies. The court reserves decision on the issue of revocation.

Slip Op. 06–148

U.S. TSUBAKI, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 01–00519

OPINION

[Plaintiff's motion for summary judgment denied in part. Defendant's cross-motion for summary judgment is granted.]

Dated: October 10, 2006

Barnes, Richardson, & Colburn (*Brian Francis Walsh*, *Christine Henry Martinez*, *Kazumune V. Kano*) for Plaintiff U.S. Tsubaki, Inc.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*), for Defendant United States.

GOLDBERG, Senior Judge: This case involves an action to review a denial of protest under 19 U.S.C. § 1515 (2000). Plaintiff U.S. Tsubaki, Inc. ("**Tsubaki**") moves the court, pursuant to USCIT Rule 56, to enter summary judgment in its favor, and to order the defendant U.S. Customs and Border Protection ("**Customs**") to reliquidate the entries at issue and refund, with interest, the excess duties paid by Tsubaki. Customs also moves for summary judgment, contending that while five of Tsubaki's entries are deemed liquidated by operation of law, the majority of them are not. *See* Def.'s Br. Part. Opp'n Pl.'s Mot. Summ. J. 3 ("**Def.'s Br.**").[1]

Five of the entries[2] are deemed liquidated because Customs waited longer than is permitted under 19 U.S.C. § 1504 (d) (Supp. V 1984) to liquidate at the rate determined by the U.S. Department of Commerce's ("**Commerce**") administrative review. Tsubaki is therefore entitled to a refund of antidumping duties paid on them. However, the Court agrees with Customs that with the exception of these five entries, the entries at issue are not deemed liquidated.

I. *BACKGROUND*

A. Procedural History

Tsubaki imports roller chain from Japan into the United States. Pl.'s Mot. Mem. Supp. Summ. J. 3 ("**Pl.'s Br.**"). From 1979 to 1983,

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[1] With respect to the five entries subject to deemed liquidation, Customs concedes that Tsubaki is entitled to a refund of any excess duty paid and interest assess upon liquidation, with interest on the refund as provided by law. *See* Def.'s Br. 3.

[2] These entries are No. 83–952658–0, which corresponds to protest no. 3001–01–100030, and Nos. 83–676679–6, 83–677277–7, 83–677819–5, and 83–677859–3, which correspond to protest no. 2720–01–100107. *See* Def.'s Resp. Pl.'s Stmt. Mat. Facts ¶ 9; Def.'s Br. 17–18.

Tsubaki made fifty-six entries of roller chain through various ports, which were subject to an antidumping duty order. During this time, Commerce held two periods of administrative review: (1) December 1, 1979 through March 31, 1981 ("**the first period**"); and (2) April 1, 1981 through September 1, 1983 ("**the second period**"). Liquidation of the entries was suspended pending the final results from the administrative reviews. The results from the first period were published in the *Federal Register* on December 4, 1986. *See* Roller Chain, Other Than Bicycle From Japan, 51 Fed. Reg. 43,755 (Dep't of Commerce Dec. 4, 1986) (final admin. review). The weighted average final dumping margin for the roller chain at issue during the first period was 0.07%. There was no cash deposit required for entries from this period of review.

The results from the second period of review were published in the *Federal Register* on May 8, 1987. *See* Roller Chain, Other Than Bicycle, From Japan, 52 Fed. Reg. 17,425 (Dep't of Commerce May 8, 1987) (final admin. review). There was no cash deposit required for the merchandise at the time of entry,[3] but Commerce subsequently determined that the weighted average dumping margin over the period of review ranged from 0.18% to 0.36%. 52 Fed. Reg. at 17,427.

Commerce issued liquidation instructions to Customs on September 18, 2000 for both the first and second periods of review. Customs then liquidated these entries between October 2000 and February 2001. Thereafter, Tsubaki filed protests under 19 U.S.C. § 1514 claiming that the entries at issue were deemed liquidated by operation of law under 19 U.S.C. § 1504(d). Tsubaki argued that Customs should have liquidated the entries at 0%, as that was the cash deposit rate in effect at the time of entry. The protest was denied, and Tsubaki subsequently commenced this action.

B. Relevant Statutory History

The primary issue before this Court is which version of 19 U.S.C. § 1504(d) applies in this case. In 1978, Congress promulgated its first statute governing "deemed liquidation." Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 209, 92 Stat. 888, 902–03, 19 U.S.C. § 1504. Congress made minor changes to this statute in 1984.[4] Section 1504 generally provides that if merchandise is not liquidated within one year from the date of entry, it is "deemed liquidated" at the rate asserted at the time of entry by

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[3] There was no cash deposit required for entries filed from April 1, 1981 through September 4, 1981. The cash deposit rate for entries filed from September 5, 1981 through September 1, 1983 was 0%. Pl.'s Br. 4.

[4] Congress made a technical amendment to § 1504 by striking out "his consignee, or agent" and replacing it with "of record" in subsections (a), (b), (c) and (d). *See* Trade and Tariff Act of 1984, Pub. L. 98–573, § 191, 98 Stat. 2948, 2970. This was the last amendment made to 19 U.S.C. § 1504 until the 1993 amendment, which is discussed in further detail below.

the importer. *See* 19 U.S.C. § 1504(a) (Supp. V 1984). However, special rules apply if liquidation has been suspended. From 1984 until 1993, § 1504(d) provided:

> (d) Limitation - Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, *unless liquidation continues to be suspended* as required by statute or court order. When such a suspension of liquidation is removed, *the entry shall be liquidated within 90 days therefrom*.

Id. § 1504(d) (emphasis added). At first glance it appears that Customs must liquidate an entry within ninety days after suspension of liquidation is removed, but courts have interpreted the ninety-day time limit as directory, not mandatory. *See Am. Permac, Inc. v. United States*, 191 F.3d 1380, 1382 (Fed. Cir. 1999) ("[E]ntries not liquidated within 90 days after removal of suspension are not deemed liquidated by operation of law. . . .") (*citing Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989)). Because this time limit is discretionary,

> [t]he statute had an unfortunate anomaly that made deemed liquidation available for entries for which removal from suspension occurred within the four-year period, but not for entries for which removal from suspension occurred even one day after the four-year time limit. In those circumstances, Customs had an unlimited amount of time in which to liquidate entries.

Koyo Corp. of U.S.A. v. United States, 29 CIT ___ , ___ , 403 F. Supp. 2d 1305, 1308 (2005).

Section 1504(d) was amended by the North American Free Trade Agreement Implementation Act in 1993. *See* Pub. L. No. 103–182, § 641, 107 Stat. 2057, 2204–05. The 1993 version provides as follows:

> (d) Removal of suspension. When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. *Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record*.

19 U.S.C. § 1504(d) (Supp. V 1993) (emphasis added). Unlike the 1984 version, there is no discretionary ninety-day time limit. The 1993 version provides explicitly that merchandise is "deemed liquidated" at the rate asserted at the time of entry if Customs fails to liquidate an entry within six months after receiving notification that the suspension was removed.

In light of the differences between the 1984 and 1993 versions of § 1504(d), Tsubaki claims that its merchandise entered between 1979 and 1983 should be deemed liquidated as a matter of law because Customs failed to liquidate that merchandise within six months after suspension of liquidation had been removed. Customs disagrees, and asserts that application of the 1993 version in this case would have an impermissible retroactive effect. Instead, Customs argues that the 1984 version's ninety-day discretionary limit should govern. Furthermore, as the 1984 version's four-year time limit applies to only five of the fifty-six entries at issue, the majority of Tsubaki's entries are not deemed liquidated by operation of law.

II. *JURISDICTION*

The Court has exclusive jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (2000). This action is timely and jurisdiction is proper under 28 U.S.C. § 1581(a).

III. *STANDARD OF REVIEW*

This Court reviews protest denials de novo. *See* 28 U.S.C. § 2640(a)(1) (2000) ("The Court of International Trade shall make its determinations upon the basis of the record made before the court in . . . [c]ivil actions contesting the denial of a protest."); *see also Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456, 951 F. Supp. 241, 246 (1996), *aff'd* 160 F.3d 1357 (Fed. Cir. 1999).

A motion for summary judgment shall be granted if "the pleadings [and discovery materials] 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). In ruling on cross-motions for summary judgment, if no genuine issue of material fact exists, the court must determine whether judgment as a matter of law is appropriate for either party. *Sea-Land Serv., Inc. v. United States*, 23 CIT 679, 684, 69 F. Supp. 2d 1371, 1375 (1999). Summary judgment is proper in this case because there are no genuine issues of material fact.

IV. *DISCUSSION*

A. The 1993 Version Would Have an Impermissible Retroactive Effect If Applied to These Facts

1. The Test for Retroactivity

In *Landgraf v. USI Film Products*, The Supreme Court identified the proper analysis for determining whether a statute should apply if it was enacted after the events giving rise to the lawsuit. 511 U.S. 244, 280 (1994). A court first must determine whether Congress expressly "prescribed the statute's proper reach." *Id.* If Congress has not done so, the court must decide whether the statute would "operate retroactively." *Id.* A statute's application is not retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment. . . ." *Id.* at 269. However, it is retroactive if the new statutory provision "attaches new legal consequences" to those events.[5] *Id.* at 269–70.

When a statute operates retroactively, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* at 280; *see also Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law."). Therefore, unless Congress clearly intended otherwise, a statute that operates retroactively with respect to events that took place before its enactment will not be applied.

It is not merely a "simple or mechanical task" to determine when a statute is retroactive.[6] *Landgraf*, 511 U.S. at 268. A statute operates

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[5] The *Landgraf* Court provided some further guidance in deciding whether a provision is retroactive:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound instincts," . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

511 U.S. at 270 (citation omitted).

[6] There are three situations where the application of a new statute to past events is "unquestionably proper." *See Landgraf*, 511 U.S. at 273–75; *see also Lindh v. Murphy*, 521 U.S. 320, 341–43 (1997) (Rehnquist, C.J., dissenting). These three categories are (1) procedural rules, (2) changes in law that provide prospective forms of relief, and (3) jurisdiction-stripping statutes. None of these categories apply here. First of all, the 1993 amendment to § 1504(d) is clearly not a jurisdiction-stripping statute. Additionally, it does not provide any prospective relief. Instead, the remedy of "deemed liquidation" under § 1504(d) is "quintessentially backward looking." *See Landgraf*, 511 U.S. at 282. Because the 1993 amendment attaches a new legal burden (i.e., deemed liquidation) to conduct that has already occurred, the statute is retroactive. *See id.*

Finally, the 1993 version of § 1504(d) does not fall within the category of new procedural rules that can be applied to past conduct and pending cases. It is true that because rules of procedure "regulate secondary rather than primary conduct," they generally do not operate

retroactively if it would (1) impair the rights a party possessed when he acted, (2) increase a party's liability for past conduct, or (3) impose new duties with respect to transactions already completed. *See id.* at 280. In deciding whether the application of legislation would be retroactive, a court must look at the "interrelationship between the new law and past conduct." *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 752 (Fed. Cir. 1997). If the conduct that "triggers" a particular statute's application occurs before the law's effective date, the statute's application to that conduct would be retroactive. *See id.* (citation omitted). To select the appropriate triggering event, the Court will examine at which point in the importation process the 1993 version 19 U.S.C. § 1504(d) becomes relevant.

2. Application of the Test for Retroactivity

In a case that is exactly on point, the U.S. Court of Appeals for the Federal Circuit ("**Federal Circuit**") stated that "[t]he 'triggering event' for the running of the 6-month time period under [the 1993 version of 19 U.S.C. § 1504(d)] is the lifting of the suspension on liquidation. . . ." *Am. Permac*, 191 F.3d at 1381. Prior to 1993, Customs faced very different legal consequences if it failed to liquidate within six months after suspension of liquidation was removed. *See id.* Under the older statute, Customs was under no statutory mandate to liquidate entries within a particular time period. Instead, Congress merely suggested that Customs liquidate the relevant entries within ninety days. Even if ninety days passed after removal of the suspension, the entries would not be deemed liquidated.[7] In contrast, after the 1993 amendment, Customs is *required* to liquidate entries within six months after suspension has been removed. If Customs fails to do so, the entries will be deemed liquidated. This mandated

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retroactively. *Id.* at 275. A procedural rule is not retroactive if it does not "impose an additional or unforeseeable obligation" upon a party. *Id.* at 278 (*quoting Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 721 (1974)). However, in this case, § 1504(d) governs how long Customs can wait before it must liquidate entries before they are "deemed liquidated" by operation of law. Customs' failure to liquidate Tsubaki's entries within six months after suspension of liquidation was removed is the conduct that is squarely at issue in this lawsuit. Furthermore, if the 1993 version of § 1504(d) applied in this case, it would impose an unforeseeable obligation on Customs. Under the 1984 version of the law, Customs suffered no consequences if it failed to liquidate entries that were at least four years old after the suspension of liquidation was removed. *See supra* Part I.B. By contrast, under the 1993 statute, any entries, regardless of age, would be deemed liquidated if Customs failed to liquidate them within six months of receiving liquidation instructions after removal of suspension. Customs properly liquidated all but five of the entries according to the 1984 version of the statute. Because the 1993 version would impose an unforeseeable legal obligation on Customs, it would operate retroactively in this case. *Cf. Landgraf*, 511 U.S. at 275 n.29 ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime. . . .").

[7] As discussed above, if liquidation was suspended, "deemed liquidation" would only occur if (1) the entries were less than four years old, (2) suspension of liquidation was removed, and (3) Customs failed to liquidate within that same four-year period. 19 U.S.C. § 1504(d) (Supp. V 1984); *see Koyo*, 29 CIT at ____ , 403 F. Supp. 2d at 1308.

deemed liquidation is a new legal consequence of removal of suspension that was not present under the 1984 version.

The suspension on liquidation of the two sets of Tsubaki's entries was lifted in December 1986 and May 1987, when Commerce published the results of its administrative reviews. *See Int'l Trading Co. v. United States*, 24 CIT 596, 606, 110 F. Supp. 2d 977, 986 (2000), *aff'd* 281 F.3d 1268, 1275 (Fed. Cir. 2002) (suspension removed when final results published by Commerce). As the suspension was removed well before the 1993 amendment to § 1504(d), the 1993 version would have a retroactive effect in this case. As there is no evidence that Congress contemplated that the statute apply retroactively, the presumption against retroactivity requires that the 1993 amendment does not apply to these facts. *See Am. Permac*, 191 F.3d at 1381–82 (*citing Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 237 (1995)).

Citing *American International*, Tsubaki argues that the statement by the *American Permac* court identifying the relevant "triggering event" as the removal of suspension is a dictum. The *American International* court described *American Permac's* narrow holding as follows: "It [is] impermissible to apply § 1504(d) as amended in 1993 when the removal of suspension, the running of the six-month period, and the date of liquidation by operation of law all occurred prior to the effective date of the 1993 amendment." *See Am. Int'l Chem., Inc. v. United States*, 29 CIT ___ , 387 F. Supp. 2d 1258, 1265 (2005). Unlike in *American Permac*, there was no retroactive effect in *American International* because all the relevant events occurred after the 1993 amendment. Significantly, in the present case, the removal of suspension, the running of the six-month period, and the date of liquidation by operation of law all occurred prior to December 8, 1993. Therefore, even under the narrower *American Permac* holding restated in *American International*, the 1993 version would operate retroactively if applied to Tsubaki's entries.[8]

With the support of *Travenol*, Tsubaki asserts that the triggering event should be Customs' liquidation of the entries. However, Tsubaki's reliance on *Travenol* is misplaced. To begin with, the provision at issue in *Travenol* was 19 U.S.C. § 1505(c), which is not the statute at issue in the present case. Section 1505(c) relates to the in-

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[8] Tsubaki argues that this case "parallels" that of *Fujitsu General*, in which the court applied the 1993 version of § 1504(d). Pl.'s Br. 14 (*citing Fujitsu Gen. Am., Inc. v. United States*, 24 CIT 733, 110 F. Supp. 2d 1061 (2000), *aff'd* 283 F.3d 1364 (Fed. Cir. 2002)). That case involved entries which took place between 1986 and 1988. The importer challenged the final results of an administrative review, which was completed in 1991. The Federal Circuit ruled that suspension of liquidation was not removed until 1996, when the time to petition the Supreme Court expired. In contrast, the suspension of liquidation of Tsubaki's entries was removed when the final results of the administrative review were published, in 1986 and 1987, well before 1993. Tsubaki did not challenge the results of the final administrative review, and therefore no injunction to continue suspension of liquidation was requested or issued after publication of the final results of the administrative reviews.

terest that is owed for either an underpayment or overpayment of estimated duties. *See Travenol*, 118 F.3d at 753. The *Travenol* court held that the triggering event for § 1505(c) is the liquidation or reliquidation of an entry because § 1505(c) "comes into play only after there has been a determination that interest is due. . . ." *Id.* Because Customs cannot assess interest until after an entry is liquidated, liquidation must occur before Customs can decide how much an importer owes. Under such circumstances, it is clear that liquidation sets in motion, or triggers, the process by which the rate of interest is determined.

In this case, the issue is not the rate of interest but at what rate goods can be liquidated after suspension has been removed. Under the 1993 version of § 1504(d), that rate is determined by reference to the date Customs received notice that suspension was removed. Therefore, it is impossible for liquidation, namely the event which concludes the process, to be the triggering event. Under the circumstances of this case, the event that began the running of the six-month period was the date Commerce published the final results of the administrative review, thereby lifting the suspension of liquidation and providing Customs with notice of the same. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002) (**"Int'l Trading II"**) (notice requirement of § 1504(d) as amended in 1993 is met when Commerce publishes the final results of the administrative review in the *Federal Register*).

The Court therefore holds that the application of the 1993 version of § 1504(d) would have an impermissible retroactive effect if applied to a case where the following events have occurred before the enactment of the 1993 amendment: (1) Commerce published the final results of its administrative review (thereby simultaneously lifting the suspension of liquidation and giving notice to Customs) and (2) the six-month time limit imposed by the 1993 amendment has run. Therefore, the 1984 version of 19 U.S.C. § 1504(d) must apply to these facts.

B. Pursuant to the 1984 Version of 19 U.S.C. § 1504(d), the Entries at Issue Are Not Entitled to Deemed Liquidation

Prior to 1993, the first sentence of § 1504(d) provided that if an entry is not liquidated within four years from the date of entry, it will be "deemed liquidated" unless the liquidation is suspended. *See* 19 U.S.C. § 1504(d) (Supp. V 1984). In this case, all but five of Tsubaki's entries were under suspension for longer than four years. Because the suspension of liquidation orders were not removed until after the four-year time limit expired, the language in the first sentence of § 1504(d) simply does not apply in this case. *See Canadian Fur Trappers*, 884 F.2d at 565–66; *Dal-Tile Corp. v. United States*, 17 CIT 764, 769, 829 F. Supp. 394, 398 (1993), *aff'd*, 26 F.3d 139 (Fed.

Cir. 1994) (merchandise under suspension more than four years after date of entry falls under exception to the four-year time limit).

The second sentence of § 1504(d) contains a specific exception to the four-year time limit for liquidation suspended either by statute or by court order. It provides that such entries "shall be liquidated within 90 days [after the suspension of liquidation is removed]." 19 U.S.C. § 1504(d) (Supp V 1984). As discussed above, this language was directory, rather than mandatory. Even if Commerce removes the suspension of liquidation, and ninety days pass, the entries are not deemed liquidated as a matter of law. *See Canadian Fur Trappers*, 884 F.2d at 566.

Tsubaki's merchandise entered more than four years before the suspension of liquidation was removed in 1986 and 1987. Therefore, Tsubaki's entries are not liquidated as a matter of law because they fall under the 1984 version of § 1504(d), which does not mandate deemed liquidation on these facts. In line with *Canadian Fur Trappers* and *American Permac*, the Court finds that none of Tsubaki's contested entries are entitled to deemed liquidation under 19 U.S.C. § 1504(d) (Supp. V 1984).

C. Five of Tsubaki's Entries Are "Deemed Liquidated" under the 1984 version of § 1504(d)

Entry Nos. 83–952658–0, 83–676679–6, 83–677277–7, 83–677819–5, and 83–677859–3 were made between May 23 and July 25, 1983. The removal of suspension of liquidation of these entries occurred on May 8, 1986, when Commerce published the final results of its administrative review. Because four years did not pass between the date of entry and the date suspension of liquidation was removed, the language in the first sentence of § 1504(d) (Supp V 1984) applies. As Customs properly concedes, these entries are therefore deemed liquidated by operation of law. *See Nunn Bush Shoe Co. v. United States*, 16 CIT 45, 46–48, 784 F. Supp. 892, 893–94 (1992).

D. The Existence of an E-mail Sent by Commerce to Customs on June 9, 2000 Is Not Relevant

Finally, Tsubaki makes the alternative argument that because Customs allegedly received e-mail notice from Commerce regarding the lifting of suspension after the effective date of § 1504(d) (Supp. V 1993), the 1993 amendment applies.[9] Tsubaki alleges that that

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[9] The existence of this e-mail is disputed by the parties. *See* Def.'s Reply 7 ("The plaintiff offers no proof of the contents of the e-mail, or that Commerce sent the e-mail, or that Customs received the e-mail."), but as it is irrelevant to this lawsuit, it is not a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

Commerce e-mailed liquidation instructions to Customs on February 2, 2000, well after the effective date of the 1993 amendment. Pl.'s Br. Opp. Def.'s Cross Mot. Summ. J. 11 (**"Pl.'s Br. Opp."**). Tsubaki reasons that because Customs did not receive e-mail instructions in this case until 2000, adequate notice did not occur until that time. *Id.* (*citing Am. Int'l Chem.*, 29 CIT at ___ , 387 F. Supp. 2d at 1269–70 (ruling that liquidation instructions e-mailed from Commerce to Customs constituted adequate notice that the suspension of liquidation had been lifted)).

The problem with Tsubaki's argument, however, is that in *American International*, Commerce e-mailed liquidation instructions to Customs before it published the final results of the administrative review in the *Federal Register*. *Id.* at 1261. The issue in that case was whether, absent such publication, e-mail instructions constituted adequate notice. That court ruled that it did. *Id.* at 1269–70. In the case at hand, however, the results of the administrative review were published long before Commerce allegedly sent Customs liquidation instructions via e-mail. *See* Pl.'s Br. Opp. 2 (stating that the final results of the administrative reviews were published in 1986 and 1987, and the e-mail was sent to Customs in 2000). Notice is effected upon publication in the *Federal Register*. *See Fujitsu Gen. Am., Inc.*, 283 F.3d at 1381–82; *Int'l Trading II*, 281 F.3d at 1275–76; *Am. Int'l Chem.*, 29 CIT at ___ , 387 F. Supp. 2d at 1267. The mere fact that Customs did not receive an e-mail until 2000 does not render meaningless the publication of final results in 1986 and 1987. *See Am. Int'l Chem.*, 29 CIT at ___ , 387 F. Supp. 2d at 1267 (publication is the "hallmark of proper notice under § 1504(d)"). It is therefore irrelevant that Commerce may have sent e-mail liquidation instructions in 2000.

V. *CONCLUSIONS*

For the foregoing reasons, the Court denies in part Tsubaki's motion for summary judgment and grants Customs' motion for summary judgment. Pursuant to the 1984 version of 19 U.S.C. § 1504(d), fifty-one of the entries at issue in this case are not deemed liquidated by operation of law because the four-year time limit did not apply. Five of the entries are deemed liquidated because less than four years had passed between the date of entry and the date the suspension of liquidation was removed. These five entries should be reliquidated by Customs as entered, and any excess antidumping duties and interest assessed upon liquidation should be refunded to Tsubaki with interest on the refund as provided by law. Judgment shall be entered accordingly.

Slip Op. 06–149

GILDA INDUSTRIES, INC. Plaintiff, v. UNITED STATES, Defendant.

Consol. Court. No. 03–00203
Before: Barzilay, Judge

[Defendant's motion to dismiss is granted.]

Decided: October 10, 2006

(*Peter S. Herrick*) for Plaintiff Gilda Industries, Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Jeanne E. Davidson*), Deputy Director; (*David S. Silverbrand*), Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *John J. Mahon*, International Trade Field Office, U.S. Department of Justice; *William Busis*, Office of General Counsel, Executive Office of the President, Office of the United States Trade Representative, of counsel, for Defendant United States.

OPINION

BARZILAY, JUDGE: In this case, on remand from the Court of Appeals from the Federal Circuit, the court must determine whether the United States Trade Representative ("USTR") has complied with the "carousel provision" of 19 U.S.C. § 2416 with respect to its retaliatory duty list, created as a result of the hormone beef dispute between the United States and European Community ("EC"). Pursuant to the statute, the USTR must either undertake a periodic review and revision of the list unless she qualifies for one of two statutory exceptions to this mandate: (1) that the USTR believes that the trade dispute will be resolved imminently or (2) that "the Court No. 03-00203 Page 2 [USTR] together with the petitioner involved in the initial investigation . . . (or if no petition was filed, the affected United States industry) agree that it is unnecessary to revise the retaliation list." 19 U.S.C. § 2416(b)(2)(B)(ii). Because the court finds that the USTR has met the requirements of the second exception, Defendant's motion to dismiss is granted, and this case is dismissed.

I. Procedural History

In 1999, the USTR imposed 100 percent *ad valorem* retaliatory duties on a spectrum of EC exports to the United States pursuant to 19 U.S.C. § 2416 in response to the EC's failure to comply with the World Trade Organization Dispute Settlement Body, which found the EC's ban on hormone-treated meat to contravene its trade obligations. *See Implementation of WTO Recommendations Concerning EC — Measures Concerning Meat and Meat Products (Hormones)*, 64 Fed. Reg. 14,486–01 (USTR Mar. 25, 1999). Among the products selected for the retaliatory list were those falling under subheading 9903.02.35, HTSUS, which includes rusks, toasted bread, and simi-

lar products. Soon after the implementation of these duties, Congress amended § 2416 to require the USTR to periodically modify its list.

Four years later, Plaintiff Gilda Industries, Inc. ("Gilda"), filed protests with the Bureau of Customs and Border Protection ("Customs") to contest the classification of the toasted bread it imported into the United States from Spain and the imposition of the retaliatory duties on its three related entries. Customs denied the protests. Subsequently, Gilda filed suit in this Court, requesting reliquidation of its entries, a refund of the duties it paid as a result of its products' placement on the retaliation list, and removal of its products from the list. The court dismissed Gilda's complaint for failure to state a claim upon which relief could be granted. *See Gilda Indus., Inc. v. United States*, 28 CIT ___ , 353 F. Supp. 2d 1364 (2004) ("*Gilda I*"). Gilda appealed.

After affirming most of the holdings in *Gilda I*, the Court of Appeals for the Federal Circuit vacated this court's decision that the USTR had not violated the "review and revise" requirement of § 2416. Although the USTR claimed that he[1] " 'determine[d] that implementation of a recommendation made pursuant to a dispute settlement proceeding [was] imminent,' " *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1279 (Fed. Cir. 2006) (quoting 19 U.S.C. § 2416(b)(2)(B)(ii)(I)) ("*Gilda II*"), the Court of Appeals wrote that "the applicability of the statutory exception in this case requires consideration of evidence and findings of fact. The record is insufficient to support the . . . conclusion that [it] applies in this case as a matter of law." *Id*.

On remand, the court now must determine as a factual matter whether the USTR has fulfilled one of the statutory exceptions in § 2416(b)(2)(B)(ii). If the USTR demonstrates that a statutory exception applies, Gilda will find no remedy in this suit. However, if an exception does not apply, "the court [will] consider whether it is appropriate to direct the [USTR] to review and revise the retaliation list."[2] *Id*. at 1282. This court has jurisdiction under 19 U.S.C. § 1581(i).

II. Discussion

Defendant maintains that "at this time, the USTR and the domestic industry agree that it is unnecessary to revise the retaliation list" and that, consequently, "the USTR is not required to revise the re-

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[1] From 2001 to 2005, Robert B. Zoellick served as the USTR. On June 8, 2006, Susan C. Schwab assumed the position.

[2] Irrespective of the outcome of this case, Gilda "is not entitled to a refund of duties paid or removal of its imported products from the retaliation list." *Id*. at 1283.

taliation list."[3] Def.'s Resp. Pl.'s Br. Remand Issues 3 (citing 19 U.S.C. § 2416(b)(2)(B)(ii)(II)). To support its contention, Defendant has submitted letters from the president/CEO of the U.S. Meat Export Federation ("USMEF"),[4] counsel for the National Cattlemen's and Beef Association ("NCBA"),[5] and the USTR.[6] *See* Def.'s Resp. Pl.'s Br. Remand Issues Exs. A & B. The USMEF and its members state that they "consider it unnecessary at this time to revise the retaliation list in the case of *EC Measures Concerning Meat and Meat Products (Hormones), AB–1997–4*." Def.'s Resp. Pl.'s Br. Remand Issues Ex. A. NCBA also contends that "it is unnecessary to revise the retaliation list." Def.'s Resp. Pl.'s Br. Remand Issues Ex. A. Furthermore, the USTR has determined that because "industry associations representing substantially all of the United States beef-producing industry . . . do not believe it is necessary to revise the retaliation list at this time," pursuant to § 2416(b)(2)(B)(ii)(II), he "agree[s] with the affected U.S. industry that it is unnecessary to revise the retaliation list" in question. Def.'s Resp. Pl.'s Br. Remand Issues Ex. B.

From the documentation produced, the court concludes that Defendant has met the requirements of the carousel provision exemption delineated in 19 U.S.C. § 2416(b)(2)(B)(ii)(II). Further, because the USTR's determination in this matter receives "substantial deference," *Gilda Indus., Inc. v. United States*, 453 F.3d 1362, 1364 (Fed. Cir. 2006), Plaintiff's challenge must fail, as "there is no remedy available to Gilda in this suit." *Gilda II*, 446 F.3d at 1282. Defendant's motion to dismiss is granted. Judgment will be entered accordingly.

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[3] Although Defendant originally placed the USTR's imminence determination at center of its argument, the parties raised both possible exceptions to § 2416(b)(2)(B) during oral arguments. *See* Tr. 8–10.

[4] USMEF is a non-profit trade association that represents the export interests of the U.S. beef, pork, and lamb industries.

[5] NCBA is the primary association representing U.S. cattle and beef producers.

[6] While factual determinations in this case would normally be confined to the administrative record, because the current record proves inadequate, the court may " 'obtain from the agency . . . additional explanation of the reasons for the agency decision as may prove necessary.' " *Gilda Indus., Inc. v. United States*, 453 F.3d 1362, 1363 (Fed. Cir. 2006) (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)).