Slip Op. 06 – 187

KYOCERA INDUSTRIAL CERAMICS CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00705

Opinion

[Upon cross-motions as to classification of certain ceramic substrates for electronic integrated circuits, summary judgment for the defendant.]

Decided: December 21, 2006

DeKieffer & Horgan (*J. Kevin Horgan* and *A. David Lafer*) for the plaintiff.

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 (*Jack S. Rockafellow*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Michael W. Heydrich*), of counsel, for the defendant.

AQUILINO, Senior Judge: Defendant's motion to dismiss plaintiff's amended complaint for lack of subject-matter jurisdiction having been denied by the court in slip opinion 03–148, 27 CIT 1703, 293 F.Supp.2d 1360 (2003), *reh'g denied* (Nov. 18, 2004), familiarity with which is presumed, the parties have now interposed cross-motions for summary judgment as to the correct classification of certain imported ceramic substrates for electronic integrated circuits ("IC substrates") that underlie this action.

I

As recited in slip opinion 03–148, paragraph 7 of the amended complaint avers that,

> [p]rior to March 10, 1999, blank IC substrates imported by KICC[1] were classified under HTSUS subheading 8542.90, as parts of integrated circuits, based on HQ 088157 (July 2, 1992), *i.e.*, the "Diacon Ruling," which classified ceramic pieces used as bases for integrated circuits under HTSUS 8542.90, a duty-free classification. The classification determination made in the Diacon Ruling was followed by KICC and Customs until Customs issued NY D88010 (March 10, 1999), which classified blank IC substrates of porcelain under HTSUS 6914.10.8000 as "Other ceramic articles: Of porcelain or china: . . . Other," dutiable at 9% *ad valorem*.

27 CIT at 1706, 293 F.Supp.2d at 1362 (footnote omitted). Certain numbered protests covered by this pleading encompass entries prior to that day in 1999. Moreover, plaintiff's papers in opposition to defendant's motion to dismiss contained a copy of the following declaration to the Customs Service sworn to soon thereafter by KICC's erstwhile import/export specialist:

> 2. In 1992, I became aware of a new ruling, HQ 088157 (July 2, 1992) (i.e., the "Diacon Ruling"), which affected the tariff classification of blank ceramic substrates imported by KICC. The Diacon Ruling held that "ceramic pieces" used as mounting bases for electronic integrated circuits were properly classified under subheading 8542.90 of the . . . HTSUS[ ] as parts of integrated circuits.
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> 3. Upon learning of the Diacon Ruling, I transmitted a copy . . . to all of KICC's customs brokers in the ports then being used by KICC to import ceramic substrates. I instructed the brokers to classify all of KICC's ceramic substrates for integrated circuits in accordance with the Diacon Ruling.
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> 4. At the same time I advised KICC's customs brokers to attach a copy of the Diacon Ruling to each ceramic substrates entry packet submitted to USCS.
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> 5. When KICC underwent a National Customs Survey Audit by the USCS in 1993–95, the auditors reviewed the tariff classification of KICC's imports, including the tariff classification of blank ceramic substrates. The auditors did not object to any of KICC's classifications.
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> 6. On several occasions during my tenure with KICC, I discussed with employees of USCS the implications of the Diacon Ruling for the tariff classification of ceramic substrates imported by KICC. During these conversations, the USCS em-

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[1] This is counsel's choice of reference to their plaintiff client.

> ployees never objected to the classification of ceramic substrates in accordance with the Diacon Ruling.[2]

A

The plaintiff takes the position that Customs "issued a new ruling modifying the Diacon Ruling but has not published notice of that ruling in the Customs Bulletin." First Amended Complaint, para. 15. Hence, this "new ruling" is ineffective upon a reading of 19 U.S.C. § 1625(c), which provides:

> A proposed interpretive ruling or decision which would–
>
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
>
> (2) have the effect of modifying the treatment previously accorded by . . . Customs . . . to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

The focus of plaintiff's complaints has been on foregoing subsection (c)(1). Plaintiff's subsequently-filed memorandum in support of its motion for summary judgment, pages 9–10, added that subsection (c)(2) required Customs to publish

> notice in the Customs Bulletin before implementing a ruling modifying the tariff treatment of Kyocera's blank ceramic substrates because the ruling had the effect of modifying the treatment accorded to substantially identical transactions involving the importation of blank ceramic substrates by Kyocera during the preceding seven years.

This additional claim caused the defendant to file a motion to strike it from this action or to stay proceedings herein and remand it for initial administrative determination. This court granted the al-

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[2] Plaintiff's Memorandum in Support of Motion for Summary Judgment, Exhibit 5; 27 CIT at 1706–07, 293 F.Supp.2d at 1363 (footnote omitted). The acronym "USCS" refers to the Customs Service, as it was then still known.

ternative relief prayed for. Whereupon Customs and Border Protection, as it has now become known, issued HRL 967539 (April 25, 2005), concluding that

> there is insufficient evidence to substantiate that KICC had a treatment. KICC's treatment claim is hereby denied.

(1)

According to the plaintiff, "the Diacon Ruling required that all ceramic substrates for integrated circuits be classified under HTSUS 8542.90"[3] and the subsequent rulings "constituted a modification of the Diacon Ruling by limiting its application". Plaintiff's Memorandum, p. 19. That it pertained to *all ceramic substrates for integrated circuits*, however, cannot be gleaned from the text of the ruling. Indeed, the word "substrate" is not to be read therein. Appended as exhibits 9–12 to plaintiff's summary-judgment memorandum are the protest that resulted in the Diacon Ruling; an April 30, 1992 Memo re Meeting with Laboratories & Scientific Services Related to Diacon Ruling; a Memo from Laboratories & Scientific Services to Chief, Metals and Machinery Branch Related to Diacon Ruling; and a September 19, 1990 Letter from Sandler, Travis & Rosenberg Related to Diacon Ruling. These exhibits do contain the phrases "ceramic substrates or chip carriers", "ceramic substrate, a housing for an electronic integrated circuit", "ceramic substrate or chip carriers", and "alternatively referred to as . . . ['']ceramic substrates' ", respectively. But compare HQ 088157, wherein the word substrate does not once appear.

Be the exact content of that Diacon Ruling as it is, the defendant

> flatly reject[s] the conclusion that the [subject imports] – or that earlier entries of substantially similar merchandise – were substantially identical to the ceramic pieces at issue in the Diacon Ruling. In contrast, [it] direct[s] the Court's attention to the drawings and accompanying description in the Diacon Patent, which demonstrate that the ceramic pieces described as "substrate" therein are each used to house an individual IC chip [ ], and are **not** used themselves, as is Kyocera's substrate, in making IC chips.

Defendant's Memorandum in Opposition, p. 3 (internal citation omitted; boldface in original). Plaintiff's exhibits, which, as noted, do refer to the imports in Diacon as "substrates", nonetheless support defendant's position that, whatever their nomenclature, they were used for housing IC chips, not in making such chips, which is the function of the ceramic pieces at bar. The exhibits cited also contain

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[3] First Amended Complaint, para. 15.

phrases such as "[t]he ceramic substrates or chip carriers are the housings for semiconductor devices or integrated circuits"; "[i]t is a ceramic substrate, a housing for an electronic integrated circuit"; "the ceramic base does not come into contact with the electrical circuit"; and "used exclusively in the semiconductor industry in leaded chip carriers, flatpacks, hybrid packages, etc. . . . which house electronic integrated circuit chips."

A substrate is defined in *The Free On-line Dictionary of Computing*, http://foldoc.org/, © 1993–2005 Denis Howe, as

> [t]he body or base layer of an integrated circuit, onto which other layers are deposited to form the circuit. . . . It is used as the electrical ground for the circuit.

The aforementioned Memo from Laboratories & Scientific Services to Chief, Metals and Machinery Branch Related to Diacon Ruling states that "the ceramic base does not come into contact with the electrical circuit and does not appear to serve any electrical insulating function." In contrast thereto, plaintiff's proffered Statement of Material Facts as to Which There is No Genuine Issue to Be Tried explains:

> 1. . . . The substrates are used in the United States solely or principally as bases in the production of integrated circuits [ ]. . . .
>
> * * *
>
> 4. At the time of importation, these substrates are dedicated to their use as IC substrates. There is no other regular commercial application for these articles.
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> 5. In general, Kyocera's customers for blank ceramic substrates are laser houses that will . . . generally sell the scored substrates to IC manufacturers who will, in the case of thick-film substrates, use screen printing to place resistors and electrical interconnects for multiple IC's on the substrate. In the case of thin film substrates, resistors and interconnects are achieved through vacuum deposition or sputtering. Additional components (*e.g.*, monolithic integrated circuits, transistors, diodes) are then affixed to the substrate. The result is a square or rectangle consisting of multiple hybrid integrated circuits on a conjoined substrate.

Footnotes omitted.

Due to the material differences between the subject imports at issue in each case, this court cannot and therefore does not conclude that the Diacon Ruling applied to "all ceramic substrates for integrated circuits". It was not modified or revoked by the later 1999 or 2002 rulings, and the procedures of 19 U.S.C. § 1625(c)(1) did not govern plaintiff's imports.

(2)

With regard to plaintiff's alternative claim of "treatment", in *Arbor Foods, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–74, p. 16 (May 17, 2006), the court held that,

> [t]o establish a violation of § 1625(c)(2), [a party] must show that: "(1) an interpretive ruling or decision (2) effectively modifie[d] (3) a 'treatment' previously accorded by Customs to (4) 'substantially identical transactions', and (5) that interpretive ruling or decision has not been subjected to the notice-and-comment process outlined in § 1625(c)(2)." *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1040, 116 F.Supp.2d 1350, 1374 (2000).

That is, in order to prevail on its subsection 1625(c)(2) claim, KICC has the evidentiary burden of showing that the 1999 Ruling *effectively modified a treatment previously accorded by Customs to substantially identical transactions. See* 19 C.F.R. § 177.12(c)(1)(iv). To quote again from *Arbor Foods*,

> [b]ecause § 1625(c) does not define treatment, the agency and the reviewing court give[ ] the undefined term its ordinary meaning. . . . In *Precision Specialty Metals*, the court held that "treatment" refers to the actions of Customs and that § 1625(c) allows importers to order their behavior based on Customs' prior actions. . . . Customs, however, narrowed the scope of actions that constitute treatment under § 1625(c). In 19 C.F.R. § 177.12(c), Customs stated that "[it] will give no weight whatsoever to informal entries or transactions which [it], in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review." 19 C.F.R. § 177.12(c)(1)(ii) (2006). The Federal Circuit subsequently held that this was a permissible construction of § 1625(c) that warrants deference and that entries liquidated under Customs' "bypass" procedures are not considered "treatments" for the purposes of § 1625(c). . . .

30 CIT at ___ , Slip Op. 06–74, p. 17 (case citations omitted).

Here, the plaintiff claims that it "was not required to comply with these later-adopted regulations when it invoked section 1625 in its protest filed in October 2000". Plaintiff's Memorandum, p. 18. However, the court of appeals has held in *Motorola, Inc. v. United States*, 436 F.3d 1357, 1366 (Fed.Cir. 2006), that

> [i]t makes no difference to our analysis that the regulation was promulgated in 2002, after the controversy arose and after this litigation began. So long as an agency's interpretation of a statute is not a "post hoc rationalization . . . seeking to defend past agency action against attack," *Auer v. Robbins*, 519 U.S. 452,

> 462 . . . (1997), or "wholly unsupported by regulations, rulings or administrative practice," *Smiley v. Citibank (S.Dak.), N.A.*, 517 U.S. 735, 741 . . . (1996)(quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 . . . (1988)), *Chevron* deference is due even if the adoption of the agency's interpretation post-dates the events to which the interpretation is applied.

Subsection 177.12(c)(1)(i) of 19 C.F.R. provides that, to substantiate a claim of "treatment", there must be evidence to establish that

> (A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;

and subsection (c)(1)(iv) adds that the

> evidentiary burden as regards the existence of the previous treatment is on the person claiming that treatment. The evidence of previous treatment by Customs must include a list of all materially identical transactions by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each transaction (where applicable), the ports of entry, the dates of final action by Customs, and, if known, the name and location of the Customs officer who made the determination on which the claimed treatment is based. In addition, in cases in which an entry is liquidated without any Customs review (for example, the entry is liquidated automatically as entered), the person claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry.

Although the plaintiff discounts the need to follow these regulations, it argues compliance in that KICC "inform[ed] Customs of its reliance on the Diacon Ruling on multiple occasions orally and in documentary form by including the Diacon Ruling in its entry packages." Plaintiff's Reply Memorandum, p. 19. The plaintiff asserts that it "should not be penalized because [the Customs officer] was not paying attention despite [KICC's] repeated efforts to inform him of that fact." *Id*. at 20. The requirement is actual determination, however, not attempted notice by an importer.

Additionally, the plaintiff claims satisfaction of subsection 177.12(c)(1)(i)(A), *supra*, in that the requisite evidence is "clearly establish[ed]" in the declarations designated exhibits 5 and 6, and executed by Michael G. Lubitz and Penny A. Evans, KICC's Import/Export Specialist during the period 1991–1995 and the company's Manager of the Import/Export Department from 1990 through 1994, respectively. In addition to the representations quoted from the Lubitz declaration, *supra*, the Evans declaration states:

> 2. In 1992, I was advised by Joyce Bryant of USCS's Otay Mesa office that a new ruling, HQ 088157 (July 2, 1992)(i.e., the "Diacon Ruling"), was issued that affected the tariff classification of blank ceramic substrates imported [by] Kyocera [ ]. The Diacon Ruling held that "ceramic pieces" used as mounting bases for electronic integrated circuits were properly classified under subheading 8542.90 of the [HTSUS] as parts of integrated circuits.

While there may well have been no objection on the part of Customs, that was not the equivalent of a positive determination that would satisfy the standard of subsection 177.12(c)(1)(i)(A). With regard to the foregoing paragraph from the Evans declaration, in its Diacon Ruling Customs cites *Kyocera Int'l, Inc. v. United States*, 2 CIT 91, 527 F.Supp. 337 (1981), *aff'd*, 69 CCPA 168, 681 F.2d 796 (1982), for support of its classification decision. That matter dealt with imports described as "ceramic articles" which, "[a]fter completion of assembly and processing . . . function as a package or housing for an associated integrated circuit chip". 2 CIT at 91, 92, 527 F.Supp. at 337, 338. Therefore, the Diacon Ruling could or would apply to certain KICC ceramic imports, and it would not be incorrect for Customs officers to so react. But, there is no support on the record, adduced from plaintiff's declarations or otherwise, that "[t]here was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment" herein.

Counsel have also filed Plaintiff's Supplemental Statement of Material Facts as to Which There is No Genuine Issue to Be Tried. Among other things, it represents that, "[p]rior to the issuance of NY D88010 on March 10, 1999, blank ceramic substrates imported by Kyocera were consistently classified under HTSUS subheading 8542.90." The declaration of Gregory Onses and list of entries attached thereto are presented to prove this point. However, as long as evidence is absent that such classification was the result of an actual determination by a Customs officer and those elements spelled out by 19 C.F.R. § 177.12(c)(1)(iv), the presentment is not conclusive. Moreover, the court notes in passing that the attached list of "Blank Substrates Totals by Line Item" fails to reveal the ports of entry, the dates of final action by Customs, and the name(s) and location(s) of Service officer(s) who made any determination(s) on which the claimed treatment is based. The list also fails to prove that its imports were "materially identical transactions".

In sum, the evidence submitted, such as it is, does not establish that "Customs approved the classification of [subject] blank ceramic substrates as parts of ICs", as claimed in plaintiff's motion for summary judgment. There is nothing to suggest that the imports at issue were processed after an examination by Customs or after Service-officer review of the kind contemplated by 19 C.F.R. § 177.12(c)(1)(i)(A), *supra*, and there certainly is not adequate fac-

tual evidence within the meaning of subsection 177.12(c)(1)(iv). This court thus concludes that the plaintiff has failed to satisfy the burden required to prevail on its "treatment" claim under 19 U.S.C. § 1625(c)(2).

II

Independent of any legal consequence of the Diacon Ruling for the merchandise still at bar[4], the plaintiff continues to press for classification under HTSUS chapter 85, heading 8542, as follows:

8542	Electronic integrated circuits and microassemblies; parts thereof:
	* * *
8542.90.00	Parts

That is, plaintiff's protests of classification under HTSUS subheading 6914.10.80 ("Other ceramic articles: Of porcelain or china: . . . Other") led Customs to issue HQ 964811 (May 1, 2002), which opted for subheading 6909.11.40, to wit:

6909	Ceramic wares for laboratory, chemical or other technical uses; . . .
6909.11	Of porcelain or china:
	* * *
6909.11.40	Other

A

Each side is of the view that this action is ripe for summary judgment. *See*, *e.g.*, Defendant's Memorandum, p. 7; Plaintiff's Reply Memorandum, p. 1. Upon review of all of the papers filed in support of, and in opposition to, the parties' cross-motions, the court cannot conclude that there is any genuine issue of material fact that cannot be resolved without a trial. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Indeed, a "classification decision, ultimately, is a question of law based on two underlying steps." *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed.Cir. 1997). First, the court must define the terms in the relevant classification headings, then it has to determine under which of them the subject imports more correctly land. *Id*. When defining the terms in a tariff heading, the court proceeds *de novo*, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id*. at 492, quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "Al-

[4] Included in plaintiff's entries were substrates for magnetic head sliders in disc drives for automatic data processing machines, the classification of which is not at issue herein. *See* Slip Op. 03–148, 27 CIT at 1704 and 293 F.Supp.2d at 1361 n. 3.

though our review is *de novo*, we accord deference to a Customs' classification ruling in proportion to its 'power to persuade' under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134 . . . (1944)." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed.Cir. 2006)(case citations omitted).

HTSUS General Rule of Interpretation ("GRI") 1 is that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes" of the HTSUS. And the "heading which provides the most specific description shall be preferred to headings providing a more general description." GRI 3(a). Additional U.S. Rule of Interpretation 1(c) states that

> a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for "parts" . . . shall not prevail over a specific provision for such part. . . .
>
> (1)

Accordingly, if the ceramic substrates at issue herein are parts of electronic integrated circuits at the time of their importation, they should be classified under subheading 8542.90.00, *supra*, it being more specific. On the other hand, if the subject imports are not "parts thereof", heading 6909 must be considered. *Cf. Bauerhin Technologies Ltd. Partnership v. United States*, 110 F.3d 774, 779 (Fed.Cir. 1997)("a provision for a part must prevail over a mere basket provision").

Here, the meaning of subheading 8542.90.00 focuses on the word "parts". The question of whether something is a part or a material has been considered in numerous prior cases. In *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333 (Fed.Cir. 1999), for example, the court considered whether Oxyphan®, which was imported in ten-kilometer spools, was a part or a material for purposes of the HTSUS. The exact length of the Oxyphan® required for each finished item was not fixed with certainty at the time of entry. Post-importation, it was cut, tied in groups, and wrapped around a steel bellow. The court relied on the following two-prong analysis:

> . . . First, the item must be dedicated solely or principally for use in those articles and must not have substantial other independent commercial uses. *See Bauerhin*, 110 F.3d at 779. . . . Second, if the item as imported can be made into *multiple* parts of articles, the item must identify and fix with certainty the individual parts that are to be made from it. *See The Harding Co. v. United States*, 23 C.C.P.A. 250, 253 (1936).

182 F.3d at 1338–39 (emphasis in original).

At bar, the defendant "admits that at the time of importation, the principal commercial use of Kyocera's articles is as IC substrates, and that as so used, the substrates are dedicated to that use." Defendant's Response to Plaintiff's Statement of Material Facts, para. 4. *Cf.* Plaintiff's Statement of Material Facts, para. 4. Therefore, the focus now is on the second element of the *Baxter* test.

In that case, the court found that the rolls of Oxyphan® were not parts "[b]ecause the individual parts are not identifiable or fixed at the time of import," thereby failing the "fix with certainty the individual parts that are to be made from it" standard. *See* 182 F.3d at 1339. *Cf. Benteler Industries, Inc. v. United States*, 17 CIT 1349, 1356, 840 F.Supp. 912, 918 (1993)(a laser cutting process eliminated need for physical markings yet the number of parts was fixed with certainty prior to importation). In *Ludvig Svensson (U.S.) Inc. v. United States*, 23 CIT 573, 62 F.Supp.2d 1171 (1999), the function and composition of screens for greenhouses that were of high technology, design and planning were found to not have been altered by post-importation processing, which included cutting, sewing two screens together, and adding tape and hooks. That processing was found to be minor, attributable to installation. In *E.M. Chemicals v. United States*, 13 CIT 849, 728 F.Supp. 723 (1989), *aff'd*, 920 F.2d 910 (Fed.Cir. 1990), liquid crystals that had been processed sufficiently to dedicate their use in LCDs and whose post-importation treatment consisted of adding a twist agent and then placing the mixture between two panels was found to be assembly. Additionally in that case, although the size of the display to which the liquid crystals would be ultimately dedicated was not known at the time of importation, their character was found to be fixed with certainty at that time due to advanced manufactured state.

Courts have considered the extent of post-importation processing in other cases. *See, e.g., Heraeus-Amersil, Inc. v. United States*, 10 CIT 258, 640 F.Supp. 1331 (1986)(post-importation cutting of contact tape and positioning and welding to certain strength requirements an assembly process, not further processing); *The Servco Co. v. United States*, 68 Cust.Ct. 83, C.D. 4341 (1972), *aff'd*, 60 CCPA 137, C.A.D. 1098, 477 F.2d 579 (1973)(imports in the shape and form of pipes and tubes not parts due to substantial post-importation processing necessary before they could be drill collars).

(2)

In a case such as this, the court must review the underlying agency analysis to determine whether it "is eligible to claim respect." *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001). The level of respect the court can afford a Customs ruling depends upon

> the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronounce-

> ments, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Additionally,

> [b]y statute, Customs' classification decision is presumed to be correct. 28 U.S.C. § 2639(a)(1). . . . The presumption of correctness [ ] carries force on any factual components of a classification decision, such as whether the subject imports fall within the scope of the tariff provision, because *facts* must be provenvia *evidence.*

Universal Elecs., Inc. v. United States, 112 F.3d at 491–92 (internal quotations omitted; emphasis in original).

In HQ 964811 (May 1, 2002), relying on *Baxter Healthcare Corp., supra*, Customs provided KICC with the following rationale for its decision to deny classification of its blank ceramic substrates as parts of electronic integrated circuits and microassemblies under HTSUS subheading 8542.90:

> As the instant articles are eventually cut into multiple parts, the protestant relies on *Benteler Indus., Inc. v. U.S.*, 840 F.Supp. 912 (CIT 1993), for the proposition that the laser cutting process used on the substrates negates the need for markings. In *Benteler*, measurements for cutting the steel tubing sections used in car doors were programmed into the laser-cutting machine. We find this argument unpersuasive. In that case, the court held that an indiscernible number of articles could not be made from the steel tubing sections upon entry. *See id*[.] at 918. The number of beams to be cut from the sections was known prior to importation, and the sections were color-coded and number-coded, as the design of each section was specific to a particular door type and door structure. *See id.* That is not the case here. The number of individual substrates, and thus integrated circuits, to be made on the blank ceramic substrates is not discernible upon importation. The blanks are sold to "laser houses," where various integrated circuits are fabricated according to customer specifications.
>
> Moreover, the premise that small articles imported in one piece should be classified as if already cut apart when all that remains to be done is the cutting, *see United States v. Buss*, 5 Ct. Cust. App. 110, T.D. 34138 (1914), is not relevant here because what remains to be done to the substrates is far more than mere cutting. The "laser houses" first must fabricate integrated circuits, which involves a series of etching and implantation steps on the whole piece of ceramic before it can be cut into individual parts. . . . These steps exceed the minimal processes performed on the screens in *Ludvig Svensson*. . . .

> Without the post-importation processing, or any other identifying characteristic, the ceramic pieces, like the rolls of Oxyphan in *Baxter* . . . cannot be distinguished at importation as parts of electronic integrated circuits or microassemblies. The identity of the substrates as parts of electronic integrated circuits or microassemblies is not fixed with certainty because the substrates are blank; there are no circuit elements. Accordingly, neither type of blank ceramic substrate [is] classifiable under subheading 8542.90, HTSUS.

In its motion for summary judgment, the plaintiff counters that

> it is clear that the absence of visible markings on the IC substrates to indicate individual parts does not preclude classification of the merchandise as parts. As the Court of International Trade recognized in *Benteler*, . . . where the imported merchandise is to be cut using a laser cutting machine programmed to cut the merchandise, visible markings on the imported merchandise are unnecessary.

Plaintiff's Memorandum, p. 14. HQ 964811, however, discusses *Benteler* in determining that the substrates are not parts and clearly distinguishes that case where "[t]he number of beams to be cut from the sections *was known* prior to importation", and the sections were appropriately coded. Emphasis added. Although the plaintiff would interpret Customs' use of the word "discernible" to signify visible markings for cutting lines, it is clear to this court that that agency usage is akin to "fixed", as used in *Baxter* and *Benteler*, *supra*, and in keeping with the established rule regarding "parts" as discussed hereinabove.

Given that Kyocera generally did not know at the time of importation (1) "the sizes of individual integrated circuits [ ] into which any of the subject substrates would ultimately be cut"; (2) "the number of resistors, transistors, diodes, and/or capacitors which were intended to be placed on each of the ICs"; (3) "the specific intended design of the interconnects [ ] to be placed on each of the ICs"; (4) "the electric or electronic articles which would incorporate the ICs";[5] or whether any bipolar substrates or metal-oxide semi-conductor ICs are made on any of the subject substrates,[6] the court cannot conclude that HQ 964811 is unfounded and therefore not "eligible to claim respect" within the meaning of *Skidmore*, *supra*.

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[5] Defendant's Statement of Undisputed Material Facts, paras. 1 to 4.

[6] *See id.*, paras. 5, 6.

(3)

Should the court defer to HQ 964811, it still must ensure that the Customs choice of tariff classification is "correct". *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876–78, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984). While, as quoted above, that ruling letter concludes that the identity of the substrates as parts of electronic integrated circuits or microassemblies is not fixed with certainty because the substrates are blank; there are no circuit elements, further discussion is warranted.

When pre-importation processing leaves a good in such "an advanced manufactured state" or "of such high technology, design and planning" that it is dedicated for one purpose, its identity can be said to have been set. *See generally E.M. Chemicals* and *Ludvig Svensson (U.S.) Inc.*, *supra*. For post-importation processing to be substantial, it must "alter the function or composition of the [import]". *Ludvig Svensson (U.S.) Inc. v. United States*, 23 CIT at 583, 62 F.Supp.2d at 1180. Here, it is undisputed that, pre-importation, KICC's imports are fabricated in such a manner as to engender technical properties that are required for use as IC substrates. *See* Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue to Be Tried, paras. 2 and 2[7]; Defendant's Response to Plaintiff's Statement, paras. 2 and 2. In fact, it is reasonably clear that "ceramic products" can be highly developed where their manufacturing process includes preparation of the paste, shaping, drying, firing, and finishing. *See, e.g.*, World Customs Organization, Harmonized Commodity Description and Coding System, 3 Explanatory Notes 995–96 (2d ed. 1996).

Ludvig Svensson (U.S.) Inc., *E.M. Chemicals* and *Baxter Healthcare Corp.* all dealt with imports in an advanced manufactured state. In the first two of those cases, the court found that the imports were merely assembled post-importation. In *Baxter*, the court found that cutting lengths of the imported Oxyphan®, tying them together, wrapping them around a cylinder 22 times and enclosing them in a manifold was significant post-importation processing.

In this action, at the times of importation of the substrates, KICC did not know the IC finished size, materials therein, or ultimate use thereof. *See* Defendant's Statement of Undisputed Material Facts, paras. 1–8. The blanks were sold to some 60 companies, typically laser houses rather than IC manufacturers, where, in turn, such houses would score the substrates, create required holes, and then generally sell them further processed to IC manufacturers. *See id.*, paras. 9–12. If this, in fact, was what first happened to plaintiff's products upon entry, it cannot be said that they were not subjected to substantial further processing, as discussed and defined in the

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[7] Plaintiff's statement has consecutive paragraphs numbered "2".

cases cited. It was that processing which transformed the imported ceramic ware for technical use into part of an electronic integrated circuit. Ergo, this court is required to conclude that plaintiff's products were and are properly classified under HTSUS subheading 6909.11.40, *supra*.

III

In view of the foregoing, plaintiff's motion for summary judgment as filed must be denied. Judgment will enter accordingly.

Slip Op. 06–189

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

ELKEM METALS CO. and GLOBE METALLURGICAL, INC., Plaintiffs, v. UNITED STATES, Defendant, and RIMA INDUSTRIAL S/A, Deft.-Int.

Court No. 02–00232

[Matter remanded to the United States Department of Commerce.]

DLA Piper US LLP (*William D. Kramer*, *Martin Schaefermeier*) for Plaintiffs Elem Metals Co., and Globe Metallurgical, Inc.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Reginald T. Blades, Jr.*); *Robert LaFrankie*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Greenberg Traurig, LLP (*Philippe M. Bruno*, *Rosa S. Jeong*) for Defendant-Intervenor, Rima Industrial S/A.

ORDER

This matter is before the Court pursuant to the remand ordered by the Court of Appeals for the Federal Circuit ("CAFC") in *Elkem Metals Co. v. United States*, 468 F.3d 795 (Fed. Cir. 2006), and the CAFC mandate of December 18, 2006. Therein, the CAFC reversed and remanded the judgment of this Court in *Elkem Metals Co. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1270 (2004).[1] *See id.* at 797.

[1] Elkem Metals Company and Globe Metallurgical, Inc. appealed the decision of this Court sustaining a determination by the United States Department of Commerce, in which it, pursuant to remand by this Court, recalculated the constructed value of silicon metal produced in Brazil by Rima Industrial S/A ("Rima"). The CAFC, however, dismissed this appeal as moot. *See Elkem*, 468 F.3d. at 797. This order addresses the only live issue, the reversal and remand of the cross-appeal filed by Rima and the United States.

The CAFC held that the United States Department of Commerce's ("Commerce") policy with respect to value-added-tax ("VAT") is a reasonable interpretation of 19 U.S.C. § 1677b(e). *See Elkem*, 468 F.3d at 802. The Court explained that, under § 1677b(e), if Brazilian VAT is refunded or remitted upon export, Commerce is required to exclude it from constructed value. *Id*. at 802–03. It reasoned, however, that the inverse does not apply, and that § 1677b(e) contains no requirement that Commerce include in constructed value, taxes that are not refunded or remitted upon export. *Id*.

Commerce's policy interpreting § 1677b(e), calls for a case-by-case inquiry as to whether an exporter/producer is able to fully offset its VAT liability by using its VAT credits. *See Silicon Metals from Brazil*, 63 Fed. Reg. 42,001, 42,004 (Dep't Commerce Aug. 6, 1998). Pursuant to this policy, for purposes of calculating constructed value under § 1677b(e), VAT is included as a "cost" only to the extent that the exporter/producer does not fully use the VAT credits generated by export sales. *See Elkem*, 468 F.3d. at 801 (citing 63 Fed. Reg. at 42,004).

Under the "deferential lens of *Chevron*," the CAFC found that Commerce's determination that the VAT paid by Rima should be excluded from constructed value is based on a permissible construction of § 1677b(e). The Court further concluded that "it is entirely appropriate for Commerce to make an individual determination as to whether and to what extent VAT is, given the circumstances of a particular country and company, a cost." *Id*. at 803. Because, here, Commerce determined that the Brazilian tax system can have the effect of offsetting VAT via a VAT credit, and that during the period of review, Rima, a producer, fully offset its VAT costs by using its VAT credits, the CAFC determined that this Court may not upset these determinations. *Id*.

Accordingly, in conformity with the decision of the CAFC, it is hereby

ORDERED that this matter is remanded to Commerce to allow it to recalculate Rima's dumping margin in light of any adjustments made in the *Final Results of Redetermination Pursuant to Court Remand, Elkem Metals Co. v. United States*, (Dep't Commerce Mar. 16, 2005), but using the methodology promulgated in *Silicon Metals from Brazil*, 63 Fed. Reg. at 42,004, and applied in the *Final Results of Redetermination Pursuant to Court Remand, Elkem Metals Co. & Globe Metallurgical Inc. v. United States*, (Dep't Commerce June 8, 2004), the first Remand Results. Commerce shall limit its adjustments to the factual circumstances circumscribed by the CAFC in its opinion, i.e., where Rima fully offset its VAT costs using its VAT credits; and it is further

ORDERED that Commerce's remand results are due on March 21, 2007; comments are due on May 4, 2007; and replies to such comments are due on May 19, 2007.

Slip Op. 06–190

UNITED STATES, Plaintiff, v. JEAN ROBERTS OF CALIFORNIA, INC., Defendant.

Before: Timothy C. Stanceu, Judge

Court No. 03–00212

OPINION

[Granting plaintiff's application for judgment by default against defendant in the amount of $242,375.46]

Dated: December 22, 2006

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Kenneth S. Kessler*); *Erik Gantzel*, Office of the Associate Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, of counsel, for plaintiff.

Stanceu, Judge: Plaintiff United States commenced this action pursuant to Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2000) ("Section 592"), against defendant Jean Roberts of California, Inc. ("Jean Roberts") on April 30, 2003, to recover a civil penalty for alleged negligence by Jean Roberts arising from 34 consumption entries of knit acrylic/polyester blankets imported from Mexico in 1997 and 1998, for which Jean Roberts claimed preferential tariff treatment under the North American Free Trade Agreement ("NAFTA"). *See* North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103–182, 107 Stat. 2057 (1993); 19 U.S.C. §§ 3311 *et seq.* (2000). On December 1, 2003, the United States filed Plaintiff's Request for Entry of Default on the grounds that Jean Roberts repeatedly failed to appear by licensed counsel and defend the allegations pleaded in the complaint. Default was entered by the Office of the Clerk of the Court of International Trade on December 3, 2003 pursuant to USCIT Rule 55(a) "for failure to obtain counsel in order to defend the allegations set forth in the complaint." Entry of Default (appended to Pl.'s Req. for Entry of Default). On February 20 and July 23, 2004, the United States applied for judgment by default pursuant to USCIT Rule 55(b). Various communications between defendant and the office of the Clerk of the Court occurred, yet defendant did not retain counsel. On March 30, 2005, the court ordered defendant to show cause why judgment by default should not be entered against it for failure to answer the complaint in this action according to the court's rules. *United States v. Jean Roberts of Cal., Inc.*, 29 CIT ___ , Slip Op. 05–41 (Mar. 20, 2005). The purpose of this order was to ensure that Jean Roberts was provided "a full and fair opportunity to retain legal counsel and

defend itself in response to the allegations set forth in the Complaint." *Id.* at 2. Through its order, the court granted Jean Roberts until May 31, 2005 to obtain licensed counsel and to respond to the court's order to show cause. Because defendant, despite repeated notifications that it must retain counsel to avoid a default judgment, has neither caused an attorney to enter an appearance in this action nor responded to the show cause order, the court will enter a default judgment against Jean Roberts in the amount of $242,375.46. This amount represents the statutory maximum penalty of two times the loss of revenue alleged in plaintiff's complaint.

I. BACKGROUND

A complete background of the underlying administrative penalty proceeding and procedural history of the penalty collection action is set forth in the court's Opinion and Order dated March 30, 2005. Familiarity with plaintiff's claim for penalty is therefore presumed. For purposes of this opinion, the court will restate those facts that are relevant to plaintiff's application for judgment by default and, specifically, a determination of the amount of a default judgment to be entered. Determining that amount has required the court to resolve issues that arose because the United States Customs Service[1] ("Customs") committed certain errors, discussed in this opinion, during the administrative penalty proceeding that it must conduct under Section 592(b) to perfect a claim for which a penalty can be recovered in a proceeding in the Court of International Trade. Those errors became apparent upon the court's review of documents provided with plaintiff's application for judgment by default and the court's review of additional, related documents from the administrative record that the court requested the plaintiff to provide in order to resolve questions raised by information in the documents plaintiff provided. The court's review disclosed, specifically, errors committed by Customs pertaining to the penalty claim as stated in the notice of penalty that Customs sent to Jean Roberts and the mitigation decision it issued under 19 U.S.C. § 1618. Additionally, Customs erred in refusing to consider defendant's claim for waiver of penalty under the Small Business Regulatory Enforcement Fairness Act of 1996 and defendant's request for mitigation based on inability to pay.

Plaintiff's complaint and application for judgment by default are based on claims that Jean Roberts, in the entry documentation, falsely described the imported blankets as "woven" when in fact they were knit, and that Jean Roberts entered the merchandise according to a claim for NAFTA preferential duty rates for which the merchan-

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[1] The United States Customs Service since has been renamed as the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

dise did not qualify. Pl.'s Compl. ¶¶ 6–7. Plaintiff claims that the description of the blankets as "knit" was material because the blankets, if woven, would have qualified for the NAFTA preference. *Id.* ¶ 8.

On November 29, 2000, Customs issued a "Pre-Penalty Notice" pursuant to 19 U.S.C. § 1592(b)(1) (2000). According to the Pre-Penalty Notice, defendant "failed to exercise reasonable care and competence throughout the importation process of thirty-four consumption entries" filed at the port of Otay, Mesa, California from August 29, 1997 through July 20, 1998. Pl.'s Notice of Filing of Supplemental Documentation in Supp. of Pl.'s Application for Default J. in Resp. to the Ct.'s Telephonic Req. Ex. 1 at 2 ("Pl.'s Supplemental Documentation"). The Pre-Penalty Notice cited a potential loss of revenue of $121,508.52, which it supported by attaching a worksheet identified as a "Schedule of Entries," and notified Jean Roberts that Customs was contemplating issuance of a civil penalty of $243,017.04, an amount equal to the statutory maximum penalty of two times the potential loss of revenue, as provided by Section 592(c)(3)(A)(ii). *Id.*; *see* 19 U.S.C. § 1592(c)(3)(A)(ii). Defendant did not respond to the Pre-Penalty Notice and later alleged that it never received it. Pl.'s Supplemental Documentation Ex. 3 at 2 n.1.

On February 26, 2001, Customs issued to Jean Roberts an administrative penalty claim under 19 U.S.C. § 1592(b)(2) in the form of a "Notice of Penalty." The Notice of Penalty demanded payment of a monetary penalty of $121,508.52. Pl.'s Supplemental Documentation Ex. at 2. On May 14, 2001, Jean Roberts responded to the Notice of Penalty by filing a petition requesting mitigation. *Id.* Ex. 3. On April 19, 2002, Customs issued to Jean Roberts a mitigation decision under 19 U.S.C. § 1618. The mitigation decision denied mitigation and stated that "the penalty against petitioner is affirmed at one (1) times the loss of revenue, or $121,508.52" and ordered Jean Roberts to pay the loss of duties in the amount of $121,508.52, and the penalty, an additional $121,508.52. *Id.* Ex. 4 at 10. Jean Roberts did not pay the mitigated penalty or the duties, which duties later were paid by the importer's surety in response to a demand by Customs under the importer's bond.

In the complaint filed in this action on April 30, 2003, Customs requested judgment for the statutory maximum penalty for negligence, an amount equal to two times the actual loss of revenue. In an exhibit to the complaint, Customs stated the actual loss of revenue to be $121,187.73, resulting in a penalty claim in the amount of $242,375.46. Pl.'s Compl. ¶ 9. On February 20 and July 23, 2004, the United States, pursuant to USCIT Rule 55(b), applied for judgment by default for a penalty in the amount of $242,375.46, plus post-judgment interest and costs. Pl.'s Application for Default J. at 25.

II. DISCUSSION

In an action brought to recover on a penalty claim brought under Section 592, "all issues, including the amount of the penalty, shall be tried de novo[.]" 19 U.S.C. § 1592(e)(1). However, a defaulting defendant is deemed to admit all facts well-pleaded in the complaint against it. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981) (explaining that "the court should . . . accept[ ] as true all of the factual allegations of the complaint, except those relating to damages."). The facts pleaded in plaintiff's complaint, as discussed herein and in the court's Opinion and Order dated March 30, 2005, are sufficient to state a factual basis for a claim for penalty under Section 592. Accordingly, in consideration of the facts that plaintiff has pleaded and the showing that plaintiff has made in the application for judgment by default, including the showing made by means of the documents appended thereto, the court's inquiries are whether plaintiff has established as a matter of law its entitlement to a judgment by default, and if so, in what amount a default judgment should be entered by the court.

From a review of the relevant statutory provisions, when applied to the facts as alleged in the complaint and deemed to be admitted, and from a review of the application for judgment by default and supporting documents of record, the court concludes that plaintiff has established its entitlement to a judgment by default based on penalty liability under Section 592(a). In particular, the court concludes that the alleged misdescription of the blankets as "woven" was material for purposes of Section 592(a) because the blankets, had they actually been woven, would have qualified for the NAFTA duty preference. The court next considers procedural issues, including the effect of the various errors made by Customs in conducting the administrative proceeding under Section 592.

Before seeking to recover a penalty in the Court of International Trade, Customs must perfect its penalty claim in the administrative process required by Section 592 by issuing a pre-penalty notice and a notice of penalty. 19 U.S.C. § 1592(b)(1)–(2). Customs must include certain information in every pre-penalty notice, including "the amount of the proposed monetary penalty[.]" *Id.* § 1592(b)(1)(A)(vi). After the issuance of the pre-penalty notice and consideration of any representations made by the importer, Customs must issue a "written penalty claim," *i.e.*, a notice of penalty, specifying any changes in the information provided in the pre-penalty notice. *Id.* § 1592(b)(2). Following the notice of penalty, the importer is afforded "a reasonable opportunity," pursuant to 19 U.S.C. § 1618, to make "representations, both oral and written, seeking remission or mitigation of the monetary penalty" assessed in the notice of penalty. *Id.* Customs must respond to the representations by issuing a decision under the authority of 19 U.S.C. § 1618, which provides for the mitigation of penalties. *See id.* The importer then either may pay the penalty

amount stated in the mitigation decision or may refuse to pay, thereby rejecting the offer of mitigation and leaving it to the United States to initiate an action on behalf of Customs for recovery of any monetary penalty claimed under § 1592. *See id.* § 1592(b)(2), (e).

The first issue presented is whether the Pre-Penalty Notice required by Section 592(b) was invalid in this case because, as stated by defendant in the administrative proceeding, it was not received by defendant and was sent to defendant's former rather than current address. The second inquiry concerns the nature of the penalty claim that the United States is attempting, pursuant to Section 592(e), to recover in this judicial proceeding. The specific issue is whether the claim for penalty brought against Jean Roberts in the administrative penalty, which was stated ambiguously in the Notice of Penalty, was, absent any subsequent mitigation, a claim for a civil penalty at the statutory maximum of two times the potential loss of revenue or, alternatively, a claim for a civil penalty calculated as one time the potential loss of revenue. The court also considers the possible effect of an improper refusal by Customs during the administrative proceeding to address defendant's claim for exemption from penalty under the Small Business Regulatory Enforcement Fairness Act of 1996 and defendant's request for mitigation based on inability to pay. The court concludes that none of the errors committed by Customs in the administrative penalty proceeding is sufficient to defeat plaintiff's penalty claim or to justify a penalty in an amount different from that sought in plaintiff's application for judgment by default.

A. The Record Does Not Demonstrate that the Pre-Penalty Notice Was Procedurally Defective

Section 592(b)(1) provides, with exceptions not here applicable, that Customs, before issuing a claim for a monetary penalty, shall issue a pre-penalty notice to the person concerned if it has reasonable cause to believe a violation of Section 592(a) has occurred and allow such person a reasonable opportunity to make oral and written representations as to why a claim for a monetary penalty should not be issued. 19 U.S.C. § 1592(b)(1)(A). Jean Roberts made no such oral or written representations in the administrative proceeding, apparently because it did not receive the Pre-Penalty Notice.

To determine whether Customs fulfilled the statutory requirements of Section 592(b), the court has reviewed the documentation attached to plaintiff's application for judgment by default and related documents from the administrative record of the proceedings that the court requested and obtained. Upon review of this record, the court became aware that Jean Roberts, in its petition for mitigation dated May 14, 2001, stated that it did not respond to the Pre-Penalty Notice because Customs addressed the Pre-Penalty Notice to a former address of Jean Roberts. Pl.'s Supplemental Documenta-

tion Ex. 3 at 2 n.1. The issue that arises, therefore, is whether the Pre-Penalty Notice was procedurally defective; such is a possibility if the record facts establish that Jean Roberts did not receive the Pre-Penalty Notice as a result of an error by Customs.

The court notes that Jean Roberts, in stating that it did not receive the Pre-Penalty Notice and pointing out that the Pre-Penalty Notice was sent to a former address of the company, did not expressly state that it was objecting to the Pre-Penalty Notice on the ground of defective notice but simply stated that Jean Roberts had moved from its location in Commerce, California and had been located in Montebello, California for the past three years. *Id.* Ex. 3 at 2 n.1. The Notice of Penalty dated February 26, 2001 also lists for Jean Roberts the old address in Commerce, California. *Id.* Ex. 2.

Jean Roberts did not create an administrative record from which the court could conclude that the apparent irregularity was the fault of Customs. Defendant's petition dated May 14, 2001, states that Jean Roberts had been located in Montebello, California for the past three years and thus indicates that Jean Roberts must have changed location at some point prior to May 14, 1998. *See id.* Ex. 3. However, the most recent entry summary, *i.e.*, Customs Form 7501, that the record contains shows that Jean Roberts, in its submission of entry documentation to Customs, had continued to use the address in Commerce, California as late as July 20, 1998. Pl.'s Application for Default J. Ex. B at 231. In addition, Jean Roberts did respond to the Notice of Penalty with its May 14, 2001 petition for mitigation, indicating that Jean Roberts must have received the Notice of Penalty. *See* Pl.'s Supplemental Documentation Ex. 3. The record does not demonstrate that Jean Roberts properly notified Customs of its change of address when relocating from Commerce, California to Montebello, California. Based on the documentation accompanying the application for judgment by default and the related documents of record, the court cannot conclude that the Pre-Penalty Notice was procedurally defective for having been sent to an invalid address.

B. The Notice of Penalty Gave Adequate Notice of a Claim for Penalty at the Statutory Maximum Amount of Two Times the Loss of Revenue

The court next considers whether Customs, in the administrative penalty proceeding, perfected a claim for a monetary penalty in the statutory maximum amount of two times the revenue loss, as sought in defendant's application for judgment by default. The penalty claim made by Customs in the administrative penalty proceeding, as stated in the Notice of Penalty, in some circumstances may limit the recovery that the United States may obtain in an action brought in the Court of International Trade to recover on that penalty claim. *See United States v. Optrex America, Inc.*, 29 CIT ___ , ___ , Slip Op. 05–160 at 5-6 (Dec. 15, 2005).

The Notice of Penalty Customs issued to Jean Roberts was ambiguous as to whether Customs was claiming a penalty at the statutory maximum of "two times the lawful duties, taxes, and fees of which the United States is or may be deprived," 19 U.S.C. § 1592(c)(3)(A)(ii), or a lesser penalty at one times that amount. *See* Pl.'s Supplemental Documentation Ex. 2. The Pre-Penalty Notice dated November 29, 2000 included the information required by 19 U.S.C. § 1592(b)(1)(A), including the "Proposed Monetary Penalty: $243,017.04 (An amount equal to two times the potential loss of revenue)." *Id.* Ex. 1 at 4. The Notice of Penalty, however, stated the amount of the penalty claim as $121,508.52, an amount that is one-half of the amount of the contemplated penalty stated in the Pre-Penalty Notice. *Id.* Ex. 2. The Notice of Penalty did not identify any change in the potential loss of revenue as determined by Customs and as stated in the Pre-Penalty Notice and in the attached Schedule of Entries, despite the requirement under 19 U.S.C. § 1592(b)(2) that "[t]he written penalty claim shall specify all changes in" the specific information required to be disclosed in a pre-penalty notice, including the requirement under § 1592(b)(1)(A)(vi) to specify any change in the "estimated loss of lawful duties." The differing amounts in the Pre-Penalty Notice and the Notice of Penalty indicate that Customs may have intended to issue a Notice of Penalty for two times the potential revenue loss but made a mistake in calculating or transcribing the amount of total penalty. On the other hand, because the Notice of Penalty did not indicate a change in the potential loss of revenue and stated the amount of $121,508.52 as the penalty being claimed, it arguably might have been reasonable to construe the Notice of Penalty as signifying to Jean Roberts that Jean Roberts would be called on to defend itself against a penalty claim in the amount of one times the potential loss of revenue. In this regard, the court notes that Customs itself, in the mitigation decision dated April 19, 2002 that it issued under Section 592(b)(2) and 19 U.S.C. § 1618, construed its own Section 592 administrative penalty claim as a claim in the amount of one times the loss of revenue. *See id.* Ex. 4. The mitigation decision denied any mitigation. Instead, it stated expressly that "the penalty against petitioner is affirmed at one (1) times the loss of revenue, or $121,508.52." *Id.* Ex. 4 at 10. In its application for a default judgment, plaintiff provides no explanation for these multiple errors by Customs and advances no argument as to why the court should overlook them in determining the amount of the penalty for purposes of a judgment by default.

The court concludes, however, that the Notice of Penalty was sufficient to place Jean Roberts on notice that Customs was claiming a monetary penalty at the statutory maximum of two times the loss of revenue. Although the Notice of Penalty stated, on the first page, that "[d]emand is hereby made for payment of $121,508.52, representing penalties assessed against you for violation of law or regula-

tion, or breach of bond, as set forth below," the Notice of Penalty incorporated by reference Exhibit A ("Penalty Statement"), which contained the following paragraph 5: "Monetary Consequences: . . . A civil, administrative penalty of $121,508.52, an amount equals [*sic*] to two times of the potential loss of revenue. (Level of culpability of negligence)." *Id.* Ex. 2. The court concludes that the Exhibit A Penalty Statement sufficed, albeit barely, to place Jean Roberts on notice that it would be called on to defend itself, during the administrative proceeding and any judicial proceeding that could follow, against a claim for monetary penalty in the statutory maximum amount of two times the loss of revenue. The court's conclusion is grounded in the plain language of the Exhibit A Penalty Statement, which expressly identified the "monetary consequences" as "[a] civil, administrative penalty of $121,508.52, an amount equals [*sic*] to two times of the potential loss of revenue." *Id.* For two reasons, the court attaches greater significance to the statement characterizing the penalty claim as two times the potential revenue loss than to the statement therein of the penalty amount. First, the penalty amount was characterized by Exhibit A as having been derived as "two times of the potential loss of revenue," even though it apparently was derived in error.[2] Second, the Customs determination of the loss of revenue resulting from the entries that formed the basis for the penalty claim was subject to change, and did change, during or after the administrative proceeding; the revenue lost as a result of a Section 592 violation is a factual issue that ultimately may be resolved *de novo* in a proceeding brought under Section 592(e). *See* 19 U.S.C. § 1592(e)(1). Jean Roberts, therefore, was not entitled to rely detrimentally and reasonably could not assume that the calculation of revenue loss would not change subsequently and that the amount of the civil penalty being sought would not change accordingly.

Because Customs provided adequate notice to Jean Roberts of a civil penalty claim at the statutory maximum for an alleged violation based on a level of culpability of negligence, *i.e.*, at the amount of two times the loss of revenue, this case is readily distinguished from the recent decision of the Court of International Trade in *United States v. Optrex America, Inc.* In *Optrex*, the United States moved to amend its complaint, which sought to recover a civil penalty under Section 592 based on a level of culpability of negligence, to add two additional consumption entries to the summons and to plead additional claims based on the higher levels of culpability of gross negligence and fraud. *Optrex*, Slip Op. 05–160 at 5. Customs had not pursued a penalty based on gross negligence or fraud in the administrative pro-

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[2] In referring to "potential" revenue loss, Customs apparently was referring to its estimate of revenue loss at some point prior to the liquidation of the entries. At the time it issued the mitigation decision, Customs also issued, under Section 592(d), a demand for payment of duties in the amount of $121,508.52. Pl.'s Supplemental Documentation Ex. 4 at 1.

ceeding. *Id.* at 2–4 The court in Optrex denied the government's motion to amend the complaint. *Id.* at 15. Employing the traditional rule of statutory construction, *in pari materia*, the court in *Optrex* concluded that all subsections of Section 592, when construed together, require Customs to fulfill certain "administrative procedural requirements" to perfect a penalty claim under Section 592 and to recover in an action brought before the court. *Id.* at 6,8. Specifically, the court in *Optrex* held that the "level of culpability is an inextricable part of a particular penalty claim issued pursuant to § 1592(b)(2), and allowing the government to amend its complaint to include penalty claims that have not been perfected through the administrative process would be contrary to the statutory scheme and the [relevant] statute of limitations." *Id.* at 15; *see United States v. Ford Motor Co.*, 463 F.3d 1286, 1296–98 (Fed. Cir. 2006) (discussing, with approval, *in dicta*, the court's reasoning in *Optrex*). Underlying the analysis in *Optrex* was the necessity of adequate notice to the party with interests at stake and the purpose of "giv[ing] an importer an opportunity to fully resolve a penalty proceeding before Customs, before any action in [the United States Court of International Trade.]" *Optrex*, Slip Op. 05–160 at 9. In contrast, Jean Roberts was placed on notice of a civil penalty claim at the statutory maximum for a level of culpability of negligence and given the opportunity to resolve, in the administrative proceeding, the potential liability stemming from that penalty claim. Based on the administrative record as a whole, the court concludes that Customs, in its administrative penalty proceeding, perfected a penalty claim based on negligence at the statutory maximum level of two times the loss of revenue.

Plaintiff's complaint and supporting exhibit claim an actual loss of revenue of $121,187.73 and request judgment in the amount of two times that loss of revenue, or $242,375.46. Pl.'s Compl. ¶¶ 9, 12. The court considers *de novo* the amount of the loss of revenue. 19 U.S.C. § 1592(e)(1). Because plaintiff is entitled to a judgment by default, the court determines, for purposes of entering a default judgment, the loss of revenue according to plaintiff's complaint and the attached exhibits, which loss of revenue defendant is deemed to admit.

C. Plaintiff Did Not Satisfy the Factors Required to Qualify for Exemption from Penalty Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996

The court next considers the refusal by Customs during the administrative penalty proceeding to consider the claim by Jean Roberts for relief from penalty based on defendant's assertion during that administrative penalty proceeding that it qualified for relief from penalty pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 and its request for mitigation based on inability to pay. *See* Pl.'s Supplemental Documentation Ex. 4 at 10; *see*

also 19 C.F.R. § 171 App. B(G) (2001). In its March 29, 2002 decision on defendant's petition in response to the Notice of Penalty, Customs stated that "[w]e decline to address petitioner's claims of (1) inability to pay; and (2) status as a small business entity under the Small Business Regulatory Enforcement Act of 1996." Pl.'s Supplemental Documentation Ex. 4 at 10. "We note that the statute of limitations in this case will begin to expire on August 29, 2002." Pl.'s Supplemental Documentation Ex. 4 at 10. Customs interpreted petitioner's non-responsiveness to Customs' request for a waiver of the statute of limitations as a refusal to submit the waiver Customs sought, stating that "[s]aid claims will only be addressed if petitioner submits a two-year waiver of the statute of limitations." *Id*. The demand by Customs that defendant waive the applicable statute of limitations for a two-year period in return for any consideration of these two claims for relief was neither justified under the applicable statute and regulations nor consistent with principles of equity and fairness.

The court does not interpret the statute or the regulations to justify, on the particular facts revealed by the record, a refusal by Customs even to consider claims for relief already made in a submitted petition solely because the petitioner has not acceded to demands by Customs for a voluntary waiver of the statute of limitations. The Customs regulations attach certain consequences to an impending expiration of the statute of limitations, including the shortening of the period to file a petition in response to a penalty claim to 7 days. *See* 19 C.F.R. §§ 162.78(a) (2001), 171.2(e), 171 App. B(E)(2)(c); *see also* 19 C.F.R. § 171.64 (providing Customs with the discretion to require a waiver of the statute of limitations as a condition precedent before accepting a *supplemental* petition in cases where the statute of limitations will expire in less than one year). Nowhere do the statute or the relevant regulations provide that Customs may condition the consideration of issues raised in a petition upon the granting of a statute of limitations waiver by petitioner, especially where Customs requested the waiver *after* the submission of the petition. To the contrary, Section 592 directs that Jean Roberts "shall have a reasonable opportunity under [19 U.S.C. § 1618] to make representations, both oral and written, seeking remission or mitigation of the monetary penalty" and that "[Customs] shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." 19 U.S.C. § 1592(b)(2). Customs requested the waivers in July and December of 2001, months after Jean Roberts submitted its May 14, 2001 petition for relief. Pl.'s Supplemental Documentation Ex. 3 & Ex. 4 at 10. Moreover, Customs did not issue its decision until April 19, 2002, nearly a year after the submission of the petition. *Id*. Ex. 4. In that decision, despite the statutory directive, Customs simply declined to "set[ ] forth the final determination" as to those two issues and thereby also declined to set forth "the findings of fact

and conclusions of law on which such determination [would be] based." *See* 19 U.S.C. § 1592(b)(2). Perhaps there are situations where dilatory behavior or other action on the part of a petitioner might render such a refusal reasonable on the part of Customs. In this case, however, Customs was the source of delay. The court cannot conclude that refusal even to consider claims in the petition, when there was opportunity to do so, was reasonable or lawful under the statute and pertinent regulations. The court, therefore, has reviewed the administrative record to consider whether Jean Roberts alleged facts and submitted sufficient evidence to prove that it qualifies for exemption.

In the Small Business Regulatory Enforcement Fairness Act of 1996, Congress directed that "[e]ach agency regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity." *See* Pub. L. No. 104–121, § 223(a), 110 Stat 847, 862 (1996). In compliance with the Small Business Regulatory Enforcement Fairness Act, Customs implemented a procedure whereby, under appropriate circumstances, the penalty assessed upon the issuance of a Notice of Penalty under 19 U.S.C. 1592(b)(2) would be waived for businesses qualifying as small business entities. *See Policy Statement Regarding Violations of 19 U.S.C. 1592 by Small Entities*, 62 Fed. Reg. 30,378, 30,378 ("*Policy Statement*").

According to the Policy Statement, "[t]he alleged violator will have the burden of establishing, to the satisfaction of the Customs officer issuing the prepenalty notice, that it qualifies as a small entity. . . ." *Id*. Alternatively, the alleged violator may assert an exemption in its mitigation petition under 19 U.S.C. § 1592(b)(2) upon the issuance of a notice of penalty. *Id*. Small entities may be eligible for a reduction of penalties if (1) the small entity has taken corrective action within a reasonable correction period, including the payment of all duties, fees and taxes owed as a result of the violation within 30 days of the determination of the amount owed; (2) the small entity has not been subject to other enforcement actions by Customs; (3) the violation did not involve criminal or willful conduct, and did not involve fraud or gross negligence; (4) the violation did not pose a serious health, safety or environmental threat; and (5) the violation occurred despite the small entity's good faith effort to comply with the law. *Id*.

In addition to the aforementioned five factors, the Policy Statement requires that in establishing that it qualifies as a small entity, the alleged violator should (a) demonstrate that it is independently owned and operated, *i.e.*, there are no related parties that would disqualify the business as a small business entity; (b) prove that it is not dominant in its field of operation; and (c) provide evidence, in-

cluding tax returns for the previous three years and a current financial statement from an independent auditor, of its annual average gross receipts over the past three years, and its average number of employees over the previous twelve months.[3] *Id.*

Defendant asserted that it met all of Customs' requirements for small business status, *i.e.*, that it is independently owned and operated, is not dominant in its field, and has 27 employees. *See* Pl.'s Supplemental Documentation Ex. 3 at 17. Defendant, however, did not adduce sufficient evidence to show that it was entitled to relief under the Policy Statement. The court concludes from a review of the record that the decision by Customs not to consider defendant's claim for exemption under the Small Business Regulatory Enforcement Fairness Act, though impermissible and inconsistent with principles of equity and fairness, was harmless error.

The record does not establish that defendant satisfied the first factor required under the Policy Statement. To the contrary, defendant did not pay the duties, fees and taxes owed within 30 days of the determination of the amount owed. Upon the issuance of the mitigation decision on April 19, 2002, Customs also made a demand for the payment of duties under Section 592(d). Pl.'s Supplemental Documentation Ex. 4. As stated in the complaint and plaintiff's other submissions, Jean Roberts did not pay the duties and its surety, American Contractors Indemnity, satisfied the total amount of duty liability asserted by Customs. *See* Pl.'s Compl. ¶ 9; Pl.'s Supplemental Documentation Ex. 3 at 2. Defendant thereby failed to qualify for relief from penalty under the Policy Statement.

Moreover, defendant did not satisfy the additional factors indicated in the Policy Statement. Defendant did not submit any evidence that proves it is independently owned and operated, that there are no related parties, and that Jean Roberts is not dominant in its field. Furthermore, although defendant submitted what may be construed as financial auditing statements that satisfy the Policy Statement, those statements indicate that the financial statements were not produced by an independent auditor as the Policy Statement requires. *See Policy Statement*; Pl.'s Application for Default J. Ex. A at 23 (disclosing, in an introductory letter accompanying defendant's financial statements from defendant's accountants, that "[defendant's accountants] are not independent with respect to the above men-

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[3] The number of employees a business employs is highly determinative in deciding whether the business is, in fact, a small business. Customs' Policy Statement references 13 C.F.R. § 121.201, which is the Small Business Administration's size standards that define whether a business entity is small and, thus, eligible for government programs and preferences reserved for "small business concerns." Size standards have been established under the North American Industry Classification System ("NAICS") for types of economic activity or industry and are published in a manual. Among the chief factors for assessing a company's size within an industry are annual receipts in millions of dollars and the number of employees. *See* 13 C.F.R. § 121.201.

tioned company."). Finally, none of the evidence submitted substantiates the average number of employees employed by defendant as required by the Policy Statement. The failure by defendant to pay the duties owed and the insufficient factual demonstration by defendant render harmless any error Customs made in conditioning consideration of defendant's small business exemption claim upon the submission of a waiver of the statute of limitations.

D. The Court Declines to Mitigate the Penalty on the Basis of Equitable Considerations

Finally, the court has considered the issue of whether the court should afford mitigation in determining a penalty amount, due to an inability to pay or any other relevant mitigating factor. The court has considered the various factors relevant to the question of the penalty to be assessed. *See United States v. Complex Machine Works Co.*, 23 CIT 942, 948, 83 F. Supp.2d 1307, 1315 (1999) (identifying fourteen factors relevant to determining the penalty amount); *see also* 19 C.F.R. Part 171 Appendix B(G) (listing the factors that Customs considers in mitigating a penalty amount under Section 592). Two possible mitigating factors, ability to pay and claimed inexperience in importing, deserve particular mention.

With respect to ability to pay, the court notes, first, that the financial information submitted in defendant's petition dated May 14, 2001 pertains to the financial status of the defendant in years prior to that time and is not probative of defendant's current financial status. *See* Pl.'s Supplemental Documentation Ex. 3. The other record evidence relevant to the issue of defendant's ability to pay is contained in correspondence sent by the president of Jean Roberts to the Deputy Clerk of the Court of International Trade. Pl.'s Application for Default J. Ex. A at 22–41. That correspondence generally addressed the requirement that Jean Roberts obtain counsel in order to enter an appearance. A letter from the president of Jean Roberts dated July 24, 2003 requested a "public defender" and referred to an appended statement of defendant's accounting firm in support of contentions that the company's losses exceeded $1 million and asserted a net worth for the company of "minus this amount." *Id.* at 22. The response of the Deputy Clerk of the Court correctly informed Jean Roberts that because Jean Roberts is a corporation, court-appointed counsel was not available and that an attorney admitted before the Court of International Trade must enter an appearance in order for Jean Roberts to make any filings with the court. *Id.* at 32; *see* 28 U.S.C. § 1654 (2000); *see Rowland v. California Men's Colony*, 506 U.S. 194, 201–02 (1993).

A letter from the president of Jean Roberts dated August 13, 2003 informed the Deputy Clerk of the Court of International Trade that Jean Roberts has "a negative net worth of over one million dollars" and reiterated another point made in the July 24, 2003 letter by

stating that "what little assets we have are pledged to Banco Popular." Pl.'s Application for Default J. Ex. A at 33. The letter further states that Jean Roberts has entered bankruptcy proceedings,[4] that its equipment and inventory were pledged to Banco Popular and soon would be liquidated, that the company would go out of business in November 2003, that it has a $15,000 negative balance in its bank account, and that the company could not afford to retain counsel to defend itself in the collection action. *Id.* The correspondence from the president of Jean Roberts and the attached financial statement are relevant to a finding that the financial status of Jean Roberts would support a claim for mitigation of penalty or relief from penalty liability based on inability to pay, and they also provide an explanation for the failure of Jean Roberts to respond to the court's show cause order. *See id.* Ex. A at 33–39.

The court, however, declines to mitigate the penalty amount because of an overriding equitable consideration: the court concludes from the record as a whole that Jean Roberts never made any attempt to fulfill, or even to comprehend, its responsibilities as an importer of record. The administrative penalty proceeding placed Jean Roberts on notice of its responsibilities as an importer. Even after the administrative penalty proceeding was concluded, the president of Jean Roberts still was claiming, in the letter dated August 13, 2003, that Jean Roberts was not the importer of the merchandise, implying that on this basis it should not be held liable. "We have never imported anything or would not have any idea how to import anything, especially when Nova-Tex told us all duties was [*sic*] paid." *Id.* Ex. A at 33. The record contains conclusive evidence that Jean Roberts was the importer of record on the entries that are the subject of this civil penalty action and discloses that Nova Textil Rivera Hermanos y Asociados, S.A. de C.V. was the exporter, not the importer. The letter dated August 13, 2003 reveals that the president of Jean Roberts continued, even after the conclusion of the penalty proceeding conducted by Customs, to fail to understand the responsibilities imposed on an importer under the tariff laws, which include, most basically, the duty to exercise reasonable care when causing merchandise to be imported into the United States. Jean Roberts failed to make even a good faith effort to do so.

The court has reviewed the entire administrative record to ascertain whether, despite the facts as pleaded, which are deemed admitted by defendant, any other basis for mitigation exists, including mitigation according to the various factors cited by Jean Roberts during the administrative penalty proceeding. The court concludes

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[4] In its petition of May 14, 2001, Jean Roberts earlier had stated that it "anticipates having to file for bankruptcy if Customs requests payment of such penalties, as the company has no financial condition to pay for them." Pl.'s Supplemental Documentation Ex. 3 at 16.

from its examination of the record that there is no other basis that would warrant mitigation or other equitable relief from penalty.

III. CONCLUSION

From its review of the complaint and plaintiff's application for judgment by default, including the documents appended thereto and the additional documents from the administrative record necessary to resolve issues of law raised by the application for judgment by default, the court concludes that defendant has established its entitlement to a judgment by default against defendant Jean Roberts for a civil penalty under Section 592. Facts pleaded in the complaint relevant to the establishment of liability are deemed admitted, as is the claimed loss of revenue in the amount of $121,187.73. Based on the admitted loss of revenue, the court will grant plaintiff's application for judgment by default against Jean Roberts in the amount of $242,375.46, plus post-judgment interest as provided for by law. The plaintiff shall bear its own costs.