Decisions of the United States
Court of International Trade

SLIP OP. 04–130

FORMER EMPLOYEES OF ERICSSON, INC., PLAINTIFFS, v. UNITED STATES SECRETARY OF LABOR, DEFENDANT.

CONSOL. COURT NO. 02–00809
PUBLIC VERSION

[United States Department of Labor's negative determination remanded a second time]

Dated: October 13, 2004

Katten Muchin Zavis Rosenman (*Michael E. Roll*), *Elena Paraskevas-Thadani*, of counsel, for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch; *Jeanne E. Davidson*, Assistant Director, International Trade Section, Civil Division, Commercial Litigation Branch (*Michael D. Panzera*); *Peter Nessen*, Office of the Solicitor, United States Department of Labor, of counsel, for Defendant.

OPINION AND ORDER

BACKGROUND

EATON, *Judge*: This matter is before the court following voluntary remand to the United States Department of Labor ("Labor"). The former employees of Ericsson, Inc. ("Plaintiffs") are software engineers who were employed by Ericsson, Inc. at its Brea, California facility. *See* Pet. for NAFTA-Trade Adjustment Assistance ("NAFTA-TAA"), Pub. Admin. R. at 2 (Aug. 1, 2002) (the "Petition").[1] Plaintiffs designed, wrote code for, and tested software programs that were installed in cellular telephone base stations, enabling them to route

[1] The documents in both the public and confidential versions of the Administrative and Supplemental Administrative Records in this case have been consecutively numbered. Thus, citations are to the page numbers within each record as a whole, and not to page numbers within specific documents contained in each record.

cellular telephone calls. *See* Notice of Negative Determination on Reconsideration on Remand, Conf. Supp. Admin. R. at 38 (Jan. 14, 2004) ("Negative Determination on Remand"). Plaintiffs lost their jobs when Ericsson transferred their work to Ericsson's facility located in Canada in August of 2002. *See* Petition, Pub. Admin. R. at 2.

On August 1, 2002, Plaintiffs filed a Petition with Labor for NAFTA-TAA certification pursuant to 19 U.S.C. § 2331(a)(1) (2000).[2] On September 24, 2002, Labor determined that Plaintiffs were not eligible for NAFTA-TAA assistance because they did not produce an "article" within the meaning of 19 U.S.C. § 2331. *See* Negative Determination Regarding Eligibility to Apply for NAFTA-TAA, Conf. Admin. R. at 20 ("Negative Determination"). "The investigation revealed that the workers of the subject firm do not produce an article. . . . The Department of Labor has consistently determined that the performance of services does not constitute production of an article." *Id.* at 20 (emphasis added). On December 9, 2002, Plaintiffs commenced suit in this Court seeking judicial review of Labor's September 24, 2002, decision. *See Former Employees of Ericsson, Inc. v. United States Sec'y of Labor*, Ct. No. 02–00809.[3]

On September 5, 2003, Labor filed a motion requesting a voluntary remand to conduct further investigation, stating: "Specifically, Labor would like to obtain additional information as to whether the workers' firm produced an article during plaintiffs' employment with Ericsson. This information would permit Labor to assess more completely whether plaintiffs are eligible for TAA and/or NAFTA-TAA

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[2] This statute provides:

> A group of workers . . . shall be certified as eligible to apply for adjustment assistance under this subpart . . . if [Labor] determines that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated, and either—
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> (A) that—
>
> (i) the sales or production, or both, of such firm or subdivision have decreased absolutely,
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> (ii) imports from Mexico or Canada of articles like or directly competitive with articles produced by such firm or subdivision have increased, and
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> (iii) the increase in imports under clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or
>
> (B) that there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of *articles* like or directly competitive with *articles* which are *produced* by the firm or subdivision.

19 U.S.C. § 2331(a)(1) (emphasis added).

[3] Following its denial of NAFTA-TAA certification for Plaintiffs, Labor also published a negative determination for TAA benefits. *See* Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 68 Fed. Reg. 49,522 (Labor Aug. 18, 2003); *see also* 19 U.S.C. § 2331(c)(2) (requiring Labor to consider petitions filed under NAFTA-TAA under TAA if the NAFTA-TAA petitions are denied). On June 18, 2003, Plaintiffs filed suit in this Court challenging the TAA denial. *Former Employees of Ericsson, Inc. v. United States Sec'y of Labor*, Ct. No. 03–00389. The court granted Plaintiffs' consent motion to consolidate the two cases on August 20, 2003.

benefits." Def.'s Consent Mot. for Voluntary Remand at 3–4 (Sept. 5, 2003) (emphasis added). The court granted Labor's motion on September 11, 2003.

After completing its remand investigation, Labor concluded, for a second time, that Plaintiffs were not eligible for NAFTA-TAA benefits:

> The remand investigation consisted of independent research and analysis of software as a commodity and multiple requests [for] additional information from the [Plaintiffs] and the subject company regarding the functions of the subject worker group. . . . While the Department considers workers who are engaged in the mass copying of software and manufacturing of the medium upon which the software is stored . . . to be production workers, the Department does not consider the design and development of the software itself to be production and, therefore, does not consider software designers and developers to be production workers. . . .

Negative Determination on Remand, Pub. Supp. Admin. R. at 38–39. Plaintiffs ask the court to overturn Labor's negative remand determination, and to rule that Plaintiffs are eligible to be certified for NAFTA-TAA benefits under 19 U.S.C. § 2331(a)(1).

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1581(d)(1) (2000), the Court of International Trade has exclusive jurisdiction over any action commenced to review a final determination of the Secretary of Labor, including denial of trade adjustment assistance. *See id.; see also Former Employees of Alcatel Telecomms. Cable v. Herman*, 24 CIT 655, 658 (2000) (not reported in the Federal Supplement) ("Cases contesting the denial of trade adjustment assistance are generally filed under [§ 1581(d)] . . . "). Judicial review of a Labor determination denying certification of eligibility for trade adjustment assistance benefits is confined to the administrative record. *See* 28 U.S.C. § 2640(c) (1994); *see also Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998). The Trade Act of 1974 ("Trade Act")[4] contains a provision for judicial review of the Secretary of Labor's eligibility determination. *See* 19 U.S.C. § 2395(a) (2003).[5] Labor's determination

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[4] It should be noted that Congress repealed 19 U.S.C. § 2331 on August 6, 2002, placing the § 2331 NAFTA-TAA program into a new trade adjustment assistance plan under the newly-revised version of the Trade Act of 1974, as amended, in 19 U.S.C. § 2272. The 1974 Act was renamed the Trade Act of 2002. See Pub. L. No. 107–210, §§ 113(a)(1)(A), 123(a), 116 Stat. 933, 944 (2002). For this reason, the current § 2395 makes an internal reference to § 2272, not § 2331. However, Plaintiffs' application and claim for NAFTA-TAA benefits antedates the November 4, 2002, effective date. Therefore § 2331 governs Plaintiffs' claim.

[5] This statute provides in relevant part:

must be sustained if its findings of fact are supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 2395(b). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (citations omitted); *see also Former Employees of Gen. Elec. Corp. v. United States*, 14 CIT 608, 611 (1990) (not reported in the Federal Supplement). "In addition, the 'rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis.' " *Former Employees of Rohm & Hass Co. v. Chao*, 27 CIT ___, ___, 246 F. Supp.2d 1339, 1346 (2003) (quoting *Int'l Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978)).

DISCUSSION

Both Plaintiffs and Labor agree that the only substantive dispute is whether the work Plaintiffs performed for Ericsson constitutes production of an article. *See* Pls.' Resp. to Dep't of Labor's Negative Remand Determination ("Pls.' Resp.") at 5; *see also* Def.'s Mem. in Opp'n to Pls.' Comments Regarding Def.'s Remand Determination ("Def.'s Mem.") at 2. In this regard, the United States Government, on behalf of Labor, maintains that (1) the design and development of software does not constitute the production of an article[6] for purposes of NAFTA-TAA certification; (2) Labor's determination is supported by substantial evidence on the record, and its reliance on statements made by Ericsson's Human Resources Manager is in accordance with law; and (3) Labor's reliance upon the treatment of computer software under customs law as interpreted by the Bureau

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(a) Petition for review; time and place of filing.

A worker [or] group of workers . . . aggrieved by a final determination of the Secretary of Labor under section 2273 of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination. . . .

19 U.S.C. § 2395(a).

[6] In its Negative Determination on Remand, Labor gives one reason and cites two factors for its conclusion that the design and development of software does not constitute production of an article. First, Labor relies on its interpretation of United States customs law and, in particular, the Harmonized Tariff Schedule of the United States ("HTSUS"). Under Labor's interpretation, software is not a tangible commodity under the HTSUS, and thus the development of software is "not the type of employment work product[ ] that customs officials inspect and that the TAA program was generally designed to address." Negative Determination on Remand, Pub. Supp. Admin. R. at 40. Second, the two factors cited by Labor in reaching its decision are that the software was (1) "not sold as manufactured products to the general public," and (2) "not sold as a component to an article that available to the general public." *Id.* at 39.

of Customs and Border Protection[7] and the United States International Trade Commission is proper and should be accorded deference under *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

For their part, Plaintiffs argue that (1) the work performed for Ericsson constitutes the production of an article within the meaning of 19 U.S.C. § 2331(a), and (2) Labor erred in adopting the unsupported legal conclusions of Ericsson's Human Resources Manager. While the legal contentions of the parties must be addressed in due course, it is apparent that the record has not been sufficiently developed for adequate judicial review. Thus, the court will defer until after remand all questions of law, except for those dealing with statements made by Ericsson's Human Resources Manager.

Labor based its finding that Plaintiffs did not make an article, and were therefore not production workers, on information it gathered in its initial investigation and its investigation on remand. Labor's initial investigation consisted of (1) consideration of the Petition for NAFTA-TAA benefits filed by Ericsson's Human Resources Manager, which stated that Plaintiffs lost their jobs due to Ericsson's shift of production to Mexico or Canada, *see* Pub. Admin. R. at 2; (2) a confidential request for data, which was completed by Ericsson's Human Resources Manager only up to the point of declaring that Plaintiffs "do not produce a product!", Conf. Admin. R. at 9 (emphasis in original); (3) "anecdotal information" supplied by Ericsson's Human Resources Manager in a telephone call, in which she stated that Plaintiffs "do not manufacture a product, but do design the necessary software," *id.* at 10; and (4) a six-question inquiry dated August 27, 2002, answered by Ericsson's Human Resources Manager. *See id.* at 17–18. Labor justified this truncated investigation on the grounds that, "based on the facts in the case, a full investigation would serve no purpose since workers do not produce an article as required by the Act." Conf. Admin. R. at 21–22.

On September 5, 2003, however, following commencement of Plaintiffs' action in this Court, Labor sought a voluntary remand "to obtain additional information as to whether the workers' firm produced an article. . . ." Def.'s Consent Mot. for Voluntary Remand at 3–4 (Sept. 5, 2003) (emphasis added). The entire factual investigation on remand consisted of (1) the mailing of a letter to Ericsson's Human Resources Manager on October 7, 2003, which she declined to answer; (2) a telephone conversation between a Labor employee and Ericsson's Human Resources Manager on October 17, 2003; (3) a telephone conversation between a Labor Department employee and

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[7] See *Former Employees of Murray Engineering Inc. v. Chao*, 28 CIT ____ , slip op. 04–45 (May 4, 2004), in which the court held that Labor's interpretation of customs law, specifically the HTSUS, should not be accorded deference because Labor does not have delegated authority to enforce or administer the HTSUS. *See id.* at 6–8.

one of the Plaintiffs; and (4) various submissions by Plaintiffs, and their attorneys, explaining their work. *See* List of Documents Constituting Conf. Supp. Admin. R. Labor characterized its investigation upon remand as "multiple requests [for] additional information from [Plaintiffs] and the subject company regarding the functions of the subject worker group." Negative Determination on Remand, Pub. Supp. Admin. R. at 38.

It is well-settled that the plaintiffs in a NAFTA-TAA case are entitled to an adequate investigation of their claims. As this Court has stated, "While Labor has 'considerable discretion' in conducting its investigation of TAA claims, 'there exists a threshold requirement of reasonable inquiry. Investigations that fall below this threshold cannot constitute substantial evidence upon which a determination can be affirmed.' " *Former Employees of Sun Apparel of Tex. v. United States*, 28 CIT ___ , ___ , slip op. 04–106 at 15 (Aug. 20, 2004) (internal citation omitted).

In two recent opinions, the Court of Appeals for the Federal Circuit has provided guidance as to the threshold required for an adequate investigation. In *Former Employees of Marathon Ashland Pipe Line LLC v. Chao*, 370 F.3d 1375 (Fed. Cir. 2004), Labor's investigation, which consisted of making inquiries of both Marathon management and of the employees to determine exactly what functions they performed, revealed that there was substantial agreement as to the nature of the tasks performed by the Marathon employees. Thus, the only question for the Federal Circuit was whether these tasks fell within the legal definition of the word "production." The Court found that, "[w]hile the definition of the statutory term 'production' is a question of law, the question whether particular employees are engaged in 'production' within that definition is factual." *Id.* at 1381. The Court held that because there was substantial agreement with respect to the facts, Labor's determination was supported by substantial evidence.

In *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377 (Fed. Cir. 2004), the Federal Circuit examined the adequacy of an investigation concerning the allocation of production activities, i.e., an investigation seeking to determine at which location work was actually performed. In *Callebaut*, unlike *Marathon*, there was not substantial agreement as to the facts. In addition to review of completed questionnaire responses,[8] Labor's investigation in *Callebaut* consisted of (1) questioning the employer's management on three occasions; (2) obtaining a chart from the employer's Marketing Director and former Director of Finance showing the allocation of production to each facility; and (3) obtaining affidavits from three members of

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[8] For a complete description of Labor's investigation in this case, see *Former Employees of Barry Callebaut v. Herman*, 25 CIT 1226, 177 F. Supp. 2d 1304 (2001), and 26 CIT____ , 240 F. Supp. 2d 1214 (2002).

the employer's management addressing production allocation matters and offering an explanation for seeming inconsistencies. Based on the variety and formality of the inquiries and responses in *Callebaut*, the Court found Labor's investigation into the allocation of production activities to be adequate. *Id.* at 1383.

The investigation here is distinguishable from those conducted in *Marathon* and *Callebaut*. First, unlike in *Marathon*, here there is no substantial agreement as to the facts of Plaintiffs' employment. That is, while there is agreement with respect to Plaintiffs' day-to-day activities, there is no agreement as to how their work was utilized by Ericsson. Moreover, given that Ericsson's Human Resources Manager, for the most part, either did not respond to, or did not complete Labor's questionnaires, Labor's investigation here, unlike that in *Marathon*, cannot be said to provide substantial evidence for Labor's findings. Second, given the evident disagreement with respect to the facts, the nature and extent of the investigation in this case falls short of the more thorough investigation found adequate in *Callebaut*. *See, e.g., Former Employees of Sun Apparel*, slip op. 04–106 at 18 (investigation in which Human Resources Manager failed to complete entire section of Labor questionnaire deemed incomplete and inadequate); *Former Employees of Champion Aviation Prods. v. Herman*, 23 CIT 349, 353 (1999) (not reported in Federal Supplement) (remanding to Labor where "record lacks adequate factual development").

A review of the record demonstrates that the instant investigation was insufficient in several respects. First, while it is agreed that Plaintiffs designed, wrote code for, and tested software programs, there is disagreement over how the programs were used. In its Negative Determination on Remand, Labor stated:

> The remand investigation revealed that the petitioning workers designed and programmed software which enabled base stations (routing equipment) to properly route cellular phone messages pursuant to customers' telecommunication needs. *The software was not sold as manufactured products to the general public or sold as a component to an article that is available to the general public.*

Negative Determination on Remand, Pub. Supp. Admin. R. at 38–39 (emphasis added). However, Labor cites no evidence to support its statement that "[t]he software was not sold as manufactured products to the general public," and nothing in the record corroborates this conclusion. Rather, in a letter dated December 10, 2003, Plaintiffs' counsel responded to Labor's request for additional information pursuant to remand by stating, "With respect to your question regarding whether Ericsson sold any of the software products our clients developed, the answer to your question is 'yes.' " *Id.* at 30. Plaintiffs' counsel then identified several customers to whom Plaintiffs

believed the software had been sold, directed Labor to Ericsson's Web site for further information about Ericsson's sales contracts, and urged Labor to confirm the Plaintiffs' sales information with Ericsson. *See id.* Plaintiffs further pointed out that "Ericsson represents on its own website that it sells the software produced by Plaintiffs, along with infrastructure systems and other necessary products, to mobile phone companies abroad." Pls.' Reply [to] Dep't of Labor's Negative Remand Determination Denying Pls. Certification under NAFTA-TAA ("Pls.' Reply") at 16 (footnote omitted). There is no indication that Labor made any effort to investigate these matters.

Second, Plaintiffs dispute Labor's finding that the "software [Plaintiffs developed] was not sold as a component to an article that is available to the general public," on the grounds that this contention is "completely unsupported by the record." Pls.' Resp. at 3 n.1 (internal citation omitted). Indeed, an examination of the record suggests that Labor's finding is not only unsupported by substantial evidence, but is rather contradicted by the scant evidence that is present in the assembled material. First, the answers provided by Ericsson's Human Resources Manager in response to Labor's questions indicate that the software was a component part of the base stations of which Ericsson was a global seller. In answer to the six-question inquiry dated August 27, 2002, Ericsson's Human Resources Manager stated that (1) "Ericsson is a global supplier of mobile communications systems and solutions," and (2) Plaintiffs were engaged in employment that was "Related to the Production — These workers developed software components for a CDMA base station controller which routes cellular phone calls." Conf. Admin. R. at 17 (emphasis in original). The uncontradicted declaration of one of the Plaintiffs confirms that the software was installed in the base stations:

> Each of these [software] products w[as] part of cellular telephone infrastructure system. Specifically, they were part of a CDMA2000 network which included everything necessary to provide wireless telephone and data communications services. CDMA2000 is a type of cellular telephone network (CDMA stands for Code Division Multiple Access) and consists of multiple elements such as radio transmission devices, network cables, hardware nodes, and software programs.
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> My department was responsible for developing software for [ ] one of the hardware nodes – specifically a base station controller (BSC) node. BSC nodes, which are somewhat analogous to a computer, are installed at certain geographical locations to consolidate network traffic and to provide certain network management functions. . . . My responsibilities included design of software programs so as to secure proper interaction with other

> software programs of a CDMA2000 network, writing the code, and testing it. Just as a personal computer is inoperable without software, a BSC node also would be inoperable without the software we designed and created.

Declaration by Dmitri Okhotski, Pub. Supp. Admin. R. at 9. These statements tend to call into question Labor's finding that the software was not sold as a component of an article. Indeed, they give some support to Plaintiffs' assertion that "the software programs that Plaintiffs produced meet [the definition of production] because they were incorporated into the tangible commodity sold by Ericsson to third parties," Pls.' Resp. at 9.

Next, there is insufficient evidence to justify Labor's conclusion that "[the initial] investigation also revealed that the subject facility did not support an affiliated facility covered by an existing certification." Pub. Supp. Admin. R. at 38. Labor's finding was apparently based on notes taken by a Labor employee during a telephone conversation with Ericsson's Human Resources Manager, in which the manager stated that "the Brea, California facility was not connected to or supported [by] another facility including Base Station and Systems Development, Durham, North Carolina, and the facility in Woodbury, New York." Conf. Supp. Admin. R. at 6. This statement, however, seems to be at odds with the Human Resources Manager's August 27, 2002, submission:

> [Question] 6. Please briefly explain the circumstances relating to layoffs that have taken place in the last year at your facility at Brea, California.
>
> [Answer] The Brea facility develops software applications *for other Ericsson units*. There ha[ve] been layoffs during the last year related to slower business and reduced budgets. The layoff of the CDMA team on August 16, 2002 is the first layoff in Brea resulting from work being transferred to Montreal, Canada[.]

Conf. Admin. R. at 18 (emphasis added). Although it may be that the facilities where the software was utilized were not "covered by an existing certification," the proof apparently relied upon by Labor to justify the conclusion that the subject facility did not support any other facility, does not amount to substantial evidence.

Finally, Labor's apparent reliance on the legal conclusions of Ericsson's Human Resources Manager as the factual basis for its negative determination is not in accordance with law. "An unsupported conclusion simply does not suffice as a proper investigation." *Former Employees of Alcatel Telecomms. Cable v. Herman*, 24 CIT 655, 665 (2000) (not reported in the Federal Supplement). This is particularly true of the August 30, 2002, submission of Ericsson's Human Resources Manager, in which she stated her conclusion that Plaintiffs "do not produce a product!", Conf. Admin. R. at 9 (empha-

sis in original), then marked as "not applicable" and declined to answer questions seeking data regarding sales of produced articles, employment of production workers, employment of salaried workers, and shifting of production to Canada. *See id.* at 9, 11–12. Thus, while Ericsson's Human Resources Manager may have concluded that Plaintiffs "do not produce a product," no factual basis is provided for her conclusion. As previously noted, the Federal Circuit has found that, "[w]hile the definition of the statutory term 'production' is a question of law, the question whether particular employees are engaged in 'production' within that definition is factual." *Marathon*, 370 F.3d at 1381. Therefore, rather than relying on Ericsson's Human Resources Manager's essentially legal conclusion, Labor should have required her to complete the questionnaire so that it could determine precisely what tasks were performed by Plaintiffs, and the use to which their output was employed. Had Labor sought this additional information from Ericsson's Human Resources Manager then, rather than relying on her conclusions, it would then have been in a position to determine, based on the facts of their employment, whether Plaintiffs were engaged in "production" according to a lawful definition of that term.

CONCLUSION

Because Labor failed to adequately investigate Plaintiffs' claims, its Remand Results are not supported by substantial evidence on the record. In addition, any findings based solely on the essentially legal conclusion of Ericsson's Human Resources Manager are not in accordance with law. On remand, Labor shall conduct a reasonable investigation into Plaintiffs' claims. Should Labor continue to find Plaintiffs ineligible for NAFTA-TAA benefits, it shall: (1) reconsider its finding that Plaintiffs were not production workers by conducting an investigation that does not impermissibly rely on the conclusory statements of an Ericsson employee; (2) state with specificity any reasons, other than its reliance on the HTSUS, for reaching its determination, and fully explain those reasons; (3) determine whether the software written by Plaintiffs was a component of any product sold by Ericsson to third parties; (4) if so, determine whether such products would have performed the tasks for which they were designed absent the incorporation of the software; (5) explain why Labor chose to view the software in isolation, rather than as a component of the product into which it was incorporated; (6) determine if the software had any use other than as a component of the routers; (7) determine the location at which the routers were assembled; (8) determine whether the software was sold to any third parties without having been incorporated into any Ericsson product; (9) if so, explain the manner in which the software was transmitted to such purchasers (i.e., by disk or otherwise); (10) explain why "sold to the general public" is an important consideration; (11) fully explain its

conclusion that "such products are not the type of employment work products that customs officials inspect and that the TAA program was generally designed to address"; (12) state with specificity its reasons for finding that the facility at which Plaintiffs were employed did not "support" any other facility; and (13) with respect to each finding made in its determination, state with specificity the facts relied upon in reaching such finding, including specific reference to documents in the record.

Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing. Neither comments nor replies to such comments shall exceed thirty pages in length.

Slip Op. 04–136

NIPPON EXPRESS USA, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 97–12–02187

[Plaintiff's motion for judgment on the pleadings granted.]

Dated: November 4, 2004

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Steven P. Florsheim* and *Robert F. Seely*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Todd M. Hughes*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*), *Richard McManus*, Senior Attorney, Office of the Chief Counsel, Civil Division, Customs & Border Protection, Department of Homeland Security, of counsel, for defendant.

OPINION

RESTANI, Chief Judge: The United States, as part of a reciprocal arrangement with other countries, provides privileged treatment to imports of "[a]rticles for the official use of members of the armed forces of any foreign country on duty in the United States." Harmonized Tariff Schedule of the United States ("HTSUS"), 9809.00.30. These articles are exempt from "payment of duty," as well as "payment of any internal–revenue tax imposed upon . . . importation." HTSUS, Ch. 98, U.S. Note 3 (referred to hereinafter as "U.S. Note 3" or the "foreign military articles exemption"). Plaintiff Nippon Express USA, Inc. properly entered certain articles of military equipment under this exemption, but was required to pay Harbor Maintenance Tax ("HMT"), a tax on port use equal to 0.125 percent of the

value of the imported articles. 26 U.S.C. § 4461 (2000). The parties' cross-motions for judgment on the pleadings ask the court to determine whether the HMT is an "internal revenue tax" for purposes of the HTSUS foreign military articles exemption.

The U.S. Note 3 exemption cannot fulfill its role in the reciprocal military relationship between the United States and other countries if the court adopts an unusual and restrictive view of the applicable privilege. Reciprocity between different domestic legal systems depends to a significant extent on a willingness to construe key terms in a manner that will not create the impression that one party is attempting to frustrate the privileges enjoyed by the other party. Because the foreign military articles exemption should be broadly construed to encompass a measure like the HMT—which in commonly understood terms is a tax—HMT was improperly imposed on Nipon Express's imports. Accordingly, the Government's cross–motion for judgment on the pleadings is denied, and Nippon Express's cross–motion is granted.

BACKGROUND

The facts are not in dispute and merit only brief discussion. In 1996, 1997, and 1998, Nippon Express filed five customs entries covering ground support equipment and dummy missiles for training of personnel of the Japanese Ground Self-Defense Forces ("JDF") in the United States. One of those entries, entry number 510–7221682–6 is at issue in this case. The entry was liquidated as claimed duty free under subheading 9809.00.30, HTSUS, and HMT of $63,280.22 was collected on the entry. Nippon Express properly protested the imposition of HMT on the merchandise, and Customs denied this protest. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

RELEVANT STATUTES AND REGULATIONS

A. Chapter 98, HTSUS, U.S. Note 3 (1996–1998)

> Any article exempted under subchapters IV through VII, inclusive, or subchapter IX from the payment of duty shall be exempt also from the payment of any internal-revenue tax imposed upon or by reason of importation.

B. Chapter 98, subchapter IX, HTSUS (1996–1998)

Heading/Subheading	*Article Description*
	Articles for foreign governments on a reciprocal basis and for public international organizations
	***
9809.00.30	Articles for the official use of members of the armed forces of any foreign country on duty in the United States . . . . .

C. 19 C.F.R. § 148.90 (1996–1998)

(a) *Exemptions allowed.* Port directors shall in accordance with the provisions of this section admit the following free of duty and internal revenue tax imposed upon or by reason of importation:

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(3) Articles entered or withdrawn from warehouse for consumption for the official use of members of the armed forces of any foreign country on duty in the United States, under subheading 9809.00.30, HTSUS.

(b) *Reciprocity limitation.* When port directors have been advised officially of a finding by the Secretary of the Treasury that a foreign country does not reciprocate to members of the armed forces of the United States on duty in its country and members of their immediate families the privileges accorded its members and their families in the United States, the port director shall accord to the personnel of such foreign government privileges under the law only to the extent to which the foreign government accords similar treatment to members of the armed forces of the United States and members of their immediate families.

(c) *Status of importer questioned.* If any question arises as to the status of the importer under subheading . . . 9809.00.30, HTSUS, or whether articles entered thereunder are for official use . . . , the port director shall report the available facts to the Commissioner of Customs for instructions.

D. 26 U.S.C. § 4461, Imposition of tax

(a) *General Rule.*
There is hereby imposed a tax on any port use.

(b) *Amount of Tax.*
The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) *Liability and time of imposition of tax.*

(1) *Liability*
The tax imposed by subsection (a) shall be paid by —

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) *Time of imposition*
Except as provided by regulations, the tax imposed by subsection (a) shall be imposed —

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

E. 19 C.F.R. 24.24, Harbor Maintenance Fee

(a) *Fee.*
Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent (.000125) of its value if the loading or unloading occurs at a port within the definition of this section, unless exempt under paragraph (c) of this section or one of the special rules in paragraph (d) of this section is applicable.[1]

DISCUSSION

The court concurs with the parties that this case turns on an issue of law and may be decided on the basis of the pleadings pursuant to Rule 12(c) of this court. *See* CIT R. 12(c); *see also Schulstad USA, Inc. v. United States*, 240 F. Supp. 2d 1335, 1336–37 (Ct. Int'l Trade 2002). As with any issue of law, the matter is determined *de novo*. Deference to any agency statutory interpretation would be owed if the statutory language in issue were ambiguous. Even then, in the absence of a regulation or a formal adjudication, deference would be owed only so far as that interpretation has the power to persuade. *See United States v. Mead*, 533 U.S. 218, 235 (2001). In this case, the meaning of the statute is clear.[2]

The issue in this case is whether the HMT constitutes an "internal-revenue tax imposed upon . . . importation" within the meaning of HTSUS Chapter 98, U.S. Note 3. An "internal revenue tax" may not be imposed upon "[a]rticles for the official use of members of the armed forces of any foreign country on duty in the United States." HTSUS 9809.00.30. This favorable treatment for articles of foreign armed forces represents the domestic component of recipro-

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[1] The remainder of the regulation is not relevant and paragraphs (c) and (d) do not reference the situation at issue.

[2] The federal agency involved in the case before the court is the Bureau of Customs and Border Protection. It is not clear, however, that Customs should provide the relevant interpretation. The government has not represented that the views of other potentially affected agencies, here particularly the Department of Defense, have been sought. Of course, it is the intent of Congress, not the view of any executive agency, which is key. Here, the intent of Congress is clear.

cal arrangements that the United States enjoys with some countries. The exemption's text, context, and legislative history lead to the conclusion that, for purposes of U.S. Note 3, the HMT is (a) an "internal revenue tax," (b) "imposed upon importation."

A. The HMT is a "tax" within the meaning of Chapter 98, HTSUS, U.S. Note 3.

The HMT statute itself does not exempt imports of military equipment intended for use by foreign armed forces during training in the United States. Where the HMT does not directly exempt a good, the good may still be exempt from HMT through the operation of another statute. *Citgo Petroleum Corp. v. United States*, 24 CIT 333, 335, 104 F. Supp. 2d 106, 108 (2000); *see also BMW Mfg. Corp. v. United States*, 241 F.3d 1357, 1361 (Fed. Cir. 2001).[3] In this case, the other statute is U.S. Note 3, which exempts the articles imported by Nippon Express from customs duties as well as "internal revenue tax."[4]

1. "Internal Revenue Tax" Under Chapter 98, HTSUS, U.S. Note 3.

Because U.S. Note 3 does not define "internal revenue tax," the term is deemed to have its ordinary meaning. *See Int'l Bus. Machs. v. United States*, 201 F. 3d 1367, 1372 (Fed. Cir. 2000). *Black's Law Dictionary* defines "internal revenue"as "[g]overnmental revenue derived from domestic taxes rather than from customs or import duties." *Id.* at 820 (7th ed. 1999). Considering internal revenue taxes and customs or import duties to be mutually exclusive categories of government revenue—one focused on domestic revenue sources and the other on foreign sources—the foreign military articles exemption is broad indeed, shielding covered imports from both types of charges. *See Int'l Bus. Machs.*, 201 F. 3d at 1371 (observing that a measure which derives its revenue from internal sources tends to be an internal revenue tax).

Congress, however, went further in giving the exemption a broad scope: U.S. Note 3 provides an exemption from payment of "*any* internal-revenue tax imposed upon or by reason of importation."

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[3] In *BMW Mfg.*, the Federal Circuit cited the general principle that to explicitly include some things within a statue is to exclude others. *Id.* at 1361. Nevertheless, the court went on to evaluate whether another statutory provision, 19 U.S.C. § 81c(a), operated to exempt from the HMT goods admitted into a foreign trade zone. *Id.* (rejecting the argument that the HMT constituted a customs duty for purposes of 19 U.S.C. § 81c(a)).

[4] The U.S. Notes to the HTSUS are integral parts of the HTSUS and serve "to define the precise scope of each heading, subheading, chapter, subchapter, and section." *Trans–Border Customs Services, Inc. v. United States*, 18 CIT 22, 26, 843 F. Supp. 1482, 1486 (1994).

HTSUS, Chapter 98, U.S. Note 3 (emphasis added).[5] Congress' reference to "any" internal revenue tax indicates a preference that "internal revenue tax" be construed broadly, not narrowly. This inclusive language does not denote an intention that the applicability of the exemption should turn on fine distinctions among revenue measures that are found in the internal revenue code and imposed in connection with the importation process. The language also undermines the proposition that Congress would extend considerable privileges to foreign military articles—preventing the imposition of customs duties or any internal revenue tax imposed upon importation—and yet subject them to a charge on their use of the harbor. Such a proposition seems even more improbable considering that the exemption is the mechanism through which the United States maintains reciprocal privileges with other countries.

The U.S. Note 3 exemption is premised on reciprocity; i.e., "[t]he mutual concession of advantages or privileges for purposes of commercial or diplomatic relations." *Black's Law Dictionary* 1276. The hallmark of a reciprocal relationship is that each party accords the same or similar treatment to the other. Accordingly, the foreign military articles exemption will be modified or withheld if the Secretary of the Treasury finds that a foreign country "does not reciprocate to members of the armed forces of the United States on duty in its country and members of their immediate families the privileges accorded its members and their families in the United States." 19 C.F.R. § 148.90(b)(3). A country that does not reciprocate will have its U.S. import privileges reduced to a level "similar" to what the country provides to U.S. forces. *Id.* The use of "similar" underscores the proposition that a reciprocal legal arrangement among countries with different domestic laws cannot succeed if one country splits hairs; for instance, denying a benefit on the grounds that an import-related charge is neither a customs duty nor an internal revenue tax but is instead a non-exempt "user fee." It is easy to imagine that analogous opportunities for hair-splitting might present themselves in other countries. Indeed, the other side of the coin for the foreign military equipment exemption is that a foreign country may feel compelled to withhold favorable treatment for entries of U.S. military equipment if that country perceives that the United States has declined to reciprocate. A foreign country might easily perceive a lack of reciprocity if the court were to strictly construe "internal-revenue tax imposed upon . . . importation," where such a result is not clearly required by statute or case law.

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[5] The collection of HMT and issuance of refunds is governed by customs laws as if the HMT were a customs duty. *Int'l Bus. Machs.*, 201 F. 3d 1367, 1372–73 (Fed. Cir. 2000) (interpreting "administration and enforcement" as used in 26 U.S.C. § 4462(f)(1)).

An extremely narrow construction of the exemption is also refuted by the relevant legislative history,[6] which reflects a recognition that, by extending privileges toward the modest number of foreign troops on duty in this country, the United States would obtain a considerable benefit for the significant number of its armed forces operating abroad:

> The purpose of the first section of this bill is to extend to members of the *armed forces of any foreign country* on duty in the United States, its Territories or possessions (*of whom there are now less than 600*) exemption from duties and internal revenue taxes imposed upon or by reason of the importation or withdrawal from warehouse of articles, for the official use of a member of the armed forces fo a foreign country, or for the personal use of a member of the armed forces of a foreign country, or for the personal use of himself or any member of his immediate family. The exemption is conditioned upon reciprocal treatment being accorded to members of the *armed forces of the United States (of whom there are now approximately 7,100 serving in foreign countries other than occupied territory*) and members of their families.
>
> Personnel of the armed forces of the United States and members of their immediate families are in most, if not all, cases accorded exemptions by the foreign country in which they are stationed comparable to those provided in the bill, but *the continuation of such privileges is jeopardized by the termination on June 30, 1948, of a wartime statute* (Public Law 635, 75th Cong., 56 Stat. 462) limited to members of the armed forces of

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[6] This legislative history pertains to a law enacted as section 1, chapter 517 of the Act of August 27, 1949, Pub. L. No. 81–271, 63 Stat. 666, 666–67 (1949) (originally codified at 19 U.S.C. § 196(a)). Although this is an antecedent statute to U.S. Note. 3 and subheading 9809.00.30 of the HTSUS, its relevant provisions are nearly identical:

> articles entered, or withdrawn from warehouse, for consumption in the United States, its Territories, or possessions for the official use of persons who are on duty in the United States, its Territories, or possessions as members of the armed forces of any foreign country, or for the personal use of any such person or of any member of his immediate family, *shall be admitted free of all duties and internal revenue taxes imposed upon or by reason of importation* (including taxes imposed by sections 3350 and 3360 of the Internal Revenue Code) *and of all customs charges and exactions*

Id. (emphasis added).

Section 3350(a) of the Internal Revenue Code provided for the levy, collection, and payment in the United States on articles imported from the Virgin Islands of "a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture," and 3350(b) made such articles exempt from the payment of "any tax imposed by the internal revenue of such islands." 26 U.S.C. § 3350 (codified as amended at 26 U.S.C. § 7652 (2002)). Section 3360 contained similar provisions with respect to articles from Puerto Rico. 26 U.S.C. § 3360 (codified as amended in scattered sections of 26 U.S.C., including 26 U.S.C. § 7652 (2002)).

> the United Nations stationed in this country.
>
> . . .
>
> The Secretary of Defense included this legislation in the legislative program of the National Military Establishment. The measure has been coordinated with the Departments of the Army, Navy, and Air Force, and with the Treasury Department.
>
> The Department of State in a communication to the Secretary of the Navy recommended that legislation of this character be sought. The Bureau of the Budget has interposed no objection to its enactment.

S. Rep. No. 81–685 (1949), *reprinted in* 1949 U.S.C.C.S. 1876, 1877 (the Senate Report repeats the substance of H. Rep. No. 81–833 (1949)) (emphasis added). Given the disproportionate benefit that would accrue to the United States across an number of reciprocal arrangements, Congress had every reason to craft a broad exemption. Tellingly, the exemption is to cover all Customs charges and exactions as well:

> Subsection (a) of this section would exempt from duties and internal revenue taxes imposed upon or by reason of importation or withdrawal from warehouse (including taxes imposed by secs. 3350 [7] and 3360 of the Internal Revenue Code upon articles coming into the United States from the Virgin Islands and Puerto Rico), and from *all customs charges and exactions*

Id. (emphasis added). Thus, Congress intended the broadest possible exemption from taxes, whether imposed as Customs duties, other charges, fees or taxes.

2. The Applicability of "Internal Revenue Tax" to the HMT

The broad language and reciprocal structure of the foreign military articles exemption are the critical factors in determining whether the exemption includes the HMT within the term "internal revenue tax." The obvious starting point for this inquiry is to note that both U.S. Note 3 and the HMT use the term "tax." When Congress enacted subheading 9809.00.30 in the HTSUS, the HMT was already codified in the Internal Revenue Code and referred to itself "as a tax both in its title and in its body." *Thomson Multimedia Inc. v. United States*, 340 F. 3d 1355, 1361 n.4 (2003); *see also United States v. United States Shoe Corp.*, 523 U.S. 360, 367 (1998) ("The HMT bears the indicia of a tax."). Although it is more important to "regard things rather than names," *United States Shoe*, 523 U.S. at 367 (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876)), the terminol-

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[7] *See* note 6 for a description of Sections 3350 and 3360.

ogy of the HMT and its location in the Internal Revenue Code are entirely consistent with that of an internal revenue tax.

In terms of substance, federal courts have determined, in some circumstances, that the HMT is either a tax or a measure bearing many of the features of a tax. *See United States Shoe*, 523 U.S. at 370 (HMT is a tax for purposes of the Export Clause of the Constitution); *Int'l Bus. Machs.*, 201 F.3d at 1372 (accepting, for purpose of analysis, that "both the structure and the content of the HMT point toward it being an internal revenue tax"); *Citgo*, 24 CIT at 334, 104 F. Supp. 2d at 107 (finding the HMT to be an "internal revenue tax" within the meaning of 19 U.S.C. § 1309(a)). It is unlikely that Congress would extend considerable privileges to foreign military articles—preventing the imposition of customs duties or any internal revenue tax imposed upon importation—and yet exclude an import-related measure that appears to be and has been held to be a tax in various contexts.

No court, however, has ruled yet on the precise issue of whether the HTSUS includes the HMT as one of the internal revenue taxes from which the articles of foreign armed forces are exempt. Prior cases do demonstrate that the meaning and effect of the HMT may only be ascertained through careful analysis of the textual provisions at issue, whether they be constitutional or statutory. Both *United States Shoe* and *Thomson Multimedia* analyzed constitutional challenges to the HMT by considering how Congress's power to impose flat and ad valorem charges varies according to the requirements of the constitutional provision at issue. *See United States Shoe*, 523 U.S. at 367–68; *Thomson Multimedia*, 340 F.3d at 1360–61. In *United States Shoe*, the Supreme Court determined that the HMT as applied to exports is a tax that violates the express prohibitions of the Export Clause of the Constitution. *United States Shoe*, 523 U.S. at 370. In contrast, *Thomson Multimedia* upheld the HMT as applied to imports because it did not run afoul of the less restrictive provisions of the Uniformity Clause. 340 F.3d at 1363–64 ("because the HMT as applied to imports and domestic unloadings is a valid user fee and not a tax, we hold that it is outside the scope of the *Uniformity Clause's* prohibitions"). *Thomson Multimedia* recognized that, because the Uniformity Clause is more tolerant of user fees than the Export Clause, the Uniformity Clause imposes fewer restrictions on Congress. Accordingly, the Federal Circuit applied the user fee test developed by *Massachusetts v. United States*, 435 U.S. 444, 464 (1978), with the understanding that it is much less strict than the standard set forth in *Pace v. Burgess*, 92 U.S. at 375, and applied in *United States Shoe*. *See Thomson Multimedia*, 340 F.3d at 1360–61.

The Government argues that the conclusion yielded by the *Massachusetts* test in *Thomson Multimedia*—that the HMT as applied to imports is a user fee and not a tax for purposes of the Uniformity

Clause—automatically defines the foreign military articles exemption in the HTSUS. The court cannot agree, heeding its duty to interpret a statute according to its language and context. *See Int'l Bus. Machs.*, 201 F.3d at 1372 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). What came to be known as the *Massachusetts* test did not originate as an all-purpose tool with which to define "tax" throughout the United States Code. Instead, it was originally crafted to determine whether a federal revenue measure abided by the dormant Commerce Clause, *see Evansville–Vanderburgh Airport Auth. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and later applied in the context of states' narrow constitutional immunity from taxation. *See Massachusetts*, 435 U.S. at 467. In these areas of constitutional jurisprudence, a revenue measure may be discussed as a tax and yet still be considered a constitutionally-valid user fee. Indeed, this was the case in *Massachusetts*. 435 U.S. at 467 (referring to the measure in question as a "tax" but nevertheless sustaining it as a user fee). In *Massachusetts*, the Supreme Court adhered to a "practical construction" of the limitations on the federal power to tax states rather than a strict taxonomy of revenue raising measures:

> this doctrine [of state tax immunity] does not inflexibly require the invalidation of any revenue measure that is labeled or operates as a tax. That [the statute at issue] is called or can be characterized as a "tax" thus possesses no talismanic significance. We observe, moreover, that Congress did regard [the statute at issue] as a user fee.

435 U.S. at 461 n.18. Over time, the *Massachusetts* test has been used in conjunction with various constitutional provisions where it was consonant with a given provision's restriction on Congress's power to impose user fees. *See, e.g.*, *United States v. Sperry Corp*, 493 U.S. 52, 60 (1989) (evaluating the ad valorem fee imposed upon awards from the Iran–United States Claims Tribunal under the Takings Clause); *Thomson Multimedia*, 340 F.3d at 1361 (Uniformity Clause); *Alamo Rent-A-Car, Inc. v. Palm Springs*, 955 F.2d 30, 30–31 (9th Cir. 1992) (Commerce Clause challenge to airport access road fee). Conversely, the *Massachusetts* test is inapplicable where the constitutional provision more strictly limits Congress' power to levy charges, as seen in the successful Export Clause challenge to the HMT in *United States Shoe*, 523 U.S. at 370.

There is no basis for extracting from this multi-textured landscape the overly-simplistic rule that a federal statute excludes the HMT whenever it uses the term "internal revenue tax," particularly where such a construction of the HTSUS will frustrate the intent of Congress as expressed in a particular statute and compromise the privileges enjoyed by U.S. armed forces abroad. Considering both the broad construction warranted by the reciprocal scheme of the HTSUS foreign military articles exemption and the fact that for

various constitutional and statutory purposes the HMT is a tax, the court determines that the HMT also is an "internal revenue tax" within the meaning of U.S. Note 3.

B. HMT is paid upon importation.

The next issue presented is whether the language "tax imposed *upon or by reason of importation*" in U.S. Note 3 limits the exemption so as to exclude HMT from its reach. U.S. Note 3 (emphasis added). In *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999), the drawback of HMT was not permitted because in the words of 19 U.S.C. § 1313(j)(2), HMT is not imposed "because of . . . importation." *Texport*, 185 F.3d at 1296. In U.S. Note 3, "by reason of importation" corresponds to "because of importation." As indicated in *Texport*, HMT is imposed "because of" port use. To avoid finding part of the statute redundant, "upon importation" as used in U.S. Note 3 must mean something more than "by reason of," as statutes should be interpreted to give meaning to every word. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Royal Thai Gov't v. United States*, No. 02–00026, Slip Op. 04–91 at 21 (Ct. Int'l Trade July 27, 2004).

Giving meaning to both relevant terms in U.S. Note 3, it becomes clear the HMT is imposed *upon importation* in the case of imported goods. 26 U.S.C. § 4461(c) refers specifically to imported goods. Section 4461(c)(2) differentiates between exported goods and all others because, without a specific provision, it would be unclear when taxes or duties are "imposed" on exported goods. Thus, under the statute, HMT is imposed on exported goods at the time of loading and on all other goods at the time of unloading. Unloading is part of the importation process. *See Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122 (1923) ("Importation . . . consists in bringing an article into a country from outside . . . regardless of the mode in which it is effected. Entry through a customs house is not of the essence of the act."). Unloading the merchandise is "importation" in this sense.[8]

CONCLUSION

The plain words of U.S. Note 3 to Chapter 98 of the HTSUS do not permit imposition of the HMT on goods of foreign military personnel reciprocally exempted from taxes and customs duties, charges and exactions. The applicable legislative history indicates that the words of U.S. Note 3 must be given this ordinary broad meaning to insure reciprocal rights to U.S. military personnel.

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[8] This is consistent with the definitional provisions of 19 C.F.R. § 101.1, which state in relevant part, " 'date of importation' means . . . the date on which the vessel arrives within the limits of a port in the United States with the intent then and there to unload such merchandise." *Id.*

ACCORDINGLY, the Government's motion is denied and Nippon Express's motion is granted. Judgment shall so enter.

Slip Op. 04–138

AUTOALLIANCE INTERNATIONAL, INC. Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 01–01070

[Defendant's Motion to Set Aside Entry of Default is granted.]

Dated: November 10, 2004

Baker & Hostetler, LLP (*Shelby F. Mitchell*), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, U.S. Department of Justice; *Saul Davis* and *Aimee Lee*, Civil Division, Commercial Litigation Branch, U.S. Department of Justice.

OPINION AND ORDER

Carman, Judge: Pursuant to United States Court of International Trade ("USCIT) Rule 55(c), the defendant, the United States, moved to set aside entry of default. Defendant argued inadvertence in its failure to file a timely answer to Plaintiff's Amended Complaint. Defendant had separately moved for leave to file out of time a motion for stay or extension of time and motion for extension of time prior to the entry of default. Plaintiff opposed Defendant's motion asserting that Defendant failed to demonstrate excusable neglect required to set aside the entry of default. This Court has jurisdiction to resolve this question under 28 U.S.C. § 1581(a). For the following reasons, Defendant's Motion to Set Aside Entry of Default is granted.

BACKGROUND

In 2001, Plaintiff, AutoAlliance International, Inc., filed a complaint asserting two causes of action, one related to value and the other related to the tariff classification of imported merchandise. In Slip Op. 02–137 (Nov. 22, 2002), this Court severed and dismissed the value advance claim for lack of subject matter jurisdiction but held subject matter jurisdiction for the classification claim. The latter claim remained on hold pending the parties' appeal of the subject matter jurisdiction decision. The Court of Appeals for the Federal Circuit upheld this Court's severance and dismissal of the valuation claim from Plaintiff's case. *AutoAlliance Int'l, Inc. v. United States*, 357 F.3d 1290 (Fed. Cir. 2004).

On May 28, 2004, Plaintiff filed an amended complaint. On June 18, 2004, Defendant filed a Consent Motion for an Extension of Time to answer Plaintiff's amended complaint, which was granted. In accordance with this Court's Order, Defendant's answer to Plaintiff's Amended Complaint was due on August 20, 2004. Defendant failed to file its answer or other responsive pleading by the deadline. Within two weeks following August 20, counsel for Defendant attempted to reach Plaintiff's counsel. (Def.'s Mot. to Set Aside Default at 2.) Plaintiff's counsel rejected Defendant's request for consent to file its answer out of time and for an extension of time. (*Id.*)

On September 9, 2004, Plaintiff filed a Request to Enter Default on Defendant. On September 10, 2004, Defendant filed a Motion for Leave to File Out of Time a Motion for Stay or Extension of Time and Motion for Extension of Time. On September 15, 2004, the Clerk of the Court of International Trade entered default against Defendant. On September 20, 2004, Defendant filed a Motion to Set Aside Entry of Default. On October 5, 2004, Plaintiff filed its Opposition to United States' Motion to Set Aside Entry of Default. Defendant's Motion to Set Aside Default is presently before this Court. Procedurally, Plaintiff has not filed a motion for judgment on the default.

STANDARD OF REVIEW

The standard of review when entertaining a motion to set aside an entry of default is set forth in the rules of this court. The Court may set aside an entry of default for "good cause shown." USCIT R. 55(c).[1] Courts have broad discretion in determining when the defaulting party has demonstrated sufficient "good cause" to set aside entry of default, especially when, as in this matter, default judgment has not been entered. *O'Connor v. State of Nevada*, 27 F.3d 357, 364 (9th Cir. 1994), citing *Mendoza v. Wight Vineyard Management*, 783 F. 2d 941, 945 (9th Cir. 1986); *see also* 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure*, Civil 3d, § 2693 (1998).

Although this Court encourages parties to abide by the prescribed rules and orders, defaults are viewed with disfavor. *Bluegrass Marine, Inc. v. Galena Road Gravel, Inc, et al.*, 211 F.R.D. 356, 357 (S.D. Ill. 2002). Default is a harsh penalty for noncompliance with procedural rules. Thus, courts prefer resolving disputes on their merits. *Id.; see also O'Connor*, 27 F.3d at 364. However, the judicial preference for a decision on the merits must be weighed against "considerations of social goals, justice and expediency." *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970). Nevertheless, the standards for setting aside entry of default are viewed liberally by the court, and

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[1] Court of International Trade rule mirrors Federal Rule of Civil Procedure 55(c). Thus, the cases interpreting Federal Rule of Civil Procedure are appropriate for discussing the Court of International Trade Rule.

doubts are resolved in favor of setting aside the default. *Medunic v. Lederer*, 533 F.2d 891 (3d Cir. 1976); *see also*, 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure*, Civil 3d, § 2693 (1998).

The moving party bears an especially high burden when seeking default judgment, the procedural step following entry of default, against the government. USCIT Rule 55(e) states that:

> No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

In interpreting Federal Rule of Civil Procedure 55(e), which is identical to this Court's rule (USCIT R. 55(e)), several courts have held and we have adopted that "default judgment against the government cannot be granted based simply on the failure to file within a prescribed deadline." *Syva Co. v. United States*, 12 CIT 199, 200 (1988) (citations omitted). When the government fails to plead or otherwise defend, courts usually decline to enter default or, if default has been entered, set it aside. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977); *see also*, 10A Charles Alan Wright *et al.*, *Federal Practice & Procedure*, Civil 3d, § 2702 (1998).

In interpreting the "good cause shown" standard of USCIT R. 55(c), this court recently adopted several factors to consider when entertaining a motion to set aside entry of default:

1. Good cause for the default;
2. Quick action to correct it; and
3. A meritorious defense to plaintiff's complaint.

Okaya (USA), Inc. v. United States, ___ CIT, Slip Op. 03–130 (Oct. 3, 2003) (citations omitted). In addition to or in lieu of the considerations cited above, other courts have looked to the following:

1. Length and reason for the delay;
2. Whether the defendant acted in good faith;
3. Whether the default was wilful;
4. Prejudice to nonmoving party due to the delay; and
5. A meritorious defense.

Id. When considering motions to set aside entry of default, federal courts have also looked to Federal Rule of Civil Procedure 60(b). *Okaya*, Slip Op. 03–130 at 13. A court may set aside a final (*e.g.*, default) judgment, upon - among other things - showing of mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P. 60(b). However, the guidelines of Rule 60(b) are applied more liberally when

judgment by default has not yet been entered. *Bluegrass Marine*, 211 F.R.D. at 358.

PARTIES' CONTENTIONS

A. *Plaintiff's Contentions*

Plaintiff contends that Defendant has not met its burden to establish that its failure to file a timely response to Plaintiff's Amended Complaint was the result of "excusable neglect." (Pl.'s Opp'n to United States Mot. to Set Aside Entry of Default at 4.) In support of its position, Plaintiff cited several cases in which counsel's overburdened schedules, failures to file timely papers, and oversight were not found by the courts to be sufficient grounds to set aside default. (*Id.* at 2, citing *Ceramica Regiomontana, S.A., v. United States*, 8 CIT 309 (1984); *McLaughlin v. LaGrange*, 662 F.2d 1385 (11th Cir. 1981); *Gadsen v. Jones Lang LaSalle Americas, Inc.*, 210 F. Supp. 2d 430 (S.D.N.Y. 2002).) Likening the facts of the present matter to those in the cases it cited, Plaintiff propounded that this Court must not grant Defendant's motion to set aside the entry of default. (Pl.'s Opp'n to United States Mot. to Set Aside Entry of Default at 2–3.) Plaintiff also asserted that it will be prejudiced if Defendant's motion is granted (*id.* at 4) although it failed to specify how. Lastly, Plaintiff claims that Defendant has not "even attempted to demonstrate that it has a meritorious defense to Plaintiff's claims." (*Id.* at 4.)

B. *Defendant's Contentions*

Defendant acknowledged that its answer was not timely filed. In its motion, Defendant explained that the failure was the result of turnover in the office, a large number of active cases, numerous other pressing matters, and failure of the internal tickler system. (Def.'s Mot. to Set Aside Entry of Default at 1–2.) Upon realizing the error, Defendant's counsel attempted to contact Plaintiff's counsel to request a consent motion to file its response out of time. (*Id.* at 2.) By the time Defendant's counsel and Plaintiff's counsel conferred, some twenty days after Defendant's response was due, Plaintiff's counsel had already requested that the Clerk of this Court enter default against Defendant. (*Id.*) Within three days after Plaintiff's request for default, Defendant's counsel filed a Motion for Leave to File Out of Time a Motion for Stay or Extension of Time and Motion for Extension of Time. (*Id.*) Defendant filed its Motion to Set Aside the Default five days after entry of default by the Clerk. Further, Defendant alleged in its Motion to Set Aside Entry of Default that this Court lacks jurisdiction over claims made in Plaintiff's Amended Complaint. (*Id.* at 3.) Defendant averred that this Court cannot enter default judgment for matters over which it lacks jurisdiction. (*Id.*)

ANALYSIS

The issue before this Court is whether Defendant has met its burden to establish "good cause" for its failure to plead or otherwise respond to Plaintiff's Amended Complaint. For the following reasons, this Court finds that it has.

The court is not persuaded by the cases Plaintiff cited. Except for *Lasky*, which Plaintiff only cited for the proposition of the factors the court should consider in setting aside an entry of default, Plaintiff's cases all discuss and rely on a rule not at issue before this Court– Federal Rule of Civil Procedure 6(b). Thus, not only are the cases distinguishable because none involves default by the government, but they are also not relevant to the disposition of this matter and need not be addressed by the Court.

This Court acknowledges for every case posing a similar fact pattern where the court granted the moving party's request to set aside entry of default, Plaintiff could have found cases where the court denied setting aside the entry of default.[2] The number of cases both for and against setting aside entry of default evinces the "broad discretion" judges have when entertaining such motions. *Bluegrass Marine*, 211 F.R.D. at 358.

In addition, Plaintiff relied on an "excusable neglect" standard that does not directly apply in this matter. The Court acknowledges that "excusable neglect" is a factor in decisions under USCIT Rules 6(b) and 60(b). While Federal courts have looked for guidance to the factors for setting aside a judgment under Federal Rule of Civil Procedure 60(b), *Okaya*, Slip Op. 03–130 at 13, the equivalent USCIT Rule 60(b) is not at issue in this matter. This case is decided under the "good cause shown" standard of USCIT Rule 55(c) and the factors delineated previously by this Court and others in determining whether that standard has been met, specifically:

1. Good cause for the default;
2. Quick action to correct it; and
3. A meritorious defense to plaintiff's complaint.

Okaya, Slip Op. 03–130 (CIT 2003).

Exercising its broad discretion in this matter and recognizing Plaintiff's considerable burden in seeking default against the United States, *see, e.g.*, *Jorden v. National Guard Bureau*, 877 F.2d 245, 251 (3rd Cir. 1989), this Court finds that Defendant demonstrated good cause for its failure to timely file a response to Plaintiff's Amended Complaint. Defendant's failure to file a timely answer is not alleged to have been and does not appear to have been in bad faith, wilful, or

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[2] See *Bluegrass Marine*, 211 F.R.D. at 358 and cases cited therein.

more than inadvertent error. Upon discovering the lapse, Defendant quickly contacted Plaintiff's counsel to request an agreed motion to file out of time. Plaintiff's counsel failed to personally discuss the request with Defendant's counsel prior to filing Plaintiff's request to enter default against Defendant. Lastly, Defendant has alleged a meritorious defense to at least some claims raised in Plaintiff's Amended Complaint. Defendant claimed in it's Motion to Set Aside Entry of Default that this Court lacks jurisdiction over some of Plaintiff's claims, which were severed and dismissed by this Court in an earlier ruling. The court has an obligation to determine whether it has subject matter jurisdiction over the matters before it, and "subject matter jurisdiction may be challenged at any time." *Okaya*, Slip Op. 03–130 at 8–9; *see also Syva*, 12 CIT at 200.

This Court notes that any prejudice to Plaintiff is merely a slight delay in the proceedings. Were this Court to deny Defendant's motion, USCIT Rule 55(e) would nonetheless require Plaintiff to establish its claim or right to relief. In addition, given the judicial preference to decide cases on their merits and to resolve doubt in motions to set aside default in favor of the moving party, *O'Connor*, 27 F. 3d at 364, this Court finds that Defendant has satisfied its obligation to show "good cause" for setting aside the entry of default.

CONCLUSION

Upon consideration of Defendant's Motion to Set Aside Entry of Default and Plaintiff's Opposition thereto, Defendant's Motion is granted.