U.S. Customs and Border Protection

Slip Op. 10–108

SINCE HARDWARE (GUANGZHOU) CO., LTD., Plaintiff, v. UNITED STATES, Defendant, AND HOME PRODUCTS INTERNATIONAL, LTD., Def.-Int.

Before: Richard K. Eaton, Judge:
Court No. 09–00123
Public Version

[Plaintiff's motion for judgment on the agency record sustained in part and remanded.]

Dated: September 27, 2010

Dorsey & Whitney LLP (*William E. Perry*) for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand* and *Carrie A. Dunsmore*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Thomas M. Beline*), of counsel, for defendant.

Blank Rome LLP (*Frederick L. Ikenson*, *Peggy A. Clarke*, and *Larry Hampel*) for defendant-intervenor.

OPINION AND ORDER

Eaton, Judge:

Introduction

Before the court is plaintiff's motion for judgment on the agency record challenging the final results of the administrative review of the antidumping order for Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof from People's Republic of China ("PRC"), 74 Fed. Reg. 11,085 (Mar. 16, 2009) (final results) and accompanying Issues & Decision Memorandum ("Issues & Dec. Mem.") (collectively, "Final Results") for the period of review ("POR") August 1, 2006 through July 31, 2007. *See* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem."). This is the third administrative review of the order.

Using adverse facts available, the Department of Commerce ("Commerce" or the "Department") applied a PRC-wide rate of 157.68 percent to plaintiff's merchandise in the Final Results. By its motion, plaintiff asks the court to instruct Commerce "to treat Since Hardware as a company separate from [the] China-wide entity and calculate a margin specific to Since Hardware using the U.S. sales data-

base and factors of production reported by Since Hardware, as was done in the preliminary results of this proceeding." Pl.'s Mem. 12–13. Defendant and defendant-intervenor oppose plaintiff's motion. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Resp."); Br. Home Products Int'l, Inc. Opp. to Pl.'s Mot. J. Agency R. ("Def.-Int.'s Opp.").

The central question in this case is the lawfulness of Commerce's conclusion that the inaccuracies in plaintiff's questionnaire responses provided a sufficient basis for finding that Since Hardware provided "'unreliable and incomplete' documentation in support of its claimed purchase of market economy materials" and that "the nature of the unreliable submission called into question the reliability of questionnaire responses submitted by Since Hardware in the review, including its claim of eligibility for separate rate status." Def.'s Resp. 15 (citing Issues & Dec. Mem. at Comm. 1).

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). For the reasons that follow, plaintiff's motion is granted, in part, and the case is remanded for further consideration.

STANDARD OF REVIEW

When reviewing the final results of an antidumping duty review, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(I).

DISCUSSION

I. Legal Framework

A. Presumption of State Control and Commerce's Preliminary Findings

Plaintiff operates in the PRC. As a result of the PRC's status as a non-market economy[1] country, its domestic companies are presumed

[1] A non-market economy includes "any foreign country that the administering authority [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A); *Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT 1624, 1625 n.1 (2004) (not reported in the Federal Supplement).

"Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i). The PRC has been determined to be an NME country. The Department has treated the PRC as a non-market economy country in all past antidumping investigations. *Zhejiang Native Produce & Animal By-Products Imp. and Exp. Corp. v. United States*, 27 CIT 1827, 1834 n.14, (not reported in the Federal Supplement) (citations omitted).

to be part of the state-wide entity. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997) ("[I]t was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control . . . . Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control." (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)). The presumption, however, can be rebutted. *See id*. at 1405 ("[T]he Court of International Trade has ruled that an exporter in a nonmarket economy country must 'affirmatively demonstrate' its entitlement to a separate, company-specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports.' Absence of de jure government control can be demonstrated by reference to legislation and other governmental measures that decentralize control. Absence of de facto government control can be established by evidence that each exporter sets its prices independently of the government and of other exporters, and that each exporter keeps the proceeds of its sales.") (internal citations omitted).

In this review, Since Hardware provided information relating both to its separate rate status and the price of its manufacturing inputs from claimed purchases from market economy sources. *See* Def.'s Resp. 3–4 (citing questionnaire responses). In the preliminary results, based on the company's questionnaire responses, Commerce found that the company had demonstrated the absence of de jure and de facto government control over its activities, and thus was entitled to separate rate status. *See* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the PRC, 73 Fed. Reg. 52,277, 52,279 (Dep't of Commerce Sept. 9, 2008) (preliminary results) ("Preliminary Results"). Also in the Preliminary Results, the Department calculated an antidumping duty rate of 1.53 percent, based, in part, on the prices from the claimed market economy purchases. Preliminary Results, 73 Fed. Reg. at 52,280–82.

B. Factors of Production

Because Commerce has found the PRC to be a non-market economy, 19 U.S.C § 1677(18) requires the Department, when calculating an antidumping duty margin,[2] to determine normal value on the basis of the factors of production used in producing the subject merchandise.

[2] In antidumping investigations, Commerce must ultimately calculate or assign a dumping margin, *i.e.*, "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). If the price of an item in

19 U.S.C. § 1677b(c)(1). To value the factors of production, Commerce generally uses prices or costs from a market economy country that is at a level of economic development comparable to that of the nonmarket economy country, and which is a significant producer of comparable merchandise. 19 U.S.C. § 1677b(c)(4). Accordingly, Commerce normally uses information and data from a surrogate market economy country to value the respondent's inputs used in the production of its merchandise.

Commerce does not use surrogate values, however, if a respondent purchases inputs from a market economy country at the market economy purchase price. *See* Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 Fed. Reg. 61,716, 61,71619 (Dep't of Commerce Oct. 19, 2006) (notice) ("Market Economy Inputs Methodology"). As to these purchases, Commerce has instituted a

> rebuttable presumption that market economy input prices are the best available information for valuing an entire input when the total volume of the input purchased from all market economy sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources during the period. In these cases, unless case-specific facts provide adequate grounds to rebut the Department's presumption, the Department will use the weighted-average market economy purchase price to value the entire input.

Market Economy Input Methodology, 71 Fed. Reg. at 61,717–18. In other words, Commerce's policy is to presume that market economy purchase prices are the best available information, and thus, where possible, to use them to value the total quantity of an input.

Here, in accordance with its policies, Commerce used the reported market economy purchase prices to value plaintiff's inputs of cold-rolled steel, hot-rolled steel, steel wire rod, powder coating, cotton fabric, springs, bolts, center nail and nail heads, rivets, cartons, corrugated paper, and labels. Def.'s Resp. (citing Preliminary Results, 73 Fed. Reg. at 52,280). Home Products International ("HPI"), the petitioner and currently the defendant-intervenor, challenged Since Hardware's market economy purchases, as it had in each of the prior segments of this antidumping duty order. *See* Def.'s Resp. 4–5; Mem. to File Regarding July 15, 2008 and Aug. 7, 2008 Meetings with Fred

the home market (normal value) is higher than the price for the same item in the United States (export price), then the dumping margin comparison produces a positive number that indicates dumping has occurred.

Ikenson, dated Aug. 12, 2008, Public Record ("PR") 47. Petitioner met with Commerce to discuss its concerns, and Commerce subsequently responded to this challenge by issuing five supplemental questionnaires.

As a result of these questionnaires, it came to light that the company had submitted false and fraudulent documentation regarding the country of origin and valuation of the claimed market economy purchases. *See* Def.'s Resp. 5–14 (citing to record). Commerce stated:

> The certificates submitted by Since Hardware relating to its claimed purchases of a steel input from a market economy supplier are clearly not used by the regulatory agency responsible for certifying the origin of the input. These certificates constitute the entire basis for establishing that Since Hardware purchased the steel input from a market economy supplier. In its October 31,2008 letter, the Department asked Since Hardware to explain the discrepancies detailed by Petitioner in the certificate of origin forms which Since Hardware submitted. However, Since Hardware failed to address the discrepancies . . . .

Issues & Dec. Mem. at Comm. 1. The discrepancies, which have to do with the country of origin of various inputs, are further detailed in the Memorandum Regarding Since Hardware (Guangzhou) Co., Ltd.'s Claim Re: Market Economy Purchases, and Use of Adverse Facts Available, dated Mar. 9, 2009, Confidential Record ("CR") 870 ("AFA Memo").[3] Further, Commerce found that the

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[3] The most serious issues related to Since Hardware's claimed market purchases of [[ ]] steel. AFA Memo at 3. Commerce noted:

> Since Hardware's claim of [[ ]] steel purchases is inconsistent with World Trade Atlas[[ ]] export data for Harmonized Commodity Description and Coding System (HS) item [[ ]] ([[ ]] is the HS classification number for [[ ]] steel). Since Hardware claimed it purchased [[ ]] metric tons of [[ ]] steel from [[ ]] during calendar 2007. However, Petitioner noted that World Trade Atlas (WTA) data for these same twelve months for HS [[ ]] indicate a total of only [[ ]] tons of [[ ]] steel were exported from [[ ]] to Hong Kong. Further, Since Hardware claims all of its [[ ]] metric tons were purchased between the months of [[ ]]. That claim is not consistent with WTA data, which indicate [[ ]] shipments of just [[ ]] metric tons to Hong Kong in April 2007, with no shipments at all during [[ ]] or [[ ]] 2007. Further the data shows only [[ ]] metric tons in shipment of HS [[ ]] followed in [[ ]] . . . .
>
> More importantly, Petitioner noted that major discrepancies exist between the documentation submitted by Since Hardware and the certificate of origin form employed by the [[ ]] licensing board, the[[ ]]. . . .

AFA Memo at 3. Moreover, the Department concluded, *inter alia* :

> The [[ ]] certificates submitted by Since Hardware are clearly not forms used by the [[ ]]. These [[ ]] certificates constitute the entire basis for establishing

> identical typographical errors and other discrepancies appear on documentation submitted from multiple, independent, unaffiliated suppliers. Since Hardware has never explained the source of these typographical errors and discrepancies, and has provided no credible explanation as to why the same set of typographical errors appear in the documentation submitted from multiple independent, unaffiliated suppliers.

Issues & Dec. Mem. at Comm. 1. In other words, Commerce found the forms submitted by Since Hardware to substantiate its market economy purchases were fraudulent.

After the questionnaire responses revealed that the company's documentation of these inputs appeared to be false, Commerce asked for, among other things, mill certificates from the input manufacturers in order to determine the origin of the inputs (e.g., the steel) used in the production of the subject merchandise. *See* Def.'s Resp. 12 (citing PR 73, CR 25). Since Hardware claimed it had no mill certificates to identify the type of steel it bought or, for that matter, to verify any of the other inputs it had purchased and used in its products. Def.'s Resp. 6 (citing PR 48, CR 14). It further insisted that it relied on its suppliers for country of origin information, and indeed, relied on its suppliers for all the documentation it submitted to Commerce. Def.'s Resp. 12–13 (citing PR 61; CR 21).

The company then provided ledger entries that it claimed documented its purchases. Def.'s Resp. 10 (citing PR 57; CR 19). The accounting ledgers included the disputed market economy purchases. AFA Memo at 11. With respect to these ledger entries, Commerce noted that they

> were purportedly associated with its market economy purchases . . . which were consistent with "the now-discredited . . . documentation submitted by Since Hardware." Holding that "[t]his evinces that the pervasive errors in the . . . documents infect Since Hardware's own books and accounting records," and that

that Since Hardware's [[ ]] steel was of [[ ]] origin. In its October 31, 2008, letter, the Department asked Since Hardware to explain the discrepancies detailed by Petitioners in the [[ ]] forms which it submitted. However, Since Hardware failed to address the discrepanciese numerated in Petitioners' September 2, 2008, letter and summarized above. These discrepancies include numerous and inexplicable errors including the misspelling of "[[ ]];" an easily discernible discrepancy between the signature of the [[ ]] official and that official's actual signature; and unrecognizable [[ ]] signature/date stamp; and an alpha-numeric numbering protocol different from the sequential numbering employed by [[ ]]. In addition, one of the certificates on the record in the first administrative review was purportedly signed by a specific [[ ]] official long before she began her employment with the [[ ]].
AFA Memo at 11.

> Since Hardware's accounting records "reflect unreliable and inaccurate information" Commerce determined that it was unable to rely on the accuracy and validity of the data which Since Hardware retrieved from its accounting system.

Def.'s Resp. 16–17 (internal citation omitted).

When a respondent in an administrative review "significantly impedes" the proceeding, Commerce is permitted to "fill [ ] gaps in the record" using facts otherwise available. *See* Statement of Administrative Action, Uruguay Round Agreements Act, accompanying H.R. Rep. No. 103–316, 656, 830–31 (1994), reprinted in 1994 U.S.C. C.A.N. 4040, 4199; *see also* 19 U.S.C. § 1677e(a)(2)(C).[4] Based on the submission of false questionnaire responses, "Commerce determined, pursuant to its statutory authority, to use facts otherwise available because Since Hardware withheld information requested by Commerce and significantly impeded the investigation." Def.'s Resp. 18 (citations omitted).

Once it has determined that the use of facts otherwise available is required, Commerce may make findings to determine if the "use [of] an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available," is authorized. Commerce may make an affirmative determination if it finds that the respondent "has failed to cooperate by not acting to the best of its ability to comply" with a request for information. *Nippon Steel Corp. v. United States*, 337 F. 3d 1373 (Fed. Cir. 2003) ("*Nippon Steel* "); 19 U.S.C. § 1677e(b).[5]

Because it found that, as a result of its unreliable questionnaire responses, plaintiff "failed to cooperate to the best of its ability," Commerce applied adverse facts available ("AFA"), and assigned an

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[4] If–
(1) necessary information is not available onthe record, or
(2) an interested party or other person . . .
(C) significantly impedes a proceeding underthis subtitle, . . .
the administering authority . . . shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.
19 U.S.C. § 1677e(a)(C).

[5] Pursuant to 19 U.S.C. § 1677e(b):
If the administering authority ... finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority ..., the administering authority ..., in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
(1) the petition,
(2) a final determination in the investigation under this subtitle,
(3) any previous review under section 1675 of this title [periodic review] or determination under section 1675b of this title [countervailing duty injury investigations], or
4) any other information placed on the record.

antidumping duty rate to the company that was equal to the highest rate calculated for a respondent in prior segments of the proceeding. Def.'s Resp. 15 (citing Issues & Dec. Mem. at Comm. 1). Commerce explained: "Since Hardware's conduct in this review . . . significantly impeded the proceeding" by producing false information for market economy purchases that "constitute a major portion of the production inputs of the subject merchandise" to the effect that the company's responses "are no longer reliable for purposes of determining Since Hardware's margin of dumping." AFA Memo at 10. Commerce then found:

> We have determined that the documentation submitted by Since Hardware to support its claimed purchases of market economy inputs to be unreliable and inaccurate. The deficiencies in Since Hardware's response establish a pattern of behavior that undermines the reliability and credibility of Since Hardware's entire questionnaire response, including Since Hardware's claim of eligibility for separate rate status.

Issues & Dec. Mem. at Comm. 1. Commerce thus put aside the entirety of Since Hardware's submissions, including evidence relating to separate rate status, and assigned the PRC-wide entity antidumping duty rate of 157.68 percent. *See* Def.'s Resp. 15, 18.

In its motion for judgment on the agency record, plaintiff contends: (1) that Commerce should not have rescinded the separate rate status plaintiff was afforded in the Preliminary Results; and (2) that Commerce should have applied partial adverse facts available only to valuing the inputs found to be based on unreliable information, rather than total adverse facts available.[6] Pl.'s Mem. 11–13. In pleading its case, plaintiff does not contest the application of facts available, nor that partial adverse inferences should be applied. Pl.'s Mem. 11.

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[6] The term "total adverse facts available" is not referenced in either the statute or the agency's regulations. The phrase can be understood within the context of this case to be referring to Commerce's application of adverse facts available not only to the facts pertaining to market economy purchases for which false and fraudulent information was found to be provided, but also to the facts respecting all of Since Hardware's sales encompassed by the relevant antidumping duty order and evidence relating to separate rate status. *See Shandong Mach. Imp. & Exp. Corp. v. United States*, 33 CIT ___, Slip Op. 09–64 at 14 n.5 (2009) (not reported in Federal Supplement) (citation omitted).

II. Analysis

A. Separate Rate Status

In the Final Results, Commerce concluded that the "unreliable and inaccurate" information regarding market economy purchases called into question all of Since Hardware's responses including the record evidence regarding state control. An examination of the record, however, reveals that none of the unreliable information submitted by the company is relevant to the question of government control. That is, while many of plaintiff's answers to questions dealing with market economy purchases were untrue, there is nothing to suggest that the company was other than truthful when answering questions relating to government control. Put another way, the evidence that the company was not controlled by the government (e.g., documentation substantiating its claims that it is a wholly foreign-owned enterprise registered in PRC— such as the "Foreign Trade Law of the People's Republic of China" and copies of its business licenses— and evidence regarding de facto control over its export activities) is far removed from questions relating to the origin of the factors of production and their cost. *See, e.g.*, Preliminary Results, 73 Fed. Reg. at 52,278–9.

This Court has previously faced a similar situation relating to questionnaire responses. In *Qingdao Taifa Group Co. v. United States*, 33 CIT __, 637 F. Supp. 2d 1231 (2009) ("*Qingdao*"), the Court found:

> Commerce may not apply the PRC-wide rate as the AFA rate where AFA is warranted for sales and [factors of production] data, but the respondent has established independence from government control.

33 CIT at __, 647 F. Supp. 2d at 1240–41 (citation omitted).

In *Qingdao*, as here, Commerce found an absence of government control in the preliminary results, and subsequently discovered the respondent's failure to report accurately factors of production data. The Court remanded the matter to Commerce to determine whether substantial evidence supported a finding of government control, and stated that if there was a sufficient link to the PRC, Commerce could apply the PRC-wide rate; if not, Commerce was directed to calculate a separate AFA rate for the respondent. *Qingdao*, 33 CIT at __, 637 F. Supp. 2d at 1240–41, 1244; *see Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT 753, 772, 387 F. Supp. 2d 1270, 1287 (2005) ("Gerber") (finding application of adverse facts available unsupported by substantial evidence where Commerce imposed a rate that presumed government control when respondent was found to be inde-

pendent of government control); *Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1595–6 (2003) (not reported in Federal Supplement) (same).

Similarly, here, Commerce has found that Since Hardware's responses failed to report accurately information, such as prices and country of origin, for inputs purchased in market economy countries. The Department, however, made no specific finding that the responses concerning state control were inaccurate. When, as here, the use of AFA is justified, Commerce may "use an inference that is adverse to the interests of [a respondent] in selecting among the facts otherwise available." *Nippon Steel*, 337 F. 3d at 1381; 19 U.S.C. § 1677e(b). When making this selection, however, Commerce may not stray too far from the questionnaire responses that justified the use of AFA. Neither Commerce nor defendant-intervenor has presented any information tending to lead to the conclusion that Since Hardware's questionnaire responses relating to government control were other than truthful. Consequently, remand is warranted.

B. Adverse Facts Available Applied to Entirety of Since Hardware's Responses

As previously noted, by rejecting all of the company's questionnaire responses, Commerce applied inferences adverse to Since Hardware's interests in selecting from the facts available. Def.'s Resp. 15 (citing Issues & Dec. Mem. at Comm. 1). Since Hardware contends that it

> is no[t] challenging either the Department's determination to apply facts available or the Department's determination to utilize an adverse inference as to Since Hardware in the application of facts available. Since Hardware is challenging only the manner in which the Department applied adverse facts available to Since Hardware.

Pl.'s Mem. 11. Specifically, the company contends that Commerce overreached by finding that its production information was unreliable not only as to the country of origin and cost of its factors of production, but also as to the identification of each factor and its quantity:

> The record in this case established that the Department may have been correct in determining that it was appropriate for the Department to rely upon facts available and to make adverse inferences with respect to Since Hardware's reported market economy purchases. However, under the statutory scheme, the Department's application of adverse facts available should have been limited strictly to the offending information. The Depart-

> ment's application of total adverse facts available, and its rejection of all of Since Hardware's responses, overreached the manner in which the statute authorizes the application of adverse facts available.

Pl.'s Mem. 20. Therefore, while Since Hardware does not dispute that the information it submitted as to the country of origin and valuation of certain inputs was unreliable, it objects to Commerce extending its finding of unreliability to all of plaintiff's other factors of production responses. Accordingly, plaintiff argues, the court should "remand the action to the Department with instructions for the Department to apply partial adverse facts available and limit the impact of adverse facts available only to the offending information relating to Since Hardware's market economy purchases." Pl.'s Mem. 20. Plaintiff further contends that Commerce, rather than being permitted to assign a rate, should be instructed to use surrogate values to value Since Hardware's other reported factors of production and then calculate an individual rate for the company.

Commerce submits that its determinations are supported by substantial evidence.

> Since Hardware submitted contradictory and unreliable information and these discrepancies permeated Since Hardware's responses. By including the discredited and unsubstantiated market economy purchase prices in its accounting ledgers, Since Hardware rendered its entire submission inaccurate. By failing to adequately explain the discrepancies in its supporting documentation to Commerce and provide requested alternative documentation, Since Hardware failed to cooperate with the administrative review. Accordingly, Commerce applied total adverse facts available to Since Hardware.

Def.'s Resp. 21. Further, Commerce found that the "problems with the market economy input purchases pervaded Since Hardware's entire responses." Def.'s Resp. 16 (citing AFA Memo at 11). Indeed, Commerce points out that after it questioned Since Hardware's early submission, the company

> provided copies of ledger entries that were purportedly associated with its market economy purchases . . . , which were consistent with "the now-discredited . . . documentation submitted by Since Hardware." Holding that "[t]his evinces that the pervasive errors in the . . . documents infect Since Hardware's own books and accounting records," and that Since Hardware's accounting records "reflect unreliable and inaccurate informa-

> tion[,]" Commerce determined that it was unable to rely on the accuracy and validity of the data which Since Hardware retrieved from its accounting system.

Def.'s Resp. 16–17 (internal citations omitted). Consequently, Commerce insists that it cannot rely on Since Hardware's submission in its entirety.

The court finds that Commerce's use of AFA to assign a dumping rate to Since Hardware's merchandise is in accordance with law and supported by substantial evidence. First, it is clear that the Department acted reasonably in determining that it could not rely on the material the company placed on the record relating to the country of origin and valuation of the factors of production. Plaintiff submitted forged and altered documents on its market economy purchases. Then it submitted accounting ledgers that contained information taken from the forged and altered documents. As Commerce stated:

> Since Hardware submitted contradictory and unreliable information and these discrepancies permeated Since Hardware's responses. By including the discredited and unsubstantiated market economy purchase prices in its accounting ledgers, Since Hardware rendered its entire submission inaccurate. By failing to adequately explain the discrepancies in its supporting documentation to Commerce and provide requested alternative documentation, Since Hardware failed to cooperate with the administrative review.

Def.'s Resp. 21.

Here, Commerce's determination rests on credibility. This Court in *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 360 F. Supp. 2d 1339 (2005) ("*Shanghai Taoen*"), upheld the application of adverse facts available to an entire submission in similar circumstances. The Court noted that the application of partial adverse facts available was not appropriate because

> [t]his is not a case of partial gaps in the record. Commerce determined that [respondent] failed to provide a credible explanation for the inconsistencies between Customs' entry documents and [respondent's] questionnaire responses which concerned the identity of suppliers. Such information is core, not tangential, and there is little room for substitution of partial facts.

Shanghai Taoen, 29 CIT at 199 n.13, 360 F. Supp. 2d at 1348 n.13. As in *Shanghai Taoen*, here the missing information on production in-

puts goes to the core of the antidumping duty rate determination, *i.e.*, the inputs at issue are a "major portion of the production inputs of the subject merchandise." AFA Memo at 10. Since Hardware insists that its sales and factors of production data were not tainted by its market economy input purchases. However, the unsubstantiated market economy purchase prices were included in Since Hardware's accounting ledgers, themselves found to "reflect unreliable and inaccurate information." AFA Memo at 11. This being the case, it can hardly be said that Commerce was unreasonable in determining not to rely on these documents. Thus, the court finds that, given the pervasiveness of the inaccuracies in Since Hardware's questionnaire responses, Commerce acted reasonably in determining it could not rely on any of the company's financial information. Accordingly, Commerce's application of adverse facts available to all of plaintiff's input submissions is sustained.

CONCLUSION

For the foregoing reasons, the court grants plaintiff's motion, in part, and remands a portion of Commerce's determination. On remand Commerce shall reexamine the record to again determine if Since Hardware has produced evidence sufficient to qualify for application of a separate rate. In doing so, Commerce may not assume that the portion of the record Court No. 09–00123 Page 23 relating to independence from government control has been impacted by Since Hardware's questionnaire responses to unrelated matters. If the record supports application of a separate rate, Commerce must determine a separate AFA rate for Since Hardware; if not, Commerce may apply the PRC-wide rate. The remand results shall be due on January 27, 2011; comments to the remand results shall be due on February 28, 2011; and replies to such comments shall be due on March 14, 2011.

Dated: September 27, 2010
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Errata

Since Hardware (Guangzhou) Co., Ltd. v. United States, Court No.09–00123, Slip Op. 10–108 (Sept. 27, 2010)

Page 1, caption: "HOME PRODUCTS INTERNATIONAL, LTD." should read "HOME PRODUCTS INTERNATIONAL, INC.".

Slip Op. 10–115

SHAH BROTHERS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 09–00180

[Motion to dismiss Plaintiff's Amended Complaint granted.]

Dated: Dated: October 6, 2010

Stein Shostak Shostak Pollack & O'Hara (*Elon A. Pollack*, *Bruce N. Shulman*, and *Juli C. Schwartz*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke* and *Edward F. Kenny*) for the Defendant.

OPINION

Pogue, Judge:

I. Introduction

In this action, Plaintiff Shah Bros. challenges the Defendant's classification of its imported merchandise, and the resulting tariff duties and excise taxes imposed. Plaintiff seeks reclassification of its goods, a return of said duties and taxes, with interest thereon, and further declaratory relief. In response to Plaintiff's Complaint, the Defendant confessed judgment to Plaintiff's classification claim, agreeing to refund, with interest, the contested duties and excise taxes. *See* USCIT R. 54(b). The court then dismissed, subject to a right to amend, Plaintiff's claim for further declaratory relief.

Plaintiff has now filed an amended complaint, alleging a continuing dispute, based on the Alcohol and Tobacco Tax and Trade Bureau's ("TTB") classification of Plaintiff's merchandise, prior to the Defendant's confession of judgment, and U. S. Customs and Border Protection's ("Customs") implementation thereof. In further response, the Defendant now moves to dismiss Plaintiff's amended complaint for

lack of subject jurisdiction, claiming that its confession of judgment has rendered Plaintiff's complaint moot.

As explained below, the court concludes that the responsibility for the administration and enforcement of the duties and taxes at issue lies with Customs — not TTB. Therefore, it is Customs' decisions that are at issue. As Plaintiff has not established that the statutory protest procedure, and the special provisions for judicial review thereof, provide an inadequate remedy for these Customs' decisions, the court dismisses Plaintiff's Amended Complaint.

II. Background

Five entries[1] of Plaintiff's merchandise (imported through the port of Memphis) are at issue.[2] Specifically, in 2007, Plaintiff began importing "gutkha", a tobacco product that "include[s] crushed betel nuts, aromatic spices (*viz.*, lime, saffron and cardamom), menthol and/or catechu additives (optional) and crushed tobacco leaf." (Pl.'s First Am. Compl. ("Am. Compl.") ¶¶ 26, 27.) The specific gutkha product, contained in the five entries, "is a grayish/beige substance consisting of dry rough chunks of betel nut pieces and bits of tobacco leaf, coated with a powdered blend of the spices." (*Id.* ¶ 27.) According to Plaintiff, "[t]he tobacco leaf is not finely cut, ground or powdered" and "[w]hen the gutkha is rinsed in a fine mesh strainer, the spice coating is washed off, and the remaining components, *i.e.* crushed betel nut and tobacco leaf, are plainly visible and identifiable as such." (*Id.*)

As a "smokeless tobacco," Gutkha is subject both to import tariffs in accordance with the Harmonized Tariff Schedule of the United States ("HTSUS") and to federal Internal Revenue excise taxes in accordance with 26 U.S.C. § 5701(e)(2006). Title 26 defines "smokeless tobacco" as "any snuff or chewing tobacco." 26 U.S.C. § 5702(m)(1).[3] Although the tariff rate for either snuff or chewing tobacco is the same, the excise tax for snuff is higher than that for chewing tobacco. Customs is responsible for collecting both the tariffs and the excise taxes. *See* 6 U.S.C. § 215(1); 27 C.F.R. § 41.62; Treas. Order 100–16 (May 15, 2003).

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[1] The five entries listed in the Summons, are: D52–89005048, D52–8900489–2, D52–0899860–4, D52–0899773–9, and D52–0899179–9. (Def.'s Mot. for Entry of Confession of J. in Pl.'s Favor 1; Pl.'s Summons 1, 3.)

[2] Plaintiff imports and sells "authentic, traditional foodstuffs and related products from India."

[3] Title 26 also defines "chewing tobacco" as "any leaf tobacco that is not intended to be smoked." 26 U.S.C. §5702(m)(3).

Upon entry, Shah Bros. classified the subject gutkha as "chewing tobacco" under HTSUS Subheading 2403.99.2030.[4] (Am. Compl. ¶ 32.) According to the amended complaint, in November 2007, a TTB investigator collected samples of the gutkha from Shah Bros.' premises. The investigator then submitted these samples to the TTB Regulations and Rulings division ("RRD"). (*Id.* ¶ 33.) In January 2008, Customs, in a CF 29 Notice of Action, changed the gutkha tariff classification to HTSUS 2403.99.3070 "tobacco ... other."[5] (*Id.* ¶ 34.) It appears that this classification ultimately resulted from a typographical error, as Customs in fact liquidated the merchandise as "snuff,"[6] under HTSUS 2403.99.2040.(*Id.* ¶ 34.)[7] Subsequently, as a result of the reclassification and liquidation, Customs issued a bill to Shah Bros. for $4,706.30. (*Id.* ¶ 35) Shah Bros. protested this classification and assessment in Protest Nos. 2006–08–100509[8] and 2006–08–100516[9]; in November 2008, Customs denied Plaintiff's Protests and Application for Further Review. (*Id.* ¶¶ 40–41.)

Concurrent with Shah Bros.' dispute with Customs, in February 2008, Shah Bros. also requested a ruling from RRD on the tax classification of the subject merchandise. (*Id.* ¶ 36.) RRD issued Priv. Ltr. Rul. 5200:2008R-122P,[10] which classified Shah Bros.' gutkha as "snuff." (*Id.*) According to RRD, "upon visual inspection," the gutkha

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[4] Classification as "chewing tobacco" under HTSUS Subheading 2403.99.2030 results in a tariff rate of $0.247 per kilogram in addition to an Internal Revenue tax of $0.195 per pound. *See* HTSUS 2403.99.20; 26 U.S.C. § 5701(e)(2).

According to the Defendant, Shah Bros. classified its gutkhaas "spice mixtures" as per HTSUS 0910.91.00. (Def.'s Mot. to Dismiss 2.) As the court has not received any documentation or rulings from the Defendant as to this matter, and as the Defendant has not placed in dispute the content thereof, the court assumes Plaintiff's non-jurisdictional allegation to be true for the purposes of this motion.

[5] The Defendant asserts that Customs originally classified the gutkha as "chewing tobacco." (Def.'s Mot. to Dismiss 2.) However, again, as the court has been unable to obtain any documentation or rulings from the Defendant as to this matter, the court assumes Plaintiff's non-jurisdictional allegation to be true for the purposes of this motion.

[6] Classification as "snuff" under HTSUS Subheading 2403.99.2040 results in an identical tariff rate to chewing tobacco; however, the Internal Revenue tax rises to $0.585 per pound. *See* HTSUS 2403.99.20; 26 U.S.C. § 5701(e)(1). Title 26 defines "snuff" as "any finely cut, ground, or powdered tobacco that is not intended to be smoked." 26 U.S.C. § 5702(m)(2).

[7] Fifteen days later, Customs corrected its error and reclassified the merchandise under HTSUS 2403.99.2040, although the corrected CF 29 was not issued until July 9. (Am. Compl. ¶¶35, 39.)

[8] Protest No. 2006–08–100509 covered entry D52–8900504–8. (*See* Pl.'s Summons 1.)

[9] Protest No. 2006–08–100516 covered entries D52–8900489–2, D52–0899860–4, D52–0899773–9, and D52–0899179–9. (*See* Pl.'s Summons 3.)

[10] Neither party has presented the court with a copy of this document, nor has the court been able to obtain this document from TTB. Thus, for the purposes of this motion, the court will rely upon Plaintiff's Amended Complaint as to the contents of this ruling.

contained "no discernible leaf tobacco." (*Id.*) In its January/February reclassification mentioned above, Customs relied upon this RRD ruling. (*Id.* ¶ 41.)

Plaintiff then moved for reconsideration, requesting that TTB perform the Alcohol Tobacco and Firearms ("ATF") Procedure 87–4 ("ATF Proc. 87–4") sieve test[11] "in order to ascertain an objective result" because (1) "certain products like gutkha can be difficult to classify" and (2) "gutkha is universally marketed and consumed as chewing tobacco" (*Id.* ¶ 37.) TTB denied Shah Bros.' petition on the ground that "no 'fibrous' leaf material was visible." (*Id.* ¶ 42.) According to the Plaintiff, TTB did not, either in its rulings or in other communications, provide Plaintiff the results of any sieve test on the subject gutkha, if such test was even performed at all. (*Id.* ¶¶ 38, 42.)[12]

In addition, other of Plaintiff's gutkha entries, entered at the same time as those at issue here, are currently subject to seizure and judicial forfeiture, as well as a (recently dissolved) criminal investigation by U.S. Immigration and Customs Enforcement.[13] [14] (Am. Compl. ¶¶ 46–47.) Plaintiff alleges that these entries are (a) identical to those at issue in this case and (b) "aris[e] out of the same series of...transactions occurring during the same time frame." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Br.") 12.) The Defendant has not challenged the veracity of either of these two factual assertions.

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[11] ATF Proc. 87–4 serves to "advise of the testing method used by [ATF] in determining whether smokeless tobacco products are chewing tobacco or snuff under 26 U.S.C. Secs. 5701 and 5702." ATF Proc. 87–4 Sec. 1. Because "the statutory definitions do not provide a clear delineation between what is a leaf tobacco (chewing tobacco) and what is a finely cut tobacco (snuff)," ATF instituted a sieve test to provide "object information" in order to distinguish between the two. *Id.* Secs. 2.02, 2.04, 2.06. However, the sieve test "is employed only when it is not readily apparent from other available information (visual appearance, method of manufacture, etc.) whether the product is chewing tobacco or is snuff." *Id.* Sec. 2.06.

[12] In an about-face, on January 27, 2009, Customs issued interpretive ruling HQ HO43318, therein holding that "gutkha is 'chewing tobacco' and is classified under HTS[US] 2403.99.2030."(*Id.* ¶ 44.) Further, Customs stated that "the definitions set forth in the TTB regulations are for purposes of implementing statutes other than the Customs laws and are not definitive as to the classification of the merchandise." (*Id.* (quotation marks omitted).) But Customs revoked the ruling approximately sixty days later. (*Id.* ¶ 45.) Informal communications with Customs, according to Plaintiff, indicated that the ruling was revoked due to the Shah Bros. dispute with TTB. (*Id.*)

[13] Plaintiff claims only that the seizure and investigation are both results of the erroneous classification of gutkha as snuff. *See* Am. Compl. ¶¶ 46, 47. The court has no details before it concerning the precise nature of the seizure and the criminal investigation; however, this information is not necessary for the court's determination, except that the court will assume as true Plaintiff's allegation that Customs relied upon the TTB classification of the imported goods when seizing those goods and investigating Plaintiff.

[14] Defendant has recently informed the court that the criminal investigation has been dissolved. (Def.'s Resp. to Cts.' Questions at 3.)

Having paid all duties and taxes, Shah Bros. filed its Summons and initial Complaint on April 29, 2009. As noted above, the Defendant moved to confess judgment as to the entries at issue, *i.e.*, to reclassify the goods under HTSUS Subheading 2403.99.2030 as "chewing tobacco" and to reliquidate the entries accordingly, refunding the excess Internal Revenue tax paid, together with interest. Plaintiff objected to this motion. Ultimately, the court granted the Defendant's motion and partial judgment was issued for Shah Bros.

Remaining before the court is Plaintiff's First Amended Complaint with the court, asserting jurisdiction under 28 U.S.C. § 1581(a), (i)(1) and (i)(4) (2006). The amended complaint makes two allegations. First, Shah Bros. challenges TTB's "erroneous administration and enforcement of the relevant statutes, regulations and test procedures in determining the classification of imported gutkha for tax assessment and revenue collection purposes." (Am. Compl. ¶ 5.) In this charge, Plaintiff claims that "TTB and [Customs] have treated gutkha inconsistently in the past," (*id.* ¶ 50,) and have acted arbitrarily and contrary to law in imposing "discernable leaf tobacco" and "fibrous leaf material" requirements. (*Id.* ¶¶ 51, 54.) Again according to the complaint, as a result of TTB's actions, Shah Bros. "has [been] adversely affected . . . because [TTB's] decision has resulted in the imposition of a higher excise tax, a seizure and a criminal investigation." (*Id.* ¶ 53.)

Second, Shah Bros. alleges that Customs "improperly performed its . . . role[15] with respect to the determination of the tax status of gutkha and the exaction of additional tax because it erroneously relied on TTB's arbitrary classification of gutkha as 'snuff.'" (*Id.* ¶ 55.) Plaintiff also references a more recent summons and complaint that address Customs' classification of other "identical" entries. (Pl.'s Br. 12; Notice of Errata to Pl.'s Opp'n to Def.'s Mot. to Dismiss 1–2 (informing the court that it has filed a summons and complaint for Court. No. 10–00205 which covers Protest No. 1601–10–100051).) Shah Bros. seeks declaratory and equitable relief.

The Defendant asserts, that because of its confession of judgment, Plaintiff has received complete relief in the form of reclassification of the gutkha imports at issue. As a consequence, the Defendant argues, Shah Bros. cannot assert any claim under either section 1581(a) or section 1581(i). Further, because the Defendant confessed judgment as to Plaintiff's classification claim, the Defendant argues that no

[15] Plaintiff originally referred to Customs' role here as "ministerial." (*Id.* ¶ 55.) However, in its opposition brief to Defendant's motion, Plaintiff states that "[t]o the extent Defendant is troubled by the use of the word 'ministerial' in the First Amended Complaint, with leave of the Court, Shah Bros. is amenable to deleting this word." (Pl.'s Br. 9 n.3.)

case or controversy exists, and therefore this matter is not justiciable under Article III of the Constitution.

III. Analysis

Whether jurisdiction exists is a question of law. *Sky Techs. LLC v. SAP AG*, 576 F.3d 1374, 1378 (Fed. Cir. 2009). Because the Defendant has moved to dismiss Plaintiff's action for lack of jurisdiction, the court accepts as true all factual allegations asserted in Shah Bros.' Amended Complaint. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999). Nonetheless, Plaintiff, "[the] party seeking the exercise of jurisdiction in its favor[,] has the burden of establishing that [] jurisdiction exists." *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936)).[16]

Proper categorization of Plaintiff's claims within the framework of this Court's statutory jurisdiction provides context, and is thus "logically antecedent," to discussion of Article III justiciability. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (addressing class certification questions before turning to Article III considerations, as "the class certification issues are[] . . . 'logically antecedent' to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing" (citations omitted)).

A. Direct Review of TTB's Actions is Precluded in this Court

As explained below, the court does not have jurisdiction over Plaintiff's direct challenge seeking declaratory relief from TTB's actions.

i. Direct Review of TTB's Alleged Decision Pursuant to Section 1581(a) is Unavailable

Section 1581(a) applies only to protests of Customs' decisions. *See* 28 U.S.C. § 1581(a) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]."); 19 U.S.C. § 1515(a) (noting the protesting party may file a civil action

[16] As a consequence, "[i]f a motion to dismiss for lack of subject matter jurisdiction [] . . . challenges the truth of the jurisdictional facts alleged in the complaint, the [] court may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d746, 747 (Fed. Cir. 1988). However it remains Plaintiff's burden to present evidence to establish jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) ("if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof." (citation omitted)); *Ritchie*, 170 F.3d at 1099 ("a [plaintiff's] allegations alone do not conclusively establish standing. If challenged, the facts alleged which establish standing are part of the [plaintiff's] case, and[] . . . must be affirmatively proved." (citation omitted)).

contesting the denial of protests under 19 U.S.C. § 1514); *id.* § 1514 (providing for protests of "decisions of the Customs Service"). As such, TTB's alleged decision is not directly reviewable under this subsection.[17]

ii. Direct Review Pursuant to Section 1581(i) is Unavailable

In addition to 1581(a), in seeking review of TTB's actions, Plaintiff attempts to invoke the court's "residual" jurisdiction under 28 U.S.C. § 1581(i)(4). 1581(i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[17] The court notes that Plaintiff's challenges to Customs' actions regarding the protests before the court were appropriately brought under 28 U.S.C. § 1581(a), a valid protest having been filed pursuant to 19 U.S.C. § 1514. As we explain below, because Customs was not bound to follow TTB and, indeed, TTB has no statutory or regulatory authority over imports of tobacco products, *see supra*, Plaintiff was challenging Customs' decision to classify the gutkha consistent with TTB's analysis and recommendations. Thus, Plaintiff contested "decisions" by Customs, namely, Customs' classification of, and the subsequent tax rate assigned to, the subject merchandise. *See Norsk HydroCan., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (noting that courts must therefore "look to the true nature of the action" in determining jurisdiction (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986))) (quotation marks omitted).

The court also notes that Customs' process in classifying merchandise is challenged in a protest, and reviewed here under subsection 1581(a). *See Autoalliance Int'l, Inc. v. United States*, 29 CIT 1082, 1093, 398 F. Supp. 2d 1326, 1336 (2005).*Cf. Luxury Int'l, Inc. v. United States*, 23 CIT 694, 697, 69 F.Supp. 2d 1364, 1368 (1999) ("the gravamen of the allegations before the Court and the relief sought by [Plaintiff] concern 'the regulations promulgated by Customs and their administration and enforcement by that agency.' The Court is empowered to determine whether Customs acted properly in enforcing the regulations pertaining to the exclusion of the LCD games. *See* 28 U.S.C. § 1581(a)") (citations omitted).

Id. Plaintiff asserts that its action challenging TTB's classification of Plaintiff's merchandise "arises out of" a law that provides for TTB's "administration and enforcement" of a law that involves "revenue from imports," i.e., 26 U.S.C. §§ 5701, 5702.[18]

The Defendant states that the court cannot review actions taken by TTB, because "regardless of TTB's ruling policy, CBP is the entity ultimately responsible for classifying merchandise and assessing excise tax, although [CBP] may consider TTB's rulings in those determinations." (Def.'s Mot. to Dismiss 7.) As such, "CBP's reliance upon TTB's rulings would naturally be a part of the inquiry in a typical protest case arising under section 1581(a), and therefore unreviewable under section 1581(i)." (*Id.* 7–8.)[19]

Plaintiff responds that, because the excise taxes at issue "are internal revenue [] taxes[,] TTB is the agency charged with administering the statute" and "shares responsibility with Customs for assessing and collecting the higher tax rate on gutkha." (Pl's Br. 9 (citing *Ammex, Inc. v. United States*, 419 F.3d 1342, 1346 (Fed. Cir. 2005)).[20]

As a matter of law, however, the court cannot agree with Plaintiff's characterization of the current relationship between Customs and TTB in the administration of the excise tax on tobacco imports. Rather, it is Customs, not TTB, that both "administers" and "enforces" the excise taxes imposed on tobacco imports. This is because authority as to assessment of excise taxes, and the classification associated with this assessment, lies with Customs and no longer with the Treasury Department. Specifically, Treasury Department Order 100–16 provides:

> Consistent with the transfer of the functions, personnel, assets, and liabilities of the United States Customs Service to the Department of Homeland Security[21] as set forth in [6 U.S.C. §

[18] Although "district courts have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports and tonnage," such jurisdiction "except[s] matters within the jurisdiction of the Court of International Trade", 28 U.S.C. § 1340, as will be discussed below.

[19] The court reads the Defendant's statements as arguing that TTB's decision does not qualify as "administration or enforcement."

[20] Plaintiff also insists that its reading of TTB's involvement in assessment of the instant excise taxes "does not run afoul of the *Homeland Security Act*, 6 U.S.C. [§ 215]." (Pl.'sBr. 9).

[21] CBP — formerly the U.S. Customs service, a part of the Treasury Department — is now organized as a component of the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107–296, § 403(1), 2002 U.S.C.C.A.N. (116 Stat.) 2137, 2178, and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, p.4 (Feb. 4, 2003).

> 203(1)], *there is hereby delegated to the Secretary of Homeland Security the authority related to the Customs revenue functions* vested in the Secretary of the Treasury as set forth in [6 U.S.C.§§ 212, 215] . . . .

Treas. Dep't Order No. 100–16 ¶ 1, 68 Fed. Reg. 28,322 (May 23, 2003 (emphasis added)). This delegation is not limited in any way that is relevant here.[22] Section 212 does provide that, notwithstanding the broad statutory delegation of Treasury Department authority to the Department of Homeland Security provided in section 203:

> authority related to Customs revenue functions that was vested in the Secretary of the Treasury by law before the effective date of this chapter under those provisions of law set forth in paragraph (2)[[23]] shall not be transferred to the Secretary [of Homeland Security] by reason of this chapter . . . .

6 U.S.C. § 212(a)(1). However, important to the case at hand, "on and after the effective date of this chapter, the Secretary of the Treasury may delegate any such authority to the Secretary [of Homeland Security] at the discretion of the Secretary of the Treasury." *Id.* As previously mentioned, the Treasury Department delegated authority to Customs as to "Customs revenue functions." Section 215 defines "Customs revenue functions" as, among other things, "*[a]ssessing and collecting* customs duties[,] . . . *excise taxes*, fees, and penalties *due on imported merchandise*, *including classifying and valuing merchandise for purposes of such assessment*." *Id.* § 215(1) (emphasis added). Thus, as a Bureau under the Treasury Department, TTB no longer has authority as to these Customs revenue functions involving imported goods. Rather, that authority lies directly with Customs.

Plaintiff provides no support for its position that TTB "is charged with administering" the excise tax and has not pointed to a single "law" that provides for TTB's administration of the excise tax as to

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[22] Moreover:

> To the extent this Delegation of Authority requires any revocation of any [] prior Order or Directive of the Secretary of the Treasury, such prior Order or Directive is hereby revoked.

Id. ¶ 4

The delegation is subject to certain exceptions that are not relevant here. Treas. Dep't Order No. 100–16 ¶ 1(a)(i)-(ii), 68Fed. Reg. 28,322 (May 23, 2003). Express exceptions listed in the Order imply that the delegation to Customs, of the "authority related to the Customs revenue functions vested in the Secretary of the Treasury," is otherwise comprehensive. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:11 (7th ed. 2010).

[23] Provisions referred to in paragraph (2) include "any [] provision of law vesting customs revenue functions in the Secretary of the Treasury." 6 U.S.C. § 212(a)(2).

imports. Nor could it. As part of the Treasury Department, TTB originally was granted authority to administer 26 U.S.C. §§ 5701 and 5702. *See* 6 U.S.C. § 212(a)(1); *id.* § 531(c)(2), (d). *See generally* 27 C.F.R. §§ 40.1–46.274. *See also* Treas. Dep't Order 12001 ¶ 4 [full cite - IRS bulletin] (Jan. 24, 2003). However, TTB's authority extends only as far as the "duties of the [Treasury] Secretary." *See* Treas. Dep't Order 120–01 ¶ 3; TTB Order O 1135.41A ¶ 3 (Dec. 3, 2008). As noted above, the Treasury Secretary's authority as to excise taxes on imported goods is delegable, and, indeed, has been delegated to Customs. Consequently, TTB's "administration" of 26 U.S.C. §§ 5701 and 5702 is limited to domestically-manufactured tobacco products. Plaintiff's assertion that Customs and TTB "share[] responsibility . . . for assessing and collecting the higher tax rate on gutkha" (Pl.'s Br. 9) is therefore without statutory or regulatory support. Only Customs now "administers" laws associated with such taxes. Treas. Dep't Order No. 100–16 ¶ 1; 6 U.S.C. § 215(1).[24]

Plaintiff also attempts to argue that TTB administers the tax because it "assesses" the tax. In support, Plaintiff references *Ammex* as "noting that the [Internal Revenue Service ("IRS")] assesses import taxes on fuels." (Pl.'s Br. 9 (emphasis omitted);) *Ammex*, 419 F.3d at 1346. Plaintiff analogizes *Ammex* 's conclusion to the excise taxes in this case. But the cause of action in *Ammex* occurred in 1994, previous to the Treasury Department's delegation to Customs. Moreover, "assessment," in the context of taxation and customs, is defined as "the official recording of liability that triggers levy and collection efforts" *Ammex*, 419 F.3d at 1345 (quoting *Hibbs v. Winn*, 542 U.S. 88, 89 (2004), or the "recordation of the calculated amount of liability." *Id.* That is, "assessment determines the specific amount of liability," *id.*, and involves a calculation of the actual tax amount owed by the payee. *See id.* As the entity with full "authority" over Customs revenue functions, Customs "assesses" excise taxes on imports and "classif[ies] and valu[es] merchandise for purposes of . . . assessment." 6 U.S.C. § 215(1). Customs, therefore, as the lone "assessor," calculates and records the amount of excise taxes due on imported goods and, accordingly, "triggers" collection of the excise tax at issue; these ac-

[24] For the same reasons, Plaintiff's statement — that its reading of the relationship between Customs and TTB in administering the excise tax at issue "does not run afoul of Homeland Security Act" (Pl.'s Br. 9) — is unpersuasive. Perhaps Plaintiff's reading would be consistent with the original, unaltered language of the Act, but, again, pursuant to and in the context of the same Act, authority over assessment and collection of the excise tax on imported tobacco has been delegated to Customs.

tions analogize to "administration" of the tax. Thus *Ammex* does not support Plaintiff's position, and Shah Bros. cannot assert jurisdiction under 1581(i)(4).[25]

Plaintiff also asserts jurisdiction pursuant to 1581(i)(1), claiming that its on-going dispute with Customs and TTB arises out of a law providing for revenue from imports, i.e., the imposition of excise taxes on Shah Bros.' goods. Further, Plaintiff complains that it must continually contest each classification made by Customs for each of its entries, and must expend monetary and other resources thereon. Plaintiff argues that subsection 1581(i) is available because other sections of the jurisdictional statute — here, subsection 1581(a)— are "manifestly inadequate." *See Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008) However, because Customs has the authority to classify the goods at issue, protest of the classification before Customs and review here is not an inadequate remedy, as demonstrated by Defendant's confession of judgment.[26] [27]

The fact that there may be some delay associated with the protest scheme does not justify application of subsection 1581(i). *Int'l Customs Products, Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)("[D]elays inherent in the statutory process do not render it manifestly inadequate" (citing *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551 (Fed. Cir. 1983) ("[Customs'] regulations have not built unconscionable delay into the protest procedure")). *But see United States Cane Sugar Refiners Assoc. v. Block*, 69 C.C.P.A. 172, 175 (1982) (Special circumstances of the subsection 1581(a) review warranted subsection 1581(i) jurisdiction: "We are persuaded that in this case, involving the potential for immediate injury and irreparable harm to an industry and a substantial impact

[25] Plaintiff also points to the language of the Protest decision noting that Customs, in denying Plaintiff's protest, gave the explanation that the "classification [was] based on [the] ruling issued by the TTB," the "governing" entity involved. (Ex. B to Pl.'s Br. at 1.) However, given the plain language of the statute and Treasury regulation, the appropriate issue is whether Customs properly followed a TTB decision in light of the delegation. (*Accord* Def.'s Reply in Supp. of Its Mot. to Dismiss ("Def.'s Reply") 7.) The reviewable action is Customs', not TTB's.

[26] *See Shinyei Corp. of America v. United States*, 355 F.3d1297, 1304–1305 (Fed. Cir. 2004). *See also* Norcal/Crosetti *Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992).

[27] *Compare United States v. United States Shoe Corp.*, 523 U.S. 360, 363, 365 (1998) (although petitioner filed a protest, jurisdiction was available under section 1581(i) because Customs "protests are not pivotal" when "Customs performs no active role, [but] merely passively collects HMT payments."); *Gilda Indus. v. United States*, 446 F.3d 1271, 1276 (Fed. Cir. 2006) ("Gilda does not challenge any decision by Customs. The duty to which Gilda objects was imposed pursuant to a decision of the Trade Representative. Because Customs has no authority to overturn or disregard the Trade Representative's decision, Customs would have no authority to grant relief in a protest action challenging the imposition of the duty.").

on the national economy, the delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i).”); *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1245 (Fed. Cir. 1985) (“The objective of the addition of § 1581(i) was to make it clear that . . . prospective importers challenging Customs Service regulations imposing import restrictions need not attempt to import merchandise, file a protest and then contest the administrative denial of the protest in the CIT under § 1581(a).”)

Moreover, as issue preclusion does not apply to customs classification cases, and each entry or set of entries contained in a summons is treated *de novo* in the ensuing litigation before the court as to those entries, any declaration by the court would have limited effect as to future entries. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 233–34 (1927) (“[T]he finding of fact and the construction of the statute and classification thereunder as against an importer [is] not res judicata in respect of a subsequent importation involving the same issue of fact and the same question of law.”); *Avenues in Leather, Inc. v. United States*, 317 F.3d 1399, 1403 (Fed. Cir. 2003) (“Under the public policy adopted by the Supreme Court in *Stone & Downer*, each new entry is a new classification cause of action, giving the importer a new day in court.”); *Schott Optical Glass v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984) (“The opportunity to relitigate applies to questions of construction of the classifying statute as well as to questions of fact as to the merchandise.” (citation omitted)).[28]

Plaintiff also alleges that the court has jurisdiction to review what Plaintiff characterizes as TTB's “final agency action” Priv. Ltr. Rul. 5200:2008R-122P “because Plaintiff otherwise would be deprived of a remedy for the unlawful actions against it,” (Am. Compl. ¶¶ 8, 56,) and “because it has been adversely affected and suffered economic injury as a direct result of the actions of TTB and [Customs] within the meaning of the Administrative Procedures Act, 5 U.S.C. § 702.” (*Id.* ¶ 11.)

The court disagrees. The Plaintiff can use neither 1581(i), nor the APA, to circumvent the appropriate statutory channels for bringing its claim. *See e.g.*, *Bowen v. Mass.*, 487 U.S. 879, 903 (1988) (“Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action[,] [and] . . . § 704

[28] Though *stare decisis* does apply in classification actions, *see Avenues in Leather, Inc. v. United States*, 423 F.3d 1330 (Fed. Cir. 2005); *Daimler Chrysler Corp. v. United States*, 442F.3d 1313, 1321 (Fed. Cir. 2006), this does not alter the fact that “each new entry is a new classification cause of action.” *Avenues in Leather*, 317 F.3d at 1403.

does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." (quotation marks, footnotes and citations omitted)); *Abitibi-Consol. Inc. v. United States*, 30 CIT 714, 718, 437 F. Supp. 2d 1352, 1357 (2006) (noting that Section 704 of the APA "is mirrored in the court's residual jurisdiction case law, which . . . prescribes that section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or manifestly inadequate").[29]

Plaintiff notes, correctly, that this Court does not have jurisdiction over seizures and forfeitures themselves, even when performed by Customs. 28 U.S.C. §§ 1356 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under [28 U.S.C. § 1582 [30]]"), 1355 (" The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under [28 U.S.C. § 1582]"). *See also Hansen v. United States*, 1 Cust. Ct. 752 (1938); *Sheldon & Co. v. United States*, 8 Ct. Cust. 215 (1917); *In re Chichester*, 48 F. 281 (1891). Nor does the Court have jurisdiction over criminal prosecutions. 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.").

However, any actual Customs "decision" underlying such seizure, forfeiture, or criminal prosecution is protestable.[31] The fact that Cus-

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[29] Plaintiff also raises the specter of Customs' evasion of review of its own improper administration and enforcement of its classification and testing procedures by a repeated confession of judgment in Court. No. 10–00205. It is sufficient to note that this scenario is not presently before the court.

[30] 28 U.S.C. § 1582 involves certain actions commenced by the United States to recover civil penalties, bond, or customs duties. As such, section 1582 is not applicable here.

[31] Said protest "shall be filed with [Customs] within 180 days after but not before . . . (A) date of liquidation or reliquidation, or . . . (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made." 19 U.S.C. § 1514(c)(3)(A)-(B)).

Case law indicates that review of some classifications may only be had following the denial of a protest *and* liquidation and payment of duties. *See United States v. Boe*, 64 CCPA 11, C.A.D.1177, 543 F.2d 151, 156 (1976) ("[T]he dispute between the parties concerns classification of the merchandise. Classification is but one step in the liquidation process, appraisement being another. Hence the subject civil action directly involves the liquidation procedure. Such actions are governed by § 1514(b)(2)(A) [(now 19 U.S.C. § 1514(c)(3)(A))]. Liquidation not having occurred, importer's protests were premature."). *See also* 28 U.S.C. § 2637(a) ("A civil action contesting the denial of a protest under [19 U.S.C. § 1515] may be commenced in the Court of International Trade only if all liquidated duties, charges, or

toms, seizes and forfeits the classified imports neither deprives a plaintiff of the protest procedure under 19 U.S.C. § 1514(a)(2) nor divests this Court of jurisdiction over the protest pursuant to 28 U.S.C. § 1581(a). Further, *Cf. Campus Sportswear Co. v. United States*, 621 F. Supp. 365 (E.D. Mo. 1985) (Court of International Trade maintains jurisdiction to evaluate Customs' classification of goods prior to imposition of penalty, though the imposition of the penalty itself falls under the jurisdiction of the district court). Thus, regardless of the seizure action, Plaintiff's remedy is still to protest any Customs' decision.

The special statutory procedures for protest and review specifically contemplate this relationship. Under 19 U.S.C. § 1499, Customs may detain, seize and forfeit merchandise. *See* 19 U.S.C. § 1499(c)(1),(4). However, if Customs fails "to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination, or such longer period if specifically authorized by law, [it] shall be treated as a decision of the Customs Service to exclude the merchandise for purposes of sections 1514(a)(4) of this title [and thus subject to protest and judicial review]." *See* 19 U.S.C. § 1499(c)(5)(A). Moreover, as may be relevant to the dispute between the parties here, notice of testing procedures and results are specifically required. *See* 19 U.S.C. § 1499(c)(3)(A).

Consequently, when considered in light of the full array of remedies available under 28 U.S.C. § 1581(a), the court cannot find the protest review procedures inadequate here.

IV. Conclusion

For the foregoing reasons, the court hereby ORDERS that Defendant's motion to dismiss for lack of jurisdiction is GRANTED. Judgment will be entered accordingly.

Dated: October 6, 2010
New York, New York

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

exactions have been paid at the time the action is commenced, except that a surety's obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest."). The *Boe* court refused to apply 19 U.S.C. §1514(b)(2)(B) — the predecessor to the current 19 U.S.C. §1514(c)(3)(B) — in a classification action. However, significantly, in *Boe*, the plaintiff was seeking "prompt and specific liquidation" under its claimed classification. *Boe*, 64 CCPA at 156. In the case before the court, Plaintiff is seeking to avoid criminal prosecution and judicial forfeiture. In addition, Plaintiff has already filed another complaint concerning additional entries it believes were classified incorrectly. *Def's Resp. to Questions* at 6.

United States Court
of International Trade
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ANNOUNCEMENT

The 16th Judicial Conference of the United States Court of International Trade is scheduled for Thursday, November 18, 2010 at Trump SoHo Hotel, 246 Spring Street, New York, New York and will commence promptly at 8:30 a.m.

The theme of the Conference is: **"The Court in Its Fourth Decade: Addressing the Challenges of Change."**

The Conference will be attended by the Judges of the United States Court of International Trade. Officials from the International Trade Commission, Customs and Border Protection, the Department of Justice and the Commerce Department, as well as other distinguished guests, have been invited to attend. The keynote speaker at the luncheon will be Kenneth R. Feinberg, Special Pay Master, Head of BP Claims Fund.

All interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received by the close of business on November 5, 2010. Additional information regarding the program, including CLE credits, is available at the Judicial Conference page on the Court's Website.

We look forward to your participation in the Conference.

TINA POTUTO KIMBLE
Clerk of the Court

September 27, 2010