

Decisions of the United States Court of International Trade

Slip Op. 06–164

UNITED STATES, Plaintiff, v. XL SPECIALTY INSURANCE COMPANY, Defendant.

Court No. 06–00131

[Defendant's motion for a stay pending outcome of related proceedings denied.]

Dated: November 9, 2006

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sean B. McNamara*); and Office of Assistant Chief Counsel, U.S. Customs and Border Protection (*Kevin M. Green*), of counsel, for the plaintiff.

Sandler, Travis & Rosenberg and Glad & Ferguson, P.C. (T. Randolph Ferguson) for the defendant.

Opinion & Order

AQUILINO, Senior Judge: Plaintiff's complaint, filed pursuant to 19 U.S.C. §1592(d) and 28 U.S.C. §1582, prays for recovery of duties upon a continuous entry bond executed by Intercargo Insurance Company, n/k/a XL Specialty Insurance Company, per Customs Form 301 on behalf of Dell Products LP and Dell Computer Corporation. It prays for \$1,558,049.79 alleged to have not been paid due to entries

. . . 13. . . into the commerce of the United States by means of materially false documents, markings, written or oral statements, acts and/or omissions by Dell. Specifically, the entry documents misdescribed the merchandise and provided an incorrect tariff classification.

* * *

15. The false statements, acts, and/or omissions referred to . . . were material because they prevented and/or had the potential to prevent [] Customs . . . from applying the correct du-

liable rate to the shipments, thereby causing the United States to suffer an actual loss of revenue. . . .

16. The material false statements, acts and/or omissions . . . were the result of fraud, and/or gross negligence, and/or negligence on the part of XL's insured, Dell, in violation of 19 U.S.C. §1592(a)(1), which deprived the United States of lawful duties. . . .

17. Pursuant to 19 U.S.C. §1592(d), XL, as surety, is liable for the duties owed the United States on the entries identified. . . .

I

The defendant has responded by filing a Motion to Stay Pending Outcome of Administrative Proceedings. It describes Dell's merchandise as "notebook computers from Malaysia . . . [that] contain[] one battery encased in the notebook housing. . . ."

. . . After entry for consumption, the notebooks are admitted into a foreign trade zone ("FTZ") in domestic status. Within the FTZ, the notebook is unpacked, and placed into a larger box with other items ordered by the purchaser for use with the notebook. These other items could include operational manuals, a power adapter, and any additional items the customer has purchased. Some customers purchase an additional battery for the notebook. In some cases the advertised price of a notebook includes the additional battery. Even in those cases, where the listed price includes an additional battery, if the customer does not want to purchase the additional battery, it can be deleted from the order and the price is adjusted accordingly, and the customer can choose other features of the advertised laptop. In order to fill a customer order, the ordered items are pulled and placed in a box. . . . There are no prepackaged goods ready to be shipped without subsequent repacking. The boxed merchandise is then withdrawn from the FTZ and shipped to the customer. . . .

The additional batteries are imported and are not entered for consumption in the U.S. and are admitted into the FTZ in non privileged foreign status. According to the importer, the additional battery is used as an additional power source by customers that need longer battery life than that supplied by the primary battery encased in the notebook. The additional battery is designed to fit into the same battery slot as the primary battery, and cannot be used with other types of Dell laptops, with other brands of laptops, or with any other equipment. The importer also sells the batteries admitted into the FTZ individually.

Affidavit of David M. Murphy in Support of Defendant's Motion to Stay, Exhibit A, pp. 1–2 (HQ 967364 (Dec. 23, 2004)). Pursuant to request for an “internal advice” from the headquarters of the Bureau of Customs and Border Protection (“CBP”), the additional lithium-ion batteries were held separately dutiable under HTSUS subheading 8507.80.80. *See generally id.* And CBP began thereafter liquidating such entries pursuant thereto. It also commenced this action to collect those duties that had not been tendered on those entries, which were liquidated prior to the headquarters ruling. *Cf.* Complaint, Exhibit B.

Defendant's motion points to the importer's protests of the CBP liquidations under subheading 8504.80.80, which, at the time of its filing, apparently had not been acted upon by the agency. Whereupon it states:

... Until the correctness of the importer's classification at the time of entry is determined, either by Customs in its administrative resolution of the protest in favor of the importer, or by this Court in a separate action maintained by the importer contesting denial of the importer's protest, the importer in this case cannot be shown to have engaged in any conduct that violates 19 U.S.C. §1592(a).

A

Defendant's motion cites *Pentax Corp. v. Robison*, 125 F.3d 1457 (Fed.Cir. 1997), and *United States v. Blum*, 858 F.2d 1566 (Fed.Cir. 1988), for the proposition that, if there has been no violation of 19 U.S.C. §1592(a), there can be no collection of duties under 19 U.S.C. §1592(d). Of course, such violation must be established for there to be any such collection, but it does not necessarily follow that that predicate be established in an action between the government and the importer. That is, *Blum* held there to be a direct cause of action against a surety for recovery of lost duties due to violation of section 1592(a), which is this matter at bar. The government is not foreclosed from commencing this kind of action first. To be sure, when it does so, it bears the burden of proving such violation of the statute, just as it does in any action brought by it against an importer pursuant to 19 U.S.C. §1592.

B

As indicated, the crux of defendant's instant motion is that its importer, Dell, has taken and will take steps to defend itself. At the time of filing, they were administrative. Now, the CIT docket reflects the commencement of an action, No. 06–00306, against the government *sub nom. Dell Products LP v. United States*. The complaint contests in four counts CBP's “improper classification, under subheading 8507.80.80, HTSUS, of batteries that are components of Dell

computers”, albeit covering separate entries from those at issue here. That this new action and the one against the surety are inter-related is obvious. But, their postures and responsibilities differ. In the more recent matter, Dell has the burden of prosecution and persuasion. In the former, that burden is on the plaintiff government.

Be their array and concomitant burdens as they may, the

suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Landis v. North American Co., 299 U.S. 248, 255 (1936). In other words, a movant must “make a strong showing” that a stay is necessary and that “the disadvantageous effect on others would be clearly outweighed.” *Commodity Futures Trading Comm’n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983). This the movant surety has not done herein, presumably because it is not able to do so.

II

In thus hereby necessarily denying* defendant’s Motion to Stay Pending Outcome of Administrative Proceedings, the court can confirm its confidence that this and its related action can and will nonetheless proceed to final resolution without needless, duplicative litigation.

So ordered.

Slip Op. 06–165

MOTOROLA, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 01–00126

Held: Plaintiff’s motion for summary judgment denied. Defendant’s cross-motion for summary judgment granted. Final judgment entered for Defendant.

November 13, 2006

**Cf. United States v. Aegis Security Ins. Co.*, 29 CIT _____, 398 F.Supp.2d 1354 (2005). Given the quality of the written submissions on both sides, defendant’s motion for oral argument can be, and it hereby is, also denied.

Pisani & Roll, (Michael E. Roll) (Mark S. Zolno, of counsel) for Motorola, Inc., Plaintiff.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Amy M. Rubin, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel, Chi S. Choy, Office of the Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, for the United States, Defendant.

OPINION

TSOUCALAS, Senior Judge: This case is before the Court pursuant to a remand ordered by the United States Court of Appeals for the Federal Circuit (“CAFC”) in *Motorola, Inc. v. United States*, 436 F.3d 1357 (Fed. Cir. 2006)(“*Motorola II*”). Therein, the CAFC mandated that this Court determine “whether either the 900 ‘bypass’ entries or the PRLs [preclassification ruling letters] constituted ‘treatment’ within the meaning of section 1625(c)(2), as interpreted in light of 19 C.F.R. § 177.12(c)(1)(ii).” *Id.* at 1368. Thus, on remand, this Court will address whether the “entries at issue in this case were processed without review or examination by Customs, and thus fall within the scope of the regulation. . . .” *Id.* at 1367. For the reasons set forth below, the Court enters judgment for the United States (“Customs” or “Defendant”).

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a)(2000).

DISCUSSION

I. Background

The facts of this case have been set forth in the prior decisions of the CAFC and this Court. *See Motorola II*, 436 F.3d 1357; *Motorola, Inc. v. United States*, 28 CIT ___, ___, 350 F. Supp. 2d 1057 (2004)(“*Motorola I*”).¹ The facts and procedural history relevant to the instant inquiry are as follows.

The merchandise initially at issue in *Motorola I*, was eight models of circuits used in battery packs for Motorola cellular phones, entered between January and June of 1998. *See Motorola II*, 436 F.3d at 1358. Motorola, Inc. (“Plaintiff” or “Motorola”) declared these entries to be duty free, classifiable as “hybrid integrated circuits” under subheading 8542.40.00 of the Harmonized Tariff Schedule of the United States (“HTSUS”). *See id.* In October 2000, the United States Customs Service² rejected Motorola’s proposed classification and liq-

¹ Familiarity with both of these decisions is presumed.

² The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108-32 (2003).

liquidated the merchandise under HTSUS subheading 8536.30.80, subject to a duty rate of 3.2 percent *ad valorem*. *Id.* Customs based this decision on Headquarters Ruling (“HQ”) 961050, issued on May 1, 2000, in response to an earlier protest by Motorola concerning different circuits.³ *See id.* HQ 961050 reflected that certain Motorola circuits were classifiable under HTSUS subheading 8536.30.80. *See* HQ 961050 (May 1, 2000). At the time HQ 961050 was issued, Motorola had entered the contested circuits under HTSUS subheading 8542.40.00. *See Motorola II*, 436 F.3d at 1358. Customs, however, had not yet liquidated those entries, and thus was able to liquidate them under HTSUS subheading 8536.30.80. Plaintiff protested the classification, and Customs denied in full. *Id.* Thereafter, Motorola filed an action in this Court, the decision of which was appealed to the CAFC. *Id.*

In *Motorola II*, the Federal Circuit affirmed this Court’s finding that the contested circuits are classifiable under HTSUS subheading 8536.30.80, not under 8542.40.00. *See id.* at 1368. The CAFC also affirmed this Court’s holding that four of the eight contested circuits were not “substantially identical” to the circuit models that Customs liquidated on bypass. *Id.*

This remand, however, concerns more than 900 entries of circuits entered duty free through Customs’ bypass procedure, and entries made pursuant to the two preclassification ruling letters (“PRLs”). The liquidation of these entries is relevant because Plaintiff contends that Customs violated the notice and comment provisions of 19 U.S.C. § 1625(c)(2000) (“the statute”) when it issued HQ 961050. *See* Pl.’s Mem. Law Remand (“Pl.’s Mem.”) at 1–3. This statute requires that Customs publish for notice and comment, any interpretative ruling or decision that would “have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions[.]” 19 U.S.C. § 1625(c).

In 1992 and 1994, Customs issued two PRLs to Motorola. A PRL is a letter from Customs to the requesting party, advising the party of how the merchandise specified therein, will be classified upon entry. *See Motorola II*, 436 F.3d at 1362; *see also* 19 C.F.R. § 177.1, 177.2(a)(2006). In both letters sent to Motorola, Customs classified each part number specified in the PRL request under HTSUS subheading 8542.20.00, the predecessor to the current subheading 8542.40.00. Both subheading 8542.20.00 and its successor, provide for duty free entry into the United States. *See Motorola II*, 436 F.3d at 1362.

³In 1996 the Customs Port Director in Chicago reviewed 92 of the 900 bypass entries and determined that they should be classified under a different HTSUS subheading, not providing for duty free entry. After Customs liquidated the 92 entries under the new subheading and with duty, Motorola protested. In response, Customs issued HQ 961050. *See Motorola I*, 350 F. Supp. 2d at 1060.

Then, between 1995 and 1997, Motorola made over 900 entries of circuits (“bypass entries”) pursuant to Customs’ bypass procedures. *See id.* Customs liquidated the majority of these entries duty free under HTSUS subheading 8542.40.00. *See id.*

Motorola contends that the issuance of the two PRLs, and the liquidation of the bypass entries each established a “treatment” that could only be modified in accordance with the notice and comment provisions of § 1625(c)(2). *See* Pl.’s Mem. at 3–10. On remand, the remaining issue, then, is whether the particular bypass entries at issue, or the goods imported pursuant to the PRLs were subject to “treatment” by Customs.

II. The Liquidation of the Bypass Entries at Issue Does Not Constitute Treatment Within the Meaning of 19 U.S.C. § 1625(c)(2) and 19 C.F.R. § 177.12(c)(1)(ii)

First at issue is whether the entries liquidated under Customs’ bypass procedures were subject to “treatment” for purposes of 19 U.S.C. § 1625(c). In *Motorola II*, the CAFC vacated this Court’s finding that the term “treatment” in § 1625(c)(2) was unambiguous, and thus, not entitled to *Chevron* deference. *See Motorola II*, 436 F.3d at 1365–68. Instead, the CAFC found that the word treatment is ambiguous, and that 19 C.F.R. § 177.12(c)(1)(ii) (“the regulation”) contains a permissible construction of the statute, entitled to *Chevron* deference. *Id.* As result, on remand, this Court revisits its analysis of treatment in light of § 177.12(c)(1)(ii). *Id.* at 1367.

As will be discussed *infra*, whether treatment has occurred depends upon the degree of review or examination by Customs. Accordingly, the CAFC directed that this Court address “whether the particular bypass entries at issue . . . were processed without review or examination by Customs, and thus f[e]ll within the scope of the regulation, or whether the goods were examined or the entries otherwise reviewed in a manner that would take them out of the reach of the regulation.” *Id.*

A. Contentions of the Parties

Motorola contends that the liquidation of the bypass entries qualifies as treatment under § 177.12(c)(2)(ii). *See* Pl.’s Mem. at 4. Specifically, it argues that Customs reviewed Motorola’s bypass entries, and that the “Customs’ Rule 30(b)(6) agent . . . confirmed that Customs *actually reviewed* entries put on bypass” *Id.* at 5 (emphasis in original). Motorola maintains that Customs has a “detailed procedure” for determining which entries are placed on bypass status. Inherent in this decision, Plaintiff claims, is a review of the entries in

order to select which entries will be processed through bypass.⁴ *Id.* at 5–6.

Customs responds that Motorola has failed to demonstrate that its bypass entries establish a treatment. *See* Def.'s Resp. Pl. Mem. Law Remand ("Def.'s Mem.") at 4–14. It sets forth several arguments as to why Plaintiff's proffered evidence does not support a finding that the entries at issue were reviewed. *See id.* For all that Motorola offers in support of its position, Customs' conclusion is the same: although Motorola's evidence may tend to show that there may have been some sort of review-like function of bypass entries, it is not the type of review that constitutes treatment, and there is no evidence that the particular entries at issue were actually reviewed.⁵ The Court finds Customs' arguments to be convincing.

B. Analysis

a. Statutory and Regulatory Framework

The starting point of the Court's analysis is § 1625(c). This provision provides that:

A proposed interpretive ruling or decision which would –

- (1) modify (other than to correct a clerical error) or revoke a prior interpretative ruling or decision which has been in effect for at least 60 days; or
- (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30–day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625(c). Relevant to the instant matter, is the interpre-

⁴In its memorandum, although noting its perceived connection between the PRLs and the bypass entries, Plaintiff itself analyzes the bypass entries and PRLs separately. *See* Pl.'s Mem. at 9. During oral argument, however, counsel for Plaintiff set forth argument urging the Court to determine whether there had been treatment based on the PRLs and 900 bypass entries taken together. *See generally* Trans. Oral Arg. Oct. 27, 2006. The Court finds this argument unconvincing.

⁵As the Court concurs with the majority of Customs' arguments it does not needlessly reiterate them in its opinion.

tation and application of subsection (c)(2) of the statute. To establish a violation of § 1625(c)(2), Plaintiff must show that: (1) an interpretative ruling or decision; (2) effectively modified; (3) a “treatment” previously accorded by Customs to “substantially identical transactions;” and (4) the interpretative ruling or decision had not been subject to the notice and comment process set forth in § 1625(c)(2).⁶ See *id.*; see also *Arbor Foods, Inc. v. United States*, 30 CIT ____, Slip Op. 06–74 at 8 (May 17, 2006) (not published in the Federal Supplement); *Precision Speciality Metals, Inc. v. United States*, 24 CIT 1016, 1040, 116 F. Supp. 2d 1350, 1374 (2000).

Because neither the statute, nor its legislative history define “treatment,” in the past this Court has applied its ordinary meaning. See *Precision Speciality Metals*, 24 CIT at 1042, 116 F. Supp. 2d at 1376. In *Precision Specialty Metals*, the Court found that the term treatment denotes a consistent pattern of actions by Customs, and allows importers to order their behavior based on these prior actions. *Id.* at 1044 (holding that “importers may order their actions based not only on Customs’ formal policy, ‘position,’ ‘ruling,’ or ‘decision,’ but on its prior actions.”). In *Motorola II*, however, although the CAFC found this definition to be a useful “starting point,” it indicated that it, alone, did not answer the question presented herein, i.e., what degree of action constitutes treatment, and is sufficient to bind Customs. See *Motorola II*, 436 F.3d at 1365. (defining the issue as whether “bypass entries of the sort at issue in this case involve a sufficient degree of action by Customs to constitute “treatment.”). Instead, the Court found that the term treatment in § 1625(c)(2) is ambiguous, and that 19 C.F.R. § 177.12(c)(1)(ii) contains a permissible construction of the statute entitled to *Chevron* deference. *Id.* at 1366. (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

In order to reach its conclusion, the *Motorola II* Court engaged in *Chevron* analysis and explained that:

When Customs liquidates bypass entries without inspecting the goods, it may be said to have ‘acted’ in the sense that it has chosen not to scrutinize the entries more closely, but it is not clear on the face of the statute that Customs has ‘treated’ the goods as being what the importer says they are. The question of what degree of action (as opposed to acquiescence) is sufficient to bind Customs is not an issue that Congress directly addressed.

Id. As a result, the Court held that the word treatment is ambiguous and proceeded to the second step of the *Chevron* analysis. *Id.* *Chev-*

⁶It is undisputed that HQ 961050 is an interpretative ruling or decision, and that it was not published in the Customs Bulletin.

ron requires that the court determine whether the agency's answer to the question presented, here § 177.12(c)(1)(ii), is based on a permissible construction of the statute. *See, Chevron*, 467 U.S. at 843. The CAFC indicated that, "[t]urning to the text of the regulation itself, we believe that the agency's answer to the specific question at issue is a reasonable and permissible construction of the statute." *Motorola II*, 436 F.3d at 1366. It found that it "is reasonable to conclude that goods which are admitted pursuant to representations by the importer *and* are not independently examined or reviewed . . . are not "treated" by Customs. . . ." *Id.* (emphasis added). Because the CAFC found Customs' interpretation of the word treatment to be reasonable, this Court may not substitute its own construction of the statutory provision. *See Chevron*, 467 U.S. at 843. As a result, the Court revisits its analysis of the word treatment, with the regulation as a guide.

The regulation, entitled "Treatment previously accorded to substantially identical transactions," provides, in relevant part, that:

- (ii) The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors. In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise . . . by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations. For purposes of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or values, and Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review[.]

§ 177.12(c)(1)(ii). Thus, in order to discern whether treatment has occurred, Customs must determine: (1) whether there was an examination of the entries; *or* (2) the extent to which the entries were otherwise reviewed to determine the proper application of the Customs laws and regulations. *Id.* Whether the review or examination constitutes treatment, however, is a matter of degree. *See Motorola II*, 436 F.3d at 1365. The analysis of whether treatment has occurred, therefore, is both qualitative and quantitative.

In determining whether treatment has occurred, the regulation also specifies which transactions Customs will accord diminished, or no weight, and will thereby disqualify from constituting a treatment. Section 177.12(c)(1)(ii) instructs that "[f]or purposes of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or val-

ues. . . .” § 177.12(c)(1)(ii). It further directs that Customs “give no weight whatsoever to . . . entries and transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review[.]” *Id.* In other words, for an entry or transaction to be totally disregarded it is not sufficient that the entries be processed to expedite commercial interests; there must also be an absence of examination or review.

Lastly, the regulation instructs that to qualify as treatment, the purpose of the review must be in order to “determine the proper application of the Customs laws and regulations.” *See id.*

b. Application of “Treatment” in Light of § 177.12(c)(1)(ii)

As discussed *supra*, the CAFC found that “the admission of entries expeditiously and without examination or Customs officer review does not constitute treatment within the meaning of section 1625(c)(2).” *Motorola II*, 436 F.3d at 1367 (internal quotations omitted). It is undisputed that entries subject to Customs’ bypass procedure are processed expeditiously, in the interest of commercial facilitation and accommodation. *See G & R Produce Co., v. United States*, 27 CIT ___, ___, 281 F. Supp. 2d 1323, 1333–34 (2003) (“ Customs uses its bypass procedure to manage its workload. . . . Customs elected to place entries . . . on bypass for its own convenience. . . .”). As a result, in order to prove the existence of a treatment and thereby prevail, Motorola need only demonstrate that a Customs Official examined or reviewed the particular entries to a sufficient enough degree. *See Notice of Proposed Rulemaking*, 66 Fed. Reg. 37,370, 37,375 (Dep’t Treasury July 17, 2001) (“the burden of proving the existence of a treatment is on the person claiming the treatment.”). Specifically, it is incumbent upon Motorola to demonstrate both that the particular entries fall within the general rule of the regulation, and that the limiting language of the regulation does not apply to the entries at issue. *See* § 177.12(c)(1)(ii)(giving “diminished” or “no” weight to certain entries or transactions.).

The disposition of this issue, then, turns on whether there has been sufficient examination or review by Customs. Neither the statute nor the regulation, however, define these terms. A basic principle of statutory construction is that a Court will give an undefined term its “ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42, (1979). A dictionary is an appropriate resource for gleaning that ordinary meaning. *See Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994); *see also Best Power Tech Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) (“It is a basic principle of statutory interpretation, however, that undefined terms in a statute are deemed to have their ordinary understood meaning. For that meaning, we look to the dictionary.”) (citation omitted). Rules of statutory construction are similarly applicable to the Code of Federal Regulations, interpreting a statute.

See *Harak v. United States*, 30 CIT ____ , ____ , Slip Op. 06–106 at 28 (July 18, 2006)(not published in the Federal Supplement) (applying the “cannons of statutory construction [to] the regulation at issue.”).

Black’s Law Dictionary defines review as “consideration, inspection, or reexamination of a subject or thing.” *Black’s Law Dictionary* 1345 (8th ed. 2004). Similarly, Webster’s defines review as “to study or examine again; to consider retrospectively.” *Webster’s II New Riverside University Dictionary* 1006 (Riverside Publishing Company 1994). “Examination” is defined as an “investigation; search; inspection[.]” See *Black’s Law Dictionary* 557 (6th ed. 1990). Webster’s Dictionary defines “examine” as “to inspect in detail[;] to analyze or observe carefully; to question formally.” *Webster’s*, 449. In determining whether the bypass entries were reviewed or examined, and thereby received treatment, the Court applies these common, ordinary dictionary definitions.

In an effort to demonstrate that its bypass entries were processed with review or examination, Plaintiff relies upon various Customs sources. In order to fully understand both Plaintiff and Defendant’s arguments, however, the Court first sets forth a summary of the relevant bypass procedure, as laid out in Customs’ Directive 3550–26 (“Directive”). See generally Directive 3550–26 (Dep’t of Commerce Sept. 8, 1987). As an initial matter, the Directive pertains to “primary” or “pure” bypass. See Directive ¶ 3. Moreover, at that time, a manual bypass system was in operation.⁷ *Id.* ¶ 2.

Entry summaries are subject to a process known as “entry segregation.” See Directive ¶¶ 3, 4.A & B. Entry segregation occurs at the entry level but “prior to the import specialist review.” *Id.* ¶ 4.B. During entry segregation, entries are sorted by entry unit personnel in accordance with a criteria list based on data contained in Customs Form (“CF”) 7501. *Id.* The criteria list “delineates the entries that will *not* be bypassed.” *Id.* ¶ 4.A (emphasis added). Indeed, the criteria list is a default to bypass.⁸ In other words, any type of entry sum-

⁷The June 12, 1981 Headquarters Manual Supplement number 3500–02 established national guidelines for implementation of a manual entry selection system or bypass. See Directive ¶ 2. The 1987 Directive established “a uniform national procedure for processing entries under the current manual entry selection procedures.” *Id.* ¶ 2. This manual system, however, was an interim procedure. As summary selectivity was implemented, an automated bypass supplanted the manual procedure. At the time the Directive was written, however, manual bypass was “the only viable bypass system,” and the Directive pertained solely to the manual bypass procedure. See *Id.* ¶¶ 1, 2.

⁸The following entry categories are not forwarded to bypass:

- Absolute Quota and/or Visa
- Steel Requiring SSSI
- Antidumping Duty Actions
- Countervailing Duty Actions
- Significant Trade Issues
- Headquarters Directed Actions.

See Directive ¶ 4.A.

mary *not* falling within the criteria on the list receives bypass processing; any entry category meeting the criteria is not forwarded to bypass. The soundness and integrity of this criteria is ensured by regional and district managers through a review of a random sample of the entries processed through bypass. *See Id.* ¶ 4.C. This check is performed after bypass processing. *Id.* Once the entries have been sorted for bypass processing, the Entry Aids verify the presence of the following on the CF 7501: Importer; TSUSA (the predecessor to HTSUS); Country of Origin; Value; and Signature or Approved Facsimile on CF 7501. *Id.* ¶ 4.B. Absence of any of these data elements result in the entry being routed through the Entry Officer for any appropriate action under the broker compliance program. *Id.* No other data is verified. *Id.* Once an entry is deemed eligible for bypass, it undergoes immediate liquidation processing. *Id.*

With this framework in mind, the Court addresses Plaintiff's contentions. First, Motorola urges that "this Court . . . reach the same result as in its original decision [finding that the bypass entries were treated] because Customs reviewed Motorola's bypass entries." Pl.'s Mem. at 5. In support of its position, Motorola first relies upon deposition testimony taken from a Customs Rule 30(b)(6) agent ("Agent Dep."). *Id.* at 5 (citing to Deposition of John Elkins at 26). Motorola quotes the following testimony, which it purports buttresses its conclusion that "Customs actually reviews entries put on bypass":

Q: So Customs doesn't look at the shipment or the paperwork on bypass entries. Is that –

A: Quite often they don't, yes, other than for a periodic maybe verification, an audit spot check type of thing that happens, a quality-assurance type function. That would be the only way they would look at it, unless there was some specific allegation that somebody was doing something wrong with their merchandise that was on bypass.

Id. (citing Agent Dep. at 26).

The Court interprets the Agent's testimony differently than Motorola, and finds that it detracts from, rather than supports Motorola's claim. The question posed to the Agent was whether Customs "looks at" the bypass shipment or paperwork. The Agent responded that "quite often" Customs *does not*, "other than for a periodic . . . audit spot check type of thing." *Id.* This response indicates to the Court that most often, Customs does not "look," let alone review, the bypass entries' shipment or paperwork. Thus, the Agent's testimony cannot be properly viewed as supporting the conclusion that Customs "reviews" the bypass entries. Assuming *arguendo* that the agent does "look" at the entries, a look does not rise to the level of review, i.e., a "consideration," or "inspection." The "audit spot check type of thing" referenced by the Agent appears to be the exception, rather than the norm. Indeed, the Agent characterized the au-

dit as “periodic.” *Id.* Moreover, if and when this periodic check does occur, its purpose is not for determining the proper application of the Customs laws and regulations, as is required by the regulation, but instead for a “quality assurance type function.” *Id.* Motorola characterizes this function as “spot checks” and claims that they are “central to the bypass program.” *Id.* Motorola cites no authority in support this proposition. The Court, however, finds testimony relevant to these “checks.” *See* Pl.’s Mem., Ex. A at 26 (Agent Dep.). The Agent Deposition reflects that “there is no checking. The documentation is all accepted electronically. There is no paperwork. It is a mutual trusting relationship that exists.” *Id.* Although, Motorola claims that the “checks” are integral to the bypass program, the Court finds that the Agent’s testimony suggests otherwise.

Next, Motorola relies upon Customs Directive 3550–26. Pl.’s Mem. at 6 (citing Directive ¶3, 4). According to Plaintiff, the Directive instructs that Customs sort all entries for possible placement on bypass status based on certain criteria, “including tariff classification.” *Id.* (“[C]lassification is one of the criteria used to determine whether to place an entry on bypass status.”). Despite Plaintiff’s assertion, the Directive indicates that the criteria “delineates those entries which *cannot* be processed through bypass.” Directive ¶3 (emphasis added). Although the Directive states that the criteria will be “based upon data found on the CF 7501,” it does not list tariff classification as one of the criterion.⁹

Motorola also relies upon the Directive for the proposition that Customs’ managers review a “random sample, generally 2 to 10 percent” of entries placed on bypass to “ensure . . . the integrity and soundness of criteria used to identify bypass entr[ies].” Pl.’s Mem. at 6 (quoting Directive ¶ 4.C). This, Motorola contends, rebuts Customs’ claim that it never reviewed Motorola’s entries because they were on bypass, when “between 2 to 10 percent of [its] entries were, in fact, reviewed by Customs for classification accuracy.” *Id.* at 7. The Court finds Motorola’s argument unconvincing.

The cited paragraph of the Directive, entitled “Bypass Review,” reflects the following:

Regional and district managers will ensure that the integrity and soundness of criteria used to identify bypass entry summaries are maintained. They will accomplish this through a review of a random sample, generally 2 to 10 percent, of the entry summaries processed through bypass. . . . The import specialist

⁹The Court notes that a reference to “TSUSA,” the predecessor to HTSUS, appears in paragraph 4 of the Directive. *See* Directive ¶ 4. This reference, however, is simply part of a list of information that must appear on CF 7501, including *inter alia*, “importer”; “Country of Origin”; and “Signature of approved facsimile on CF 7501.” *Id.* That TSUSA is present on this list, however, does not support Plaintiff’s statement that “classification is one of the criteria used to determine whether to place an entry on bypass status.” *See* Pl.’s Mem. at 6.

team responsible for the merchandise on the bypassed entries shall thoroughly review the random sample. . . . Random sampling, and import specialist, or supervisory import specialist review, shall be the only method of bypass review used.

Directive ¶ 4.C. First, the Directive makes clear that this limited “review” is intended only to ensure the maintenance of the criteria used to identify bypass entries. It is not, however, intended to verify tariff classification. Second, the review is limited to a random sampling of only two to ten percent of all entries placed on bypass. *Id.* It is highly unlikely that given the universe of all of the bypass entries, that two to ten percent of Motorola’s entries were reviewed.¹⁰ Moreover, it is a near statistical impossibility for all of Motorola’s bypass entries to have fallen within the random two to ten percent sampling. In any event, the Court is not convinced that simply because Customs randomly reviews a small percentage of entries, that such random review is of a degree sufficient enough to constitute treatment. *See Motorola II*, 436 F.3d at 1365. Here, a random review of two to ten percent of all bypass entries is insufficient to constitute treatment.

Lastly, Motorola points to Customs Head Quarter Ruling 225191 (Apr. 19, 1994) (“HQ 225191”). *See* Pl.’S Mem. at 7. This, Motorola claims, further supports its position that Customs reviews bypass entries for classification, and by accepting or rejecting a particular classification, reaches a legal determination. *Id.* at 7–8 (citing HQ 225191) (“Customs itself has made clear that Customs officers make determinations with respect to bypass entries and that Customs, when it accepts a classification . . . has made a legal determination[.]”).¹¹ The language highlighted by Motorola, however, is not properly interpreted as indicating that, in accordance with the Directive, the liquidation of a bypass entry is equivalent to a Customs

¹⁰ Defendant makes the following, similar argument:

While the 1987 Directive instructed regional and district managers to review a random sampling of 2–10% of bypassed entries, the universe of entries to be randomly sampled would have included all importers in a given region or district. For any random sampling to have resulted in 2–10% of Motorola’s entries being reviewed would have meant that Motorola was the sole importer in the Customs region or district (or at least the only importer whose entries were selected for “random” review). This is highly unlikely considering that the majority of the bypass entries upon which Motorola is relying were made through major ports, *i.e.*, Atlanta, Georgia; Anchorage, Alaska; and Chicago, Illinois.

Def.’s Mem. at 12.

¹¹ The relevant text of the cited HQ Ruling, is as follows:

Entry summaries are evaluated against a pre-set criteria. One of the elements in this criteria is classification. *See* C.D. 3550–26, Entry Simplification–Bypass Procedures, issued September 8, 1987. Once the appropriate Customs officers has determined that an entry summary is eligible for bypass processing and has accepted the classification asserted by the filer as correct, a legal determination has been made. . . .”

Pl.’s Mem. at 8 (citing HQ 225191).

officer actually reviewing the entry and independently determining the correct tariff classification. Rather, when manual bypass was in operation under the Directive, entry segregation was a clerical task performed by Entry Unit personnel, not by an import specialist with the authority to classify goods. *See* Directive ¶ 4; Def.'s Mem. at 10–11. An import specialist would only see the entries if they met the criteria disqualifying them from bypass status. *See* Directive ¶ 4. Under manual bypass procedure, the only classification-type function that might have been performed by an Entry Aid would be to verify the presence of a TSUS tariff provision on the CF 7501. *Id.* Ensuring the appearance of a tariff provision on a Customs form does not constitute a review sufficient for classification purposes. As commonly defined, a review involves “consideration” or “inspection.” *Black’s* 1345. Consideration is defined as “continuous and careful thought.” Inspection is defined as “view[ing] closely in critical appraisal.” *See Meriam-Webster Online Dictionary 2004*, <http://www.meriam-webster.com> (last visited Nov. 7, 2006). Indeed, both of these terms connote a critical appraisal, rather than a quick glance meant to confirm the appearance of a code in an allotted space. Were the entry specialist charged with ensuring the *correct* tariff classification, a different result would obtain. This, however, is not what the Directive instructs. Accordingly, the Court finds that HQ 225191 fails to support Motorola’s position.

The history of the regulation lends further support to the Court’s conclusion that no treatment was accorded to the bypass entries. The legislative history of § 177.12(c)(2)(ii) indicates that bypass entries should generally be disregarded in determining the existence of treatment. *See* 66 Fed. Reg. at 37,375. Indeed, the Notice of Proposed Rulemaking for § 177.12(c)(2)(ii) explains that the proposed text was intended to reflect Customs’ operational reality, that “under selectivity and bypass and related procedures Customs simply does not intervene in the vast majority of the approximately 18 million formal entries filed annually. . . . Customs believes that it would be inappropriate to conclude, as a legal matter, that Customs accorded treatment to a transaction in those circumstances.” *Id.* The Notice of the Final Rule similarly indicates that as a result of bypass procedure “the vast majority of import transactions do not receive Customs review. Since those unreviewed transactions receive no action on the part of Customs, they should not be considered to constitute a ‘treatment’ within the meaning of 19 U.S.C. 1625(c).” Final Rule, 67 Fed. Reg. 53,483, 53,491 (Dep’t Treasury Aug. 16, 2002). The references to bypass entries in the Federal Register indicate that Customs intended for bypass entries to be included among the transactions that are given “no weight whatsoever” under § 177.12(c)(2)(ii). *See Id.*; 66 Fed. Reg. at 37,370.

In the event that the Court “disagree[s] with [its] assertion . . . that Customs reviewed [its] entries[,] Motorola requests the opportu-

nity to reopen discovery. . . .” See Pl.’s Mem. at 7 n.6. Defendant responds that this request is a concession by Motorola that it does not address whether the particular entries at issue were processed without review or examination.¹² See Def.’s Mem. at 13. Because Plaintiff did not make a motion to reopen discovery, however, the Court will not address this point. See USCIT R. 7(f) (“An application to the court for an order shall be by motion . . . shall be in writing and shall state, with particularity, the grounds therefor.”).

Finally, inherent in Plaintiff’s failure to demonstrate that, as a general matter, bypass entries are subject to treatment is its failure to show that the particular bypass entries at issue were treated. In *Motorola II*, the CAFC directed that this Court address “whether the particular bypass entries at issue in this case were processed without review or examination by Customs. . . .” See *Motorola II*, 436 F.3d at 1367. Logic dictates that if, on remand, Plaintiff fails to prove a broader proposition, then it certainly has not proven the narrower point, i.e., that the *particular* entries were subject to treatment. The Court, therefore, finds that Motorola’s proffered support does not show that Customs treated the particular bypass entries at issue.

For the foregoing reasons, the Court finds that Motorola has not demonstrated that the 900 bypass entries at issue were subject to examination or review sufficient to constitute “treatment” for purposes of 19 U.S.C. § 1625(c)(2), as interpreted by 19 C.F.R. § 177.12(c)(ii)(1). It is incumbent upon the party claiming treatment to demonstrate that such has occurred. See 66 Fed. Reg. at 37,374. Plaintiff has failed to do so.

III. The Issuance of the Preliminary Ruling Letters Does Not Constitute Treatment Within the Meaning of 19 U.S.C. § 1625(c)(2) and 19 C.F.R. § 177.12(c)(1)(ii)

In *Motorola I*, this Court found that the PRLs at issue met “the definition of interpretative rulings, and that HQ 961050 d[id] not modify or revoke a prior interpretative ruling. Accordingly, Customs’ failure to publish HQ 961050 in the *Customs Bulletin* did not violate 19 U.S.C. § 1625(c)(1).” *Motorola I*, 30 CIT at ____, 350 F. Supp. 2d at 1068. This finding was not appealed and, thus, is not a subject of this remand determination. Instead, Plaintiff now contends that Customs violated 19 U.S.C. § 1625(c)(2), because the issuance of the two PRLs established a “treatment.” See Pl.’s Mem. at 8.

¹²In addition, Defendant argues that the Court should find that Motorola had ample opportunity to conduct its discovery. Moreover, due to Motorola’s paperless electronic filing, additional discovery would be futile. Def.’s Mem. at 14. Electronic filing only reflects limited information and would not provide enough information for Customs to perform a substantive review for classification purposes. Defendant notes that in order for Customs to have performed the type of examination necessary to determine if Motorola’s entries fell outside of the ambit of § 177.12(c)(1)(ii), Plaintiff would have had to provide Customs with invoices supporting each entry. *Id.*

A. Contentions of the Parties

Plaintiff characterizes the issue as whether entries made pursuant to the PRLs constitute treatment, under 19 C.F.R. § 177.12(c)(1)(ii).¹³ See Pl.'s Mem. at 8. Because the PRLs did not support a claim under § 1625(c)(1), Plaintiff claims that the issuance of the PRLs involved "substantial review" and "classification" of "substantially identical merchandise" by Customs, and thus constitutes treatment. See *id.* at 8–9. See generally § 1625(c)(2) (providing for notice and comment procedure where there has been a modification of a "treatment.").

Defendant responds that "Motorola's goal appears to be to have the Court accept that, even when an interpretative ruling (here, Motorola's PRLs) cannot support a claim under 1625(c)(1), the ruling can nevertheless form the basis for a treatment under 1625(c)(2)." Def.'s Mem. at 15. Defendant finds Plaintiff's argument both unsupported and unconvincing and instead maintains that a "more logical reading of [the statute] is that Congress intended subsections (c)(1) and (c)(2) to have the same impact, but under different situations, the former when a prior interpretative ruling . . . has been issued, and the latter when no previous interpretative ruling or decision has been issued." *Id.* Reading subsection (c)(2) as including interpretative rulings, Defendant argues, would render subsection (c)(1) redundant.¹⁴ *Id.* The Court agrees.

B. Analysis

As an initial matter, the Court must determine whether a "prior interpretative ruling" may also constitute a "treatment" under § 1625(c). The Court begins its analysis by looking at the language of the statute itself. See *United States Dep't Treasury v. Fabe*, 508 U.S. 491, 500 (1993); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). As set forth *infra*, 19 U.S.C. § 1625(c) provides that:

A proposed interpretive ruling or decision which would –

- (1) modify . . . or revoke a prior interpretative ruling or decision which has been in effect for at least 60 days; or
- (2) have the effect of modifying the treatment previously ac-

¹³In *Motorola I*, although acknowledging that Plaintiff raised the issue, this Court did not rule on whether the PRLs issued by Customs in 1992 and 1994 constituted treatment. In light of the CAFC's decision in *Motorola II*, however, this Court will now decide this issue on remand.

¹⁴Both Plaintiff and Defendant put forth additional substantive arguments, however, the Court need not address these arguments. See *e.g.*, Pl.'s Mem. at 10–15; Def.'s Mem. at 17–22.

corded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin

....

in order to ensure compliance with the notice and comment procedures set forth therein. *See* 19 U.S.C. § 1625(c).

Plaintiff's interpretation of the statute requires the Court to find that a prior interpretative ruling which does not fall within the parameters of subsection (c)(1), can nonetheless be properly classified as a treatment under subsection (c)(2). Under such a reading, however, every prior interpretative ruling could qualify as a treatment, and thereby render subsection (c)(1) nugatory. General principles of statutory construction preclude this result.

As previously explained, subsection (c)(1) pertains only to "prior interpretative rulings and decisions." *See* § 1625(c)(1). It is undisputed that a PRL is a prior interpretative ruling. *See Motorola II*, 426 F.3d at 1368. Subsection (c)(2) pertains solely to "treatment" by Customs. *See id.* Treatment involves a pattern of action by Customs involving, *inter alia*, a sufficient degree of examination or review for classification purposes. *See Motorola II*, 436 F.3d at 1365; *Precision*, 24 CIT at 1043, 116 F. Supp. 2d at 1377. It seems that the issuance of a PRL necessarily involves treatment because Customs is reviewing the entries for classification purposes. *See Customs Directive*, 3610-02, ¶ 2 (Dep't Commerce Mar. 8, 1989), Pl.'s Ex. D ("During a preclassification review, a Customs Field National Import Specialist will review and propose a product classification . . . The National Import Specialist (NIS) Division will review all classification determinations proposed during a preclassification review."). This notwithstanding, because a PRL is a prior interpretative ruling, it is governed by (c)(1) and therefore not within (c)(2).

Construing § 1625(c) in the manner urged by Plaintiff would create a fictitious catchall in subsection (c)(2), which would render subsection (c)(1) meaningless. That is, every PRL issued would fall within the parameters of subsection (c)(2) and would eliminate any need for subsection (c)(1). This would violate the tenet that, where possible, the Court will avoid reading a statute in a manner that would render some words redundant. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). The Court will not interpret a statute to render other provisions of the same statute superfluous. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)(citation omitted). Rather, a court must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Id.* Indeed, a "cardinal principle of statutory construction is to save and not to destroy." *See United States v. Menasche*, 348 U.S. 528, 538 (1955)(citation omitted).

The construction issue may also be resolved by the doctrine of *noscitur a sociis*, i.e., “a word is known by the company it keeps.” *Gustafson*, 513 U.S. at 574. Here, the word “treatment” is in the company of its alternative subsection (c)(1), covering “interpretative rulings.” See § 1625(c)(1),(2). Specifically, the doctrine provides that a court should “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth to the Acts of Congress.’” *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Here, ascribing meaning to the word “treatment” that encompasses the otherwise provided for “prior interpretative rulings,” gives unintended breadth to subsection (c)(2). Under Plaintiff’s proposed interpretation, the phrase “prior interpretative ruling” would be subsumed entirely within the term “treatment” and the disjunctive “or” would be rendered meaningless. Basic principles of statutory construction preclude such an interpretation. See *Beck v. Prupis*, 529 U.S. 494, 506 (2000).

For the foregoing reasons, the Court finds that the issuance of the two PRLs, previously determined to be prior interpretative rulings, cannot for purposes of § 1625(c), also constitute a “treatment.”

IV. Because the Entries at Issue Were Not Subject to Treatment, Customs Did Not Violate 19 U.S.C. § 1625(c)

Section 1625(c) requires publication, with notice and comment, where a prior interpretative ruling or decision modifies the treatment previously accorded by Customs to substantially identical transactions. See § 1625(c)(2). Here, Customs did not violate the statute because: (1) the 900 bypass entries at issue were not subject to treatment; and (2) the two PRLs at issue were found to be prior interpretative rulings covered by subsection (c)(1), and thereby not within the parameters of subsection (c)(2). Accordingly, Customs was not required to comply with the notice and comment provisions of § 1625(c).

Conclusion

The Court finds that the liquidation of the 900 bypass entries at issue does not constitute treatment within the meaning of 19 U.S.C. § 1625(c)(2), as interpreted by 19 C.F.R. § 177.12(c)(1)(ii). The Court further finds that the issuance of the two preliminary ruling letters does not constitute treatment within the meaning of 19 U.S.C. § 1625(c)(2) and 19 C.F.R. § 177.12(c)(1)(ii). Accordingly, the Court finds that Customs did not violate § 1625(c)(2) by failing to publish HQ 961050 in the Customs Bulletin. For the foregoing reasons, the Court enters judgment for Defendant, United States, and dismisses this action. Judgment shall be entered accordingly.

Slip Op. 06–167

SANDALIO T. ALANIZ, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No. 05–00594

[Granting defendant's motion to dismiss as untimely an appeal of an agency determination denying a Trade Adjustment Assistance cash benefit]

Dated: November 15, 2006

Yormick & Associates, Co., LPA (Jon P. Yormick) for plaintiff.
Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg*); *Jeffrey Kahn*, Office of the General Counsel, United States Department of Agriculture, of counsel, for defendant.

OPINION

Stanceu, Judge: Defendant, the United States Secretary of Agriculture (“the Secretary”) moves to dismiss for lack of subject matter jurisdiction the action filed by plaintiff Sandalio T. Alaniz (“Alaniz”), arguing that dismissal is required because of Alaniz’s failure to file a timely appeal of the denial by the United States Department of Agriculture (“USDA”) of Alaniz’s application for a cash benefit under the Trade Adjustment Assistance (“TAA”) for Farmers program. Defendant contends that plaintiff failed to seek judicial review of the denial within the sixty-day period prescribed by 19 U.S.C. § 2395(a). Although conceding that his appeal is untimely, plaintiff argues that the doctrine of equitable tolling permits him to maintain this action. The court concludes that equitable tolling is not warranted in these circumstances.

I. Background

On December 28, 2004, plaintiff, a shrimper from Texas, submitted his application to the USDA for a TAA cash benefit for the 2003 Texas shrimp marketing year. Plaintiff received written notice, by letter dated May 18, 2005, that USDA was denying his application for a TAA cash benefit (“denial letter”) because plaintiff “did not meet the Net Income Requirement according to the Code of Federal Regulations 7-CFR Part 1580.301.” Letter from Ronald Ford, Deputy Dir., Imp. Policies and Program Div., U.S. Dep’t of Agric., to Sandalio T. Alaniz (May 18, 2005) (“USDA May 18, 2005 TAA denial letter”). The letter informed plaintiff of the opportunity for judicial review of the agency determination, stating as follows:

You may request review of our final determination by contacting the United States Court of International Trade, One

Federal Plaza, New York, New York 10278-0001. The Office of the Clerk of the Court can provide instructions for requesting a judicial review. The Clerk of the Court can be reached at (212) 264-2800 or you can visit the Court's website <http://www.cit.uscourts.gov> (select "Trade Adjustment Assistance – Judicial Review".) Appeals to the Court must be filed within 60 days from the date of this letter. Prior to contacting the Court of International Trade, you may wish to contact your local FSA county office if you have questions about this disapproval of cash benefits.

Id. On October 28, 2005, more than three months after the time period for filing an appeal had expired, the Clerk of the United States Court of International Trade ("Clerk of the Court") deemed filed a letter written by plaintiff requesting an appeal of USDA's negative determination.

II. Discussion

The plaintiff carries the burden of establishing a basis to invoke a court's subject matter jurisdiction. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1376-77 (Fed. Cir. 1998). In deciding a motion to dismiss, the court accepts as true all facts alleged in the plaintiff's pleadings and construes all reasonable inferences in the plaintiff's favor. *See Shearin v. United States*, 992 F.2d 1195, 1195-96 (Fed. Cir. 1993); *see also Bradley v. Chiron Corp.*, 136 F.3d 1317, 1321-22 (Fed. Cir. 1998) (noting, however, that unwarranted inferences of fact do not suffice to support a claim). In resolving a motion to dismiss for lack of subject matter jurisdiction, a court may refer to documents attached to the pleadings or documents integral to the complaint. *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 883-84 (Fed. Cir. 1985); *Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 565-66 (2d Cir. 2006); *see also Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

The Supreme Court, in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990), addressed the applicability of the doctrine of equitable tolling in suits between private litigants and the government. In considering when the doctrine can apply against the government, the *Irwin* court stated that:

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late fil-

ings where the claimant failed to exercise due diligence in preserving his legal rights.

498 U.S. at 96 (footnotes omitted).

The Court of Appeals for the Federal Circuit has applied the two-part *Irwin* test to determine both the level of diligence and the type of governmental action necessary to invoke equitable tolling. *Frazer v. United States*, 288 F.3d 1347, 1352–54 (Fed. Cir. 2002). The Court of Appeals declined to apply equitable tolling in *Frazer*, concluding that the plaintiffs did not exercise due diligence because they neglected to file their complaint in the Court of Federal Claims within the applicable six-year statute of limitations period. *Id.* at 1353. The Court then concluded that the plaintiffs failed to allege the type of government action necessary to invoke equitable tolling. *Id.* at 1353–54. In drawing this conclusion, the Court distinguished between timely-filed but defective submissions and untimely filed submissions, explaining that governmental misconduct is essential to equitable tolling in the latter situation. *Id.* “In the event of late-filed submissions, equitable tolling is available only when the lateness is attributable, at least in part, to misleading governmental action.” *Id.* “Timely filed but defective submissions differ; the defect need not necessarily be due to misleading governmental conduct.” *Id.* at 1353 n.3. Because the Court did not find governmental action that reasonably could have misled the appellants, it declined to toll the statute of limitations. *Id.* at 1354–55; see also *Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1299 (Fed. Cir. 2004) (citing both *Irwin* and *Frazer* for the principle that, in the case of untimely filed submissions, equitable tolling requires a showing of governmental misconduct or misleading action).

Here, plaintiff admits that he did not timely file his complaint within sixty days after notice of USDA’s final determination. See Pl.’s Mem. of Law Responding to Def.’s Mot. to Dismiss 2 (“Pl.’s Resp.”). Accordingly, equitable tolling is inapplicable unless plaintiff shows that governmental misconduct or misleading governmental action contributed to his late filing. See *Frazer*, 288 F.3d at 1353; *Former Employees of Sonoco Prods. Co.*, 372 F.3d at 1299.

Alaniz alleges that the denial letter was “internally inconsistent” and “confusing” in explaining the right to appeal the decision. Pl.’s Resp. 3. The denial letter, according to plaintiff, contains only “a brief, almost unnoticeable sentence” regarding the process and timeline for filing the judicial appeal. *Id.* (“The USDA first referenced its determination using no less than three (3) different descriptive words, before it referred to a *review* of its determination by this Court, but without any express reference to the period of time by which a *request* for that *review* should be made.”). Plaintiff further argues that the suggestion in the denial letter that he contact the local Farm Service Agency (“FSA”) office with questions was in-

appropriate because FSA could not file the appeal on his behalf and because contacting FSA would only result in further delay. *Id.* at 4.

The denial letter does not support a finding of misleading conduct on the part of the government. Plaintiff's principal argument appears to stem from the use in the denial letter of the terms "review of our final determination" and "judicial review," followed by later use of the term "appeals" in describing the sixty-day time limit. *See* USDA May 18, 2005 TAA denial letter. However, the denial letter states unambiguously in the fourth paragraph that "[a]ppeals to the Court must be filed within 60 days from the date of this letter." *Id.* No recipient of a negative TAA determination reasonably could conclude that he was *not* required to accomplish a filing with the Court of International Trade within sixty days of the date of the denial letter, even if he did not know from the denial letter precisely what the filing would entail. As to what was required to accomplish the filing, the denial letter also provided a telephone number and web address as references for additional information. Were plaintiff actually confused by the use of the terms "review" and "appeal," or by any other aspect of the denial letter, plaintiff could have contacted the Clerk of the Court or consulted the court's website. Although the letter used the term "review" and also the term "appeal," it used each term correctly, and in the context of the denial letter the use of these different terms cannot reasonably be characterized as misleading. In a declaration, plaintiff's wife, Betty Alaniz, confirms that she was able to follow the directions of the denial letter by contacting the court, albeit three months too late, to inquire about her husband's application for a TAA benefit. Pl.'s Resp., Ex. 1 ¶¶ 6-7; Decl. Betty Alaniz, June 23, 2006.

Plaintiff's objection that the denial letter contained an inappropriate suggestion to contact the local FSA office is also unconvincing. Plaintiff's arguments that the FSA could not file the approval on his behalf, and that contacting the FSA would only have resulted in further delay, are irrelevant to the issue of whether the denial letter is misleading. The court finds nothing misleading about the suggestion to contact the FSA.

In short, the denial letter provided plaintiff with sufficient information of the requirement of a timely appeal and contained no misinformation. To require any more from USDA than the information that was included in the denial letter would be tantamount to "impos[ing] upon the [agency] the type of affirmative obligations found in an attorney-client relationship." *Former Employees of Sonoco Prods. Co.*, 372 F.3d at 1299 (refusing to apply the doctrine of equitable tolling and stating that the government was not required to inform plaintiff of the publication procedures of the U.S. Department of Labor or of the implications of publication for triggering the running of the limitations period).

Plaintiff also contends that the court may equitably toll the statute of limitations without a showing of wrongful conduct on the part of the government provided that the plaintiff demonstrates excusable delay. Pl.'s Resp. 2–3. Plaintiff appears to rely on the following language in *Former Employees of Quality Fabricating, Inc. v. the U.S. Sec'y of Labor*:

The Supreme Court in *Irwin* stated that equitable tolling was generally allowed where a complainant was “induced” by his adversary’s misconduct into allowing a filing deadline to pass. 498 U.S. at 95–96, 111 S. Ct. 453. However, equitable tolling does not depend on the defendant’s wrongful conduct; it focuses on whether there was an “excusable delay by the plaintiff” in bringing a claim. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).

27 CIT ___, ___, 259 F. Supp. 2d 1282, 1285 (2003). In relying on the statement in *Quality Fabricating* that “equitable tolling does not depend on the defendant’s wrongful conduct; it focuses on whether there was an ‘excusable delay by the plaintiff’ in bringing a claim,” plaintiff overlooks the point that the Court in *Quality Fabricating* found action on the part of the government that induced the late filing.

Quality Fabricating involved a group of former employees that filed a petition with the Department of Labor (“Labor”) for North American Free Trade Transitional Adjustment Assistance. *Id.* at 1283. One of the plaintiffs in the case, Margaret Miller, diligently monitored the petition and was instructed by Labor employees that she should check for the petition status on the Labor’s website. *Id.* When Labor’s final determination on the petition was complete, however, Labor published the status determination in the Federal Register and did not post it on the agency website until two months later. *Id.* at 1284. As a result, Ms. Miller missed the deadline to appeal the negative agency determination despite contacting Labor’s regional office, regularly checking the status of the petition on Labor’s website, visiting the Department’s Trade Adjustment Representative, and contacting her congressional representatives as to the status of the petition. *Id.* at 1283–84. The Court in *Quality Fabricating* concluded that the case presented equitable circumstances meriting the tolling of the statute of limitations. *Id.* at 1286–87. The Court found that the “uncontroverted facts” in the case showed that, despite Ms. Miller’s diligent attempts to follow her case, the government had induced her into allowing the filing deadline to pass. *Id.* Because the plaintiff had satisfied the two-part test of *Irwin*—showing both misleading action on the part of the government and due diligence in preserving her legal rights—the Court tolled the statute and permitted the plaintiff to appeal the agency finding. *Id.* at 1288.

Plaintiff next argues that he, through both his own efforts and the efforts of his wife, exercised due diligence in pursuing his TAA claim. Plaintiff, however, has not alluded to specific evidence of due diligence. Whether a plaintiff has acted with due diligence is a fact-specific inquiry that is guided by reference to the hypothetical reasonable person. *See Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993). For equitable tolling to apply, the plaintiff must remain ignorant of necessary information or requirements despite exercising diligence. *See Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999). The doctrine is not to be applied “to what is at best a garden variety claim of excusable neglect.” *Irwin*, 498 U.S. at 96.

Plaintiff contends in his October 26, 2005 letter to the Clerk of the Court that he mailed a timely appeal but that “for some reason” the court did not receive his paperwork and suggests that the paperwork was “lost or misplaced” by the post office. Pl.’s Letter of Appeal (“Pl.’s Letter”). Plaintiff offers no evidence and pleads no specific facts to support the statement in his letter that, although he attempted to file his appeal, his paperwork was lost or misplaced by the post office. *See, e.g. Lady Kelly, Inc. v. U. S. Sec’y of Agric.*, 30 CIT ____ , ____ , 427 F. Supp. 2d 1171, 1173–77 (2006) (refusing to toll the statute of limitations where USDA never received plaintiff’s application for a TAA benefit, but plaintiff asserted that it had timely mailed a completed application and submitted “evidence in the form of a photocopied envelope, with a handwritten note documenting the mailing date of the alleged . . . application.”). The court may not assume diligence based on unwarranted inferences of fact. *See Bradley*, 136 F.3d at 1321–22.

Plaintiff also contends that his wife, Betty Alaniz, attempted to file a timely appeal but was unsuccessful because she was unable to obtain the necessary assistance from plaintiff’s company, Zimco Marine, or from the local FSA office. Pl.’s Resp. 5–6. According to her declaration, Ms. Alaniz made several efforts to file an appeal within the statutory period. She explains that upon receiving the denial letter, she failed to contact FSA with questions about the denial because she “knew that they would not be able to assist [her].” Pl.’s Resp., Ex. 1 ¶ 2. She avers that she spoke with her husband about the proper course of action while he was at sea, approximately three weeks after receiving the denial letter.¹ *Id.* at Ex. 1 ¶ 3. She further avers that upon her husband’s suggestion, she provided a representative at his company with the letter at some indefinite point in time, only to be informed one month later that the representative

¹Although the plaintiff in this case was out at sea when the TAA denial letter arrived, his wife’s declaration makes clear that she was able to contact him to inform him of USDA’s decision. Accordingly, the court need not address, in this decision, the situation of a fisherman who is unreachable at sea and therefore cannot receive notice from the USDA in a manner that will enable him to file a timely appeal of the denial of his TAA benefits.

had quit her job and that the representative would therefore not provide Ms. Alaniz with assistance. *Id.* at Ex. 1 ¶¶ 3–5. Ms. Alaniz does not indicate in her declaration what additional efforts she made to obtain the company’s assistance.

The efforts of Ms. Alaniz are comparable to, and may even fall short of, those found inadequate in *Leonard v. Gober*, in which the Court of Appeals for the Federal Circuit affirmed the refusal of the United States Court of Appeals for Veterans Claims to equitably toll the statute of limitations for a plaintiff appealing a negative decision by the Board of Veterans Appeals. 223 F.3d 1374, 1375 (Fed. Cir. 2000) . The Court of Appeals for Veterans Claims refused to toll the statute of limitations even though the appeal was only one day late and despite plaintiff’s assertion that the late filing was “beyond her control” because she “asked the American Legion to help her with her claim, but [] they did not respond to her request for two months and did not tell her that they would not help her until twelve days before the statutory deadline date.” *Id.* The efforts of plaintiff and his wife do not rise to the level of diligence that could serve as a partial justification for the application of the doctrine of equitable tolling.

III. Conclusion

Equitable relief is applied only in rare circumstances and cannot be extended to cover the circumstances present in this case. Because of the absence of misleading acts or misconduct by the government contributing to the untimely filing, and the lack of due diligence by the plaintiff, the court concludes that the doctrine of equitable tolling is inapplicable. The denial letter was not misleading and was sufficient to put plaintiff on notice that he must appeal the agency’s decision within sixty days of the date of the letter. Plaintiff cannot avoid the consequence of the sixty-day limitation based on allegations that both he and his wife attempted diligently, albeit unsuccessfully, to appeal the decision, because his allegations are unsupported by the pleading and the evidence. Judgment dismissing this action for lack of subject matter jurisdiction will be entered accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

<i>DECISION NO./DATE JUDGE</i>	<i>PLAINTIFF</i>	<i>COURT NO.</i>	<i>ASSESSED</i>	<i>HELD</i>	<i>BASIS</i>	<i>PORT OF ENTRY & MERCHANDISE</i>
C06/54 10/6/06 Restani, J.	Inabata Speciality Chems. Corp.	02-00727	3913.90.20 5.8%	3001.90.00 Free of duty	Agreed statement of facts	Los Angeles Chondroitin sulfate
C06/55 10/24/06 Eaton, J.	Coach, Inc.	06-00049	4202.11.00 Not stated	4820.10.20 Not stated	Agreed statement of facts	Jacksonville Leather portfolios
C06/56 10/31/06 Restani, J.	Inabata Specialty Chems. Corp.	04-00576	3913.90.20 5.8%	3001.90.00 Free of duty	Agreed statement of facts	Newark Chondroitin sulfate
C06/57 10/31/06 Restani, J.	Rexall Sundown, Inc.	03-00883	3913.90.20 5.8%	3001.90.00 Free of duty	Agreed statement of facts	Los Angeles Chondroitin sulfate
C06/58 10/31/06 Restani, J.	Rexall Sundown, Inc.	05-00026	3913.90.20 5.8%	3001.90.00 Free of duty	Agreed statement of facts	Los Angeles Chondroitin sulfate
C06/59 11/7/06 Pogue, J.	Elan-Polo, Inc.	04-00499	6403.99.90 10%	6403.30.00 Not stated	Agreed statement of facts	Miami Footwear
C06/60 11/8/06 Pogue, J.	Toyota Tsusho Am., Inc.	03-00780	7210.12.00 0.7% + additional assessed duties of 30% pursuant to Steel Products Proclamation (67 Fed. Reg. 10553, 3/7/02)	Single reduced, electrolytic tin plate in the gauge of 0.155 mm falls within the scope of the exclusion from the safeguard measures found in U.S. Note 11(b)(ix)(B) of the HTSUS- additional duties should be refunded by CBP	Agreed statement of facts	Not stated Single reduced, electrolytic tin plate in the gauge of 0.155 mm

ABSTRACTED VALUATION DECISIONS

<i>DECISION NO./DATE JUDGE</i>	<i>PLAINTIFF</i>	<i>COURT NO.</i>	<i>VALUATION</i>	<i>HELD</i>	<i>BASIS</i>	<i>PORT OF ENTRY & MERCHANDISE</i>
V06/15 10/24/06 Eaton, J.	Swak	04-00322	Transaction value	Allowance in entered value of the subject merchandise for cost of repairs on merchandise that was performed by a third party and paid for by plaintiff-defective goods allowance	Agreed statement of acts	Newark Boys' & girls' sweaters

