U.S. Customs and Border Protection

Slip Op. 11–70

SHELL OIL COMPANY, C/O GULF COAST DRAWBACK SERVICES, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 08–00109

[Denying Plaintiff's Motion for Summary Judgment, and granting summary judgment for Defendant.]

Dated: June 20, 2011

Galvin & Mlawski (*John J. Galvin*); for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Todd M. Hughes*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Tara K. Hogan*); *Richard McManus*, Senior Attorney, Office of the Chief Counsel, Bureau of Customs & Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Shell Oil Company contests the U.S. Customs Service's denial of protests filed by Shell seeking drawback (refund) of certain taxes and fees. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Pl. Brief") at 4–5.[1] Distilled to its essence, the issue presented is the timeliness of Shell's requests for such drawback. *See* Defendant's Response to Plaintiff's Motion for Summary Judgment ("Def. Brief") at 1, 5, 8.

The relevant facts are relatively straightforward and not in dispute. The action involves seven claims and one partial claim for non-manufacturing substitution drawback associated with certain petroleum products that Shell imported between 1993 and 1994, and acceptable substitute finished petroleum derivatives that were exported during the same period. *See* Pl. Brief at 1; Def. Brief at 4.

In pertinent part, the drawback statute requires all drawback claims to be filed within three years of the date of exportation of the

[1] The U.S. Customs Service – formerly part of the U.S. Department of Treasury – is now part of the U.S. Department of Homeland Security, and is commonly known as U.S. Customs and Border Protection. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is referred to as "Customs" herein.

substitute merchandise. *See* 19 U.S.C. § 1313(r)(1) (1994).[2] It is undisputed that Shell filed timely drawback claims, expressly seeking drawback only as to the import duties that the company had paid upon importation of the petroleum products at issue. *See* Pl. Brief at 1; Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment ("Pl. Reply Brief") at 8, 23; Def. Brief at 4–5, 6, 7, 11–12, 13. It is similarly undisputed that Customs refunded as drawback 99% of the import duties, in accordance with the drawback statute. *See* Pl. Brief at 1; Def. Brief at 5, 12; 19 U.S.C. § 1313. Finally, it is also undisputed that, on November 7, 1997 (more than three years after the date of Shell's exportation of the substitute petroleum products), Shell filed protests with Customs, seeking – for the first time – drawback as to Harbor Maintenance Tax ("HMT") and Environmental Tax ("ET") payments that Shell had made in connection with the imports at issue. *See* Pl. Brief at 1; Pl. Reply Brief at 6; Def. Brief at 5, 7.[3] Customs promptly denied Shell's protests. *See* Pl. Brief at 1; Def. Brief at 5. Shell thereafter filed a timely summons in this Court.

This action, which has been designated a test case pursuant to USCIT Rule 84, is now before the Court on Shell's Motion for Summary Judgment. Shell maintains that it timely requested drawback of HMT and ET, that its protests were wrongly denied, and that its claims for drawback of HMT and ET should be sustained. *See* Pl. Brief at 4–5, 13; Pl. Reply Brief at 23–24.[4] In contrast, the Government argues that Shell failed to seek drawback of HMT and ET within the statutory three-year period following the company's exportation of substitute merchandise, that Shell's requests for HMT and ET therefore were untimely, and that Shell's protests therefore were

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[2] Except as otherwise indicated, all statutory citations are to the 1994 edition of the United States Code.

[3] The Harbor Maintenance Tax ("HMT") is a tax on port use imposed pursuant to the Water Resources Development Act of 1986. *See Aectra Refining & Marketing, Inc. v. United States*, 31 CIT 2086, 2087 n.2, 533 F. Supp. 2d 1318, 1318 n.2 (2007) (*citing* 26 U.S.C. § 4461). The Environmental Tax ("ET") is a "tax imposed on crude oil received at a United States refinery and on petroleum products entered into the United States for consumption, use, or warehousing." *See id.*, 31 CIT at 2087 n.4, 533 F. Supp. 2d at 1318 n.4 (*citing* 26 U.S.C. § 4611).

[4] In its Motion for Summary Judgment, Shell – for the first time – sought drawback of Merchandise Processing Fees ("MPF"), which are fees "charged 'for the provision of customs services,' and '[f]or the processing of merchandise that is formally entered or released during any fiscal year,'" and which are "intended to reimburse Customs for costs incurred in the processing of imported and exported goods." *See* Pl. Brief at 2 n.3, 4–5, 13; Pl. Reply Brief at 6, 19, 23; *Texport Oil Co. v. United States*, 185 F.3d 1291, 1296 (Fed. Cir. 1999) (*citing* 19 U.S.C. § 58c(a)(9)). In the course of oral argument, Shell advised that, because the company failed to raise drawback of MPF in its protests and in its Complaint, it has abandoned all of its claims as to drawback of MPF. *See* Recording of Oral Argument at 1:01:50–1:02:15.

properly denied. *See* Def. Brief at 1, 6, 13. According to the Government, *Aectra* requires the entry of judgment in its favor, and the dismissal of Shell's complaint. *See* Def. Brief at 1, 6, 13; *Aectra Refining & Marketing, Inc. v. United States*, 565 F.3d 1364 (Fed. Cir. 2009).

Jurisdiction lies under 28 U.S.C. § 1581(a). For the reasons that follow, Shell's Motion for Summary Judgment must be denied, and summary judgment is granted in favor of the Government.

I. *Background*

This action involves seven claims and one partial claim for non-manufacturing substitution drawback associated with certain petroleum products that Shell imported between 1993 and 1994, and acceptable substitute finished petroleum derivatives that were exported during the same period. *See generally* 19 U.S.C. § 1313(p) (addressing drawback and "Substitution of finished petroleum derivatives"). At issue is the timeliness of Shell's claim for drawback (refund) of certain taxes and fees, specifically HMT and ET.

The drawback statute requires all drawback claims to be filed within three years of the date of exportation of the substitute merchandise, and claims that are not completed within the three-year period are – in the words of the statute – "considered abandoned." *See* 19 U.S.C. § 1313(r)(1). A complete drawback claim consists of "[a] drawback entry and all documents necessary to complete a drawback claim." *See* 19 U.S.C. § 1313(r)(1).[5] At the time of the transactions in question, claims filed under the provision of the drawback statute at issue here (*i.e.*, the "substitute petroleum derivatives" provision) were limited to 99% of "the amount of the duties paid on, or attributable to" the imported petroleum products. *See* 19 U.S.C. § 1313(p); 19 U.S.C. § 1313(a).[6]

Shell's timely drawback claims, filed in 1995 and 1996, sought drawback only as to the import duties that it had paid. Each "Draw-

[5] *See also* 19 C.F.R. § 191.2(i) (1995) (stating that a "drawback claim" is comprised of "the drawback entry and related documents required by . . . regulations which together constitute the request for drawback payment"); 19 C.F.R. § 191.2(j) (1998) (same).

The "drawback entry" is "[the] document containing a description of, and other required information concerning, exported or destroyed articles on which drawback is claimed." 19 C.F.R. § 191.2(h) (1995); *see also* 19 C.F.R. § 191.2(k) (1998) (same).

[6] At the time, a different provision of the statute provided for more generous drawback on "unused merchandise." Specifically, imported merchandise that was either exported or destroyed under Customs' supervision within three years of importation, and which was not used in the United States, was eligible for drawback of 99% of "any duty, tax, or fee imposed under Federal law because of . . . importation." *See* 19 U.S.C. § 1313(j) (addressing drawback and "Unused merchandise"); 19 U.S.C. § 1313(a).

back Entry" form (Customs Form 7539) that Shell filed with Customs required Shell to state its "net claim" specifying the precise sum that it sought. Nowhere did Shell claim for (or even refer to) drawback of HMT and ET – much less include HMT and ET in the "net claim" figure that the company provided on each of the drawback entry forms that it filed with Customs.[7] Customs paid all of Shell's drawback claims in full, refunding 99% of the import duties as requested in the drawback claims that Shell had filed.

Thereafter, on November 7, 1997 (after the statutory three-year period for the filing of drawback claims had expired), Shell filed protests with Customs, seeking – for the first time – drawback as to HMT and ET payments that Shell had made in connection with the imports at issue. Customs denied Shell's protests less than a month later, on December 3, 1997, stating:

> Under provisions of 19 U.S.C. § 1313(b) & (p) drawback is allowed upon Customs duty paid on imported merchandise. Harbor Maintenance Tax (HMT) is an incidental expense incurred upon a vessel entering a harbor. The HMT is not incurred as a result of the importation of merchandise but simply imposed for the use of the harbor. The fee is collected by U.S. Customs for the benefit of the Army Corps of Engineers.

Protest No. 5301–97–100421 (Dec. 3, 1997) (same language used to deny all of Shell's protests). Some months later, Shell commenced this action, filing a timely summons in this Court.[8]

In 1999, Congress amended the relevant language of the drawback statute. Among other things, Congress expanded the scope of draw-

[7] In a 1997–98 rulemaking, Customs' regulations were revised to, *inter alia*, "clarify what documents constitute a complete drawback claim." 62 Fed. Reg. 3082, 3087 (Jan. 21, 1997). As amended, the regulations now expressly require that a drawback claimant "correctly calculate the amount of drawback due" as an element of a "complete claim." *See Aectra*, 565 F.3d at 1371–72 (discussing 19 C.F.R. § 191.51(b) (1998)).

[8] This action was originally part of *Shell Oil Co. v. United States*, Court No. 98–05–02198 (Ct. Intl. Trade filed May 20, 1998). That action remained on the Reserve Calendar pending the decision in *George E. Warren Corp. v. United States*, 341 F.3d 1348 (Fed. Cir. 2003). After *George E.* Warren issued, this action was severed from Court No. 98–05–02198, which was stipulated for judgment on an agreed statement of facts on the grounds that Shell's claims for drawback of taxes and fees remaining thereunder were asserted within three years of exportation. *See* Stipulated Judgment on Agreed Statement of Facts, *Shell Oil Co.*, Court No. 98–05–02198 (July 9, 2008).

Upon severance from Court No. 98–05–02198, the instant action was suspended under *Aectra Refining & Marketing, Inc. v. United States*, Court No. 04–00354 (Ct. Intl. Trade filed July 23, 2004). Following the issuance of *Aectra*, 565 F.3d 1364 (Fed. Cir. 2009), Shell filed the pending Motion for Summary Judgment. This case was thereafter designated as a lead case, and dozens of cases were suspended hereunder.

back available under the "substitute petroleum derivatives" provision of the statute, to include other import-related expenditures in addition to customs duties. Specifically, in relevant part, the 1999 amendments made eligible for drawback "any duty, tax, or fee imposed under Federal law because of . . . importation." *See* 19 U.S.C. § 1313(p) (2000); 19 U.S.C. § 1313(j) (2000).[9]

In addition, the 1999 amendments suspended the standard statutory three-year period for the filing of drawback claims, but only as to "drawback claim[s] filed within 6 months after the date of enactment of [the 1999 amendments]" for which the statutory three-year period had expired. *See* 1999 Trade Act, Pub. L. No. 106–36, § 2420(e), 113 Stat. 127, 179 (1999).[10] The effect of that language was to "creat[e] a six-month grace period in which otherwise untimely [drawback] claims could be filed or re-filed to obtain relief under the amended

In addition, after the pending Motion for Summary Judgment was filed, some of the merchandise covered by one of the drawback entries here at issue was severed from this action, and was designated as a new case and then stipulated for judgment on an agreed statement of facts (again, on the grounds that the claims for drawback of taxes and fees were asserted within the statutory three-year period). *See* Order, *Shell Oil Co. v. United States*, Court No. 08–00109 (Feb. 23, 2010); Stipulated Judgment on Agreed Statement of Facts, *Shell Oil Co. v. United States*, Court No. 10–00069 (Feb. 7, 2011).

Indeed, numerous cases that were suspended under this action – including cases brought by Shell – involved protests seeking drawback of taxes and fees that were filed within three years of exportation, even though the original drawback claims only sought drawback of import duties. The Government has agreed to resolve such cases by stipulated judgment on agreed statements of facts. *See*, *e.g.*, Stipulated Judgment on Agreed Statement of Facts, *Shell Oil Co.*, Court No.10–00069 (Feb. 7, 2011) (cited above); Stipulated Judgment on Agreed Statement of Facts, *Williams Alaska Petroleum, Inc. v. United States*, Court No. 04–00370 (Mar. 8, 2011); Stipulated Judgment on Agreed Statement of Facts, *Citgo Petroleum Corp. v. United States*, Court No. 04–00656 (Apr. 12, 2011).

In the course of oral argument, the Government explained that, in the instant case, if Shell had filed its protests or otherwise asserted its claims for drawback of HMT and ET within three years of exportation, or if Shell had asserted its claims during the six-month "grace period" following the 1999 amendments to the drawback statute, the Government would have consented to stipulated judgment as it has done in other cases, including those discussed above. *See* Recording of Oral Argument at 1:31:10–1:31:36 (Government stated that, if protests seeking drawback of taxes and fees were filed within three years of export, the Government would not dispute that claimant is entitled to drawback of taxes and fees); *see also id.* at 2:17:05–2:17:25 (Government stated that Customs is treating protests seeking drawback of taxes and fees that are filed within three years of export as amendments to initial drawback claims); *id.* at 2:23:16–2:23:55 (Government stated that, if Shell had asserted the instant claims for HMT and ET during six-month "grace period," Government would have consented to stipulated judgment).

[9] *See also Aectra*, 565 F.3d at 1370–71; *Aectra*, 31 CIT at 2088, 533 F. Supp. 2d at 1319–20 (discussing 1999 amendments).

[10] Specifically, the 1999 amendments provided that:

> The amendments made by this section [amending this section] shall take effect as if included in the amendment made by section 632(a)(6) of the [1993] North American Free Trade Agreement Implementation Act. For purposes of section 632(b) of that Act [providing that the NAFTA Implementation Act amendments applied to any entry filed after

statute." *See Aectra*, 565 F.3d at 1370–71. As a result, between June 25, 1999 and December 25, 1999, importers who had failed to make such claims within the statutory three-year period were expressly authorized to file claims for drawback of "any duty, tax, or fee imposed under Federal law" paid on imported merchandise "because of its importation." Unlike other importers who seized on this opportunity to file otherwise untimely drawback claims, Shell took no action to avail itself of the 1999 amendments. *Compare, e.g., Aectra*, 565 F.3d at 1367 n.2 (noting that plaintiff in *Aectra* re-filed drawback claims "in December 1999 pursuant to a temporary suspension of the three-year limitations period accompanying a June 25, 1999 amendment to the drawback statute").

Shortly thereafter, however, the Court of Appeals issued its decision in *Texport*, interpreting the statute's "because of . . . importation" language to preclude the payment of drawback on any "duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments" – not just imports – "utilizing ports." *See Texport Oil Co. v. United States*, 185 F.3d 1291, 1295–97 (Fed. Cir. 1999). *Texport* ruled the Merchandise Processing Fee ("MPF") to be eligible for drawback, concluding that the MPF "is explicitly linked to import activities." *See Texport*, 185 F.3d at 1296. On the other hand, reasoning that the HMT is "assessed in a nondiscriminatory fashion against all shipments utilizing the ports" (not just imports), *Texport* ruled the HMT to be ineligible for drawback. *See Texport*, 185 F.3d at 1296–97. *George E. Warren* held the ET to be ineligible for drawback, for similar reasons. *See George E. Warren Corp. v. United States*, 341 F.3d 1348 (Fed. Cir. 2003) (holding ET ineligible for drawback, and ruling reversal of *Texport* unwarranted).

In December 2004, Congress amended the drawback statute with the express intent of overturning *Texport* and eliminating the distinction between taxes and fees that discriminate against imports and those that do not. *See* S. Rep. 108–28 (2003), at 173 (stating that "the U.S. Court of Appeals for the Federal Circuit erred in overturning the U.S. Court of International Trade's ruling in [*Texport*] that [the "unused merchandise" provision of the drawback statute] allows drawback of [HMT]"). In particular, the 2004 amendments deleted the "*because of . . . importation* " language, and instead made eligible for drawback "any duty, tax, or fee imposed under Federal law *upon entry or importation*." *See* 19 U.S.C. § 1313(j) (Supp. V 2005) (emphases

1988 or unliquidated as of the Act's passage], the 3-year requirement set forth in section 313(r) of the Tariff Act of 1930 shall not apply to any drawback claim filed within 6 months after the date of the enactment of this Act [June 25, 1999] for which that 3-year period would have expired.

1999 Trade Act, § 2420(e), 113 Stat. 179 (first and fourth alteration in original) (citations omitted); *see also Aectra*, 565 F.3d at 1370–71.

added); *see also* S. Rep. 108–28, at 173. With the 2004 amendments, taxes and fees such as HMT and ET were thereafter indisputably eligible for drawback.

Unlike the 1999 amendments, which included a "grace period" to allow the filing (or re-filing) of otherwise untimely drawback claims, the 2004 amendments applied only to any "drawback claim filed on or after [the date of the 2004 amendments' enactment] and to any drawback entry filed before that date if the liquidation of the entry [was] not final on that date." *See* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. 108–429, Title I, § 1557(b), 118 Stat. 2579 (2004). "Nothing in the text of the [2004 amendments] states or suggests that [the amendments were] intended to waive the normal three-year limit" on the filing of drawback claims. *See Aectra*, 565 F.3d at 1370; *see also id*. (noting that "it was not unreasonable to assume that Congress would limit the right to those who had previously attempted to claim [drawback of HMT] within the three-year limitations period").

The Court of Appeals most recently considered these statutory provisions in *Aectra*, a case with some striking similarities to the case at bar. *See Aectra Refining & Marketing, Inc. v. United States*, 565 F.3d 1364 (Fed. Cir. 2009). Like Shell here, the plaintiff in *Aectra* (Aectra) timely filed drawback claims within three years of its export of substitute petroleum derivatives. *See id*., 565 F.3d at 1367. Like the drawback claims filed by Shell here, however, Aectra's timely-filed claims sought drawback of import duties only. *See id*., 565 F.3d at 1367. After Customs liquidated Aectra's drawback entries and refunded the requested import duties in full, Aectra (like Shell) filed protests, seeking – for the first time – drawback of taxes and fees. *See id*., 565 F.3d at 1368. But, as in this case, Aectra's protests were filed more than three years after the date of exportation. *See id*., 565 F.3d at 1368.

Like Shell's protests, Aectra's protests also were denied. *See Aectra*, 565 F.3d at 1368. Aectra sought review in this court, which rejected Aectra's arguments and sustained Customs' denials of the protests. *See Aectra Refining & Marketing, Inc. v. United States*, 31 CIT 2086, 2097, 533 F. Supp. 2d 1318, 1326 (2007).

The Court of Appeals affirmed. In so doing, the Court of Appeals acknowledged that, at the time of the transactions in *Aectra* (as here), the law did not yet provide for drawback of taxes and fees in cases like *Aectra* and the case at bar, which involve substitute petroleum derivatives. *See Aectra*, 565 F.3d at 1367. The Court further observed that, like Shell here, Aectra was aware that the issue of drawback of

taxes and fees was a hot topic in the industry at the time. *See id*., 565 F.3d at 1367. In light of that fact, the Court of Appeals took note that, like Shell here, Aectra offered "no explanation for why it did not include protective claims for [taxes and fees] in its . . . drawback claims other than its belief that such claims would not be successful at the administrative level." *See id*., 565 F.3d at 1367.

The Court of Appeals held that Aectra was entitled to no relief because Aectra failed to properly claim drawback of taxes and fees within the statutory three-year period within which all drawback claims must be filed. *See generally Aectra*, 565 F.3d 1364; 19 U.S.C. § 1313(r)(1). The Court of Appeals rejected Aectra's argument that, since the statute does not expressly require a calculation of the amount of tax and fee drawback claimed, Aectra's drawback claims were "complete" for purposes of the statute "because [Aectra's] drawback entries themselves [seeking drawback of import duties only] were timely filed within three years of export." *See Aectra*, 565 F.3d at 1371–73. In particular, the Court reasoned that, although "the drawback statute itself does not *explicitly* state that a calculation of taxes and fees sought must be included . . . as one of the 'documents necessary to complete a drawback claim,'" a regulation which took effect in 1998 (specifically, 19 C.F.R. § 191.51(b)) requires a drawback claimant to "correctly calculate" the amount of drawback due, which in turn requires "an accurate calculation of the entire amount that [a claimant] seeks to be refunded under the drawback statute." *See id*., 565 F.3d at 1371–72 (emphasis added).

Due to the explicit nature of the 1998 regulation (which does not apply in the case at bar), the Court of Appeals had no occasion in *Aectra* to consider matters such as whether, absent that 1998 regulation, the drawback statute or regulations otherwise required that a drawback claimant include in its timely-filed drawback claims all sums (including taxes and fees) that the claimant sought to recover, and whether (even if a drawback claimant was not required to include in its timely-filed claim all sums sought as drawback, including taxes and fees) a claimant was nevertheless required to give Customs some sort of notice of its claim for drawback of taxes and fees within the statutory three-year period.

The Court of Appeals also rejected various other theories of recovery advanced by Aectra. For example, much like Shell here, "Aectra argued in essence that the 2004 [amendments to the statute] suspended the three-year limitations period." *See Aectra*, 565 F.3d at 1368. The Court dismissed Shell's contention, noting that, although the 1999 amendments created a special "six-month grace period" for the filing (or re-filing) of otherwise untimely claims, "[n]othing in the

text of the [2004 amendments] states or suggests that [the 2004 amendments were] intended to waive the normal three-year limit" on the filing of drawback claims. *See id*., 565 F.3d at 1370.[11] Similarly, like Shell here, Aectra argued that "claims for [taxes and fees] were 'implicit' in its timely-filed drawback claim seeking import duties." *See id*., 565 F.3d at 1373 n.11. But the Court concluded that there is "no basis for such an argument." *Id*. Finally, like Shell here, "Aectra argued that it was not required to file a claim for [taxes and fees] because such a claim would have been futile." *See id*., 565 F.3d at 1368; *see also id*. at 1367, 1373. However, the Court of Appeals ruled that "futility does not excuse the failure to file a proper claim for limitations purposes," and that "[a] claimant is generally required to file a *complete* and *specific* claim *within the limitations period*, even if the government authority to whom the claim is presented is certain to dispute the validity of the claim." *See id*., 565 F.3d at 1373 (emphases added).

Against this backdrop, Shell maintains that it is entitled to drawback of HMT and ET paid on the subject imports. The Government counters that Shell's claims for drawback of HMT and ET were not timely, and that Customs therefore properly denied Shell's protests. Thus, as in *Aectra*, the ultimate question presented here is whether Shell timely claimed drawback of HMT and ET.

II. *Standard of Review*

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. USCIT R. 56(c). Further, where it is otherwise appropriate, summary judgment may be granted *sua sponte* in favor of the non-moving party, or even in the absence of any motion, provided that all parties are afforded an appropriate opportunity to come forward with relevant evidence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 339–55 (3d ed. 1998) (explaining that "summary judgment may be rendered in favor of the opposing party" even absent a cross-motion); 10A C.

[11] Parsing the 2004 amendments' effectiveness provision, the Court of Appeals explained in *Aectra* that "[t]he first clause applies prospectively to new drawback 'claims' filed on or after December 3, 2004, which may seek drawback on exports made within the previous three years," while "[t]he second clause covers certain drawback 'entries' filed before December 3, 2004, but not yet finally liquidated on that date." *See Aectra*, 565 F.3d at 1370. The Court of Appeals noted that the second clause "applies the 2004 . . . amendments to unliquidated entries that already included a timely protective request for HMT" and "is necessary to make clear that such unliquidated entries were entitled to the benefit of the amendments." *See id*.

Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, p. 71 (3d ed. Supp. 2011) (noting that 2010 revisions to Federal Rules of Civil Procedure amended Rule 56 to expressly authorize *sua sponte* grant of summary judgment in favor of non-moving party, or even in absence of any motion).[12]

In the case at bar, the parties differ as to the meaning and scope of the statutory and regulatory provisions at issue. They are, however, in agreement as to all material facts. Moreover, although the Government's response to Shell's Motion for Summary Judgment is not specifically denominated a cross-motion for summary judgment, the Government has expressly requested "that the Court grant judgment on the record for defendant and dismiss [Shell's] complaint." *See* Def. Brief at 1; *see also id*. at 6, 13 (same). And the pendency of Shell's Motion for Summary Judgment alone would have afforded both parties adequate notice and the requisite opportunity to present all evidence and legal argument on all issues raised in Shell's motion. This matter is therefore ripe for summary judgment, and such judgment – if otherwise appropriate – may be granted in favor of either party.

III. *Analysis*

Simply stated, Shell here seeks to recover on drawback claims that it never timely made. Shell suggests that it is entitled to recover drawback of HMT and ET that it failed to timely seek because, according to Shell, the company otherwise complied with the statute and with Customs' regulations in filing the company's timely claims for drawback of import duties. In particular, Shell focuses on its contention that the company's entries were not subject to the 1998 "correct calculation" regulations addressed in *Aectra*. However, even if Shell was not required to "correctly calculate" the amount sought in its timely-filed drawback entry forms (to include in the calculation any sums for drawback of HMT and ET that the company wished to claim), Shell failed to take any action whatsoever to make or preserve

[12] As *Celotex* noted, federal trial courts "are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp.*, 477 U.S. at 326 (1986); *see also National Presto Indus., Inc. v. West Bend Co.*, 76 F.3d 1185, 1188 (Fed. Cir. 1996) (*quoting Celotex Corp.*, 477 U.S. at 326); *Peg Bandage, Inc. v. United States*, 17 CIT 1337, 1339–40, 1349 (1993) (entering summary judgment in favor of plaintiff even though plaintiff did not cross-move for summary judgment on customs classification issue (*citing Celotex Corp.*, 477 U.S. at 326)). "By moving for summary disposition, [the moving] party is afforded the requisite notice which enables a court to enter judgment in favor of the non-moving party *sua sponte* on those claim(s) raised in the summary judgment motion." *Peg Bandage*, 17 CIT at 1340 (*citing Celotex Corp.*, 477 U.S. at 326).

claims for drawback of HMT or ET within the strict statutory three-year period in which all drawback claims must be filed.[13]

Shell does not even allege that it put Customs on notice that it was requesting drawback of HMT and ET within the statutory three-year period. Rather, the entirety of Shell's actions within the three-year period indicated that the company was seeking drawback of import duties only. Shell's first indication that it wished to seek drawback of HMT and ET was in its protests, which were filed outside the mandatory statutory three-year window. Distilled to its essence, Shell's argument seems to be that the company's timely-filed claims for drawback of import duties somehow implicitly included claims for drawback of HMT and ET. But *Aectra* laid the concept of such "implicit claims" to rest.

Shell also seeks to avail itself of the statutory amendments that made HMT and ET eligible for drawback, but which were enacted well after Shell's claims for drawback import duties were filed and paid, the associated liquidations were protested, and the protests were denied. Although a special provision of the 1999 amendments expressly authorized claimants such as Shell to file (or to re-file) otherwise untimely drawback claims, Shell failed to take advantage of this "second bite at the apple."

Shell argues in the alternative that it was justified in failing to file claims for drawback of HMT and ET within the regular statutory three-year period and/or within the special six-month grace period following the 1999 amendments. However, Shell's asserted justifications and excuses have no merit.

As outlined in greater detail below, Shell failed to file its drawback claims for HMT and ET in a timely fashion. Like the untimely claimant in *Aectra*, Shell is therefore entitled to nothing.

A. *Shell's Failure to Timely Claim Drawback of HMT and ET*

Shell goes to great lengths in an effort to distinguish this case from *Aectra*. As discussed herein, however, Shell's attempts to distance itself from *Aectra* meet with (at most) limited success. In any event, as the Government notes, Shell largely ignores the bigger picture: Even if (as Shell contends) the regulations then in effect did not require Shell to "correctly calculate" the amount of drawback sought, that would excuse only the company's failure to include sums for drawback of HMT and ET in the timely claims that the company filed seeking drawback of import duties. But Shell was nevertheless re-

[13] Congress underscored the mandatory nature and the significance of the statutory three-year period for the filing of all drawback claims by expressly providing that "[c]laims not completed within the 3-year period shall be considered abandoned." *See* 19 U.S.C. § 1313(r)(1).

quired to take some type of action within the statutory three-year period for the filing of drawback claims, in order to put Customs on notice of the company's claims for drawback of HMT and ET and to properly preserve those claims. That Shell failed to do.

Shell offers no adequate explanation for its failure to assert timely "protective claims" for drawback of HMT and ET. Further, contrary to Shell's assertions, the company's protests could not operate to properly preserve its claims for drawback of HMT and ET, because the protests were not filed within the statutory three-year period for the filing of drawback claims. Finally, Shell contends that its timely-filed claims for drawback of import duties implicitly included claims for drawback of HMT and ET as well. But that same argument was rejected in *Aectra*. As such, Shell never claimed for drawback of HMT and ET within the statutory three-year period for the filing of drawback claims.

Shell also seeks to rely on the 1999 and 2004 amendments to the drawback statute. But, contrary to Shell's assertions, the 2004 amendments did not waive the normal statutory three-year limit on the filing of drawback claims. Further, although the 1999 amendments provided a special six-month "grace period" for the benefit of claimants such as Shell who had drawback claims that were otherwise untimely, Shell took no action to avail itself of that one-time opportunity to assert its claims for drawback of HMT and ET.

Accordingly, Shell failed to timely claim drawback of HMT and ET – either during the normal statutory three-year period for the filing of drawback claims, or during the special six-month grace period established in the 1999 statutory amendments.

1. *Shell's Failure to Claim for Drawback of HMT and ET During Statutory Three-Year Period for Filing of Drawback Claims*

Shell candidly concedes, as it must, that there are significant parallels between the instant case and *Aectra*. *See* Pl. Brief at 2–3; *Aectra*, 565 F.3d 1364; section I, *supra* (highlighting similarities between *Aectra* and this case). However, in an attempt to avoid the outcome in *Aectra*, Shell spends much of its two briefs arguing what it contends is a critical factual difference distinguishing the present case from *Aectra*. Specifically, Shell asserts that – at the time it filed its claims for drawback of import duties – the Customs regulations then in force did not "require[] that a 'complete' claim include a claimant's calculation of the amount of drawback due, or . . . that such calculation include amounts other than those for import duties." *See*

Pl. Reply Brief at 23 (emphasis omitted); *see also* Pl. Brief at 3, 8–9; Pl. Reply Brief at 1, 2–4, 22–24.[14] Shell thus maintains that its drawback claims "were, as filed, 'completed' within 3 years from exportation," unlike the drawback claims at issue in *Aectra*. *See* Pl. Reply Brief at 23–24; 19 U.S.C. § 1313(r)(1); 19 C.F.R. § 191.61 (1995); *see also* Pl. Brief at 3, 5. And Shell contends that it is therefore entitled to drawback of HMT and ET even though it never requested such drawback within the statutory three-year period for the filing of drawback claims.

But Shell accords far too much weight to the difference between the regulations that applied in *Aectra* and the regulations that apply in the case at bar. The explicit nature of the 1998 regulation addressed in *Aectra* – 19 C.F.R. § 191.51(b) – may have made that case somewhat more straightforward; but the merits of the two cases are not fundamentally different.[15] In any event, Shell's narrow, single-

[14] *See generally* Pl. Brief at 3, 5–13 (arguing that 1995 regulations did not require claimant to specify total amount of drawback due as an element of a "complete" drawback claim, and asserting that 1998 regulation addressed in *Aectra* imposed new requirement on drawback claimants, which cannot be given retroactive effect); Pl. Reply Brief at 1, 2–8, 22–23 (arguing that, in contrast to 1998 regulation addressed in *Aectra*, 1995 regulations did not require claimant to specify total amount of drawback due as an element of a "complete" drawback claim, and asserting that – even if the 1995 regulations did include such a requirement – the requirement was limited to import duties only).

In its reply brief, Shell even goes so far as to challenge the reasoning and outcome in *Aectra*. Shell argues – contrary to *Aectra* – that, notwithstanding the 1998 regulations' express requirement that a drawback claimant correctly calculate the amount of drawback due, that calculation is not a component of a "complete" drawback claim, even under the 1998 regulations. *See* Pl. Reply Brief at 8–13. Shell argues in the alternative that, even if the correct calculation expressly required by the 1998 regulations is a component of a "complete" drawback claim, the requirement of a correct calculation is limited to import duties (and does not include taxes and fees) – again, contrary to *Aectra*. *See* Pl. Reply Brief at 13–18, 24. Shell thus appears to argue, in essence, that even if the 1998 regulation expressly requiring that a drawback claimant correctly calculate the amount of drawback due were to be given retroactive application, Shell's 1995 drawback claims nevertheless would be "complete."

[15] The Government vigorously disputes the overall thrust of Shell's argument – that the sums of drawback sought, as specified on the "drawback entry" forms that Shell certified and filed with Customs, have no bearing on this case.

The Government emphasizes that the history of the 1997–98 rulemaking undercuts Shell's assertions that the 1998 regulation expressly requiring that a claimant "correctly calculate the amount of drawback due" imposed a new obligation on drawback claimants. *Compare* Def. Brief at 9–10 *with* Pl. Brief at 3, 5, 8–9, 11 *and* Pl. Reply Brief at 1, 3; 19 C.F.R. § 191.51(b) (1998). For example, Customs explained, in promulgating the revised regulations, that one of the purposes of the changes to the drawback regulations was to "*clarify* what documents constitute a complete drawback claim." 62 Fed. Reg. 3082, 3087 (Jan. 21, 1997) (emphasis added). To the same effect, the Government highlights the Court of Appeals' observation in *Aectra*, stating:

> As the *Aectra* court noted, in adopting the regulations in 1998, Customs expressly rejected a proposal that would have required Customs to refund all amounts due under the law regardless of whether the claimant identified that calculation. Customs

minded focus on the difference in the language of the regulations obfuscates the more important point in this analysis. Simply stated, Shell "cannot *see* the forest for the trees."

Whether or not the regulations then in force required (either implicitly or explicitly) that Shell "correctly calculate the amount of drawback due" as part of a "complete" drawback claim is largely beside the point. *See generally* Def. Brief at 6, 11–13 (noting that "[b]y alleging merely that the 1998 regulation did not apply to Shell's drawback claims, Shell overlooks the more fundamental point under-

concluded that "*adoption*" of that procedure "would *create* an untenable administrative burden for Customs in its processing of drawback claims."

Def. Brief at 9 (*quoting Aectra*, 565 F.3d at 1373 (emphases added by Defendant) (citing 63 Fed. Reg. 10,970, 10,988 (March 5, 1998))).

The Government thus points out that – contrary to Shell's claims – "there is no reason to suggest that 19 C.F.R. § 191.51(b) created 'new duties with respect to transactions already completed.'" *See* Def. Brief at 9 (*quoting* Pl. Brief at 11). As the Government concludes, "the 'complete calculation' requirement [in the 1998 regulations] merely made explicit what was already a fundamental drawback concept." Def. Brief at 9–10.

Viewed in this context, 19 C.F.R. § 191.51(b) (1998) "merely clarified that [a] drawback claimant [is] responsible for correctly calculating its drawback request, consistent with the prior relevant law." *See* Def. Brief at 8. Although – as *Aectra* recognized – the statute does not *expressly* include a calculation requirement, the statute clearly requires the filing of "[a] drawback entry and all documents necessary to complete a drawback claim." *See Aectra*, 565 F.3d at 1371 (noting that "[t]he statute does not *expressly* require that a calculation of the amount of tax and fee drawback claimed be submitted along with the entry document in order to 'complete' a claim" (emphasis added)); 19 U.S.C. § 1313(r)(1). And, as explained above, even before the 1998 regulatory amendments, one of the "documents necessary to complete a drawback claim" was a completed drawback entry form – Customs Form 7539, entitled "Drawback Entry." *See* section I, *supra*; 19 C.F.R. § 191.2(h) (1995). That "drawback entry" form required that an importer state its "net claim" (that is, the monetary amount of drawback sought), and was required to be signed and certified by an authorized representative. Accordingly, even before the 1998 "clarify[ing]" amendments to the regulations, an importer filing a "complete" drawback claim was obligated to state for Customs the "net claim" that it sought, as a certain and specific sum. *See generally* Def. Brief at 9–10. On the drawback entry forms that Shell submitted to Customs here, nowhere did the company claim for (or even refer to) drawback of HMT and ET – much less include HMT and ET in the "net claim" figure that the company specified on each of the forms. *See generally* Def. Brief at 4–5, 6, 7, 13.

Finally, Shell sought accelerated payment of its drawback claims, a privilege that drawback claimants may request under Customs regulations. *See* 19 C.F.R. § 191.72 (1995); 19 C.F.R. § 191.92 (1998); Recording of Oral Argument at 44:10–44:17; *see also id*. at 34:35–34:55. Even the pre-1998 regulations required that a drawback claimant seeking accelerated payment include "a computation of the amount due." *See* 19 C.F.R. § 191.72 (1995). Thus, to the extent that the pre1998 regulations did not expressly require a correct calculation as part of a "complete" drawback claim, the same certainly cannot be said of a request for accelerated payment of drawback. Those drawback claimants seeking accelerated payment, like Shell here, in fact were required to include "a computation of the amount due" – even before the regulations were revised in 1998. *See* Recording of Oral Argument at 1:43:35–1:44:05.

lying the *Aectra* decision"). As the Government observes, "[r]egardless of whether Shell was exempted from a later explicit requirement to 'correctly calculate' the amount sought in its drawback claim, Shell did not make or preserve *any* claim for HMT . . . or ET within the three year statutory window." Def. Brief at 6 (emphasis added). Shell plainly was required to take *some kind of action* within the statutory three-year period to put Customs on notice of the company's claim for drawback of HMT and ET, if Shell wished to preserve such a claim.

Arguing that it was not entitled to recover drawback on taxes and fees until the 1999 amendments,[16] Shell apparently contends that, as a practical matter, it cannot be expected to have sought to preserve a claim for HMT and ET within the three-year period established by statute for the filing of all drawback claims. *See* Pl. Reply Brief at 4–6. But a sophisticated corporation like Shell cannot reasonably feign naivete. The issue of the recoverability of drawback on taxes and fees such as HMT and ET already had been percolating within the industry and the customs and international trade community for some time. Indeed, as the Court of Appeals explained in *Aectra*, the matter was actively being challenged (both initially before the agency, and then before the court) in the timeframe at issue here. *See Aectra*, 565 F.3d at 1367 (*citing Texport Oil Co. v. United States*, 22 CIT 118, 1 F. Supp. 2d 1393 (1998), *aff'd-in-part, vacated-in-part, and rev'd-in-part*, 185 F.3d 1291 (Fed. Cir. 1999)); *see also, e.g., George E. Warren Corp. v. United States*, 26 CIT 486, 201 F. Supp. 2d 1366 (2002), *aff'd*, 341 F.3d 1348 (Fed. Cir. 2003) (action filed in Court of International Trade in 1997, challenging Customs' denial of protest seeking drawback of HMT and ET).

In other words, it appears that others in the industry were at least contemplating what Shell asserts it could not (and need not) have done within the statutory three-year period in question. Even Shell itself raised the issue of drawback on HMT and ET in November 1997, when it filed the protests at issue – albeit somewhat beyond the statutory three-year period, given the export dates of the merchandise in question.[17] Shell's own actions thus undermine its assertions

[16] Shell's position has not been entirely consistent. In its briefs, Shell argued that it was entitled to drawback on taxes and fees as of the 1999 amendments. *See*, *e.g.*, Pl. Reply Brief at 5. But in the course of oral argument, Shell asserted that it could not recover drawback on taxes and fees until 2004. *See* Pl. Reply Brief at 23 (stating that HMT and ET were not available for drawback until 2004); Recording of Oral Argument at 14:28–14:45; 15:05–16:18 (Shell argued that right to drawback of HMT and ET did not arise until December 3, 2004).

[17] Shell offered no explanation as to why it was sufficiently "prescient" to file protests seeking HMT and ET in November 1997, but lacked sufficient knowledge to assert such claims in a timely fashion within the statutory three-year period. *See* Recording of Oral Argument at 31:44–32:05.

that a company would have had to be "prescient" to have sought to preserve a right to seek drawback of HMT and ET before the statute was amended in 1999. *See* Pl. Reply Brief at 23 (labeling as "prescient" all "drawback claimants who had filed claims for [HMT and ET] . . . years before the right to make such claims arose"); *id*. at 7 (arguing that drawback claimants would have required "prescience" to have sought to preserve future right to claim drawback of HMT and ET).

Here – as in *Aectra* – it is not clear why, if the company wished to seek drawback of HMT and ET, it did not include a "protective claim" for such drawback within the statutory three-year period, whether by including HMT and ET in its timely-filed drawback claims (rather than claiming drawback only for import duties) or otherwise. *See Aectra*, 565 F.3d at 1367 (noting that plaintiff there "offer[ed] no explanation for why it did not include protective claims for . . . HMT in its ten drawback claims other than its belief that such claims would not be successful at the administrative level"); Def.'s Brief at 11 (asserting that Shell was required to make timely "protective claim").[18]

Finally, Shell's attempts to characterize its protests as "protective claims" for drawback of HMT and ET are in vain. *See See* Pl. Reply Brief at 19 (arguing that Shell's claims for drawback of HMT and ET "were 'preserved' by way of timely protest"); *see also id*. at 8 (asserting that Shell "timely protested Customs' liquidations '*in order to preserve*' any future claims which might arise"). Its assertions to the contrary notwithstanding, the protests that Shell filed with Customs in November 1997 cannot be deemed effective "protective claims," because the protests were not filed within the regular statutory three-year period for the filing of drawback claims. *See*, *e.g.*, *Aectra*, 565 F.3d at 1367 (discussing option of filing "protective claim"); *Delphi Petroleum, Inc. v. United States*, 33 CIT ____, ____, 662 F. Supp. 2d 1348, 1352 (2009) (explaining that, pursuant to *Aectra*, "an effective protective claim" must be "timely submitted, despite the fact that Customs would have rejected it").

In essence, Shell contends that it is entitled to drawback of HMT and ET even though it did not claim for (or even refer to) drawback of HMT and ET – much less include a "correct calculation" reflecting those sums – in the timely claims for drawback of import duties that

[18] *Cf. Delphi Petroleum, Inc. v. United States*, 33 CIT ____, ____, 662 F. Supp. 2d 1348, 1350–53 (2009) (addressing argument that letters referring to drawback of HMT and another similar tax/fee, which were attached to importer's drawback entries expressly seeking only import duties, constituted "protective claim" under *Aectra*; emphasizing that, pursuant to *Aectra*, "an effective protective claim" must be "timely submitted, despite the fact that Customs would have rejected it").

the company filed with Customs. The Government puts it succinctly: "Although Shell's motion avoids using the term, Shell's claim for drawback of [HMT and ET] rests upon the theory that such claims were implicit in its proper and timely drawback claim for import duties." *See* Def. Brief at 11–12; *see also id*. at 6 (noting that "Shell's argument amounts to a contention that [claims for HMT and ET] were somehow implicitly preserved").

Aectra expressly rejected this very argument. Like Shell in this case, the plaintiff in *Aectra* asserted that claims for taxes and fees, including HMT, "were 'implicit' in its timely filing requesting a refund of customs duties" (*i.e.*, its drawback claim). *See Aectra*, 565 F.3d at 1373 n.11. The Court of Appeals made short work of that theory, concluding that there was "no basis for such an argument." *See id*., 565 F.3d at 1373 n.11; Def. Brief at 6, 12. The same result must obtain here.[19]

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[19] Shell takes issue with *Aectra* 's statement that there is "no basis" for the argument that a claim for drawback of taxes and fees is "implicit" in a timely-filed claim for drawback of customs duties. *See* Pl. Reply Brief at 19 (*quoting Aectra*, 565 F.3d at 1373 n.11). According to Shell, the decisions of this court in *Texport* and *George E. Warren* found claims for taxes and fees to be implicit in a claimant's claim for drawback of customs duties. *See* Pl. Reply Brief at 19–22 (*citing Texport*, 22 CIT 118, 1 F. Supp. 2d 1393); *George E. Warren*, 26 CIT 486, 201 F. Supp. 2d 1366.

But Shell's reliance on *Texport* and *George E. Warren* is misplaced. First, the facts of the two cases are readily distinguishable from those of the case at bar. Moreover, the language that Shell relies upon in each case relates solely to the jurisdiction of the court (*i.e.*, whether Customs' denials of the claimant's protests concerning drawback of taxes and fees were properly before the court), and does not address whether the claimants properly sought drawback of taxes and fees from Customs in accordance with statutory and regulatory requirements, including those governing the timing of drawback claims – which is the issue presented here. *See*, *e.g.*, *George E. Warren*, 341 F.3d at 1350–51 (in section captioned "Jurisdiction," noting that gravamen of Government's argument is that "drawback claims cannot first be raised in a protest," and highlighting "the sufficiency of a denial of a protest *for purposes of jurisdiction*") (emphasis added); *id*., 341 F.3d at 1349 (previewing court's holding that "that the Court of International Trade *did have jurisdiction*, because the action contested denial of a protest . . .") (emphasis added); *Texport*, 22 CIT at 120, 1 F. Supp. 2d at 1397 (concluding that court "has *jurisdiction*," and rejecting Government's argument that plaintiff there "failed to exhaust its administrative remedies which precludes the Court from *jurisdiction*") (emphases added); *id*., 22 CIT at 126–27, 1 F. Supp. 2d at 1401 (same).

Fundamentally, as *Aectra* explained, both *Texport* and *George E. Warren* must be read narrowly and confined largely to their facts. *See generally Aectra*, 565 F.3d at 1374 & n.12 (analyzing and limiting *Texport* and *George E. Warren*); *Aectra*, 31 CIT at 2091–92, 2094–95, 533 F. Supp. 2d at 1322, 1324–25 (same); *see also* Recording of Oral Argument at 1:42:29–1:43:20 (Government stated that, in contrast to this case, both *Texport* and *George E. Warren* focused on court's jurisdiction, and that, as *Aectra* pointed out, neither *Texport* nor *George E. Warren* specifically addressed timeliness under three-year period established in 19 U.S.C. § 1313(r)(1); Government further noted that, unlike the protests in this case, the protests seeking HMT and ET in *George E. Warren* were filed within statutory three-year period).

More to the point, Shell in effect seeks to use its "implicit claim" theory to circumvent the statutory requirement that all drawback claims be filed within three years after the date of

Under Shell's theory of the case, Customs would have had to somehow "divine" that Shell intended to seek drawback of HMT and ET, despite the fact that Shell's timely-filed drawback claims expressly sought drawback of import duties only, and made no reference whatsoever to HMT or ET. *See* Def. Brief at 11. Such a scheme would be patently unworkable. Clearly Shell was required to do *something* within the standard statutory three-year period to alert Customs that, in addition to drawback of import duties, Shell was also seeking drawback of HMT and ET. *See* Def. Brief at 11–12; *see also* Recording of Oral Argument at 1:35:25–1:36:38.[20]

exportation of the substitute merchandise. In neither *George E. Warren* nor *Texport* was the "implicit claim" theory employed for that purpose. And, indeed, the issue of the timeliness of the importer's claims for drawback of taxes and fees was not raised by Customs in either appeal. *See Aectra*, 565 F.3d at 1374 & n.12.

Further, in at least one of the two cases, it is clear from the court's opinion that the timeliness of the importer's claims for drawback of taxes and fees could not have been at issue. Thus, for example, in *George E. Warren*, the plaintiff had asserted its claim for HMT and ET for the first time in a protest. *See George E. Warren*, 26 CIT at 487, 201 F. Supp. 2d at 1368. However, that protest was filed comfortably within the statutory three-year period. *See George E. Warren*, 341 F.3d at 1349 (noting that importations were made between December 1995 and January 1996, and that protest seeking drawback of HMT and ET was filed January 3, 1997); *see also Aectra*, 565 F.3d at 1374 (noting that protests seeking drawback of HMT and ET in *George E. Warren* were filed within statutory three-year period); Pl. Reply Brief at 6 (same).

In any event, as discussed above, *Aectra* – which post-dates and carefully analyzes both *Texport* and *George E. Warren* – showed little hesitation in dismissing the argument of the plaintiff there that an "implicit" claim for drawback of taxes and fees was inherent in its timely-filed drawback claim for customs duties. *See Aectra*, 565 F.3d at 1373 n.11. Shell has made no attempt to differentiate its "implicit claim" argument from that which *Aectra* flatly rejected.

[20] At oral argument, the Government identified a number of specific ways in which Shell could have timely asserted and preserved drawback claims for HMT and ET. *See* Recording of Oral Argument at 1:29:00–1:29:15; 1:32:40–1:33:50. The Government suggested that Shell could have initially included the sums of HMT and ET drawback that it sought somewhere on its drawback entry forms or on attachments to those forms, or Shell could have filed timely amended claims seeking drawback of HMT and ET. *See* Recording of Oral Argument at 1:32:40–1:33:50. The Government further noted that, during the six-month grace period following the 1999 amendments, Shell could have sought dismissal without prejudice of its court action, or requested a remand to Customs, and then, in reliance on the 1999 amendments, filed a claim for drawback of HMT and ET with Customs. *See* Recording of Oral Argument at 2:24:00–2:25:10.

In addition, the Government indicated that – if Shell had filed its protests seeking drawback of HMT and ET within the statutory period – the Government would have consented to stipulated judgment in Shell's favor, as it has in other cases. *See* n.8, *supra*. Shell states that it was precluded from protesting the liquidations at issue here to seek drawback of HMT and ET within the statutory three-year period because liquidation had not yet occurred, and a party is not permitted to protest unliquidated entries. *See* Recording of Oral Argument at 2:27:45–2:34:55. However, a review of the relevant entry papers indicates that, contrary to Shell's representations, at least a few of the entries at issue here in fact were liquidated within the three-year period, and therefore could have been the subject of timely protests asserting claims for drawback of HMT and ET.

In this case, as in *Aectra*, Customs was never presented with a claim for HMT and ET during the statutory three-year period, and therefore never could have considered it. *See* Def. Brief at 12 (*quoting Aectra*, 565 F.3d at 1374). Customs is not required to honor "phantom" claims; and Shell is not entitled to recover on drawback claims that it never made. *See* Def. Brief at 6, 12–13.

Although Shell failed to assert any sort of "protective claim" for drawback of HMT and ET within the regular statutory three-year period for the filing of drawback claims, and although claims for drawback of HMT and ET were not "implicit" in its timely-filed claims for drawback of import duties, Shell was by no means without recourse. The 1999 amendments to the statute were designed to afford relief to drawback claimants such as Shell, who had claims that were otherwise untimely. As discussed below, however, Shell once again failed to take the steps necessary to assert claims for drawback of HMT and ET in a timely fashion.

2. *Shell's Reliance on 1999 and 2004 Amendments to Drawback Statute*

Shell asserts that Congress intended the 1999 and 2004 amendments not only "to remove all doubt as to the drawback eligibility" of taxes and fees such as HMT and ET, but also to be "retroactive as to claims such as those at bar" which Shell contends "were 'preserved' by way of timely protest." *See* Pl. Reply Brief at 19; *see also id*. at 7–8. Shell is correct as to the first part of that proposition – that is, that Congress sought to amend the statute to provide for the eligibility for drawback of certain taxes and fees, including HMT and ET. *See* Pl. Reply Brief at 19. But the second half of Shell's assertion is erroneous, both as to the retroactivity of the amendments and their effect on the protests that Shell had previously filed.

Specifically, Shell's argument that Congress "made such amendments retroactive" by authorizing the filing of claims outside the normal three-year limit is true only as to the 1999 amendments. The 2004 amendments applied only prospectively, and to "not yet finally liquidated [entries]" that "already included a timely protective request" for taxes and fees. *See Aectra*, 565 F.3d at 1370.[21] In stark contrast to the 1999 amendments, "[n]othing in the text of the [2004 amendments] states or suggests that [the 2004 amendments were] intended to waive the normal three-year limit" on the filing of draw-

[21] *See also Delphi Petroleum*, 33 CIT at ____ & n.9, 662 F. Supp. 2d at 1352 & n.9 (explaining that a drawback claim "is considered abandoned if it is not complete within three years of the date of export of the substitute merchandise," and noting, *inter alia*, that "*Aectra* held that the 2004 Trade Act 'did not suspend' [the three-year] statutory time limitation period with respect to HMT and MPF drawback claims").

back claims as set forth in the statute. *See Aectra*, 565 F.3d at 1369–71 (*inter alia*, contrasting language of 1999 amendments with that of 2004 amendments). Shell's reliance on the 2004 amendments is therefore misplaced; they add nothing to its case.

Shell's invocation of the 1999 amendments is equally unavailing. Although – as Shell correctly notes – the 1999 amendments expressly authorized the filing of drawback claims outside the standard statutory three-year period, Shell ignores the specific requirements that Congress imposed as to the procedure and timing for asserting such otherwise untimely claims. Shell failed to fulfill those requirements.

As the Court of Appeals observed in *Aectra*, one effect of the 1999 amendments was to "creat[e] *a six-month grace period* in which otherwise untimely claims could be *filed or re-filed* to obtain relief." *See Aectra*, 565 F.3d at 1370–71 (emphases added).[22] Shell could have availed itself of that special six-month grace period, which was in no way limited to "only those prescient . . . drawback claimants who had filed claims for [HMT and ET] . . . years before the right to make such claims arose." *See* Pl. Reply Brief at 23; *see also id*. at 7. It is nevertheless undisputed that – in the six months following the 1999 amendments – Shell took no action to file (or re-file) drawback claims for HMT and ET, notwithstanding the plain language used by Congress. *See Aectra*, 565 F.3d at 1370–71 (*quoting* "Effective Date" provision, 1999 Trade Act, § 2420(e), 113 Stat. 179).

Moreover, the calculated use of the terms "filed" and "after" in the language of the 1999 amendments – expressly requiring that "a drawback claim [be] *filed* within 6 months *after* the date of the enactment" of those amendments – refutes any suggestion that Shell's untimely, previously-filed and -denied protests sufficed to protect whatever rights to drawback of HMT and ET that the company otherwise may have had. *Compare* Pl. Reply Brief at 19 (asserting that Congress "made . . . amendments retroactive as to claims such as

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[22] The 1999 amendments specified, in relevant part:

> The amendments made by this section [amending this section] shall take effect as if included in the amendment made by section 632(a)(6) of the [1993] North American Free Trade Agreement Implementation Act. For purposes of section 632(b) of that Act [providing that the NAFTA Implementation Act amendments applied to any entry filed after 1988 or unliquidated as of the Act's passage], the 3-year requirement set forth in section 313(r) of the Tariff Act of 1930 shall not apply to any drawback claim *filed* within *6 months after* the date of the enactment of this Act [June 25, 1999] for which that 3-year period would have expired.

1999 Trade Act, § 2420(e), 113 Stat. 179 (emphases added; first and fourth alteration in original) (citations omitted); *see also Aectra*, 565 F.3d at 1370–71.

As discussed above, Shell did not "file[ ]" a "drawback claim"; and the company certainly did not do so in the "6 months *after*" June 25, 1999. There can be no assertion that Shell's *previously*-denied protest or its *already* -pending court action constituted a "drawback claim *filed* within six months *after*" the enactment of the 1999 amendments. (Emphases added.)

those at bar which were 'preserved' by way of timely protest"); *id*. at 8 (stating that Shell "timely protested Customs' liquidations 'in order to preserve' any future claims which might arise" (emphasis omitted)). The unambiguous language of the 1999 amendments makes it abundantly clear that a party's affirmative action – that is, the "fil-[ing]" of a "drawback claim" – was required "within 6 months after the date of the enactment" of the amendments, in order to recover for "any drawback claim . . . for which [the normal] 3-year period would have expired."

Shell has offered no adequate explanation as to why, in the wake of the 1999 amendments, it took no action to avail itself of the opportunity to "file[ ]" (or re-file) a drawback claim for HMT and ET within the six-month grace period provided for in the amendments.[23] The Government suggests, for example, that Shell could have sought dismissal without prejudice of its court action, or requested a remand to Customs, and, in reliance on the 1999 amendments, thereafter filed a claim with Customs for drawback of HMT and ET, in order to properly preserve the company's rights. *See* Recording of Oral Argument at 2:24:00–2:25:10. Had Shell filed such a claim during the six-month grace period, it would have been considered timely. *See* Recording of Oral Argument at 2:23:15–2:25:05. But Shell made no attempt to raise the matter, either vis-a-vis the court or otherwise. It is therefore of no moment that Shell's protests previously had been denied and that those denials were already before this court at the time the statute was amended in 1999. *See* Pl. Reply Brief at 6 (stating that "by the time Congress had enacted the 1999 [amendments], Customs had already ruled on the merits of Shell's claims for drawback of [HMT and ET] when denying its protests"); Recording of Oral Argument at 16:20–16:55; 21:04–21:25.

In sum, although the 1999 amendments unambiguously suspended the statutory three-year limit for the filing of drawback claims, the amendments did so only as to otherwise untimely claims that an importer "*filed* within 6 months *after* the date of the enactment of [the 1999 amendments] [*i.e.*, June 25, 1999]." *See* "Effective Date" provision, 1999 Trade Act, § 2420(e), 113 Stat. 179 (emphases added). Congress was under no obligation to provide for a grace period for claims outside the regular statutory three-year period.[24] It follows

[23] Shell's argument that it would have been futile to file a drawback claim for HMT and ET in the six-month grace period has no legs, as discussed in section III.B.1 below. *See generally Aectra*, 565 F.3d at 1373–74.

[24] *Cf*. *Aectra*, 565 F.3d at 1370 (as to 2004 amendments, acknowledging Congress' authority to "limit the right [to claim drawback for HMT] to those who had previously attempted to claim it within the three-year limitations period").

that, having elected to provide for such a grace period, Congress was entitled to require that parties seeking to avail themselves of the grace period "file[ ]" (or re-file) their claims *and* do so within a specified period of time, whether for reasons of Customs' administrative convenience and efficiency or otherwise.

Indeed, *Aectra* expressly rejected the type of scenario that Shell here envisions, where "a claimant could submit a partial claim for duty that would be fully paid by Customs as requested, and then institute a second proceeding, perhaps years later, requesting by protest an additional amount, thereby plainly increasing the cost and complexity of processing the claim." *See Aectra*, 565 F.3d at 1372; *see also Delphi Petroleum*, 33 CIT at ____, 662 F. Supp. 2d at 1352 (*quoting Aectra*, 565 F.3d at 1372); Def. Brief at 13 (same). As *Aectra* explained, the statutory and regulatory scheme is designed "to promote the orderly administration of the drawback system." *See generally Aectra*, 565 F.3d at 1372–73. Congress' express requirement that importers such as Shell "file[ ]" or re-file their otherwise untimely claims for drawback of HMT and ET within a certain specified period of time was a reasonable means to that end.

B. *Shell's Asserted Justifications and Excuses for Its Failure to Comply With Statutory Limitations on Timing of Claims for Drawback of HMT and ET*

As discussed above, Shell failed to timely claim drawback of HMT and ET, both during the normal statutory three-year period for the filing of drawback claims and during the special six-month grace period following the 1999 statutory amendments. However, raising a handful of asserted justifications or excuses, Shell argues that its failure to timely file its drawback claims for HMT and ET should not operate to bar them.

At the outset, it is unclear to what extent Shell's asserted excuses and justifications should be entertained. The language of the drawback statute expressly states that "[c]laims not asserted within the 3-year period shall be considered abandoned," and, further, clearly limits exceptions to that general rule, providing that "[n]o extensions will be granted unless it is established that the Customs Service was responsible for the untimely filing." *See* 19 U.S.C. § 1313(r)(1). Shell has not addressed the significance of these statutory provisions in this context or their application in this case, either in its briefs or in oral argument. However, because Shell's various asserted excuses and justifications fail for other reasons (as set forth below), there is no need to reach the issue here.

In an effort to excuse or justify its failure to avail itself of the special six-month grace period following the 1999 amendments, Shell first

contends that it would have been futile for the company to assert its claims for drawback of HMT and ET. In addition, based on its premise that the "right" to drawback of HMT and ET did not truly arise until the 2004 amendments, Shell invokes the so-called "default rule" (which provides that a statute of limitation generally begins to run when a cause of action accrues) to argue that the statutory three-year time limit does not bar its claims. And, finally, Shell contends that its failure to take timely action was justified due to its fear that Customs would penalize the company if it claimed drawback of HMT and ET.

The analysis set forth below explains that *Aectra* rejected the doctrine of futility as a justification or excuse for failure to timely file claims for drawback of taxes and fees such as those at issue here. Shell fares no better on its two remaining asserted justifications or excuses. Both were raised for the first time in oral argument, and therefore are untimely and must be deemed waived. But, in any event, even if they were considered on the merits, Shell still would not prevail.

1. *Futility*

According to Shell, because Customs had denied its protests "well before enactment of the 1999 amendments," it would have been pointless for Shell to file a claim for drawback of HMT and ET during "the six month 'sunset' period" (*i.e.*, the six-month grace period) following the 1999 amendments. *See* Pl. Reply Brief at 6; *see also* Recording of Oral Argument at 17:25–21:40. Shell further contends that the filing of a claim for drawback of HMT and ET during the six-month grace period was rendered even more futile by the Court of Appeals' decision in *Texport*. *See* Recording of Oral Argument at 18:52–21:40; 29:45–31:40 (discussing *Texport*, 185 F.3d at 1296–97). As discussed in section I above, the *Texport* decision issued shortly after the 1999 amendments went into effect, and interpreted the amended statute as barring drawback of "nondiscriminatory" taxes and fees such as HMT and ET. *See Texport*, 185 F.3d at 1296–97.

In an attempt to buttress its futility argument, Shell cites *George E. Warren*, in which the Court of Appeals sustained the Court of International Trade's ruling that – under facts significantly different from those of this case – the importer was not required to file a drawback claim for HMT and ET where Customs had previously denied the importer's protest seeking such drawback. *See* Pl. Reply Brief at 6–7; *George E. Warren*, 341 F.3d at 1350–51.

As the Government notes, however, the purported futility of claiming drawback of HMT and ET does not excuse a failure to file a claim within the statutory three-year period. *See* Def. Brief at 10–11; Re-

cording of Oral Argument at 1:29:43–1:30:30. *Aectra* thus expressly rejected an argument similar to that raised by Shell here, explaining that:

> [F]utility does not excuse the failure to file a proper claim for limitations purposes. *A claimant is generally required to file a complete and specific claim within the limitations period, even if the government authority to whom the claim is presented is certain to dispute the validity of the claim*.

See Aectra, 565 F.3d at 1373 (emphasis added).[25] The general rule stated by the Government and applied in *Aectra* effectively disposes of Shell's futility argument here.

Moreover, there is no truth to Shell's assertion that the instant case and *George E. Warren* "are identical in all material respects." *See* Pl. Reply Brief at 6–7. There are at least two significant differences. As a threshold matter, the futility argument in *George E. Warren* was raised solely in the context of jurisdiction – an issue that is not presented in the case at bar. *See George E. Warren*, 341 F.3d at 1350–51; *Aectra*, 565 F.3d at 1374 (discussing *George E. Warren*); *see also* n.19, *supra*. In addition, unlike Shell, the plaintiff importer in *George E. Warren* asserted its claims for drawback of HMT and ET *within the statutory three-year period*. *See George E. Warren*, 341 F.3d at 1349–50; *Aectra*, 565 F.3d at 1374 (discussing *George E. Warren*); *see also* Recording of Oral Argument at 1:42:30–1:43:20. In discussing *George E. Warren*, *Aectra* underscored the importance of such distinctions:

> [The] opinion in [*George E. Warren*] does not suggest that a party may be excused from a failure to comply with the statute of limitations by arguing futility.
>
> In any event, even if *George E. Warren* were viewed as relevant to the limitations issue, that case dealt with the unique circumstance in which Congress in 1999 extended the three-year statute of limitations after Customs (in acting on a protest) had

[25] *See also Aectra*, 565 F.3d at 1373–74 (*citing United States v. Clintonwood Elkhorn Mining Co.*, 553 U.S. 1, 5, 13–14 (2008) (holding that refund suit for tax imposed in violation of Export Clause, filed beyond applicable period of limitations, was barred where claimant had failed to first present timely administrative claim to Internal Revenue Service, even though there was little – if any– reason to believe that claim would have been granted); *Frazer v. United States*, 288 F.3d 1347, 1354–55 (Fed. Cir. 2002) (noting that possible futility of filing action and "considerable doubt" about viability of claims did not justify failure to comply with statute of limitations, and discussing *Boling v. United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000)); *Boling v. United States*, 220 F.3d at 1374 (stating that, although "[i]t is true that during the period between the decision in *Ballam* [which made claim at issue appear futile] and [*Ballam*'s] subsequent reversal in *Owen*, any claim by the plaintiffs . . . would have been difficult," that difficulty did not justify tolling the statute of limitations)).

> denied the requested refunds; at most [*George E. Warren*] held that under such circumstances the filing of a new claim in the extended limitations period was unnecessary since Customs already had notice of the claim. No comparable circumstances exist here since *Customs was never presented with, and therefore never addressed, Aectra's claim for HMT during the limitations period*.

See Aectra, 565 F.3d at 1374 (emphasis added; footnote omitted). As in *Aectra*, so too in the instant case, "Customs was never presented with, and therefore never addressed" Shell's claims for drawback of HMT and ET during the regular statutory three-year period for the filing of drawback claims – or even within the six-month grace period following the enactment of the 1999 amendments.

In short, even a well-founded belief that asserting a claim would be fruitless does not excuse a failure to comply with a statutory requirement that all claims be filed within a specified period of time. *See Aectra*, 565 F.3d at 1373 (stating that "futility does not excuse the failure to file a proper claim for limitations purposes"). Shell's futility argument therefore must fail.

2. *The "Default Rule"*

Shell's second excuse – raised for the first time in the course of oral argument – is the so-called "default rule," which refers to the broad principle that "Congress generally drafts statutes of limitations to begin when the cause of action accrues" and "legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *See Graham County Soil & Water Conservation Dist. v. United States*, 545 U.S. 409, 418 (2005) (*quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997)).[26] In other words, "[w]hile it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit," a court "will not infer such an odd result in the absence of any such indication in the statute." *See Reiter v. Cooper*, 507 U.S. 258, 267–68 (1993).

Emphasizing that *Texport* (which interpreted the statute as amended in 1999 to preclude drawback of HMT, and, by extension, ET) was issued shortly after the 1999 amendments, Shell argues that the "right" to drawback did not arise until the effective date of the

[26] *See also* Recording of Oral Argument at 15:05–15:38 (Shell stated that it bases its default rule argument on a 2005 U.S. Supreme Court decision, though it did not name the case).

2004 amendments. From that premise, Shell reasons that – based on the default rule – if the "right" to drawback of HMT and ET did not arise until 2004, the time period for claiming the right presumably did not begin before that time. *See* Recording of Oral Argument at 14:28–14:45; 15:05–16:18 (Shell argued that right to drawback of HMT and ET did not arise until 2004; and that, per default rule, Congress did not intend time for making claim to expire before right to claim arose, and thus did not intend for new right not to apply to previous entries the liquidation of which was not final). In making its argument, Shell discounts the Court of Appeals' statement in *Aectra* that the 2004 amendments in fact were "not designed to create a new right," but instead were intended to overrule *Texport* and thus to clarify the pre-existing right to drawback of HMT. *See Aectra*, 565 F.3d at 1369–70; Recording of Oral Argument at 12:15–13:55 (Shell argued that statement in *Aectra* is inconsistent with conceptual underpinnings of default rule).

Shell's "default rule" argument is both untimely and lacking in merit. As noted above, Shell raised the argument for the first time at oral argument.[27] Shell's briefs do not even allude to the default rule, much less articulate a position on the relevance and application of the rule to the facts of this case. By failing to brief the point, Shell waived its right to press its default rule argument here. *See, e.g., Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (holding that party waived argument which was not presented to Court of International Trade "until after [the party] had filed its principal summary judgment brief," reasoning that "parties must give a trial court a fair opportunity to rule on an issue other than by raising that issue for the first time in a reply brief"). However, even if Shell had briefed (and thus properly preserved) its default rule argument, it appears that Shell nevertheless could not prevail.

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[27] In the course of oral argument, Shell assured the Court that it would seek leave to "provide a short brief on the default rule as it applies to . . . the retroactive application of the 2004 amendment." *See* Recording of Oral Argument at 14:45–15:05. However, Shell never filed a supplemental brief, or sought leave to do so.

In oral argument, Shell also asserted, in passing, that Supreme Court precedent on the separation of powers doctrine is inconsistent with the Court of Appeals' observation in *Aectra* that "the 2004 . . . amendment was not designed to create a new right," but, rather, to clarify that HMT was already eligible for drawback. *See* Recording of Oral Argument at 12:10–13:45 (discussing *Aectra*, 565 F.3d at 1369–70). However, Shell never elaborated further on its "separation of powers" argument. And, certainly, the point was not raised in either of Shell's briefs.

On the wafer-thin record (particularly given the absence of any briefing), it is impossible to address the merits of Shell's separation of powers argument in any meaningful way. In any event, the fact that Shell never briefed the argument and instead raised it for the first time in oral argument precludes Shell from pressing the point in this action. *See, e.g., Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002).

As an initial matter, Shell has not established that the default rule applies to administrative deadlines, such as the statutory three-year period for the filing of drawback claims at issue here; and the court's own preliminary legal research has disclosed no instances in which the default rule has been applied other than cases involving statutes of limitations for the commencement of actions in court.

Even more to the point, though, there is no need to resort to the default rule here. As explained above, the default rule is an interpretative tool for use where a particular statute is ambiguous and arguably could be read to provide that a statute of limitations begins to run before the associated cause of action accrues. *See Dodd v. United States*, 545 U.S. 353, 360 (2005) (discussing *Graham County*, and noting that the text of the statute there was "ambiguous," warranting use of default rule). But Shell has identified no ambiguity in the statutory scheme at issue to justify invoking the default rule. Shell, in effect, seeks to use the default rule for another purpose entirely.

As discussed at some length above, the period within which all drawback claims must be filed is specified by statute, which is clear and unequivocal: "a drawback entry and all documents necessary to complete a drawback claim . . . shall be filed . . . *within* [*three*] *years* after *the date of exportation or destruction of the articles on which drawback is claimed*." *See* 19 U.S.C. § 1313(r)(1) (emphasis added). The drawback statute thus establishes both the event that gives rise to the right to drawback and commences the period for the filing of a claim (*i.e.*, the "exportation or destruction" of the subject merchandise), and also the duration of the period within which a drawback claim may be filed (*i.e.*, three years from the date of "exportation or destruction"). As such, there is no uncertainty or incongruence as to when the right to claim drawback arises and when the statutory three-year period for the filing of drawback claims commences – and both are the same date. Under these circumstances, there is no apparent ambiguity for the default rule to resolve.

Congress' decision not to include a grace period in the 2004 amendments evinces a clear intent to preclude drawback of fees and taxes such as HMT and ET by those importers – like Shell – who did not claim such drawback within the regular statutory three-year period, and who then also failed to file such claims in the six-month grace period following the 1999 amendments. *See generally Aectra*, 565 F.3d at 1370 (concluding that, although the 2004 amendments apply to previously filed drawback entries, the liquidation of which were not yet final, "[n]othing in the text of the [2004 amendments] states or

suggests that [the 2004 amendments were] intended to waive the normal three-year limit imposed by 19 U.S.C. § 1313(r)(1)").[28]

Congress predicated the right to drawback of HMT and ET on the filing of a timely claim for such drawback, either during the regular statutory three-year period or during the six-month grace period following the 1999 amendments. The default rule that Shell invokes does not, and cannot, provide otherwise. Therefore, like its futility argument, Shell's "default rule" argument also must fail.

3. *Shell's Alleged Fear of Revocation of Its Accelerated Payment Privileges*

As its third and final attempt to justify its failure to claim drawback of HMT and ET either within the statutory three-year period or within the six-month grace period following the 1999 amendments, Shell asserted for the first time in oral argument that – if it had filed such a claim before the 2004 amendments – the company would have been penalized by Customs. Specifically, Shell argued that Customs would have treated pre-2004 drawback claims for HMT or ET as "repeatedly file[d] claims in excess of the amount due," and would have revoked the company's accelerated payment privileges pursuant to 19 C.F.R. § 191.72(d).[29] *See generally* 19 C.F.R. § 191.72(d) (1995) (providing that "[a]ccelerated payment [of drawback] will be denied to claimants who repeatedly file claims in excess of the amount due"); Recording of Oral Argument at 34:2045:28; 1:53:07–1:55:00; 2:19:12–2:21:54; *see also id*. at 1:59:22–2:07:53 (argument by counsel for other petroleum companies).[30] Shell maintains that its failure to "file[]" (or re-file) a claim for drawback of HMT and ET either within the regular statutory three-year period or during the six-month grace period following the 1999 amendments therefore should be excused.

Yet again, Shell's asserted defense is untimely as well as unfounded. As noted above, Shell raised the spectre of revocation of accelerated payment privileges for the first time in the course of oral argument on its pending motion. Significantly, neither of Shell's briefs included even a citation to 19 C.F.R. § 191.72(d) (the regulation

[28] *See also Aectra*, 565 F.3d at 1370 (stating that "it was not unreasonable to assume that Congress would limit the right [to drawback of HMT] to those who had previously attempted to claim [drawback of HMT] within the three-year limitations period).

[29] As note 15 -above explains, Customs regulations permit claimants to request accelerated payment of drawback claims. *See* 19 C.F.R. § 191.72 (1995); 19 C.F.R. § 191.92 (1998).

[30] At oral argument on Shell's Motion for Summary Judgment, Citgo Petroleum Corporation, Texaco Refining & Marketing Inc., and Texaco Aviation Products, LLC were permitted, with the consent of all parties, to offer brief argument in support of Shell's position. They are referred to herein generally as "the other petroleum companies."

on which Shell now relies), much less an argument predicated on it.[31] By failing to timely raise and brief the issue, Shell has waived its right to raise 19 C.F.R. § 191.72(d) and any potential for revocation of accelerated payment privileges as a justification for its failure to timely file its claims for drawback of HMT and ET. *See, e.g., Novosteel*, 284 F.3d at 1273–74 (holding that an argument raised for the first time in a reply brief is waived).

Even if Shell had briefed (and thus properly preserved) its argument, however, it nevertheless would not succeed. When pressed at oral argument, neither counsel for Shell nor counsel for the other petroleum companies could cite even a single case in which Customs in fact had revoked a drawback claimant's accelerated payment privileges because the claimant had sought drawback of HMT and ET before 2004. *See* Recording of Oral Argument at 37:35–41:55; 2:01:35–2:02:05.[32] Indeed, Shell has offered nothing to substantiate its allegation that, if it had filed claims for drawback for HMT and ET before 2004, Customs would have considered such claims to be "repeatedly file[d] claims" that were "in excess of the amount due."

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[31] In its reply brief, Shell asserted that, under 19 U.S.C. § 1593a, "the filing of [drawback] claims for taxes and fees in 1995 would have subjected a claimant to . . . penalties imposed . . . for filing false drawback claims." *See* Pl. Reply Brief at 8. However, Shell's briefs made no reference whatsoever to 19 C.F.R. § 191.72(d) – the regulation that it invoked for the first time in the course of oral argument. On the other hand, Shell made no reference to 19 U.S.C. § 1593a in oral argument. Particularly under those circumstances, a single sentence in a reply brief is not sufficient to preserve an argument. *See*, *e.g.*, *Novosteel*, 284 F.3d at 1273–74 (holding that an argument raised for the first time in a reply brief is waived). Shell thus effectively waived and/or abandoned any argument that it may have had based on 19 U.S.C. § 1593a.

Even if Shell had properly preserved the argument, however, Shell could not prevail, because Shell did nothing to substantiate the argument. For example, Shell did not identify even a single case where Customs imposed penalties for filing false drawback claims on a claimant that filed a drawback claim for taxes and fees in 1995 (or before). Nor did Shell point to any other evidence to document its assertion that filing a drawback claim for taxes and fees in 1995 would have subjected a claimant to penalties for filing false drawback claims. Similarly missing from the record is anything to establish that Shell in particular actually considered filing claims for drawback of HMT and ET in 1995, but then made a conscious decision not to do so out of fear that the company would be subject to penalties under 19 U.S.C. § 1593a. Finally, and perhaps most importantly, even if Shell had properly preserved its argument, and even if that argument had been adequately substantiated, Shell has cited no case law or other authority to support the proposition that a fear of penalties under 19 U.S.C. § 1593a is sufficient to excuse a failure to comply with the statutory requirement that all claims for drawback be filed within three years.

[32] The sole case that Shell cited to support its assertion that Customs would have revoked Shell's accelerated payment privileges if the company had filed pre-2004 drawback claims for HMT and ET was a case that Shell raised for the first time in oral argument, and referred to as "the *Pillsbury* case." *See* Recording of Oral Argument at 37:35–41:55; *see also The Pillsbury Company v.* United States, 22 CIT 769, 18 F. Supp. 2d 1034 (1998). But *Pillsbury* is inapposite.

Similarly, Shell has pointed to nothing to establish that – even if Customs had considered such claims to be "repeatedly file[d]" and "claims in excess of the amount due" – the agency's response would have been to revoke Shell's accelerated payment privileges. Further, and even more importantly, there is a conspicuous lack of any evidence to establish that – whatever the rest of the industry may or may not have believed – Shell in particular actually considered filing claims for drawback of HMT and ET within the statutory three-year period for the filing of drawback claims, and/or within the six-month grace period following the 1999 amendments, but then affirmatively decided not to do so due to fear of loss of its accelerated payment privileges.

The entirety of Shell's 19 C.F.R. § 191.72(d) defense thus consists of little more than Shell's quotation of the text of the pre-1998 version of that regulation, and the bare representation of counsel for the other petroleum companies that – prior to the 2004 amendments – the industry feared that claiming drawback of HMT and ET would result in Customs' revocation of a drawback claimant's accelerated payment privileges. However, unsupported apprehension, surmise, speculation, and conjecture are insufficient to excuse compliance with the normal statutory three-year limitation applicable to the filing of all drawback claims.[33]

Contrary to Shell's implication, *Pillsbury* did not involve Customs' revocation of accelerated payment privileges. Instead, *Pillsbury* concerned Customs' revocation of a claimant's authority to use the "Exporter's Summary Procedure" (which allows multiple shipments to be combined on a single drawback claim), as well as Customs' revocation of the claimant's "blanket waiver" (which excused the claimant from the regulatory requirement to provide Customs five working days' advance notice of the exportation of goods that would be the subject of a same condition drawback claim). *See Pillsbury*, 22 CIT at 769–70, 18 F. Supp. 2d at 1035–36 (*citing* 19 C.F.R. § 191.53 (1993); 19 C.F.R. § 131.141(b)(2)(ii) (1993)). Moreover, Customs' actions at issue in *Pillsbury* were triggered not by any pre-2004 filing of claims for drawback of HMT and ET, but, rather, by an ongoing investigation into the claimant's filing of drawback claims that Customs suspected were fraudulent. *See Pillsbury*, 22 CIT at 770, 18 F. Supp. 2d at 1036.

Pillsbury therefore provides no support for Shell's assertion that Customs would have revoked Shell's accelerated payment privileges if the company had filed pre-2004 drawback claims for HMT and ET. *Pillsbury* addressed the revocation of entirely different privileges for entirely different reasons.

[33] The 1998 amendments to Customs' regulations included amendments to the provisions governing accelerated payment of drawback on which Shell relies for its excuse. The amended regulations do not include the language concerning "repeatedly file[d] claims in excess of the amount due" on which Shell premises its argument concerning the alleged fear of revocation of accelerated payment privileges. *Compare* 19 C.F.R. § 191.72(d) (1995) *with* 19 C.F.R. § 191.92(f) (1998). Instead, the amended regulations authorize Customs to revoke "the approval of an application for accelerated payment of drawback . . . for good cause (thatis, noncompliance with the drawback law and/or regulations)." *See* 19 C.F.R. § 191.92(f) (1998).

Finally, even if Shell had timely raised and briefed its argument concerning the alleged fear of revocation of accelerated payment privileges (which it did not), and even if Shell had adequately substantiated that argument (which it did not), it is also the fact that Shell has cited no case law or other authority for the bottom-line proposition that a fear of revocation of accelerated payment privileges should suffice to excuse Shell's failure to seek drawback of HMT and ET during the statutory three-year period for the filing of all drawback claims, or to "file[]" (or re-file) such claims during the six-month grace period established following the 1999 amendments to the statute. Under the circumstances, there is no need to reach that issue here.

Like Shell's two other asserted excuses or justifications (discussed above), Shell's argument based on an asserted fear of revocation of accelerated payment privileges also must fail.

IV. *Conclusion*

For all the reasons set forth above, Customs did not err in denying Shell's protests seeking drawback of HMT and ET. Plaintiff's Motion for Summary Judgment is therefore denied, and summary judgment in favor of Defendant is granted.

Judgment will enter accordingly.

Dated: June 20, 2011
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
Judge

For all the reasons outlined above, Shell cannot here rely on the pre-1998 version of 19 C.F.R. § 191.72(d) to circumvent the statutory three-year limit on the filing of drawback claims. For analogous reasons, Shell similarly cannot rely on the post-1998 version of the regulation to excuse its failure to "fil[e]" (or re-file) its claim for drawback of HMT and ET during the six-month grace period provided for in the 1999 amendments to the drawback statute. Thus, for example, Shell has not even alleged, and certainly has not proved, that – had Shell filed a claim for drawback of HMT and ET within the six-month grace period – Customs would have considered that claim to be one not made "for good cause," much less that, in the event that Customs had reached such a conclusion, the agency would have responded by revoking Shell's accelerated payment privileges.

Slip Op. 11–71

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant.

Court No. 07–00380

AMENDED JUDGMENT

Thomas J. Aquilino, Jr., Senior Judge

This court having found presentment of this action anomalous per slip opinion 09–85, 33 CIT (Aug. 12, 2009), and having entered a judgment of dismissal pursuant thereto; and the plaintiff having filed a notice of appeal therefrom; and the U.S. Court of Appeals for the Federal Circuit having come to conclude that this court erred by dismissing the action without reaching its merits but also that it was indeed meritless, 618 F.3d 1316, 1323 (2010); and that court having nonetheless reversed and remanded for entry of judgment against the plaintiff; and that court's mandate to that anomalous effect having issued; Now therefore, in conformity therewith, it is

ORDERED, ADJUDGED AND DECREED that this action be, and it hereby is, dismissed anew.

Dated: June 21, 2011
New York, New York

/S/ THOMAS J. AQUILINO, JR.
Senior Judge

Slip Op. 11–72

GLOBE METALLURGICAL INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 10–00032

[Administrative review results remanded.]

Dated: June 21, 2011

DLA Piper LLP (US) (*William D. Kramer*, *Martin Schaefermeier*, *Arlette Grabczynska*) for Plaintiff Globe Metallurgical Inc.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*L. Misha Preheim*, *Stephen C. Tosini)*; and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Aaron P. Kleiner*), of counsel, for Defendant United States.

Mayer Brown LLP (*Sydney H. Mintzer*, *Duane W. Layton*, *Jeffrey C. Lowe*) for Defendant-Intervenors Shanghai Jinneng International Trade Co., Ltd. and Jiangxi Gangyuan Silicon Industry Co., Ltd.

OPINION AND ORDER

Gordon, Judge:

This consolidated action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering Silicon Metal from the People's Republic of China. *See Silicon Metal from China*, 75 Fed. Reg. 1,592 (Dep't of Commerce Jan. 12, 2010) (final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for Silicon Metal from People's Republic of China, A-570–806 (Jan. 5, 2010), available at http://ia.ita.doc.gov/frn/summary/PRC/2010–378–1.pdf (last visited June 21, 2011) ("*Decision Memorandum*"). Before the court are motions for judgment on the agency record filed by Globe Metallurgical Inc. ("Globe"), and Shanghai Jinneng International Trade Co., Ltd. ("Shanghai") and Jiangxi Gangyuan Silicon Industry Company, Ltd. ("Jiangxi") (collectively "Respondents"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

Globe challenges (1) Commerce's decision not to reduce Respondents' export prices by the amount of an export tax and value added tax; (2) Commerce's selection of the average value for Grade A noncoking coal published in the Indian Bureau of Mines Yearbook as the surrogate value for Respondents' coal input; and (3) Commerce's reliance upon all sales invoiced by Respondents during the period of review ("POR"), rather than all sales entered during the POR.

Respondents challenge Commerce's decision to include FACOR in its SG&A calculations despite Respondents' contention that FACOR is a "sick" company under Indian law. Alternatively, Respondents challenge the exclusion of the following line-items in FACOR's financial statements from the SG&A expense ratio calculation: (1) the sale of a surplus captive power plant (a fixed asset) and (2) miscellaneous income.

For the reasons set forth below, the court remands this action to Commerce to address Respondents' challenge to Commerce's treatment of FACOR's SG&A expense ratio calculation. The court sustains Commerce's determinations regarding all other issues in this action.

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[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2011). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 West's Fed. Forms, National Courts § 13342 (2d ed. 2010).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont*, 407 F.3d 1211, 1215; *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is entitled to deference pursuant to *Chevron*.").

II. Discussion

A. Export Tax and VAT

During the administrative review Respondents provided information regarding a Chinese export tax and a value added tax ("VAT") on subject merchandise. Respondents reported that their sales of subject merchandise after January 1, 2008 were subject to a 10% export tax. *See* Jiangxi's Sec. C Questionnaire Response, PD 35 at frm. 16 (Nov. 17, 2008)[2]; Shanghai's Sec. C Questionnaire Response, PD 36 at frm. 18 (Nov. 17, 2008). Respondents reported that their respective export sales were also subject to a VAT, in addition to the export tax. *See* Jiangxi's Supp. Secs. C-D Questionnaire Response, CD 24 at frms. 11, 35–41 (Feb. 23, 2009); Shanghai's Supp. Secs. C-D Questionnaire Response, CD 28 at frms. 11–12, 19–30 (Mar. 11, 2009).

Commerce published the preliminary results, reducing Respondents' export prices by 10 percent based upon the export tax, pursuant to 19 U.S.C. § 1677a(c)(2)(B). *See* 74 Fed. Reg. 32,885, 32,887 (July 9, 2009) ("*Preliminary Results*"). Commerce did not reduce Respondents' export prices based upon the VAT, stating that it had not previously considered whether a VAT applied to export sales would be covered by subsection 1677a(c)(2)(B) and invited parties to comment upon the issue for the final results. *Id.*; *see also* Letter to Interested Parties Requesting Comments Upon Treatment of Chinese Value Added Taxes on Export Sales, PD 129 (June 29, 2009).

Respondents argued in their administrative case brief that Commerce's preliminary determination to reduce their export prices based upon the export tax was correct, but that Commerce should not further reduce their export prices based upon the VAT. *See* Respondents' Admin. Case Br., PD 156 at frms. 14–21 (Aug. 21, 2009). In its case brief Globe also argued that Commerce's preliminary determination to reduce Respondents' export prices based upon the export tax was correct, and Globe further claimed that Respondents' export prices should be reduced based upon the VAT. *See* Globe's Admin. Case Br., PD 155 at frms. 12–21 (Aug. 21, 2009).

Commerce subsequently placed three documents upon the record for comment by the parties. Two of the documents were letters from Chinese Government officials to the U.S. Secretary of Commerce regarding Commerce's treatment of the export tax and VAT. These letters stated that Commerce's preliminary determination with respect to the export tax was inconsistent with Commerce's administrative practice, as upheld by the U.S. Court of Appeals for the

[2] "PD __" refers to a document contained in the public administrative record. "CD __" refers to a document contained in the confidential administrative record.

Federal Circuit in *Magnesium Corp. v. United States*, 166 F.3d 1364, 1370–71 (Fed. Cir. 1999), and that any reduction to Respondents' export prices based upon the VAT would also run counter to this practice. *See* Letter to Interested Parties Requesting Comments Upon Letters from Ms. Zhou Wenzhong, Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to the United States, and Madame Zhou Xiaoyan, Director General of the Bureau of Fair Trade for Imports and Exports, Ministry of Commerce of the People's Republic of China, PD 170 at frms. 1–8 (Nov. 9, 2009). Commerce also placed its voluntary remand redetermination in the *Magnesium Corp.* litigation upon the record. *Id.* at 9–26. Because Commerce placed these documents upon the record subsequent to the administrative briefing period, Commerce requested that parties comment upon the letters and remand redetermination.

Commerce received comments from Globe, Respondents, and the Chinese Ministry of Commerce. Respondents and the Chinese Ministry of Commerce argued that Commerce should reverse its preliminary determination with respect to the export tax and should not reduce Respondents' export prices for the VAT, while Globe maintained that Commerce should maintain its preliminary determination with respect to the export tax and apply the same approach to the VAT. *See* Globe's Comments, PD 176 (Dec. 3, 2009); Respondents' Comments Upon Deduction of Export Taxes and VAT from Export Price, PD 177 (Dec. 3, 2009); Chinese Ministry of Commerce's Comments Upon Deduction of Export Tax and VAT From Export Price, PD 175 (Dec. 2, 2009).

Commerce then placed upon the record a letter from a third Chinese Government official to the Secretary of Commerce regarding Commerce's treatment of the export tax and VAT. The letter argued that Commerce should reverse its preliminary determination with respect to the export tax and should not reduce Respondents' export prices based upon the VAT. *See* Letter to Interested Parties Requesting Comments Upon Letter from Mr. Chen Deming, Minister of Commerce of the People's Republic of China, PD 178 (Dec. 11, 2009). On December 16, 2009, Globe provided comments in opposition to the Chinese Government's approach. *See* Globe's Comments, PD 179 (Dec. 16, 2009).

In the *Final Results* Commerce relied on *Magnesium Corp.* and Commerce's longstanding administrative practice in deciding not to reduce Respondents' export prices by the export tax or VAT. *Decision Memorandum* at 13–20, PD 184 at frms. 13–20. Commerce explained that "the salient issue in the instant case is the same issue that was

before the Federal Circuit in *Magnesium Corp.*: whether respondents' U.S. prices reflect a NME export tax such that the export tax is 'included in such price' within the meaning of subsection 1677a(c)(2)(B)." *Id.* at 15 (citing *Magnesium Corp.*, 166 F.3d at 1370–71).

Globe challenges this decision, arguing that the statute mandates that Commerce reduce export price by the export tax and VAT in a non-market economy ("NME") case. The Federal Circuit in *Magnesium Corp.*, however, held otherwise. *Magnesium Corp.* addressed Commerce's final determinations in the antidumping investigations of pure magnesium and magnesium alloy from the Russian Federation, an NME. As in this case, the Russian respondents reported that they paid an export tax and similar administrative fees on subject merchandise. Commerce reasoned that "the export tax paid to an NME government is an intra-NME transfer of funds between a Russian producer and the Russian government. As such, it is inappropriate to account for such transfers in our [less than fair value] analysis just as it is NME prices and costs." *See Pure Magnesium & Alloy Magnesium from the Russian Federation*, 60 Fed. Reg. 16,440, 16,448 (Dep't of Commerce Mar. 30, 1995) (final determ. of sales at less than fair value). Accordingly, Commerce did not reduce the *Magnesium Corp.* respondents' export prices.

The *Magnesium Corp.* petitioners challenged Commerce's determination before the U.S. Court of International Trade. Commerce, in turn, requested a voluntary remand to further explain its determination not to implement subsection 1677a(c)(2)(B) in the underlying investigations. *See Magnesium Corp. v. United States*, 20 CIT 1092, 1113–14, 938 F. Supp. 885, 905–06 (1996). On remand Commerce reasoned that the nature of NMEs precluded Commerce from valuing the Russian Federation's export taxes and fees as a component of the respondents' prices. Commerce explained:

> [I]n a market economy country, a producer subject to a government-imposed export tax can be expected to actually incur the tax liability and to incorporate the tax amount into its cost and pricing structure. . . . No such presumption can be made, however, in the context of a [NME]. The [NME] is governed by a presumption of widespread intervention and influence in the economic activities of enterprises. An export tax charged for one purpose may be offset by government transfers provided for another purpose. In such circumstances, [Commerce] has no basis for determining whether and to what extent

> a tax might be reflected in a price. This is the very type of internal NME transfer that the statute directs the Department to reject.

See Remand Redetermination, PD 170 at frm. 15. The Court of International Trade upheld Commerce's remand, deferring to Commerce's analysis of subsection 1677a(c)(2)(B) under *Chevron* Step 2. *See Magnesium Corp. v. United States*, 20 CIT 1464, 1466, 949 F. Supp. 870, 872 (1996).

The petitioners appealed to the Federal Circuit, which sustained Commerce's determination, albeit under *Chevron* Step 1. The Federal Circuit concluded that subsection 1677a(c)(2)(B) expressly contemplates that export taxes will not be included in all export prices, given that the statute requires Commerce to reduce the export price only when the export tax is "included in such price." *Magnesium Corp.*, 166 F.3d at 1370. The court further held that Commerce's approach properly recognized the statutory distinction between market economies and NMEs with respect to valuation of internal costs and prices. *Id.* The court distinguished between market and NME economies with respect to application of subsection 1677a(c)(2)(B):

> In a market economy, Commerce can presume that any tax imposed on the merchandise to be exported will be included in the [United States price] of that merchandise. However, that presumption is not available when the merchandise is produced in a non-market economy. By definition, in a [NME], the price of merchandise does not reflect its fair value because the market does not operate on market principles. Therefore, *no reliable way exists to determine whether or not an export tax has been included in the price of a product from a [NME].*

Id. (internal citation omitted; emphasis added). Accordingly, the Federal Circuit held that Commerce's interpretation harmonized subsection 1677a(c)(2)(B) with the statutory definition of an NME, and that Commerce's approach gave meaning to the phrase, "included in such price." *Id.* at 1371.

In attempting to distinguish the facts of *Magnesium Corp.*, Globe argues that the export tax and VAT in this case were not internal-NME transfers because, according to Globe, Respondents included both taxes in their export prices. Rev. Br. in Supp. of Globe's Mot. for J. upon Agency R. at 4–7, 10–11, ECF No. 42 ("Globe's Br."). The administrative record, however, does not support Globe's argument that the export tax and VAT are not internal NME transfers. The record indicates that the export tax is paid by the exporter to Chinese

Customs authorities in remimbi ("RMB") upon exportation of the merchandise, not by the U.S. purchaser. Shanghai Jinneng's Supp. Sec. C Questionnaire Response, CD 28 at Ex. SC-3 (Mar. 11, 2009). Similarly, the VAT is paid in RMB on an aggregated basis by Respondents to the Chinese authorities. *Id*. Also, contrary to Globe's claim, the record indicates that Chinese law does not require the VAT to be charged to customers on export sales. *See* Respondent's 2007/2008 Admin. Review Rebuttal Brief, CD 69 (Sept. 9, 2009). Defendant adds that even if an NME respondent asserts that its export prices incorporate a tax payment, such tax payments would still be intra-NME transfers that cannot be properly valued. Def.'s Resp. to Pl.'s and Def.-Ints.' Mots. for J. upon the Agency R. at 17 (citing *Magnesium Corp.*), ECF No. 49 ("Def.'s Br.").

Focusing upon Respondents' statements that their export prices are based upon the "world market price" for silicon metal, Globe argues that the Respondents' operations within an NME is irrelevant to Commerce's application of subsection 1677a(c)(2)(B). Globe's Br. at 12. Globe's argument mistakenly implies that Respondents' prices reflect market conditions. Commerce's determination as to whether merchandise is priced according to market conditions is based upon the nature of the exporting country, not the destination country. *See Decision Memorandum* at 1617 (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1445–46 (Fed. Cir. 1994)). Commerce explained that equating Respondents' export prices with market economy prices "would suggest that NME export prices are determined by market conditions. The Department declines to adopt this fundamental change to its NME methodology." *Id*.

Globe further argues that Commerce's determination not to reduce Respondents' export prices runs counter to Congressional intent with respect to subsection 1677a(c)(2)(B). Globe's Br. at 14–16. The legislative history cited by Globe, however, is silent with respect to the issue presented by this case—the application of subsection 1677a(c)(2)(B) within NME proceedings. *See id*. (citing H. Rep. No. 93–571 at 69 (1973), S. Rep. No. 93–1298, at 172 (1974)). In addressing this issue the Federal Circuit explained that Commerce's practice "both harmonizes subsection [1677a(c)(2)(B)] (deduction of export taxes) with subsection 1677(18) (definition of non-market economy), and gives meaning to every part of subsection [1677a(c)(2)(B)], including the clause 'if included in such price.'" *Magnesium Corp.*, 166 F.3d at 1371.

Globe also claims that Commerce's determination not to reduce Respondents' export prices by the amount of the Chinese taxes violates Commerce's statutory obligation to calculate tax-neutral dump-

ing margins. Globe's Br. at 16–17. According to Globe, because Commerce prefers tax-exclusive surrogate values in determining the normal value of subject merchandise, Commerce's determination not to reduce Respondents' export prices for the Chinese taxes runs counter to administrative and judicial precedent to calculate accurate, tax-neutral dumping margins. *Id*. Globe's "tax neutrality" argument, however, relies exclusively on cases that dealt with administrative reviews of *market economy* antidumping duty orders, and thus fails to address subsection 1677a(c)(2)(B) in the NME context. *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) (addressing Commerce's reseller policy in market economy administrative review); *Micron Techs., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir. 2001) (addressing application of 19 U.S.C. § 1677a(d)(1)(D) in market economy case); *Viraj Forgings, Ltd. v. United States*, 27 CIT 1472, 1477, 283 F. Supp. 2d 1335, 1340 (2003) (regarding application of 19 U.S.C. § 1677b(a)(1)(C) in market economy administrative review); *Certain Corrosion-Resistant Carbon Steel Flat Products From Korea*, 61 Fed. Reg. 18,547, 18,548 (Dep't of Commerce Apr. 26, 1996) (final results of admin. review).

In sum, Globe's arguments challenging Commerce's treatment of Respondent's export taxes and VAT are unpersuasive. These issues were long ago addressed and resolved by the Federal Circuit in *Magnesium Corp.*, a decision that is binding here. The court therefore must sustain Commerce's decision on these issues.

B. Respondents' Coal Input

When valuing the factors of production in an NME proceeding, Commerce must use the "best available information" when selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1), (4). Commerce's regulations provide that surrogate values should "normally" be publicly available and (other than labor costs) from a single surrogate country. 19 C.F.R. § 351.408(c) (2009). When making its surrogate value selections (and when comparing and contrasting various data sets), Commerce considers "the quality, specificity, and contemporaneity of the available values." *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,* 73 Fed. Reg. 52,015, 52,020 (Dep't of Commerce Sept. 8, 2008) (prelim. results admin. review). Commerce prefers data that reflects a broad market average, is publicly available, contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports. *Certain Pneumatic Off-the-Road Tires from the People's Republic of China,* 73 Fed. Reg. 40,485 (Dep't of Commerce July 15, 2008) and accompanying Issues and Decision

Memorandum, A-570–912 (July 7, 2008), cmt. 10 at 26, *available at* http:// ia.ita.doc.gov/frn/ summary/PRC/E8–16156–1.pdf (last visited June 21, 2011).

When reviewing substantial evidence issues involving Commerce's selection of the best available surrogate values, the court evaluates "whether a reasonable mind could conclude that Commerce chose the best available information." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d, 1323, 1327 (2006); *see also CITIC Trading Co. v. United States*, 27 CIT 356, 366 (2003) ("[W]hile the standard of review precludes the court from determining whether [Commerce's] choice of surrogate values was the best available on an absolute scale, the court may determine the reasonableness of Commerce's selection of surrogate prices.").

For the surrogate values for Respondents' inputs and expenses, Commerce selected India as the surrogate country. *Preliminary Results*, 74 Fed. Reg. at 32,887–88. During the administrative review Commerce asked for, and Respondents reported, the technical specifications of the coal input used in the production of subject merchandise. *See* Jiangxi's Supp. Secs. C-D Questionnaire Response, CD 24 at frms. 49–50, 157 (Feb. 23, 2009); Shanghai's Supp. Secs. C-D Questionnaire Response, CD 28 at frms. 141, 176, 179–180 (Mar. 11, 2009). Jiangxi reported its coal specifications, which included, in part: moisture content; ash content; volatile matter content; and caking index. *See* Jiangxi's Supp. Secs. C-D Questionnaire Response, CD 26 (Feb. 23, 2009). Shanghai's affiliated producer, Datong, reported that its coal had the following specifications, in part: moisture content and ash. *See* Datong's Supp. Secs. C-D Questionnaire Response, CD 28 at frm. 176 (Mar. 11, 2009). Additionally, Datong provided a sample invoice for its purchases of coal, which listed its ash and moisture content requirements and also specified caking index requirements. *Id*. at frm. 179.

To value Respondents' coal input, Commerce relied upon the average value for Grade A non-coking coal provided by the Indian Bureau of Mines Yearbook for 2007 ("IBM Yearbook"). *See* Selection of Factor Values Memo., PD 131 at frms. 4, 66–97 (June 29, 2009). Commerce noted that the Indian coal system uses an empirical formula to identify commercial-grade non-coking coal. *See* Prelim. Surrogate Value Memo., PD 131 at frm. 4 (citing Globe's Rebuttal Surrogate Value Submission, PD 92 at frms. 17–18). Specifically, the Indian coal classification system identifies commercial Grade A non-coking coal as having a Useful Heat Value ("UHV") in excess of 6200, pursuant to the following formula: UHV = 8900 - 138 (A + M), where A is ash

percentage and M is moisture percentage. *See* Respondents' Surrogate Value Submission, PD 87 (Apr. 3, 2009). After deriving the UHV for Respondents' coal input using Respondents' ash and moisture content specifications, Commerce determined that the appropriate surrogate value was the average value for Grade A non-coking coal provided in the IBM Yearbook. *See Decision Memorandum* at 43 (citing Respondents' Surrogate Value Submission, PD 87 at frm. 429 (Apr. 3, 2009)).

Globe argues that Commerce erred in its surrogate value selection for Respondents' coal input, insisting that Commerce's decision not to use the Chinese coal classification system to first determine whether Respondents' coal input was "coking" or "non-coking" coal caused Commerce to select an erroneous surrogate value. Globe's Br. at 20–21. Defendant counters that it "is inherent in the process of identifying many surrogate values that Commerce must rely on the surrogate country's product classification systems." Def.'s Br. at 24.

In this case Commerce used Respondents' coal specifications and tied them to a surrogate data source using an empirical formula. To the extent that Commerce classified Respondents' coal inputs using surrogate data, it did so in the same manner that it would in any other NME proceeding—it matched the technical specifications of Respondents' inputs with an appropriate surrogate data source. This approach is reasonable on this administrative record given the differences between the Chinese and Indian coal classifications systems. According to the information on the administrative record, India apparently has two classes of coal, coking and non-coking, with many grades within each class, while China appears to have 11 classes of coal with no grades. *Compare* Respondent's Surrogate Value Submission, PD 87 at frm. 429 (Apr. 3, 2009) (2007 IBM Yearbook at 24–24) *with* Plaintiff's Rebuttal Surrogate Value Submission, PD 92 at frm. 52 (Apr. 13, 2009) (Chinese GB5751–86 Standard Classification).

Commerce had no reason to rely upon the Chinese coal classification system because Respondents' detailed coal specifications allowed Commerce to accurately select a surrogate value from India. Commerce explained that because ash and moisture content provide a sufficient basis to identify the appropriate surrogate value in India, Commerce did not need to consider how various other technical specifications (such as volatile matter content) are treated under other countries' coal classification systems to identify an appropriate surrogate. This determination was both sensible and reasonable and satisfies the requirement of *Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT 288, 295, 366 F. Supp. 2d 1264, 1270 (2005) that Commerce determine the type of coal used by Re-

spondents and select an appropriate surrogate value. Commerce relied upon Respondents' particular coal specifications and an empirical classification formula to identify the appropriate surrogate value for coal.

Globe also argues that the record demonstrates that Respondents' coal could only have been coking coal. Globe's Br. at 25. Defendant responds that Globe relies exclusively upon a vague definition of coking coal that lacks the empirical rigor of Commerce's approach. Defendant explains that Globe cites a definition for primary coking coal that characterizes it as coal with "high coking properties and low volatile matter content," and then Globe asserts that Respondents' coal must be coking coal because of its caking index and volatile matter content. Globe's Br. at 26. Defendant points out that Globe fails to provide any benchmark for the "relative" properties of coking versus non-coking coals under the Indian system. Globe's analysis is unreasonably vague and imprecise when compared with Commerce's reliance upon what appears to be a more robust empirical formula. Accordingly, Globe does not provide a basis for the court to conclude that Commerce's determination is unreasonable.

Globe also argues that it is impossible to identify the type of Indian coal used by Respondents based on ash and moisture content because the ash and moisture content of coking and non-coking coal overlap. Globe's Br. at 24. Globe concludes that Respondent's coal would be graded as either Steel Grade I coking coal or Grade A non-coking coal, depending on whether it is coking coal or non-coking coal. *Id*. at 24–25. Respondents explain that Globe's conclusions are factually incorrect. As an initial matter, the IBM Yearbook does not assign a moisture content for Steel I Grade coking coal. *See* Respondent's Surrogate Value Submission, PD 87 at frm. 430 (IBM Yearbook at 24–25). The IBM Yearbook indicates that Steel Grade I coking coal has an *ash* content "exceeding 15% but not exceeding 18%," while Grade A non-coking coal has a *combined ash and moisture content* of 19% or less. *Id*. Respondents' coal has much lower ash levels than that of Steel Grade I coking coal. *See* Jiangxi Gangyuan's Supp. Sec. D Questionnaire Response, CD 24 (Feb. 23, 2009); Jiangxi Gangyuan's Supp. Sec. C-D Questionnaire Response, CD 41 (Apr. 21, 2009); Datong Jinneng' s Supp. Sec. D Questionnaire Response, CD 28 (Mar. 11, 2009). Therefore, Respondents' coal ash content is well below the floor set by the Indian Steel Grade I coking coal standard. Further, the combined ash and moisture content of Respondents' coal fall under 19%, like Grade A non-coking coal. *Id*. There is, therefore, ample record evidence demonstrating that Grade A non-coking matched Respondents' coal specifications.

Finally, Globe argues that Respondents' coal could not have been non-coking coal because only coking coal could withstand metallurgical applications such as silicon metal production. Globe's Br. at 26. If this were true, one wonders why Globe would bother with all its other arguments on this issue. Here again, Commerce determined that the record did not support Globe's claim. Commerce explained that the Coal Directory of India (a publication of the Indian Ministry of Coal that Globe placed upon the record), stated that non-coking coal with low ash content and higher fixed carbon relative to coking coal can be used in metallurgical applications. Globe's Rebuttal Surrogate Value Submission, PD 92 at frm. 34 (Apr. 13, 2009).

In short, Globe's arguments about the unreasonableness of Commerce's coal input surrogate value selection are unpersuasive. Commerce's choice was reasonable given the administrative record, and therefore must be sustained.

C. Respondents' Sales Database

During the administrative review Respondents submitted their United States sales databases, which identified the date that the United States customer was invoiced (the "invoice date"), the date that payment was received (the "payment date"), and the date that the merchandise was shipped (the "shipment date"). *See* Jiangxi's Sec. C Questionnaire Response, CD 10 at frms. 31–34 (Nov. 17, 2008); Shanghai's Second Supp. Secs. C-D Questionnaire Response, CD 40 at frms. 20–23 (Mar. 11, 2009). The databases did not identify the date that the sales entered the United States (the "entry date").

In May 2009, Commerce conducted verification of Datong's production data, Shanghai's United States sales data, and Jiangxi's production and United States sales data. *See* Verification Report for Datong, CD 62 (June 30, 2009); Verification Report for Shanghai, CD 57 (June 29, 2009); Verification Report for Jiangxi, CD 58 (June 29, 2009). In calculating Respondents' preliminary dumping margins, pursuant to Respondents' designation of the invoice date as the date of sale for their United States sales, Commerce relied upon all sales invoiced during the POR in its price comparisons. *See* Jiangxi's Sec. C Questionnaire Response, CD 10 at frm. 10 (Nov. 17, 2008) ("The date of invoice is the date of sale."); Shanghai's Sec. C Questionnaire Response, CD 11 at frm. 11 (Nov. 17, 2008) ("The date of invoice is the date of sale."); *see also* Preliminary Analysis Memo. for Jiangxi, CD 55 at frm. 13 (June 29, 2009) (using the sales invoice date ("SALINDTU") to identify sales within the POR); Preliminary Analysis Memo. for Shanghai, CD 56 at frm. 13 (June 29, 2009) (SALINDTU to identify sales within the POR).

In the *Final Results* Commerce calculated Respondents' dumping margins based upon all sales invoiced during the POR. *Decision Memorandum* at 49–51; *see also* Final Analysis Memo. for Jiangxi, CD 74 at frm. 9 (Jan. 5, 2010) (using SALINDTU to identify sales within the POR); Final Analysis Memo. for Shanghai, CD 73 at frm. 12 (Jan. 5, 2010) (using SALINDTU to identify sales within the POR). In response to Globe's claim that this determination was inconsistent with Commerce's normal practice of using only sales that entered during the POR, Commerce stated that it would deviate from its normal practice for two reasons. First, Commerce reasoned that it had relied upon all sales invoiced during the period of review for the 2005–06 new shipper reviews of Respondents, thus it had to adopt the same approach in this case to avoid missing transactions from review-to-review. *See Decision Memorandum* at 50. Second, Commerce determined that it could not filter Respondents' United States sales databases to exclude sales that may have entered after the POR because Respondents had not provided the entry dates for their United States sales. *Id*.

Subsection 1675(a)(2)(A) of the antidumping statute provides that Commerce calculate dumping margins for each *entry* during the period of review. *See* 19 U.S.C. § 1675(a)(2)(A). In interpreting this provision, Commerce has explained that, under 19 U.S.C. § 1677a and 19 U.S.C. § 1677b, Commerce is to evaluate *sales* in determining the appropriate export price (or constructed export price) and normal value, "without recognizing that [entries and sales] are not synonymous or providing a mechanism for linking them." *See Advance Notice of Proposed Rulemaking*, 56 Fed. Reg. 63,696 (Dep't of Commerce Dec. 5, 1991). Given this ambiguity, Commerce determined that Congress intended that Commerce must examine all *transactions* during the POR. Specifically, Commerce explained that, "by referring to 'entry' the drafters . . . likely intended that in a review, unlike an investigation, [Commerce] would examine every transaction; they did not mean necessarily that Commerce would have to tie 'entries' to 'sales' in ordering assessment." *Id*. Accordingly, Commerce's regulations provide that an administrative review "will cover, as appropriate, entries, exports, or sales." *See* 19 C.F.R. § 351.213(e)(1)(ii).

In this review both Respondents made "export price" or "EP" sales, meaning that their sales to the United States were made to one or more unaffiliated purchasers. *See* 19 U.S.C.' 1677a(a). Normally, in administrative reviews involving EP sales, Commerce calculates dumping margins based upon sales that entered the United States

during the POR. *See, e.g.*, *Certain Frozen Warmwater Shrimp from Ecuador*, 73 Fed. Reg. 39,945 (Dep't of Commerce July 11, 2008), and accompanying Issues and Decision Memorandum at cmt. 4, *available at* http://www.ia.ita.doc.gov/frn/summary/ECUADOR/E8–15830–1.pdf (last visited June 21, 2011). However, in this case, Commerce departed from its normal practice for two reasons. First, Commerce explained that, in the 2005–06 new shipper reviews for Respondents, it calculated dumping margins using all transactions with a date of sale during the POR. *See Decision Memorandum* at 50. Given that Respondents had designated the invoice date as the date of sale and all sales were invoiced during the POR, Commerce found that it must rely upon all sales invoiced during this review to prevent it from missing transactions from review to review. *Id.* "In order to comprehensively examine the universe of any respondent's transactions, the Department must apply a consistent methodology across segments in order to avoid potentially overlooking transactions." *Id.*

Second, Commerce explained that Respondents had not provided the entry dates for their United States sales. *Id.* Specifically, Respondents' United States sales databases identified the invoice date, payment date, and shipment date for the United States customer. The databases did not identify the entry date for the United States sales. *See* Jiangxi's Sec. C Questionnaire Response, CD 10 at frms. 31–34 (Nov. 17, 2008); Shanghai's Second Supp. Secs. C-D Questionnaire Response, CD 40 at frms. 20–23 (Mar. 11, 2009). Commerce reasoned that Respondents' inability to provide the entry dates for their sales distinguished this case from other reviews involving EP sales in which the respondents provided Commerce with the entry dates of their sales. *See Decision Memorandum* at 50–51 (citing, *e.g., Certain Frozen Warmwater Shrimp From Thailand*, 73 Fed. Reg. 50,933 (Dep't of Commerce Aug. 9, 2008) (final results of admin. review), and accompanying Issues and Decision Memorandum at cmt. 4, *available at* http://www.ia.ita.doc.gov/frn/summary/THAILAND/E8–20165–1.pdf (last visited June 21, 2011)).

Globe challenges both of Commerce's stated reasons for its departure from its normal practice. First, with respect to Commerce's determination that its reliance upon Respondents' sales invoiced during the POR is consistent with its methodology in the 2005–06 new shipper reviews of Respondents, Globe claims that Commerce's determination is inconsistent with those reviews. Globe fails, however, to demonstrate any inconsistency between the two reviews. As Commerce correctly explained, in both the new shipper reviews and in this case, Commerce relied upon the date of sale reported by Respondent (invoice date) in determining which sales to utilize in the dumping

margin calculations. *See id.* at 50.

Next, with respect to Commerce's finding that the record does not provide an evidentiary basis to filter Respondents' United States sales database to exclude sales entered after the POR, Globe argues that both Respondents provided Commerce with entry information for their sales. Defendant concedes that Commerce erred, in part, in its statement that "[t]he instant record does not provide the specific entry dates of Respondents' transactions." *See id*. at 50. Specifically, this statement was in error with respect to Jiangxi, which provided a spreadsheet that identifies the entry date of its shipments. *See* Jiangxi's Supp. Sec. C-D Questionnaire Response, CD 24 at frm. 3 (Feb. 23, 2009). This error, however, has no material effect on the *Final Results* because all of Jiangxi's sales entered the United States during the POR.

Additionally, Commerce's statement that the record lacks the entry dates for Respondents' transactions remains true with respect to Shanghai. Although Globe suggests that Shanghai reported its entry dates, the evidence cited by Globe does not contain the entry dates. Globe's Br. at 27 (citing Shanghai's Sec. C Questionnaire Response, PD 35 at frms. 8, 29 (Nov. 18, 2008)). Thus, Globe's claim that the record contains Shanghai's entry dates is unsupported.

In addition to the above claims, Globe raises a new argument before the court that it did not present to Commerce. Globe argues that Commerce should have used the U.S. Customs and Border Protection ("CBP") data showing Respondents' entries as a filter against Respondents' United States sales databases, thereby identifying which sales entered during the POR. Globe's Br. at. 29, Ex. 3–4. However, Globe never raised this claim before Commerce, nor did Globe present the evidentiary analysis contained in its supporting exhibits. Commerce's regulations require parties to raise all relevant arguments during the administrative briefing, 19 C.F.R. § 351.309, but Globe's administrative case and rebuttal briefs contain no mention of the CBP data as a basis to filter Respondents' United States sales databases, despite the issue of those databases being squarely in play.

When reviewing Commerce's antidumping determinations, the U.S. Court of International Trade requires litigants to exhaust administrative remedies "where appropriate." 28 U.S.C. § 2637(d). "This form of non-jurisdictional exhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review—advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F.

Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). By failing to raise their arguments about the CBP data at the administrative level, Globe deprived Commerce of the opportunity to address that data and "apply its expertise," potentially "rectify administrative mistakes," or "compile a record adequate for judicial review." *Id.* Therefore, the court will not consider Globe's new arguments regarding Respondents' sales database. Instead, the court will sustain Commerce's determination to calculate Respondents' dumping margins using all sales invoiced during the POR.

D. FACOR: Indian Sick Industrial Companies Act

To value Respondents' factory overhead, profit, and selling, general, and administrative expenses ("SG&A") for the preliminary results, Commerce relied upon the financial statements of two Indian companies, Sharp Ferro Alloys, Ltd. and SovaIspat Alloys (Mega Projects), Ltd. For the final results Commerce relied upon the same surrogate companies plus two additional surrogate companies that Globe placed upon the record following the preliminary results – VBC and FACOR Alloy Limited ("FACOR"). Although Respondents claimed that Commerce should not rely upon FACOR because it was a "sick" company under Indian law, Commerce found otherwise. *See Decision Memorandum* at 38–29.

Respondents challenge Commerce's use of FACOR's financial statement in its calculation of Respondents' surrogate financial ratios. Respondents contend that FACOR was designated as a "sick" company under the Indian Sick Industrial Companies Act ("SICA") during the POR.

In NME proceedings Commerce includes an amount for "general expenses and profit" in its determination of normal value. 19 U.S.C. § 1677b(c)(1)(B). Pursuant to its regulations, Commerce relies upon financial statements from surrogate producers of "identical or comparable merchandise" to determine surrogate values for manufacturing overhead, general expenses, and profit ("surrogate financial ratios"). 19 C.F.R. § 351.408(c)(4). Because the statute and regulations do not specify how to calculate this component of normal value, Commerce has developed methodologies in its administrative practice. Commerce first examines the surrogate financial statements and classifies the surrogate companies' line-item expenses and income as they relate to the following categories: SG&A; materials, labor, and energy; factory overhead; and profit. *Lightweight Thermal Paper from China*, 73 Fed. Reg. 57,329 (Dep't of Commerce Oct. 2, 2008) (final results of admin. review), and accompanying Issues and Deci-

sion Memorandum at cmt. 3, *available at* http://www.ia.ita.doc.gov/frn/summary/PRC/E8–23284–1.pdf (last visited June 21, 2011). Commerce then excludes expenses that are accounted for elsewhere in the normal value calculation, such as movement expenses. *Id.* Lastly, based upon its classification of the surrogate companies' expenses, Commerce calculates surrogate financial ratios for overhead, SG&A, and profit that it includes in the normal value calculation. *See generally Hebei Metals*, 29 CIT at 303, 366 F. Supp. 2d at 1277 n.7.

Additionally, when Commerce relies upon Indian surrogate companies, its practice is to disregard financial statements that plainly state that the surrogate company is "sick" under SICA. *See, e.g.*, *Color Televisions from China*, 69 Fed. Reg. 20,594 (Dep't of Commerce Apr. 16, 2004) (final results of admin. review), and accompanying Issues and Decision Memorandum at cmt. 14 *available at* http://www.ia.ita.doc.gov/frn/summary/prc/04–8694–1.pdf (last visited June 21, 2011). Commerce has previously explained that SICA was designed for companies whose accumulated losses surpass the net equity of share capital. Such companies must refer themselves to the Indian Board for Industrial and Financial Reconstruction ("BIFR") within 60 days of finalizing their audited financial statements, which triggers a judicial process that brings companies under the oversight of the BIFR. *See Hot-Rolled Steel from India*, 69 Fed. Reg. 907, 913–14 (Dep't of Commerce Jan. 7, 2004) (prelim. results of admin. review).

Commerce relied upon the financial statements of four Indian companies, including FACOR, in calculating the surrogate financial ratios. Commerce explained that the financial statements constituted the "best available information" on the record because they were "contemporaneous with the POR, publicly-available, and specific to ferro-alloy producers in India." *Decision Memorandum* at 36–37.

In response to Respondents' arguments that FACOR was a "sick" company under SICA and, therefore, unsuitable as a surrogate company, Commerce found that FACOR's financial statement did not plainly state that the company was sick during the POR. *Id.* 38–39. As Commerce explained, in prior cases in which it has rejected sick companies, the auditor's notes accompanying the financial statements classified the companies as sick. *Id.* (*citing Color Televisions from China*, 69 Fed. Reg. 20,594 (Dep't of Commerce Apr. 16, 2004) (final results of admin. review), and accompanying Issues and Decision Memorandum at cmt. 14, *available at* http://www.ia.ita.doc.gov/frn/summary/prc/04–8694–1.pdf (last visited June 21, 2011); *Steel Threaded Rod from China*, 74 Fed. Reg. 8,907 (Dep't of Commerce Feb. 27, 2009) (final results of admin. review), and accompanying

Issues and Decision Memorandum at cmt. 1 *available at* http://www.ia.ita.doc.gov/frn/summary/PRC/E94248–1.pdf (last visited June 21, 2011). FACOR's financial statements did not have a corresponding auditor's note indicating the company as sick.

Respondents challenge Commerce's factual determination that FACOR was not sick during the POR. According to Respondents, substantial evidence demonstrates that FACOR was sick, and therefore Commerce's reliance upon FACOR as a surrogate company was inconsistent with Commerce's administrative practice. *See* Def.-Ints.' Mem. in Supp. of Mot. for J. upon the Agency R. at 6–8, ECF No. 30 ("Respondents' Br."). The court is not persuaded by Respondents' arguments.

Respondents point to three brief passages in FACOR's financial statement that they argue indicate FACOR was sick during the POR. *See id*. at 6–7. Respondents do not, however, point to any direct statement in FACOR's financial statement that the company was sick during the POR. As Commerce explained, Commerce will not use an Indian surrogate company when the financial statement provides a plain statement that the company was sick. *See Decision Memorandum* at 38. For example, in *Tapered Roller Bearings from China*, Commerce rejected a potential surrogate company because the auditor's notes accompanying the financial statements stated that the company was sick. *Tapered Roller Bearings from China*, 64 Fed. Reg. 61,837 (Dep't of Commerce Nov. 15, 1999) (final results of admin. review), and accompanying Issues and Decision Memorandum, *available at* http://www.ia.ita.doc.gov/frn/1999/9911frn/99-b15h.txt (last visited June 21, 2011)

Although it may have been possible for Commerce draw an inference regarding FACOR's status by piecing together various passages in FACOR's financial statement, that possibility does not undermine the reasonableness of Commerce's determination. With respect to the single reference to a "Rehabilitation Scheme" in FACOR's financial statement cited by Respondents, Commerce reasonably explained that, while Section 18 of SICA provides that sick companies may be required to prepare a scheme for financial reconstruction, "there is no record evidence to demonstrate that the Rehabilitation Scheme referenced by FACOR was, in fact, instituted based on the company's designation as a sick company under Indian law." *Decision Memorandum* at 39 (citing Respondents' Submission of Factual Info. to Rebut Globe's Surrogate Value Submission (Aug. 10, 2009) ("Respondents' Aug. 10 Submission") (Section 18 of SICA, concerning "Rehabilitation Schemes")). Additionally, Commerce reasonably found that, even if FACOR had been previously designated as a sick company during an

earlier period, FACOR was not a sick company during the POR. Commerce explained that Section 17(2) of SICA provides "time to the company as it may deem fit to make its net worth exceed the accumulated losses," and cited the fact that FACOR was profitable in 2007 and 2008. *Id*. at 39 (citing Respondents' Aug. 10 Submission) (Section 17 of SICA, concerning "Powers of Board to Make Suitable Order on the Completion of Inquiry"); Final Surrogate Memo., PD 186 at frm. 141 (FACOR's financial statement) (Jan. 5, 2010).

Respondents insist that Section 17 of SICA dictates that FACOR's implementation of a "Rehabilitation Scheme" must mean that the company remains sick, and that FACOR's multi-year profits are irrelevant because sick companies can be profitable. *See* Respondents' Br. at 7–8. At bottom, however, Respondents' argument is simply that another interpretation of the SICA is possible, and the possibility of drawing two inconsistent conclusions from the record does not mean that Commerce's conclusion is unsupported by substantial evidence. *Consolo*, 383 U.S. at 620.

This is the fundamental problem with Respondents' argument. Commerce's approach, requiring a plain statement within the financial statements that a company is operating under SICA, has the benefit of certainty and predictability. Respondents want the court to disrupt that practice, adopt Respondents' interpretation of SICA, and order Commerce to find that FACOR was "sick". The court's ability to direct Commerce in the manner Respondents desire requires a command of SICA (a technical, foreign statutory scheme), which in turn depends upon the administrative record and how well Respondents developed it. All the record contains on this issue are the pertinent SICA provisions (no commentary, treatises, decisions), FACOR's financial statements, and competing interpretations of the meaning of those statutes offered by Respondents' U.S.-based counsel, and Commerce, which has dealt with the statute in multiple instances when selecting surrogate data. Respondents did not put on the record the opinion of an expert familiar with the Indian Sick Industrial Companies Act, such as an Indian lawyer or accountant.

Commerce did not disqualify FACOR as a "sick" company because it could not identify a plain statement that the company was so designated in its financial statements. That determination was consistent with Commerce's practice, and reasonably supported by the administrative record. Accordingly, the court sustains Commerce's decision not to disqualify FACOR.

E. FACOR: Expense Ratio Calculation

Respondents argue that Commerce disregarded its administrative practice by excluding the following line-items in FACOR's financial statements from the SG&A expense ratio calculation: (1) the sale of a surplus captive power plant (a fixed asset) and (2) miscellaneous income. Respondents claim that Commerce should have incorporated these revenues into its SG&A expense ratio calculation, which, in turn, would have produced a ratio with a zero or negative value, which, ultimately, violates Commerce's administrative practice of only relying on financial statements in NME cases that report an SG&A ratio greater than zero.

Defendant contends that Respondents "did not present their alternative argument about FACOR's line-items during the administrative briefing. . . . wait[ing] until after the final results and then submit[ing] this argument among several alleged 'ministerial errors.'" Def. Resp. Br. at 31. Defendant rejected this challenge as one to Commerce's substantive surrogate value calculation rather than a ministerial error. Defendant argues that Respondents failed to challenge Commerce's SG&A expense ratio calculation at the appropriate stage of the administrative process and therefore failed to exhaust their administrative remedies.

Problematically for Defendant, however, the issue of Commerce's treatment of FACOR's expense ratios first manifested itself in the *Final Results*. It was *after* the *Preliminary Results* that FACOR's financial statements first appeared on the administrative record, and the debate in the case briefs was whether those financial statements should be used at all. Respondents ultimately lost that issue. Importantly, it was only after Commerce issued the *Final Results* that Respondents had the opportunity to review the specific methodology Commerce applied to calculate FACORS's SG&A expense ratio.

Defendant's reliance on *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) is misplaced given the distinction between the facts presented here, where Commerce did not apply its ratio methodology to FACOR's financial statements in the *Preliminary Results*, and in *Dorbest*, where Commerce did apply its ratio methodology to the surrogate's financial statements in the preliminary determination. *See Dorbest Ltd. v. United States*, Court No. 05–00003, Pub. Admin. R., ECF No. 46 (Preliminary Determination Factors Valuation Mem. (June 17, 2004)). The *Dorbest* respondent had the opportunity to review and challenge Commerce's ratio calculation before issuance of the final results. Here, Respondents did not have that same opportunity and application of the exhaustion doctrine would not be appropriate.

With that said, the court must remand this issue to Commerce to address Respondents' arguments in the first instance. Defendant seems to concede that this is the proper approach. Def.'s Br. at 34 n.3. The court expresses no view as to the merits of Respondents' claims.

III. Conclusion

For the reasons stated, the court sustains Defendant's determinations as to (1) a Chinese export tax and a value added tax, (2) Respondents' coal input, (3) Respondents' sales database, and (4) FACOR and the Indian Sick Industrial Companies Act, and remands the issue of FACOR's SG&A expense ratio calculation. Accordingly, it is hereby

ORDERED that Commerce's determinations other than FACOR's SG&A expense ratio calculation are sustained; it is further

ORDERED that the issue of FACOR's expense ratio calculation is remanded to Commerce for further consideration; it is further

ORDERED that Commerce shall file its remand results with the court on or before August 17, 2011; and it is further

ORDERED that the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than 14 days after Commerce files those results with the court.

Dated: June 21, 2011
New York, New York

/s/ Judge Leo M. Gordon
JUDGE LEO M. GORDON