

Decisions of the United States Court of International Trade

Slip Op. 09-8

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: **Gregory W. Carman, Judge**
Court No. 07-00318

[Plaintiff's motion for summary judgment is denied; Defendant's cross motion for summary judgment is denied.]

January 29, 2009

Mayer Brown LLP (Simeon M. Kriesberg, Andrew A. Nicely, Jefferey C. Lowe and Evan P. Schultz) for Plaintiff.

Michael F. Hertz, Deputy Assistant Attorney General; Jeanne E. Davidson, Director; Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Edward F. Kenny); Yelena Slepak, Office of the Assistant Chief Counsel, Int'l Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

OPINION & ORDER

CARMAN, JUDGE: The matter before this Court is Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. Based on the genuine issues of material facts identified below, this Court denies Plaintiff's Motion for Summary Judgment and also denies Defendant's Cross-Motion for Summary Judgment.

PROCEDURAL HISTORY

This issue first appeared before this Court in 2005. Plaintiff-International Custom Products, Inc. ("ICP" or Plaintiff)-once again seeks relief from an action taken by U.S. Customs and Border Protection ("Customs") to reclassify 100 entries (the "Affected Entries") of ICP's imported product, "white sauce," under a different tariff heading than the one it had announced it would use in a 1999 advanced classification ruling. While challenges to tariff classification are typically brought before this court under 28 U.S.C. § 1581(a), for reasons set forth in its opinion at that time, ICP sought, and this Court found it had jurisdiction over ICP's case under 28 U.S.C. § 1581(i)(4) (2000). *Int'l Custom Prods., Inc. v. United States*, 29 CIT 617, 374 F. Supp. 2d 1311 (2005) ("*ICP I*"). The Court of Appeals for

the Federal Circuit reversed this jurisdictional decision, holding the remedy available to Plaintiff under section 1581(a) was not manifestly inadequate, and that jurisdiction under section 1581(i)(4) was therefore unavailable. *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006). ICP now alleges that it has complied with the jurisdictional requirements under 28 U.S.C. § 1581(a), and accordingly petitions this Court to reinstate the relief that it previously granted in *ICP I*.

In an Opinion and Order dated March 31, 2008, this Court dismissed two of Plaintiff's claims—Count III and Count IV (that Defendant failed to demonstrate a “compelling reason” for revoking its prior ruling, and that Defendant violated the Administrative Procedures Act, respectively)—pursuant to a USCIT Rule 12(b)(5) motion to dismiss by Defendant. *Int'l Custom Prods., Inc. v. United States*, 32 CIT ___, 2008 WL 2104868, (May 20, 2008). Plaintiff's remaining claims—Counts I, II and V (that Defendant violated 19 U.S.C. §§ 1625(c)(1) and (c)(2), and that Defendant violated Plaintiff's Due Process Rights under the Fifth Amendment to the U.S. Constitution, respectively)—survived the motion to dismiss and are now the subject of the cross motions for summary judgment now before the Court.

FACTUAL BACKGROUND

Familiarity with both this Court's previous decisions in this case and the facts underlying this litigation is generally presumed, but a brief recitation is provided here for convenience. ICP is an importer and distributor of dairy ingredients, including a product it refers to as “white sauce.”¹ (Pl.'s Stmt. Of Undisputed Facts in Supp. of its Mot. for Summ. J. (“Pl.'s Facts”) ¶ 4; Def.'s Mem. In Supp. of its Cross-Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J. (“Def.'s MSJ Mem.”) 1.) “White sauce” is a milkfat based product that serves as the base for gourmet sauces, salad dressings, processed cheeses, club cheese preparations, baked goods, butter based sauces and this litigation. (Pl.'s Facts ¶ 1; Def.'s Resp. To Pl.'s Stmt. Of Material Facts (“Def.'s Resp. Facts”) ¶ 1; Def. Stmt. of Undisputed Facts (“Def.'s Facts”) ¶¶ 8–9; Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts (“Pl.'s Resp. Facts”) ¶¶ 8–9.)

In 1998, prior to importing its first shipment of “white sauce,” Plaintiff sought a binding tariff classification ruling from Customs. (Pl.'s Facts ¶ 1; Def.'s Facts ¶ 1.) On January 20, 1999, Customs issued advance ruling NYRL D86228, which classified the product de-

¹The Government has indicated its belief “that ICP's reference to its good as a ‘white sauce’ was inaccurate; [the Government has therefore decided to] refer to ICP's imported merchandise . . . as a dairy spread.” (Def.'s MSJ Mem. at 1n.1.) The Court notes Defendant's objection to the nomenclature, but will continue to refer to the product by the name given by Plaintiff for the sake of consistency with prior opinions. By hereinafter referring to the product as “white sauce” the Court makes no accompanying judgment as to the accuracy of this term in describing the product in question.

scribed in Plaintiff's ruling request in Harmonized Tariff Schedule of the United States ("HTSUS") tariff subheading 2103.90.9060.² (Pl.'s Facts ¶ 2; Def.'s Facts ¶ 2 (admitting that the tariff subheading was 2103.90.90).) HTSUS tariff subheading 2103.90.9060 has since been renumbered and is currently tariff subheading 2103.90.9091.³ Plaintiff asserts that it has imported "white sauce" in reliance upon this ruling "from 1999 through late April 2005." (Pl.'s Facts ¶ 4; Def.'s Resp. Facts ¶ 4.)

On April 18, 2005, after making an additional inquiry with ICP and its primary customer about the nature and use of "white sauce," Customs concluded that the product had not been accurately described by its ruling NYRL D86228 and issued a Notice of Action reclassifying all unliquidated entries and all future shipments of the product under HTSUS tariff subheading 0405.20.3000. (Pl.'s Facts ¶ 23; Def.'s Facts ¶ 20.) The Notice of Action affects 100 entries—6 entries that were specified in the Notice itself, 3 entries that were entered in April 2005, but not included in the Notice, and 11 entries that were released from a bonded warehouse pursuant to the temporary restraining order granted by this Court in *Int'l Custom Prods., Inc. v. United States*, Court No. 05–00509 (Ct. Int'l Trade Sept. 15, 2005) ("*ICP II*"). (See also Compl. ¶ 13; Answer ¶ 13.) The result of Customs' reclassification of Plaintiff's imported "white sauce" is a "duty rate that is some 2400 percent higher than the rate mandated by ICP's advance ruling." (Pl.'s Mem. of P. & A. in Supp. of its Mot. for Summ. J. ("Pl.'s MSJ Mem.") 3.)

Customs has now liquidated or reliquidated "at least 99" of the entries of Plaintiff's product at the higher tariff rate under the reclassified HTSUS tariff subheading 0405.20.3000. (Pl.'s Facts ¶ 28; Def.'s Resp. Facts ¶ 28.) Specifically, Entry No. 180–05900297 (the "Entry") was liquidated on June 29, 2007. (Pl.'s Facts ¶ 24, Def.'s Resp. Facts ¶ 24.) On July 26, 2007 ICP timely protested the liquidation of the Entry, with a request for accelerated disposition, which was deemed denied 30 days after it was submitted by certified mail, pursuant to 19 U.S.C. § 1515(b) (2000). (Compl. ¶ 16; Answer ¶ 16.) Plaintiff paid all the duties that Customs assessed on the Entry by August 27, 2007. (Pl.'s Facts ¶ 27, Def.'s Resp. Facts ¶ 27.) Plaintiff now asserts that this Court has jurisdiction under 28 U.S.C. § 1581(a), and asks the Court to reinstate much of the relief it granted in *ICP I*.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C.

² HTSUS (1999) tariff subheading 2103.90.9060 provided for "[s]auces and preparations therefor; . . . : [o]ther: [o]ther: [o]ther" at a duty rate of 6.4% *ad valorem*.

³ HTSUS (2005) tariff subheading 2103.90.9091 provides for "[s]auces and preparations therefor; . . . : [o]ther: [o]ther: [o]ther: [o]ther" at a duty rate of 6.6% *ad valorem*.

§ 1581(a). See *Int'l Custom Prods., Inc.*, 467 F.3d at 1326–27. However, that jurisdiction covers one, and only one entry of “white sauce”—Entry No. 180–05900297. This conclusion was previously articulated by the Court when it denied Plaintiff’s Application for a Temporary Restraining Order and Motion for a Preliminary Injunction (“TRO/PI Motion”) in this case. *International Custom Prods., Inc. v. United States*, 32 CIT ____, 2008 WL 2104868 (May 20, 2008). This Court there noted, and here reaffirms that Plaintiff has satisfactorily commenced this lawsuit only with respect to Entry 180–05900297—and no jurisdiction has been established over any other entry of “white sauce.” *Id.* at *1.

For one reason or another, Plaintiff persists in its argument that this Court may grant relief with respect to all 100 entries of “white sauce.” (Compl. at 16 “Request for Judgment and Relief.”) Even after this Court explained the limits of its jurisdiction in this case while denying the TRO/PI Motion, Plaintiff has continued to argue that it is entitled to all of the relief requested in its prayer for relief—reaching all 100 entries. (Compare Pl.’s MSJ Mem. 25–28 (Jan. 4, 2008) (“ICP is entitled to all of the relief request in its prayer for relief.”), with Pl.’s Rep. Mem. 40 (Nov. 21, 2008) (“[T]he Court should grant ICP all of the relief to which ICP is entitled in its request for relief, including reclassification of the relevant entries in accordance with the advance ruling.”).) Plaintiff contends that the Court’s ability to provide relief with respect to these additional entries is not a question of the Court’s jurisdiction. (See Pl.’s MSJ Mem. 25–28.) Rather, Plaintiff advocates that the Court may exercise its “equitable powers” to grant relief with respect to all additional entries once Plaintiff has crossed the threshold, so to speak, via the protest, denial, and deposit of duties of a single entry. (*Id.*) Plaintiff cites a handful of cases for the proposition that once this Court determines it has jurisdiction, it may provide any “appropriate relief,” that the Court’s equitable powers may “not [be] fettered by the scope of its jurisdiction, once jurisdiction is established,”⁴ and that the Court may “protect the validity of its judgments.”⁵ (*Id.* at 25–27.)

⁴For this proposition, Plaintiff cites *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 403 (Fed. Cir. 1989). This Court notes that rather than supporting Plaintiff’s contentions, *Rhone Poulenc* underscores the problems posed by Plaintiff’s failure to establish subject matter jurisdiction over the remaining entries at issue in the present case:

[T]here is a fundamental distinction between a court’s subject matter jurisdiction and its equitable powers. The former must exist before the latter may be exercised. The former concerns the authority of a court to hear and decide, given the subject matter of the case; the latter concerns the remedial relief a court having that authority may grant.

Id. at 402.

⁵For this proposition, Plaintiff cites *United States v. Hanover Insurance Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996). While this Court agrees that it has the inherent equitable power to protect the validity of its judgments, this case does nothing to demonstrate that the Court, in fact, has jurisdiction over all 100 entries of “white sauce.” It is simply inapposite.

Plaintiff has cited no authority, and this Court believes no authority exists, for the idea that protest and payment of duties of one entry of a given good is sufficient to confer jurisdiction over multiple entries of a given good. Plaintiff's contentions, in this respect, are unavailing. The jurisdictional statute in question requires that this Court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (2000). The plain language of this statute confers upon this Court only the jurisdiction "to review the denial of a protest and . . . each protest denial is the basis of a separate claim." *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1319 (Fed. Cir. 2006) (emphasis in original, internal quotation omitted). The statutory prerequisites to filing suit are "that Customs has denied the protest containing the entry; that the importer paid all liquidated duties, charges, or exactions for the entry; and, that the importer filed a summons listing either the protest or entry number within 180 days of the denial of the protest." *Int'l Custom Prods., Inc.*, 2008 WL 2104868 at *1, n.3 (citing 28 U.S.C. §§ 2636(a), 2637 (2000); *DaimlerChrysler*, 442 F.3d at 1313.).

As this Court held once before, "[s]ince the tender of additional duties determined to be due on liquidation is a condition precedent to invoking the jurisdiction of this court pursuant to 28 U.S.C. § 2637(a) . . . this court lacks subject matter jurisdiction as to all entries for which the additional duties have not been paid." *Am. Air Parcel Forwarding Co., Ltd. v. United States*, 6 CIT 146, 150, 573 F. Supp. 117, 120 (Ct. Int'l Trade 1983); *aff'd* 718 F.2d 1546, 1550 (Fed. Cir. 1983) ("[T]he statutory requirements that a protest must be filed . . . or that duties must be paid before commencing a civil action involving the protest [may not be waived].") In this case, Plaintiff concedes the salient point – that it has only paid the liquidated duties of the one entry listed on its summons. Consequently, this Court finds that Plaintiff has successfully established jurisdiction over only that one entry—Entry No. 180–05900297.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A factual dispute is material if it might affect the outcome of the suit under the governing law. *See id.* at 248. Accordingly, the court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). Further, "[t]he inferences to be drawn from the underlying facts . . . must be viewed in

the light most favorable to the party opposing the motion,” *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), and the court “must resolve all doubt over factual issues in favor of the party opposing summary judgment.” *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

ANALYSIS

I. Count I—Plaintiff Claims That Customs Violated 19 U.S.C. § 1625(c)(1).

In Count I of its complaint, Plaintiff argues that Customs violated 19 U.S.C. § 1625(c)(1) by revoking or attempting to revoke ICP’s advance ruling with a Notice of Action. That statute states:

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days

...

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) (2000) (emphasis added). Plaintiff points out that this section “establishes a notice and comment procedure that Customs must follow before it makes an interpretive ruling or decision that modifies . . . or revokes a prior interpretation ruling or decision which has been in effect for at least 60 days.” (Pl.’s MSJ Mem. 15 (internal changes and quotations omitted).) Plaintiff asserts that “Customs does not have any discretion to deviate from the notice and comment provisions of section 1625 when it seeks to modify or revoke an advance classification ruling.” (Id. at 16.)

In order to prevail on its section 1625(c)(1) claim in this case, Plaintiff is required to show at least three things. First, Plaintiff must show it obtained “a prior interpretive ruling or decision which has been effect for at least 60 days.” 19 U.S.C. § 1625(c). Second, Plaintiff must show that the Government made “a proposed interpretive ruling or decision which would . . . modify . . . or revoke” that

prior ruling, without following the specific requirements of the statute. *Id.* Third, Plaintiff must show that it entered goods that conformed to the description of goods in the prior interpretive ruling or decision. Without a showing on this third item, Plaintiff cannot obtain the requested relief, *i.e.*, re-liquidating “white sauce” in accordance with the tariff classification set forth in the initial ruling letter.

A. Genuine Issue of Material Fact.

This Court finds that there is a genuine issue of material fact as to whether the actual goods Plaintiff imported conform to the description of “white sauce” in NYRL D86228. Defendant has presented several pieces of evidence that call this key fact into question. First, Defendant obtained, through discovery, a specification sheet from ICP’s chief customer that appears to be for the same product described in the ruling letter, but which does not include certain ingredients found in the specification sheet ICP initially provided to Customs in obtaining its ruling letter. (Def.’s Facts ¶ 5; Pl.’s Resp. Facts p.3 ¶ 5; *see also* Def.’s Exs. 4(Bates Stamp #239), and 18 (Bates Stamp # ICP 000016).) The product described in NYRL D86228 consists of “milkfat, water, vinegar (and/or lactic acid and/or citric acid), zanthan gum, carboxymethylcellulose, sodium phosphate (and/or sodium citrate).” (Def.’s Ex. 18.) The specification sheet obtained from ICP’s primary customer does not contain zanthan gum (also interchangeably referred to as zanthum gum or xanthan gum) or carboxymethylcellulose (also spelled carboxymethylcellulose). (Def.’s Exhibit 4.) Plaintiff contends that these two ingredients were omitted from the specification sheet provided to its customer at the customer’s request, but that the ingredients were not omitted from the actual “white sauce” that ICP provided to that customer. (Pl.’s Resp. Facts p.10 ¶ 5.) The existence or nonexistence of these ingredients in the product imported by Plaintiff, particularly in the single entry of “white sauce” at issue in this litigation, presents a genuine issue of material fact that must be determined at trial.

Defendant has also presented some evidence that the milkfat content of Plaintiff’s imported product deviated from the range of milkfat content Plaintiff asserted the “white sauce” would contain when it applied for NYRL D86228. Although the initial ruling letter itself does not specify a milkfat content (*see* Def.’s Ex. 18), the specification sheet Plaintiff provided to Customs in its request for a ruling letter does specify a milkfat content. In the “typical analysis” section of that specification sheet, “white sauce” is said to consist of “72–77.00%” milkfat. (Def.’s Ex. 2.) Defendant obtained, through discovery, two contracts between ICP and its largest customer for several million pounds of “White Sauce, Kosher, 77.5% milkfat.” (Def.’s Ex. 13.) To explain this apparent discrepancy, Plaintiff asserts that the 77.5% figure is calculated using a “by difference” method, which

is inherently imprecise, and tends to overstate the actual milkfat percentage by a small amount. (Pl.'s Rep. Mem 20–24.) Even if Plaintiff is correct that there are two alternative ways of calculating milkfat, this Court finds that a genuine issue of material fact remains. Namely, in light of Defendant's evidence, it must be established whether or not the Entry of "white sauce" at issue in this litigation, Entry No. 180–05900297, had a milkfat percentage that conformed with NYRL D86228.

For the foregoing reasons, the Court denies Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment on Count I of Plaintiff's Complaint alleging a violation of 19 U.S.C. § 1625(c)(1).

II. *Count II–Plaintiff Claims That Customs Violated 19 U.S.C. § 1625(c)(2)*

In Count II of its Complaint, Plaintiff alleges that Customs violated 19 U.S.C. § 1625(c)(2). That statute states, in pertinent part,

A proposed interpretive ruling or decision which would–

...

(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)(2) (2000) (emphasis added). In order to prevail on this claim, Plaintiff must establish at least four things. First, it must demonstrate what was "the treatment previously accorded by the Customs Service." 19 U.S.C. § 1625(c)(2). That is, it must show what entries of "white sauce" were previously classified under the desired tariff subheading for "sauces and preparations thereof." Second, Plaintiff must prove that the Entry at issue here is a "substantially identical transaction" to the previous treatment. *Id.* Third, Plaintiff must prove that Customs has made a "proposed interpretive ruling or decision" that would have the effect of modifying the previous treatment with respect to the Entry in question. *Id.* Fourth, Plaintiff must prove that the proposed interpretive ruling or decision violated the notice and comment requirements of this statute. *See id.*

A. Genuine Issue of Material Fact

Attempting to demonstrate the first element listed above—which action of Customs constitutes the “prior treatment”—Plaintiff alleges that “[f]rom as early as 1988 until April 2005, Customs classified imported white sauce under HSTUS 2103.90.9060 (previously numbered HTSUS 2103.90.9091).” (Pl.’s Mot. for Summ. J. ¶ 2.) Plaintiff also asserts, more specifically, that “[f]rom 1999 through late April 2005, Customs consistently classified the white sauce under HTSUS 2103.90.9060/9091 in accordance with ICP’s ruling.” (Pl.’s Facts ¶ 5.) Plaintiff contends that this classification “constitutes a ‘treatment’ within the meaning of section 1625(c)(2). (Compl. ¶ 36.) However, the Court finds that the evidence offered by Plaintiff to demonstrate this treatment is meager, at best, and perhaps nonexistent.

To substantiate its claim, ICP offers an affidavit from its President and founder, Dennis Raybuck. (Confidential Appx. in Support of Pl.’s Mot. for Summ. J. and Pl.’s Opp. to Def.’s Mot. for Summ. J. (“Pl.’s Ex.”) Tab 1.) Mr. Raybuck asserts in his declaration,

From 1989 to 1994, ICP annually purchased dozens of containers of white sauce from an importer of food products based in New Jersey. Pursuant to an advance classification issued to that importer, all of the imported white sauce that we purchased from the importer was, to the best of my knowledge, classified as ‘sauces and preparations therefor’ under HTSUS 2103.

(*Id.* at ¶ 7.) This statement closely shadows an assertion ICP made when it requested its initial ruling letter for “white sauce” in 1998. There, ICP set forth:

It is believed that there was a letter ruling issued to unknown [sic] company during the period of 1989–1994. At that time, white sauce was imported from Israel by a company named Three Diegos Import/Export Company. A search has not found a letter ruling on this product or to this company. There may be one, but we have not been able to locate it.

(Def.’s Exhibit 2(Bates Stamp # ICP000002).) Apart from this bald assertion made “to the best of [Mr. Raybuck’s] knowledge,” Plaintiff has offered no evidence that these alleged importations of “white sauce” from 1989–1994 ever occurred, much less the composition or classification of said “white sauce.” Consequently, it would seem that these entries cannot serve as the basis for “prior treatment” within the meaning of section 1625(c)(2).

The only entries of “white sauce” that could potentially satisfy the prior treatment requirement would be Plaintiff’s own importation of “white sauce” between 1999 and 2003. All of the Affected Entries (*i.e.*, those affected by the 2005 Notice of Action) were entered between 2003 and 2005. (*See* Summons, Attachments A and B.) Be-

cause Customs never liquidated the Affected Entries under tariff subheading 2103.90.9091, they cannot be the basis for the “prior treatment” that would trigger the applicability of section 1625(c)(2). Rather, based on the facts Plaintiff has alleged, only ICP’s own entries of “white sauce” from 1999 to 2003, which were actually liquidated at HTSUS subheading 2103.90.9091, could possibly qualify as “prior treatment” for the purposes of section 1625(c)(2).

However, there is no record before the Court of any such entries. Plaintiff has not identified the Entry Numbers of any “white sauce” entries from this time period that are supposed to qualify for this purpose. On the other hand, Defendant has not disputed the existence of these entries. Indeed, Defendant admits that some goods imported by Plaintiff, entered from 1999 through late April 2005, have been classified under HTSUS 2103.90.90. (Def.’s Resp. Facts ¶ 5.) Whether or not Plaintiff made entries of “white sauce” that were classified under HTSUS 2103.90.90, and that can serve as “prior treatment” for the purposes of 19 U.S.C. § 1625(c)(2), represents a genuine issue of material fact. Consequently, both Plaintiff’s Motion for Summary Judgment and Defendant’s Cross-Motion for Summary Judgment are denied with respect to Count II of Plaintiff’s Complaint.

III. *Count V—Plaintiff Claims That Customs Violated Plaintiff’s Due Process Rights*

In Count V of its complaint, Plaintiff claims that “[b]y failing to conduct the revocation or modification process in a lawful manner with notice to ICP and an opportunity for it to comment, Customs violated ICP’s rights under the Due Process Clause of the Fifth Amendment to the Constitution.” (Compl. ¶ 51.) Specifically, Plaintiff alleges that Customs violated Plaintiff’s Due Process rights by abrogating the notice and comment requirements of both 19 U.S.C. § 1625(c) and 19 C.F.R. § 177.12. (Compl. ¶¶ 52–53.) Plaintiff has not independently alleged that Customs violated 19 C.F.R. § 177.12, but such a violation serves as one of the two bases for Plaintiff’s Due Process claim. (*See id.*)

A. *Genuine Issue of Material Fact*

Because Plaintiff has predicated its Due Process claim on alleged violations of sections 1625(c) of the U.S. Code and 177.12 of the C.F.R., summary judgment is here precluded by the same genuine issue of material fact that precludes summary judgment on Count I. That is, whether or not Plaintiff’s “white sauce” as entered conformed with the description of “white sauce” given in NYRL D86228. That genuine issue of material fact must be resolved in order to validate Plaintiff’s claim under both 19 U.S.C. 1625(c) and 19 C.F.R. § 177.12, before the constitutional question is even addressed. In other words, if Plaintiff entered “white sauce” that differed from its

initial ruling letter (such as in composition or milkfat percentage), Customs could not have violated 19 U.S.C. § 1625(c) or 19 C.F.R. § 177.12, which in turn means Customs could not have violated Plaintiff's constitutional right to Due Process as Plaintiff alleges. Accordingly, both Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment are denied with respect to Count V of Plaintiff's Complaint because there is a genuine issue of material fact as to whether the "white sauce" imported by Plaintiff conforms with NYRL D86228.

IV. Defendant's Contentions that Plaintiff Made a Material Misstatement or Omission in Obtaining NYRL D86228

The government maintains that Plaintiff made a material misstatement or omission in obtaining the ruling letter. The government attempts to demonstrate a material misstatement or omission by pointing to alleged differences between the description of "white sauce" in the ruling letter and the composition of "white sauce" as entered by Plaintiff. (*See* Def.'s MSJ 25–31, 34–38.) These allegations are detailed above. *See supra* 11–13. The government also attempts to show a material misstatement or omission in obtaining NYRL D86228 by arguing that Plaintiff (1) failed to disclose its knowledge as to the typical use of "white sauce" when it obtained its ruling letter, and (2) by failing to disclose commercial, common, or technical designations of the product. (*Id.* at 31–33, 38–39.)

The Court finds that, while pertinent, the evidence offered by the government as to these issues is not sufficient to entitle Defendant to judgment as a matter of law, and consequently does not alter the Court's decision to deny summary judgment to both parties. If, in fact, NYRL D86228 was obtained by Plaintiff's material misstatement or omission at the time it was issued, such issues will be addressed and resolved at trial.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is denied. Defendant's Cross-Motion for Summary Judgment is also denied.



Slip Op. 09-9

CHRYSLER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 07-00041

[Summary judgment for Plaintiff denied; summary judgment for Defendant granted.]

Dated: January 29, 2009

Barnes, Richardson & Colburn (Alan Goggins, Lawrence M. Friedman, Carolyn D. Amadon, Eric W. Lander) for Plaintiff Chrysler Corporation.

Michael F. Hertz, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Todd M. Hughes*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Tara K. Hogan*, Trial Attorney and *Richard McManus*, Attorney, Office of Chief Counsel for U.S. Customs and Border Protection, U.S. Department of Homeland Security) for Defendant United States.

OPINION

Gordon, Judge: This case is before the court on cross-motions for summary judgment. Plaintiff, Chrysler Corporation, challenges the decision of the United States Customs and Border Protection (“Customs”) denying Plaintiff’s protest of Customs’ refusal to refund harbor maintenance taxes Plaintiff allegedly paid on exports prior to July 1, 1990. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). For the reasons set forth below, the court denies Plaintiff’s motion for summary judgment and grants Defendant’s motion for summary judgment.

I. Background

In 1986 Congress enacted the Harbor Maintenance Tax (“HMT”), 26 U.S.C. § 4461(a). As originally enacted the HMT obligated exporters, importers, and domestic shippers to pay a percentage of the value of their commercial cargo shipped through the nation’s ports. The HMT is collected by Customs and deposited in the Harbor Maintenance Trust Fund (“Trust Fund”) from which Congress may appropriate funds to pay for harbor maintenance and development projects. *See* 26 U.S.C. § 9505 (2000).

In March 1998 the Supreme Court held that the HMT collected on exports was unconstitutional because it violated the Export Clause of the Constitution, U.S. CONST., ART. I, § 9, cl. 5. *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 370 (1998). After *U.S. Shoe* the U.S. Court of Appeals for the Federal Circuit held that Customs’ denial of a request for refund of HMT collections is a “protestable decision” actionable in the U.S. Court of International Trade under 28 U.S.C. § 1581(a). *Swisher Int’l, Inc. v. United States*, 205 F.3d 1358, 1369 (Fed. Cir. 2000).

After *Swisher* Customs received thousands of HMT administrative refund requests. At the time, Customs' refund regulation required claimants to present proof of payment documentation (usually Customs Form 349). 19 C.F.R. § 24.24(e)(4) (2000). Claimants who had not retained this documentation began submitting requests for copies pursuant to the Freedom of Information Act ("FOIA."). After receiving copies of their payment documentation from Customs, exporters would return them to Customs and request a refund.

To minimize the burden of responding to FOIA requests and streamline the refund process, Customs issued interim regulations, *Amended Procedure for Refunds of Harbor Maintenance Fees Paid on Exports of Merchandise*, 66 Fed. Reg. 16,854 (Mar. 28, 2001) (interim rule). Customs then received comments, and issued a final rule amending the refund regulation, *Amended Procedure for Refunds of Harbor Maintenance Fees Paid on Exports of Merchandise*, 67 Fed. Reg. 31,948, 31,949 (May 13, 2002) (final rule).

For refunds of unconstitutional HMT collections made after July 1, 1990, Customs eliminated the requirement to submit supporting documentation because Customs verifies those refund amounts using the documentation already in its possession. 67 Fed. Reg. at 31,949 (19 C.F.R. § 24.24(e)(4)(iv)(A) & (C)).¹ For refunds of unconstitutional HMT collections made prior to July 1, 1990, however, Customs retained the proof of payment requirement. *Id.* Customs no longer possessed documentation for pre-July 1, 1990 payments, and could not independently verify those payments. *Id.* Verification was important for Customs in promulgating the rule because "experience with older payments recorded in the [HMT] database has shown that the database is unreliable." 67 Fed. Reg. at 31,950.

For refunds of pre-July 1, 1990 payments, exporters must submit "supporting documentation" to verify proof of payment. 19 C.F.R. § 24.24(e)(4)(iv)(A)&(C). Generally, the supporting documentation demonstrating entitlement to a refund is the same documentation submitted to Customs at the time of payment:

a copy of the Export Vessel Movement Summary Sheet; where an Automated Summary Monthly Shipper's Export Declaration was filed, a copy of a letter containing the exporter's identification, its employer identification number (EIN), the Census Bureau reporting symbol, and, the quarter for which the payment was made; or a copy of a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter covering the refund request.

¹Unless otherwise noted, further citations to 19 C.F.R. § 24.24 are to the version contained in the final rule set forth in 67 Fed. Reg. at 31,953-55.

19 C.F.R. § 24.24(e)(4)(iv)(C). These documents, however, are not the sole means of establishing proof of payment:

Customs also will consider other documentation offered as proof of payment of the fee, such as cancelled checks and/or affidavits from exporters attesting to the fact that all quarterly [HMT] payments made by the exporter were made exclusively for exports, and will accept that other documentation as establishing entitlement for a refund only if it clearly proves the payments were made for export harbor maintenance fees in amounts sought to be refunded and were made by the party requesting the refund or the party on whose behalf the refund was requested.

Id.

To assist exporters in identifying pre-July 1, 1990 payments and locating supporting documentation, Customs took on the obligation to search its records (both its electronic database and paper document sources) while processing a refund request, and to issue a report to the exporter (entitled the “HMT Payment Report”) listing all export payments reflected in Customs’ records for the entire period the HMT was in effect. 19 C.F.R. § 24.24(e)(4)(iv)(B)(2).

II. Uncontested Facts

The following facts relevant to Plaintiff’s claim are not in dispute. On February 10, 2003, Plaintiff requested a refund of HMT export payments made from 1987 to July 1, 1990 amounting to \$782,407.45 and recorded in Customs’ HMT database. Plaintiff did not produce any of the “supporting documentation” identified in 19 C.F.R. § 24.24(e)(4)(iv)(C). Customs denied Plaintiff’s claim for a refund of the disputed HMT payments, stating that Plaintiff had not provided supporting documentation. Plaintiff timely protested the denial, and Customs denied the protest because Plaintiff provided no supporting documentation for pre-July 1, 1990 payments, as required by regulation.

III. Standard of Review

The Court of International Trade reviews Customs’ protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). Rule 56 of this Court permits summary judgment when “there is no genuine issue as to any material fact. . . .” USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

IV. Discussion

The HMT refund regulation requires “supporting documentation” for pre-July 1, 1990 payments. 19 C.F.R. § 24.24(e)(4)(iv)(C). Plaintiff did not provide this documentation with either its refund request

or protest. Customs, therefore, denied Plaintiff's protest. For Plaintiff to prevail, Plaintiff must overcome the HMT refund regulation.

The starting point for review of the regulation is determining which framework applies to the court's analysis, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (explaining applicability of *Chevron* treatment or *Skidmore* treatment to Customs' statutory interpretation). The two-step framework of *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226–27.

Within the HMT statute Congress expressly delegated authority to Customs to:

prescribe such additional regulations as may be necessary to carry out the purposes of this subchapter, including but not limited to regulations (1) providing for the manner and method of payment and collection of the tax imposed by this subchapter . . . [and] (4) providing for the remittance or mitigation of penalties and the settlement or compromise of claims.

26 U.S.C. § 4462(i) (2000). When promulgating the current version of the HMT refund regulation, Customs used informal rulemaking under 5 U.S.C. § 553 by issuing an interim rule with an accompanying explanation of the rule's rationale. 66 Fed. Reg. at 16,854. Customs then received comments and issued a final rule addressing the comments. 67 Fed. Reg. at 31,948. For the final rule under review in this case, Customs used "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" having the force of law. *Mead*, 533 U.S. at 230. The court will therefore apply the *Chevron* framework in reviewing the Customs' refund regulation.

In *United States v. Haggart Apparel Co.*, 526 U.S. 380 (1999), the Supreme Court explained a court's consideration of an agency regulation within the *Chevron* framework:

Under *Chevron*, if a court determines that "Congress has directly spoken to the precise question at issue," then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842–843. If, however, the agency's statutory interpretation "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment 'controlling weight.'" *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1997) (quoting *Chevron*, *supra*, at 844).

Haggar, 526 U.S. at 392. Applying these principles in this action, the court notes that the HMT statute does not address the specific method for refunding HMT collections, and therefore, the court must consider whether Customs' refund regulation reasonably accomplishes the statutory purposes.

The purpose of the HMT statute is to provide revenue for the maintenance and development of U.S. ports and harbors. Although the section related to export-related payments was declared unconstitutional, the rest of the statute remains in effect. See 26 U.S.C. §§ 4461, 4462 (2000); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1368–69 (Fed. Cir. 2000) (holding export provision severable from other HMT provisions). Customs must still collect and deposit constitutional HMT payments in the Trust Fund. In fashioning procedures for the refund of unconstitutional HMT collections (as well as constitutional collections), Customs could not ignore its continuing obligation to protect the Trust Fund. See Section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1484(a)(2)(C) (2000) (“The Secretary shall also provide, to the maximum extent practicable, for the protection of the revenue.”).

Turning to the refund regulation, the court observes that the supporting documentation requirement has been in place, in some form, since 1991. See 19 C.F.R. § 24.24(e)(5) (1992) (“Refund and supplemental payment. Where a refund is requested or a supplemental payment is made, a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, should be mailed to the U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673–0915, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) in which the refund is requested or a supplemental payment is made.”)

Customs relaxed that requirement for post-July 1, 1990 HMT payments to achieve increased administrative efficiency in processing refund claims. For Customs there was no corresponding risk of overpayment or potential harm to the Trust Fund because government-retained HMT payment records existed to verify the post-July 1, 1990 transactions. The absence of government-retained HMT payment records for pre-July 1, 1990 payments, however, led Customs to retain the supporting documentation requirement for those transactions. Customs was reluctant to rely solely on the payment information contained in an HMT database that had proved unreliable. Customs considered, but explicitly rejected, using its electronic database as the sole method of verifying payment information. 67 Fed. Reg. at 31,950.

Customs' concern about the electronic database proved well-founded. Customs has identified and corrected \$143,530,474.00 of HMT payments incorrectly coded for export HMT that actually were paid on other HMT categories. Customs has also identified and corrected \$25,905,714.50 of HMT payments incorrectly coded for other

HMT categories that actually were paid on exports. The supporting documentation requirement for pre-July 1, 1990 payments has enabled Customs to “balance its obligation to issue refunds with its obligation to protect the revenue.” *Id.* at 31,948, 31,950.

Customs’ HMT refund regulation requires that most claimants, including exporters seeking refunds of pre-July 1, 1990 export payments, provide Customs with documentation supporting their request for refund. *See* 19 C.F.R. § 24.24(e)(4)(iii) & (iv) (refunds of other than export HMT and refunds of export HMT). Customs acknowledged that some exporters would face difficulties in providing the requested documentation. 67 Fed. Reg. at 31,950. To address that concern, Customs expanded the types of documentation it would accept as proof of payment so long as the other types of documentation “clearly show that the payments were made for export fees (as opposed to other harbor maintenance fees), in the amounts sought to be refunded, and by the party requesting the refund.” *Id.* Customs considered and accommodated the concerns of exporters who may not have retained certain documentation, by providing additional means of documenting their payments. 19 C.F.R. § 24.24(e)(4)(iv) (C). The regulation’s documentation requirement has allowed Customs to verify and refund \$77,453,118.80 worth of pre-July 1, 1990 export HMT payments.

Given the decisional landscape for HMT refunds—an obligation to refund unconstitutional HMT collections comingled with valid HMT payments, an unreliable electronic HMT database, and the absence of government-retained HMT payment documentation prior to July 1, 1990—the amended HMT refund regulation provides a reasonably flexible process for the efficient refund of claims while ensuring the protection of the Trust Fund. The court must therefore defer to the agency’s reasonable gap-filling and accord the regulation controlling weight. *Haggar*, 526 U.S. at 392.

Nonetheless, Plaintiff argues that the refund regulation is “contrary to law” because the regulation allegedly conflicts with a presumption of “correctness” that Plaintiff believes attaches to Customs’ HMT database. *See* Pl.’s Mem. Law Supp. Mot. Summ. J. 20–24; Pl.’s Reply Mem. in Opp’n to Def.’s Cross Mot. Summ. J. and in Supp. Pl.’s Mot. Summ. J. 16. When promulgating the refund regulation, Customs expressly rejected sole reliance on the HMT database for refunds because the database was too unreliable. 67 Fed. Reg. at 31,950 (“Customs experience with older payments recorded in the database has shown that the database is unreliable. Customs therefore cannot rely exclusively on that record source to confirm export fee payments, and exporters will have to provide that documentation.”). To overcome this legislative fact, Plaintiff argues that the court should apply a presumption of correctness against Customs. According to Plaintiff, the disputed HMT export payments within the HMT database should be “presumed correct” because those

amounts were entered by Customs (or its agents) into Customs' HMT database. The burden, Plaintiff argues, should be on Customs to overcome the presumption with specific evidence that the \$782,406.45 is unreliable.

There is a temporal problem with Plaintiff's argument. A presumption of correctness may have attached to the HMT database at one time, but subsequent events, namely, Customs' HMT refund rulemaking and acknowledgement that the HMT database was unreliable and inaccurate, now preclude any such attachment in Plaintiff's action under 28 U.S.C. § 1581(a). A presumption of correctness does not attach to the HMT database as Plaintiff argues, but to the factual components of Customs' protest decision, which in this case is the legislative fact of an unreliable HMT database.

To further explain, Customs' protest decisions enjoy a statutory presumption of correctness. 28 U.S.C. § 2639(a)(1) (2000). Despite its name, the statutory presumption of correctness applicable in customs cases is not a true evidentiary presumption governed by Federal Rule of Evidence 301, but rather an "assumption" that allocates to plaintiff the burden of proof on contested factual issues that arise from the protest decision. *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 n.2 (Fed. Cir. 1997); 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure Evid.* § 5124 (2d ed. 2008) ("Rule 301 does not apply to 'assumptions'—rules for allocating the burden of proof that are often mislabeled as 'presumptions.' . . . the best known include: . . . the 'assumption' that official duty has been regularly performed."). It is a procedural device that codifies the presumption of regularity accorded government action. H.R. REP. NO. 96-1235, at 58 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3769-70 ("The Committee does not intend to impose a limitation on the presumption of regularity and legality which is normally accorded to actions of a government agency or official. Rather, the Committee intends to specifically emphasize the propriety of that presumption as it applies to civil actions commenced under section 515, 516, and 516A of the Tariff Act of 1930."). The presumption of regularity found application in early U.S. customs cases to allocate to plaintiffs the burden of proof. *See, e.g., Arthur v. Unkart*, 96 U.S. 118, 122 (1877) ("[T]he conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. . . . [T]he . . . collector ha[s] the power to act in the first instance upon the question in dispute, and he who insists that such action is in violation of law must make the proof to show it.").

For Plaintiff's 1581(a) action, which challenges Customs' HMT refund regulation and the underlying legislative fact of an unreliable HMT database, the presumption of correctness therefore operates in exactly the opposite manner than Plaintiff suggests. The burden of proof is not on Customs to demonstrate that the \$782,406.45 is unre-

liable, but rather on Plaintiff to produce evidence that demonstrates by a preponderance that the \$782,406.45 recorded in the HMT database is accurate and export-related. *See Universal Elecs.*, 112 F.3d at 492 (explaining operation of presumption of correctness to Customs' classification decisions).

Plaintiff made some effort to carry its burden by proffering uncontested evidence regarding the general HMT collection bureaucracy into which Plaintiff made its payments. Plaintiff, however, did not proffer any specific evidence about its HMT payments from its own records. Customs, in turn, proffered an uncontested declaration of the Director of Customs' National Finance Center responsible for processing HMT payments and refunds, which declaration outlines corrections that have been made to the HMT database demonstrating its general unreliability (noted above, *see supra* at 8). Plaintiff then filed its motion for summary judgment, arguing that the \$782,406.45 recorded in the HMT database is conclusively export-related, not because Plaintiff proved this fact with specific evidence from its own records, but because Customs failed to overcome a "presumption of correctness" that Plaintiff argues attaches to the HMT database.

Rather than prove its case, Plaintiff attempts to change the ground rules and shift to Customs the burden of proof on the ultimate issue—whether the \$782,406.45 is unreliable or accurate and export-related. This the court will not do. As explained above, Plaintiff has the burden of proof on contested factual issues arising from the protest decision. *See Universal Elecs.*, 112 F.3d at 492. In challenging the HMT refund regulation as it applies to Plaintiff's "specific factual situation," *Haggar*, 526 U.S. at 392, Plaintiff evidently cannot establish from its own records or otherwise that the \$782,406.45 is accurate and export-related. By relying solely on its theory of the presumption of correctness, Plaintiff has failed to raise a genuine factual issue regarding the soundness of the legislative fact that the HMT database is unreliable.² Thus, Plaintiff has not demonstrated that the HMT refund regulation represents an "unreasonable implementation" by Customs of the HMT's statutory purposes or Customs' obligation to refund unconstitutional HMT collections under *U.S. Shoe. Id.*

²The standard for determining whether there is a genuine factual issue "mirrors the standard for a directed verdict . . . , which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. . . . In essence, . . . , the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250–52.

V. Conclusion

Customs' HMT refund regulation, 19 C.F.R. § 24.24(e)(4)(iv), represents a reasonable exercise of Customs' rule making authority contained in 26 U.S.C. § 4462(i). Plaintiff's failure to comply with the regulation requires that Plaintiff's motion for summary judgment be denied and that Defendant's motion for summary judgment be granted. The court will enter judgment accordingly.