Decisions of the United States
Court of International Trade

Slip Op. 08–11

SHERRI N. BOYNTON, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 06–00095

[Remand determination affirmed.]

Decided: January 23, 2008

Law Offices of Robert W. Snyder (*Robert w. Snyder*) for Sherri N. Boynton, Plaintiff.
Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Aimee Lee*, Civil Division, Dept. Of Justice Commercial Litigation Branch, *Maritza Tamayo-Sarver*, Of Counsel, Office of Associate Chief Counsel, U.S. Customs and Border Protection for U.S. Department of Homeland Security, Customs and Border Protection, Defendant

OPINION

Pogue, Judge: This is a review of remand results, filed by the Secretary of the Department of Homeland Security (hereafter "Secretary"), revoking Plaintiff Sherri N. Boynton's (hereafter "Boynton") customs broker's license. In our prior opinion, *Boynton v. United States*, ___ CIT ___ , Slip Op 07–146 at 28(CIT 2007), we remanded the Secretary's initial revocation "to consider what penalty is appropriate" on the record remaining after that prior review.

The Court has jurisdiction over this case under Section 641(e) of the Tariff Act of 1930, 19 U.S.C. § 1641(e)(1),[1],[2] and 28 U.S.C.

---

[1] Citation is to the 2000 edition of the U.S. Code unless otherwise noted.

[2] 19 U.S.C. § 1641(e)(1) provides: In general. A customs broker, applicant, or other person directly affected may appeal any decision of the Secretary denying or revoking a license or permit under subsection (b) or (c), or revoking or suspending a license or permit or imposing a monetary penalty in lieu thereof under subsection (d)(2)(B), by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part. A copy of the petition shall be transmitted promptly by the clerk of the court to the Secretary or his designee. In cases involving revocation or suspension of a license or permit or imposi-

§ 1581(g) (granting the Court of International Trade exclusive jurisdiction of any civil action to review the revocation of a customs broker's license by the Secretary of the Department of Homeland Security ("DHS")). In accordance with 19 U.S.C. § 1641(e)(1) and USCIT Rule 56.1(a), the court reviews the decision of the Secretary of DHS on the administrative record, considering any objections raised in that proceeding.

Background

In our earlier decision we upheld, as supported by substantial evidence, the Secretary's findings of violations of Customs rules and regulations "in Charges I, II, IV, V, VI, VIII, IX, and for Specifications 1, 4, 6, 7, 9, and 11 of Charge III" of Customs' Notice to Show Cause and Statement of Charges ("Notice"). *Id*. However, we also found that "Specifications 2, 5, and 8 of Charge III, as well as Charge VII" were not supported by substantial evidence. *Id*. Accordingly, we remanded this matter to the Secretary to consider the appropriate penalty on the record remaining after our review. *Id*.

On remand, the Secretary reviewed the record and held that, "judicially sustained Charges I, II, IV, V, VI, VIII, IX, and Specifications 1, 4, 6, 7, 9, and 11 of Charge III, jointly, and, Charges III (Specifications 4, 7, 9, 11), IV, V, VI, VIII, and IX severally or in combination thereof, support revocation of [Boynton's] license."

We now review that remand determination.

Discussion

Customs regulations allow for revocation of a customs broker's license if, "[t]he broker has violated any provision of any law enforced by Customs or the rules or regulations issued under any provision of any law enforced by Customs." 19 C.F.R. § 111.53(c). *See also*, 19 U.S.C. § 1641(d)(1)(C). However, Customs' policy has generally been to issue progressive penalties and to reserve revocation of a broker's license only for "egregious" violations. An "egregious" violation is a "flagrant act or omission that shows gross irresponsibility beyond that of a nonrepetitive [sic] clerical mistake or a good-faith oversight." Customs Directive Number 099 3530-007 Section 5(B), available at http://www.cbp.gov/linkhandler/cgov/toolbox/legal/directives/3530 -007.ctt/3530_007.doc. Thus, under Customs policy, if Boynton has committed "egregious" violations of Customs rules, then revocation of her license is warranted.

As we found in our earlier opinion, Boynton violated "several Customs rules and regulations, often on multiple occasions." The Secre-

---

tion of a monetary penalty in lieu thereof under subsection (d)(2)(B), after receipt of the petition, the Secretary shall file in court the record upon which the decision or order complained of was entered, as provided in section 2635(d) of title 28, United States Code.

tary has now determined that certain of the violations, enumerated above, jointly and severally suffice to justify revoking Boynton's license. Since nothing in our prior decision requires otherwise, we uphold the Secretary's decision.

Plaintiff claims, however, that the decision of the Secretary was both arbitrary and capricious and violated her right to due process. More specifically, Plaintiff contends that the decision of the Secretary is "arbitrary and capricious" in that the Secretary considered no penalty other than revocation and that due process was denied her because she was not allowed to submit new evidence to the Secretary after our original ruling. Neither claim has merit.

As to the first claim, if the findings of the Secretary are supported by substantial evidence they must be upheld. 19 U.S.C. § 1641(e)(3). We have already held that the charges upon which the Secretary relies in his decision were supported by substantial evidence. As noted above, revocation may be grounded on a violation of "any provision of any law enforced by customs." 19 C.F.R. § 111.53(c). The Secretary, then, did not act in an "arbitrary and capricious" manner in revoking Boynton's license, but rather acted in accordance with law.

Plaintiff's due process claim is also without merit. Plaintiff seems to believe that the "record" in the case has substantially changed and that this change justifies reopening the record to allow her to submit additional evidence. Both aspects of the claim are incorrect. First, the "record" upon which the Secretary made his remand decision is essentially the same record reviewed by the court in our prior decision with the exception of the charges that we held not to be supported by substantial evidence. It is unclear how this sort of change in the record could prejudice Boynton in any way. Boynton availed herself of her opportunity to seek and obtain judicial review. That review was completed before any penalty was imposed, and the imposed penalty was based on the record found supported by that prior judicial review.

Secondly, reopening of an administrative record is an unusual step, generally taken only in extraordinary circumstances. *Farmers Export Co. v. United States*, 758 F.2d 733, 737 (D.C. Cir. 1985). In her reply, however, Plaintiff offers no argument at all as to what "extraordinary circumstances" might justify reopening the record. It is not clear how the only claim she makes — that she has obtained judgments against certain complaining witnesses — might meet this standard because Plaintiff has provided no clarification or specific claim as to which, if any, of the charges against her might be affected by reopening the record to consider any new evidence. Given this, and given that Plaintiff has not, apparently, before sought to introduce this evidence or reopen the record, we find this claim to be without merit.

Conclusion

The Secretary has reasonably held that Charges I, II, IV, V, VI, VIII, IX, and Specifications 1, 4, 6, 7, 9, and 11 of Charge III, jointly, and, Charges III (Specifications 4, 7, 9, 11), IV, V, VI, VIII, and IX severally or in combination thereof, support revocation of [Boynton's] license. As this decision is supported by substantial evidence, is not arbitrary and capricious, and does not violate Plaintiff's right to due process we uphold the determination revoking Plaintiff's license. Judgment will be entered accordingly.

So ORDERED.

Slip Op. 08–12

AGRO DUTCH INDUSTRIES, LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR MUSHROOM TRADE, Defendant-Intervenor.

Before: MUSGRAVE, Senior Judge
Court No. 04–00493

FINAL JUDGMENT

Agro Dutch Industries Ltd. v. United States, 508 F.3d 1024 (Fed. Cir. 2007) having reversed the judgment of this court sustaining the duty absorption inquiry with respect to the plaintiff and encompassed by *Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 51630 (Aug. 20, 2004), as amended 69 Fed. Reg. 55405 (Sep. 14, 2004), and the appellate court having remanded the matter with instruction to order Commerce to annul all duty absorption findings and conclusions encompassed thereby, now, therefore, to conform the judgment to the mandate of the appellate court, it is hereby

ORDERED, that Commerce shall annul all duty absorption findings and conclusions with respect to the plaintiff and encompassed by said amended final determination in accordance with the foregoing.

Slip Op. 08–13

PS CHEZ SIDNEY L.L.C., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, and UNITED STATES CUSTOMS SERVICE, Defendants, and CRAWFISH PROCESSORS ALLIANCE, et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 02–00635

JUDGEMENT ORDER

Upon consideration of the United States International Trade Commission's determination upon remand on Plaintiff's eligibility for Byrd Amendment distributions of November, 27, 2007 ("Commission's Remand Determination"), filed pursuant to this court's decision and Order is *PS Chez Sidney, L.L.C. v. United States*, 502 F. Supp. 2d 1318 (CIT 2007); the court having reviewed the Commission's Remand Determination and all pleadings and papers on file herein, and good cause appearing therefor, it is hereby

ORDERED that the Commission's Remand Determination is in accordance with this court's decision and Order of July 26, 2007; and it is further

ORDERED that the Commission's Remand Determination is SUSTAINED.

08–14

HARLEY & MYRA DORSEY, d/b/a CONCORDE FARMS, Plaintiffs, v. UNITED STATES SECRETARY OF AGRICULTURE Defendant.

Before: MUSGRAVE, Senior Judge
Court No. 06–00449

[On the plaintiff's USCIT Rule 56.1 motion for judgment upon the administrative record of the denial of its application for trade adjustment assistance cash benefits, matter remanded to U.S. Department of Agriculture for further proceedings.]

Dated: January 25, 2008

Steven D. Schwinn, Associate Professor of Law, The John Marshall School, for the plaintiff.[1]

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation

[1] The court would like to express its appreciation to Professor Schwinn for representing the plaintiffs *pro bono*.

Branch, United States Department of Justice (*Delisa M. Sanchez*), and Office of the General Counsel, U.S. Department of Agriculture, International Affairs and Commodity Programs Division (*Jeffrey Kahn*), of counsel, for the defendant.

OPINION

Concorde Farms, a small grape vineyard in Washington State owned and operated by Harley and Myra Dorsey, challenges the determination of the U.S. Department of Agriculture, Foreign Agricultural Service ("USDA"), denying their application for monetary assistance under the Trade Adjustment Assistance Program for Farmers ("TAA") for Washington concord grapes for marketing year 2004, as reconsidered pursuant to voluntary remand after this action was filed. The Court has jurisdiction pursuant to 19 U.S.C. § 2395(c). Concorde Farms moves for judgment pursuant to USCIT Rule 56.1.

Among other conditions, the TAA statute provides that payment of adjustment assistance shall be made to an adversely affected agricultural commodity producer covered by a certification under this part if "[t]he producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part." 19 U.S.C. § 2401e(a)(1)(C). Pursuant to such authorization, USDA defined "net farm income" to mean "net farm profit or loss, excluding payments under this part, reported to the Internal Revenue Service ["IRS"] for the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102.

In order to qualify for adjustment assistance payments, applicants must "satisfy . . . all certifications of § 1580.301(e)." 7 C.F.R. § 1580.303(a). In turn, a separate regulation provides that in order to comply with the requisite certifications, the applicant "shall provide either—(i) Supporting documentation from a certified public accountant or attorney, or (ii) Relevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the [IRS] or another U.S. Government agency." 7 C.F.R. § 1580.301(e)(6).

Concorde Farms filed an application for TAA cash benefits with the USDA on April 20, 2006. Public Record Document ("RDoc") 1. Concorde Farms' application certified that its net farm income declined from the petition's pre-adjustment year. *Id*.

In support of its application, Concorde Farms submitted portions of its 2003 and 2004 tax returns. RDocs 2, 3. For IRS reporting purposes, for both tax years 2003 and 2004 Concorde Farms reported net farm income profits on Schedule F. RDocs 2, 3. For 2003, the tax return Concorde Farms submitted to the IRS reported a net farm profit of $41,888.00 on Line 36 (Net farm profit or (loss)) of Schedule F. RDoc 2. For 2004, the tax return Concorde Farms submitted to the IRS reported a net farm profit of $47,770.00 on line 36 (Net farm

profit or (loss)) of Schedule F. RDoc 3. USDA denied Concorde Farms' application for cash benefits because it did not provide acceptable documentation of net farm or fishing income by the certification deadline (September 30) to show that its net income declined from that reported during the petition's pre-adjustment tax year. RDoc 23.

By letter to the Court dated December 12, 2006, Kirk Michels, a certified public accountant who provides accounting and tax preparation services for Concorde Farms, sought judicial review upon Concorde Farms' behalf of USDA's adverse determination. Attached to the letter are Concorde Farms' 2003 and 2004 Schedule F's and 2003 Form 4562, Schedule of Depreciation. The relevant portion of the letter observes that Concorde Farms'

> net income is reflected at $41,888; the 2004 net income shown at $47,770. The 2003 expenses included a non-recurring deduction of a Section 179 expensing of a wind machine for [$]23,414. This is a non-reoccurring tax election that brought down 2003 net income accordingly. Without inclusion of their one time tax election, the 2003 net income would have exceeded the 2004 income substantially. [Concorde Farms'] operating expenses consistently run in the high sixty thousands. The true economic disaster they suffered is readily seen in their marked reduction in gross farm income from $133,936 in 2003 to [$]115,034 in 2004.

'USCIT Court No. 06–00449, Docket Entry No. 2.

The Clerk of the Court accepted the letter as fulfilling in principle the requirements of the summons and complaint for the commencement of a civil action and it then served copies of the documents comprising the summons and complaint upon USDA and the United States Department of Justice. On April 11, 2007, USDA filed an answer to the complaint. Thereafter, following a review of USDA's denial letter to the plaintiffs (RDoc 22–24) and the agency record, and after discussions with plaintiffs' counsel, on June 7, 2007, USDA filed a consent motion for voluntary remand because the agency's initial decision did not clearly indicate why Concorde Farms had failed to meet the net farm income test.[2] The court granted the

---

[2] Specifically, the motion stated it was unclear whether Concorde Farms' application was denied because it did not submit appropriate documentation by the required deadline, or whether it submitted appropriate documentation in a timely fashion, but USDA concluded based upon that information that its net farm income did not decline, *i.e.* the determination did not explain the basis for its denial of Concorde Farms' application. Def.'s Consent Mot. for Voluntary Remand at 4. Further, the motion stated that based upon discussions with counsel for plaintiffs, USDA had become aware that counsel for plaintiffs wished an opportunity to provide additional information to USDA that Concorde Farms believed would assist USDA in making its redetermination. *Id*.

motion on June 12, 2007, and the case file, then including the complaint letter, was remanded to USDA.[3]

By letter dated August 6, 2007, USDA filed with the Court the certified remand determination dated July 27, 2007 ("Rem. Det."). After setting forth the relevant statutory and regulatory criteria for qualifying TAA benefits and the definition of key terms, USDA determined that Concorde Farms' net farm income, "as reported by Harley J. Dorsey to the [IRS], did not decrease from the preadjustment year, in this case 2003, to the applicable marketing year, in this case 2004." The relevant portion of the public remand determination reads as follows:

> To determine whether there has been the requisite decline in net income from 2003 to 2004, the agency compared line 36, "Net farm profit or (loss)" on the 2003 and 2004 Schedule F's, which the agency believes is the best evidence of net farm income. Line 36 is calculated by subtracting line 35, which sets forth the farm's total expenses, from line 11, which sets forth the farm's gross income. Line 36 is consistent with the definition of net farm income in the regulation, and accords with the generally accepted definition of net income. Black's Law Dictionary defines "net income" to mean "[t]otal income from all sources minus deductions, exemptions, and other tax reductions." It further states: "Income tax is computed on net income." Black's Law Dictionary (7th ed., 1999), 767.
>
> Mr. Dorsey indicated a net farm profit of $[*], as reported on line 36 of the Schedule F, for 2003. RDoc, 2. Mr. Dorsey indicated a net farm profit of $[*],as reported on line 36 of the Schedule F, for 2004. RDoc, 3. Therefore, Concorde Farms' net farm income did not decline from 2003 to 2004. Thus, Concorde Farms does not meet one of the mandatory criteria for eligibility for TAA cash benefits.
>
> Next, we address Concorde Farm's contention in the complaint that the non-recurring deduction of a Section 179 expensing of cost of a wind machine for $[*] should be excluded from its 2003 net farm income. This contention is misplaced because the regulation defines net farm income as net profit or loss as reported to the IRS, and Mr. Dorsey's own calculation of net farm income as reported to the IRS included this expendi-

---

[3] The Court's order directed Concorde Farms to "submit any additional information that it believes is relevant to USDA's determination with respect to net farm income no later than 30 days of this order." June 12, 2007 Order. Counsel for the defendant contends that Concorde Farms "did not submit any additional information" to USDA for consideration during the remand proceedings. Def.'s Resp. to Pl.'s Rule 56.1 Mot at 6 (citing Remand Determination at 1, ¶1). Be that as it may, counsel does not argue USDA was not obligated to consider Concorde Farms' complaint letter as part of its reconsideration.

> ture as an expense on line16 of the 2003 Schedule F, an expense that Concorde Farms now contends should be excluded. RDoc, 2. The amount of $[*] on line 16 of the 2003 Schedule F reflects the expenditure for the wind machine in the amount of $[*] plus $[*] for MACRS depreciation, as reported on the Form 4562. Attachment to complaint.
>
> The definition of net farm income in the regulation requires the agency to look to the producer's net income as reported by the producer to the IRS. 7 C.F.R. § 1580.102. Mr. Dorsey's net farm income as reported to the IRS did, in fact, include this deduction. On the Form 4562, "Depreciation and Amortization," the Dorseys elected to expense the total cost of the 7-year wind machine in a single tax year, 2003. Presumably the election to report the expense in a single year was the most advantageous way to report the expense to the IRS from the standpoint [of] reducing the income taxes owed that year.
>
> Accordingly, for the aforementioned reasons, we determine that the net farm income of plaintiff, as reported to the IRS in 2004 was greater than its net farm income reported to the IRS in 2003. Therefore, because Concorde Farms' net income did not decrease from the preadjustment year, 2003, to the applicable marketing year, 2004, Concorde Farms is not entitled to TAA cash benefits under the statute and the regulation.

Rem. Det. at 2–3.

Concorde Farms argues that USDA denied TAA cash benefits based solely upon a cursory and rote review of a single line item on its tax return and failed to take into account a letter from Concorde Farms' accountant explaining why the line item did not accurately represent its net farm income. The government argues the record shows that the letter was considered and that substantial evidence supports the denial of benefits.

Discussion

In reviewing a challenge to a USDA determination on eligibility for trade adjustment assistance, the court will uphold the determination if the factual findings are supported by substantial evidence on the record and USDA's legal determinations are otherwise in accordance with law. 19 U.S.C. § 2395(b); *see also Former Employees of Shaw Pipe*, *Inc. v. United States Sec'y of Labor*, 21 CIT 1282, 1284–85, 988 F. Supp. 588, 590 (1997) (holding that substantial evidence is "more than a mere scintilla," it must be "sufficient evidence to reasonably support a conclusion") (internal quotations and citation omitted). The findings of the Secretary of Agriculture are conclusive upon the Court if supported by substantial evidence. 19 U.S.C. § 2395(b). Towards that end, the court must consider

whether the underlying determination shows that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational explanation between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted).

In this instance, USDA's redetermination fails to abide by law. For purposes of the redetermination, the case file included the complaint letter from Concorde Farms' accountant contending that the wind machine expense deduction was extraordinary and distortive of Concorde Farms' "net farm income" and that for the purpose of determining net farm income for trade adjustment assistance benefits, such an extraordinary expense should be disregarded. *See, e.g.*, *Selivanoff v. United States Sec'y of Agric.*, 30 CIT ___, Slip Op. 06–55 at 8 (2006) ("Indeed, the Farm Financial Standards Council . . . urges that in order to provide an accurate picture of net farm income, the concept should include all gains and losses from disposal of farm capital assets unless those gains or losses qualify as an extraordinary item.") (emphasis in original). Yet, the redetermination first states, independently, that benefits would be denied because the Dorseys' net income as reported to the IRS on Concorde Farms' tax filings did not show a decline. Such a conclusion fails on its face to consider and analyze the Concorde Farms' accountant's contention, which is a material argument. *Cf. United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) ("[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered").

To the extent USDA then "considered" the accountant's contention, apparently as an "alternative" basis for denying benefits, the redetermination merely states that "the regulation defines net farm income as net profit or loss as reported to the IRS" and that it "requires the agency to look to the producer's net income as reported by the producer to the IRS." If, by this, USDA is implying that when it determines net farm income it need *only* "look to" net income "as reported by the producer to the IRS" and ignore other evidence or argument on the record, that position has already been rejected. *See*, *e.g.*, *Steen v. United States*, 468 F.3d 1357 (Fed. Cir. 2006).

In the final analysis, as counsel for the plaintiffs argues, the reasoning of the redetermination is circular: net farm income is line 36 of the tax return because line 36 of the tax return is net farm income. This reasoning does not address the relevant argument on the record that the wind machine deduction was extraordinary or explain why such expense should not be excluded from the determination of net farm income. Whether it is true that "the regulation requires the agency to look to the producer's net income as reported by the producer to the IRS[,]" that does not end the analysis the USDA

is obliged to undertake if there is other information or argument on the record that bears on the issue. *See*, *e.g.*, *Steen, supra*; *Nova Scotia Foods*, *supra*. This matter must therefore be remanded for reconsideration. And towards that end, this court reminds USDA of its posture in *Viet Do v. United States Sec'y of Agriculture*, 30 CIT ___ , 427 F.Supp.2d 1224 (2006), tacitly approved in *Steen*, 468 F.3d at 1463, which has stood for the proposition that "extraordinary" net farm or fishing income items, like capital gains or losses from the sale of business assets, are appropriately excluded from the determination of net fishing income.