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# Customs Law

MATTHEW T. MCGRATH, LAWRENCE M. FRIEDMAN, AND ROBERT A. SHAPIRO\*

In 1997, the U.S. Customs Service (Customs), which is responsible for the administration of most of the U.S. laws affecting imports and exports, continued its slow march toward the full implementation of the Customs Modernization Act (Mod Act).<sup>1</sup> The agency published several Notices of Proposed Rulemaking (NPRM) and several drafts of proposed rules, but only two final rules were promulgated. The final rules published by Customs have little general applicability, dealing with a narrow area of the marking rules for country of origin<sup>2</sup> and the rules governing duty-free stores.<sup>3</sup> On the other hand, the subjects contained in the NPRMs and the draft rules involve significant issues. The Department of Commerce also published its final regulations implementing the Antidumping Code as enacted through the Uruguay Round Agreements Act.<sup>4</sup>

In the judicial arena, the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit issued several important decisions concerning administrative protests, penalties, retroactivity, and the constitutionality of the Harbor Maintenance Tax.

## I. Regulatory Developments

### A. RECORDKEEPING

In April, Customs published proposed recordkeeping regulations<sup>5</sup> that are, arguably, the cornerstone to Customs' Mod Act implementation efforts. These regulations emphasize that Customs' "paperless" entry processing environment does not relieve an importer or other designated recordkeepers from maintaining records for later review, and clearly shift this burden to the importer.

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1. North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. No. 103-182 tit. VI, 107 Stat. 2057 (1993).

2. Country of Origin Marking, 62 Fed. Reg. 44,211 (1997).

3. General Policy, 62 Fed. Reg. 15,831 (1997).

4. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

5. Recordkeeping Requirements, 62 Fed. Reg. 19,704 (1997) (proposed April 23, 1997).

The proposed rules expand the definition of parties subject to Customs recordkeeping oversight to include anyone who files an entry or declaration, transports or stores merchandise carried or held under bond, causes the transportation or storage of bonded merchandise, files a drawback claim, or causes an importation.<sup>6</sup> Additionally, both "entry records," commonly referred to as the "(a)(1)(A)" records,<sup>7</sup> and other ordinary business records that may pertain to customs activities must be maintained.<sup>8</sup>

Administrative penalties of between \$10,000 and \$100,000 per release of merchandise may be assessed for failure to produce records on reasonable demand by Customs within a reasonable time.<sup>9</sup> Reasonableness is based on the number, type, and age of the items requested. The regulations contain guidelines as to reasonable time periods for record production.<sup>10</sup> If the demanded records relate to the eligibility of the importation for special duty treatment, Customs may liquidate or reliquidate the entry at the higher duty rate.<sup>11</sup> The recordkeeper may avoid penalties by showing that the requested records had already been presented to and retained by Customs<sup>12</sup> or by participating in the Customs Sanctioned Recordkeeping Compliance Program.<sup>13</sup> Generally, records must be maintained in the format in which they are received.<sup>14</sup> Alternative storage formats will be approved if the responsible party meets certain minimum standards including the designation of two recordkeeping officers; the preparation of written procedures, including an audit trail, for the transfer of the records; and the quarterly testing of the alternative formats. Original records must be maintained for one year after the transfer to alternative storage.<sup>15</sup>

## B. DUTY DRAWBACK

Customs proposed changes to its duty drawback regulations in order to implement the Mod Act provisions, increase the clarity of this regulatory section, expedite filing and processing of drawback claims, and ensure that Customs has the necessary enforcement information to maintain effective administrative oversight.<sup>16</sup> Several general principles are enumerated in the proposed regulations. Acceptable accounting methods for the direct identification of merchandise, when required, are itemized and include: first-in, first-out (FIFO); last-in, first-out (LIFO); low-to-high; average; and inventory turnover.<sup>17</sup> The regulations also recognize the use of agents in the manufacturing process<sup>18</sup> and allow for the transfer of drawback rights to successor companies.<sup>19</sup>

6. *Id.* at 19,710 (proposed to be codified at 19 C.F.R. § 163.2).

7. Section "(a)(1)(A)" refers to the statutory provision which requires that the applicable party shall keep, and render for examination, records which "pertain to any such activity, or to the information contained in the records required by this chapter in connection with any such activity." 19 U.S.C.A. § 1508(a)(1)(A) (West Supp. 1998). A list of (a)(1)(A) records is included in the appendix to the proposed rules.

8. See 19 U.S.C.A. § 1509 (West Supp. 1998).

9. Recordkeeping Requirements, 62 Fed. Reg. at 19,712 (to be codified at 19 C.F.R. § 163.1).

10. *Id.* at 19,712 (to be codified at 19 C.F.R. § 163.6).

11. Notwithstanding the time limitations of sections 1514 and 1520, Customs may reliquidate these entries up to two years after the original liquidation. See 19 U.S.C.A. § 1509(g)(2)(C)(ii) (West Supp. 1998).

12. Recordkeeping Requirements, *supra* note 9, at 19,712 (to be codified at 19 C.F.R. § 163.6).

13. *Id.* at 19,712 (to be codified at 19 C.F.R. § 163.14).

14. *Id.* at 19,711 (to be codified at 19 C.F.R. § 163.5).

15. *Id.*

16. Drawback Regulations, 62 Fed. Reg. 3,082 (1997).

17. *Id.* at 3,103. Other methodologies may also be used with Customs approval.

18. *Id.* at 3,101 (to be codified at 19 C.F.R. § 191.9).

19. *Id.* at 3,104 (to be codified at 19 C.F.R. § 191.22(d)).

The proposed regulations reflect the Mod Act's change from "same condition" to "unused merchandise" drawback,<sup>20</sup> and the corresponding change from "fungibility" to "commercial interchangeability" as a standard for substitution under this provision.<sup>21</sup> Customs did not define commercial interchangeability beyond what was included in the legislative history.<sup>22</sup> The proposal defines "use" as the employment of the item to perform the function for which it was intended, excluding any operation performed on the object not amounting to manufacture or production.<sup>23</sup>

The proposal also implements a drawback compliance program that may reduce the potential liability for penalty of its participants.<sup>24</sup> A key part of the compliance program is the maintenance and production of records required to prove fulfillment of the various statutory elements of drawback. Drawback records are required to be kept until at least three years after the date of payment of the related claim.<sup>25</sup> Customs urges exporters to keep their drawback records at least until the liquidation of the drawback claim becomes final.<sup>26</sup>

The proposal makes the Exporters Summary Procedure available to all claimants rather than granting it as a privilege. In addition, Customs has found that, under the current regulations, the waiver of prior notice of exportation with intent to claim drawback has created significant internal control weaknesses for the agency, so the proposal restricts this procedure to a single use privilege.<sup>27</sup>

The use of accelerated payment of drawback would also be restricted under this proposal. The application to participate in this program will require the claimant to provide significantly more information, and before approval, Customs will closely examine the applicant's record for any unresolved Customs claims, inaccuracies in past claims, and prior instances of noncompliance.<sup>28</sup>

This year, Customs also issued a draft proposal for drawback penalty regulations.<sup>29</sup> The draft follows the statute in assessing penalties up to three times the loss of customs revenue for fraudulent violations of the drawback laws.<sup>30</sup> The penalties for negligent violations are graduated depending on the record of the claimant<sup>31</sup> and are reduced for participants in the

20. See North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. No. 103-182, tit. VI, § 632, 107 Stat. 2057 (1993).

21. 19 U.S.C.A. § 1313(j)(2) (West Supp. 1998). The prior law would only permit drawback if a "fungible," i.e., identical, item were substituted for the imported good.

22. Compare H.R. Rep. No. 103-361, pt. 1 at 131 with Drawback Regulations, 62 Fed. Reg. 3,107 (1997) (to be codified at 19 C.F.R. § 191.32(c)).

23. Drawback Regulations, 62 Fed. Reg. at 3,107.

24. *Id.* at 3,123 (to be codified at 19 C.F.R. § 191.191). Regulations regarding penalties for the filing of false drawback claims were published in draft form this year. See *Department of the Treasury, United States Custom Service: Drawback* (visited Apr. 7, 1998) <<http://www.customs.ustreas.gov/hot-new/fed-reg/notices/drawpen.htm>>.

25. See, e.g., Drawback Regulations, 62 Fed. Reg. at 3,106 (to be codified at 19 C.F.R. § 191.25(g)).

26. *Id.* at 3,902. See also HRL 227217 (Apr. 7, 1997) (unliquidated drawback claim denied more than three years after payment because supporting documentation was insufficient).

27. Drawback Regulations, 62 Fed. Reg. at 3,108-3,109 (to be codified at 19 C.F.R. § 191.36).

28. *Id.* at 3114 (to be codified at 19 C.F.R. § 191.92).

29. See *Department of the Treasury, United States Custom Service: Drawback* (visited April 28, 1997) <<http://www.customs.ustreas.gov/hot-new/fed-reg/notices/drawpen.htm>>.

30. 19 U.S.C.A. § 1593a (West Supp. 1998).

31. Penalties of 20 percent of the lost tariff revenue for the first violation, 50 percent for first repeat violation, and 100 percent of the lost revenue for second and subsequent repetitive violations. 19 U.S.C.A. § 1593a(c)(2)(B) (West Supp. 1998).

drawback compliance program.<sup>32</sup> Additionally, Customs will only examine the prior three years to determine whether a compliance program participant has previously committed the same negligent violation. Such temporal limitation is not available for those who do not participate in the compliance program.

### C. REASONABLE CARE

Customs released a checklist to which importers should refer in determining whether their activities meet the reasonable care standard contained in the Mod Act.<sup>33</sup> The checklist is broad, and it is not expected that all questions will be applicable to all parties. Additionally, Customs intends that this checklist will be updated to suit the changing nature of international trade. The checklist acknowledges the role of experts in providing advice to importers and stresses that reasonable care must be used in selecting an expert. The term "expert" is not further defined by Customs in the checklist. In response to public comments, however, Customs stated that choosing a customs lawyer or licensed broker as an expert makes compliance easier.<sup>34</sup>

### D. WEEKLY ENTRY PROCEDURES FOR FOREIGN TRADE ZONES

Customs announced a proposal to allow weekly entries of merchandise withdrawn from non-manufacturing foreign trade zones (FTZs).<sup>35</sup> A similar provision has been in existence for manufacturing FTZs since 1986.<sup>36</sup> As goods are often withdrawn from FTZs on a daily basis, this proposal could greatly reduce the number of entries filed. Additionally, as the merchandise processing fee is calculated and limited on a per entry basis, this proposal could result in significant savings for the FTZ operator. Participation in the program is subject to an application approval process.

### E. ENTRY DATA RECONCILIATION PROTOTYPE

Section 637 of the Mod Act amended section 484 of the Tariff Act of 1930 to establish a new subsection (b) entitled "reconciliation."<sup>37</sup> In a September 30, 1997 notice, Customs announced a prototype reconciliation system and stated that it will be the sole means for reconciling an entry with respect to: (1) value, (2) classification, (3) merchandise entered under

32. Customs proposes that the first non-repetitive violation will be subject to a warning letter. For repetitive violations the penalties are: 20 percent loss of revenue for the first violation, 50 percent for the second, and 100 percent for the third and any subsequent violations. *Id.*

33. Reasonable Care Checklist, 62 Fed. Reg. 64,248 (1997). The importer of record is required to use "reasonable care" in the declaration of value, classification, applicable rate of duty and such other information as will enable Customs to properly assess duties, collect accurate statistics and determine whether all other applicable legal requirements are met. 19 U.S.C.A. § 1481 (West Supp. 1998).

34. Reasonable Care Checklist, 62 Fed. Reg. at 64,248. Ironically, the response to public comments also notes that the selection and qualifications of the expert are "part and parcel" of the agency's determination as to whether the party exercised reasonable care, but this information is also not included in the checklist. *Id.*

35. Weekly Entry Procedure for Foreign Trade Zones, 62 Fed. Reg. 12,129 (1997).

36. See 19 C.F.R. § 146.63(c)(1) (1997).

37. See 19 U.S.C.A. § 1484(b) (West Supp. 1998).

The term "reconciliation" means an electronic process, initiated at the request of an importer, under which the elements of an entry, other than those elements related to the admissibility of the merchandise, that are undetermined at the time of entry summary are provided to the Customs Service at a later time. A reconciliation is treated as an entry for purposes of liquidation, reliquidation, and protest.

19 U.S.C.A. § 1401(s) (West Supp. 1998).

Heading 9802 of the Harmonized Tariff Schedule of the United States (known generally as "American goods returned"), or (4) merchandise entered under the North American Free Trade Agreement. The prototype requires the importer to flag each entry at the time of filing and indicate the issue for which a later reconciliation (to provide data not fully available at the time of entry) will be filed. Customs may then liquidate the entry with respect to all issues not covered by the reconciliation. The prototype is scheduled to begin no earlier than October 1, 1998 and run for approximately two years.

#### F. ITA PUBLICATION OF FINAL ANTIDUMPING REGULATIONS

On May 19, 1997, the International Trade Administration (ITA) of the Department of Commerce published its final rules on antidumping (AD) and countervailing duty (CVD) proceedings to conform to the Uruguay Round Agreements Act (URAA).<sup>38</sup> The new rules do not alter the ITA's practice or vary considerably from the interim rules issued on May 11, 1995. Rather, they tend to codify elements of the practice that have become consistent over time. Certain changes, however, merit special note.

With regard to the revocation of outstanding AD orders, ITA may revoke an order if a respondent can show an absence of dumping for three consecutive administrative review periods. In order to meet this criterion, the ITA requires that a review be conducted only in the first and third (or third and fifth) years, and that no dumping be found. ITA may revoke an order even if a review is not requested in the second (or fourth) year, provided the foreign producer sold the subject merchandise to the United States in "commercial quantities" during that intervening period. Under previous regulations, the ITA would only revoke an order if a respondent were able to show that it did not sell the subject merchandise at less than fair value in three consecutive reviews.<sup>39</sup>

Respondents may now defer a requested review for a year, absent any opposition, allowing the ITA to conduct two reviews simultaneously.<sup>40</sup> A deferral would most likely take place on the first review, in light of a pending court case on an issue that would recur in an administrative review. Such deferral would spare a foreign producer the expense of a review, while preserving for them the right to seek future revocation of an outstanding order. In addition, domestic parties may request an inquiry into whether the antidumping duty has been "absorbed" by the exporter, in the period falling between the first and second, or third and fourth anniversary of an AD order.<sup>41</sup>

With respect to the substantive issues of AD calculations, in determinations affecting "non-market economies" (which, in recent practice, has predominantly affected China), the ITA has codified a new method for calculating the labor rate portion of normal value that does not distinguish between skilled and un-skilled labor or rely on a single surrogate country's labor rates. Also, in developing the surrogate costs of production, the ITA will no longer rely on publicly available published information (PAPI), but will look to any publicly available information to determine surrogate costs.

38. Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296 (1997). Many of these rules have already been implemented through the interim rules effectuating the terms of the URAA. *See* Antidumping Duties; Countervailing Duties, 60 Fed. Reg. 25,130 (1995).

39. Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,399 (1997) (to be codified at 19 C.F.R. § 351.222).

40. *Id.* at 27,393 (to be codified at 19 C.F.R. § 351.213).

41. *Id.*

With respect to normal price comparisons in regular market economy cases, the ITA deviated from the position taken in its interim rules with respect to level of trade adjustments, codifying the practice of the previous year and a half. The final rule applies a two-prong test, requiring that a respondent who claims that an adjustment should be made for different levels of trade between home market and U.S. price comparisons must show: (i) different "marketing stages (or their equivalent)," and (ii) substantial differences in selling activities, in order to justify the level of trade adjustment.<sup>42</sup>

The ITA also codified its practice with respect to the allocation of expenses in claiming adjustments to price. The URAA did not affect the law or the ITA's practice in this area, but the ITA has acknowledged that regulatory guidance is necessary to effectuate greater certainty and predictability. Under this new rule, a foreign producer must first establish that it would not be feasible to report an expense or a price adjustment on a transaction specific basis. The ITA recognizes that a party could attempt to alter its bookkeeping practices in a way that would render impossible the tying of certain expenses or adjustments to particular sales. Feasibility will turn on a party's ability to demonstrate that its accounting systems, the accounting practices of the industry, and "the manner in which the expenses or price adjustments are incurred or granted"<sup>43</sup> make transaction specific reporting impossible. A party can anticipate that the ITA will want to see copies of historical accounting records, which may predate the period being reviewed, or look into computer generated account records that provide more detail than simple managerial and financial reports. A party then must show that the allocation method used does not result in any "distortions or inaccuracies,"<sup>44</sup> in that the party must provide a sufficiently detailed explanation of the allocation method used. Although acceptable methods are not enumerated in the final rules, ITA did provide examples in the preamble; a method will be considered distortive where the expenses or adjustments disproportionately affect merchandise not within the scope of the investigation.<sup>45</sup>

#### G. AD AND CVD SUNSET REVIEWS

Under the URAA, antidumping and countervailing duty orders must be revoked after five years of application unless the revocation would likely lead to the continuation or recurrence of dumping or a countervailable subsidy (as the case may be), and the continuation or recurrence of material injury.<sup>46</sup> There are special rules for the implementation of this provision with respect to orders that were in effect when the WTO Agreement became effective in the United States on January 1, 1995 (transition orders).<sup>47</sup> The ITA has until July 1, 1998 to begin the review of these orders, and all reviews must be initiated for all transition orders by January 1, 2000. On October 9th, the ITA published a proposed schedule for review of transition orders.<sup>48</sup> Under this schedule, reviews for similar commodities will be initiated together regardless of the initial effective date of the dumping order. As a result, some sunset reviews are scheduled to begin earlier than they may have otherwise, and some reviews have been postponed. The substantive standards for sunset reviews will be more clearly established as these reviews are conducted.

42. *Id.* at 27,414 (to be codified at 19 C.F.R. § 351.412).

43. Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,295, 27,347 (1997); *see also, id.* at 27,410 (to be codified at 19 C.F.R. § 351.401(g)(3)).

44. *Id.* at 27,410 (to be codified at 19 C.F.R. § 351.401).

45. *Id.*

46. 19 U.S.C.A. § 1675(c)(1) (West Supp. 1998).

47. *See* 19 U.S.C.A. § 1675(c)(6) (West Supp. 1998).

48. Transition Orders: Schedule and Grouping of Five-year Reviews, 62 Fed. Reg. 52,686 (1997).

## II. Judicial Developments

### A. THE HARBOR MAINTENANCE TAX

In June 1997 the U.S. Court of Appeals for the Federal Circuit affirmed the 1995 decision of the U.S. Court of International Trade and held that the Harbor Maintenance Tax (HMT)<sup>49</sup> as applied to exports, violates the export clause of the U.S. Constitution.<sup>50</sup> The Court of Appeals for the Federal Circuit found that the HMT was a tax rather than a fee, because the amount collected from exporters does not fairly approximate the value of the services provided (i.e., dredging, construction, and other expenses of maintaining the harbors for commercial traffic).<sup>51</sup> Additionally, since the HMT is calculated on the value of goods as they are loaded onto vessels or delivered to carriers, it specifically applies to exports.<sup>52</sup> The saga of the HMT is not over as the U.S. Supreme Court granted certiorari on October 31, 1997.<sup>53</sup>

There was also activity on the HMT as applied to imports. In *Sarne Corporation v. United States*,<sup>54</sup> the plaintiff argued that the surplus of funds in the HMT trust fund violated Congressional intent, and therefore frustrated plaintiff's expectations as a taxpayer. The Court held, however, that the plaintiff had not articulated a direct harm caused by an identifiable violation of the statute and dismissed the case.<sup>55</sup>

### B. PENALTIES

This was an active year for court cases involving civil penalties. In *United States v. Hitachi America, Ltd.*,<sup>56</sup> the Court of International Trade distinguished the various levels of culpability under section 592 and applied the "aiding or abetting" provision of that statute to the negligent acts of another.<sup>57</sup> Although the opinion is dominated by facts that are more likely to appear in a John Grisham novel than a customs case<sup>58</sup>—including the destruction of potentially exculpatory evidence by Customs officials—it contains several instructive points.

49. The HMT, created in the Comprehensive Water Resources Development Act of 1986, Pub. L. No. 96-622, 100 Stat. 4082 (codified at 26 U.S.C. § 4461), imposes a 0.125% tax on the value of cargo imported to or exported from a federally maintained port, as designated periodically by the Department of the Treasury.

50. *U.S. Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), *affg* 907 F. Supp. 408 (Ct. Int'l Trade 1995). The export clause to the Constitution provides: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

51. *U.S. Shoe Corp.*, 114 F.3d at 1572. Judge Mayer dissented, finding that the tax is a user fee intended and structured by Congress to raise only enough revenue to maintain harbors, and the fact that the tax has raised excess revenue does not convert it to a general tax. *Id.* at 1581.

52. The United States also argued that exporters challenging the constitutionality of the HMT were required to file an administrative protest with Customs to secure jurisdiction in the Court of International Trade. The Federal Circuit found the filing of a protest to be unnecessary because there is no protestable "decision" by Customs. To the contrary, Customs passively collects the tax in the amounts calculated by the exporter. Without a decision of some kind, there could be no protest. *Id.* at 1568-69. The importance of this decision goes to the amount of the available recovery. A protest must be filed within ninety days of the challenged decision and, therefore, the requirement of a protest would substantially reduce the government's potential refund liability. 19 U.S.C.A. § 1514(c)(3) (West Supp. 1998).

53. *United States v. U.S. Shoe Corp.*, 118 S. Ct. 361 (1997).

54. No. 97-103, 1998 WL 141789 (Fed. Cir. Mar. 26, 1998).

55. *Id.*

56. 964 F. Supp. 344 (1997).

57. 19 U.S.C.A. § 1592 (West Supp. 1998).

58. See *Hitachi America*, 964 F. Supp. at 358-59. The bulk of the opinion deals with a veritable soap opera of facts; HA employees turning paid informants, in-house counsel breaching obligations of confidentiality and the marriage and tax evasion of two informants. There is also considerable background on how HA officials failed to heed advice (from one of the informants) to seek outside counsel and to make tenders relating to these



The case arose out of an agreement between the Metropolitan Atlanta Rapid Transit Authority (MARTA) and Hitachi Japan (HJ) for the purchase of subway cars. HJ produced and sold the cars to C.Itoh Japan (CIJ) who, acting as a trading company, would export them to Hitachi America (HA). HA, the importer of record, and its joint venture partner, C.Itoh America (CIA), the banker, would then sell the cars to MARTA. MARTA paid CIA in dollars; CIA paid CIJ in Japanese yen; and CIJ paid HJ in yen. Both HJ and HA were defendants in this case.

The case specifically concerned the reporting and customs dutiability of two contractual price adjustments: the Economic Price Adjustment (EPA), which required MARTA to pay for any inflation in labor and materials, and the Monetary Value Adjustment (MVA), which required MARTA to assume the risks associated with currency fluctuations by paying a fixed amount of yen for foreign materials.

With respect to the dutiability of the MVA, the court noted that the invoice submitted with the entry indicated a dollar amount due between HA and CIJ, but that CIA paid CIJ in yen. Under Customs' internal guidelines, a contract invoiced in dollars but payable in yen, at a fixed rate, is yen-denominated. Therefore, the court found that the contract was yen-denominated and that the MVA was non-dutiable. In reporting otherwise, however, HA had negligently and consistently understated the payment to the foreign seller.

The issue with respect to the EPA was whether HA was required to notify Customs of this adjustment at the time of entry. Customs argued that HA was under an obligation to either: (1) have the entries held open for correction and liquidation at the end of the contract; or (2) deposit estimated duties, including the EPA, at the time of entry and seek a refund at the end of the contract.<sup>59</sup> HA, citing a single customs ruling,<sup>60</sup> claimed that it was permissible to delay disclosure until the full amount could be determined. The court found that HA had no definitive notice as to the proper procedure, and therefore a penalty would violate HA's right to due process.

Customs persuaded the court, however, that HA was negligent in its failure to report the EPA as it was received.<sup>61</sup> While Customs' informants breached their obligations to their employer and delayed HA's making a disclosure and tender, HA's failure to heed the advice of its compliance officer and in-house counsel, as well as its delay in seeking expert advice, supported a finding of negligence.

The court found that HA's disclosure of the contract on the entries, discussions with Customs regarding the contract, and allocation of funds for the payment of duties assessed on the value of the EPA, supported a dismissal of the fraud claim.<sup>62</sup> Customs had ample opportunity to request the contract and there was no other evidence that HA intended to deprive the government of revenue.<sup>63</sup> Also, the questionable dutiability of the MVA, and the fact that CIA, and not

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payments, as well as detail on how the government's witnesses conveniently changed their opinions on the eve of trial and how Customs destroyed records of meetings with the importer. The reviewer with only passing interest in the principles of customs law will nonetheless find this opinion an entertaining read.

59. See *Hitachi America*, 964 F. Supp. at 361. This is one of the situations that is to be resolved using the reconciliation prototype. See discussion *infra*, note 37.

60. See 18 Cust. B. & Dec. 1030, 1032 (1984).

61. Payments affecting the price of previously imported goods must be reported "at once," see 19 U.S.C.A. § 1485 (West Supp. 1998).

62. See *Hitachi America*, 964 F. Supp. at 361-62, 367. The Court found that the information given to HA executives with respect to the EPA should have put them on notice to investigate their obligation but that this was not sufficient to prove fraud. *Id.*

63. *Id.* at 370. The Court held that the fraud statute only requires a showing of intent to violate the law and not intent to deprive the government of revenue, but there is no finding of fraud under this standard. *Id.*

HA, was knowledgeable about the payments to Japan, made fraud unlikely with respect to the MVA.<sup>64</sup>

The court also declined to find that the defendants acted with gross negligence<sup>65</sup> with respect to the MVA, as even the government believed the contract to be dollar-denominated. With respect to the EPA, Customs did not prove the commonality of declaring EPA payments, so as to show recklessness on the part of HA.<sup>66</sup>

The court found that the statutory provision covering aiding or abetting requires a finding that the party charged assisted or supported the negligence of another, by substantially assisting in the conduct and failing to exercise reasonable care to determine whether the conduct was negligent.<sup>67</sup> Under this standard, HJ provided a "tremendous amount of assistance" to HA's importing activity.<sup>68</sup> HJ failed to exercise reasonable care when it did not undertake a legal review of the issues, failed to inquire of CIA how payments were being sent to Japan, and otherwise failed to ensure that duties were being paid properly.

In *United States v. Ziegler Bolt and Parts Co.*,<sup>69</sup> the Court of Appeals for the Federal Circuit affirmed a Court of International Trade decision holding that personal jurisdiction cannot be established by service on the defendant's outside counsel. Under Court of International Trade Rule 4(c)(1)(C)(ii), service of a corporate defendant may be made on an officer, managing or general agent, or any other agent authorized to receive service. In this case, the court found no indication that the lawyer had express or implied authority to accept service, and that the mere relationship between attorney and client does not confer authority to accept service. Further, the court affirmed that the timely assertion of an affirmative defense based on the invalid service was not waived by active defense of the case.

In *Pentax Corp. v. Robinson*,<sup>70</sup> the Court of Appeals for the Federal Circuit considered the interplay between the penalty and prior disclosure statutes and special duties imposed by Customs for the failure to mark a product with its country of origin.<sup>71</sup> Pentax had imported improperly marked goods and made a prior disclosure to Customs of that fact without the deposit of the liquidated penalty amount.<sup>72</sup> Customs regulations state that the party making the disclosure

64. *Id.* at 371. The government's destruction of potentially exculpatory evidence also influenced the Court against a finding of fraud. *Id.*

65. *Id.* at 374. Gross negligence is based on "willful, wanton, or reckless misconduct, or evidence of 'utter lack of all care.'" *Id.*

66. *Id.* at 371. The government's destruction of potentially exculpatory evidence also influenced the Court against a finding of gross negligence. *Id.*

67. *Id.* at 377-78. In order to weed out innocent bystanders, such as customs brokers and freight forwarders, the Court set out six factors for determining whether assistance has been "substantial": (1) the nature of the act in which the defendant assisted; (2) the amount of assistance provided; (3) the defendant's presence during the act; (4) the relationship between the defendant and the principal tortfeasor; (5) the defendant's state of mind; and (6) the duration of the alleged aider's or abettor's involvement. *Id.*

68. *Id.* at 387. The two companies are parent and subsidiary, giving them a close relationship; they conferred about the entry documentation and HJ made budget allocations for the duty payments, including the duty payable for the EPA. *Id.*

69. 111 F.3d 878, 880 (Fed. Cir. 1997).

70. 125 F.3d 1457, 1458-59 (Fed. Cir. 1997).

71. Under 19 U.S.C. § 1304, imported articles, unless exempted, must be marked with their country of origin. Subsection (h) of 1304 provides for a 10 percent *ad valorem* duty to be assessed on goods not properly marked.

72. Under 19 U.S.C. § 1592(c)(4)(B), an importer may choose to disclose to Customs the existence of a violation. If the importer does so prior to or without knowledge of the commencement of a Customs investigation into the matter and the violation results from negligence or gross negligence, any penalty assessed as a result of the violation is limited to the interest on the duties, taxes and fees that should have been paid. The importer making a prior disclosure in a negligence case must tender the unpaid lawful duties within 30 days of the disclosure.

must also tender the "actual loss of duties,"<sup>73</sup> and define this loss, in part, as "the duties of which the Government has been deprived by reason of the violation."<sup>74</sup> In reversing the Court of International Trade's decision, the Court of Appeals for the Federal Circuit reasoned that, unlike marking duties, lawful duties are those duties which the government would have received but for the violation. As the government would not collect marking duties, but for the violation, they need not be tendered in order to perfect a prior disclosure.

### C. PROTESTS

Administrative protests were also an active area of litigation this year. In *Castelazo & Associates v. United States*,<sup>75</sup> the plaintiff protested the imposition of antidumping duties, as well as the separately billed interest assessment. Customs partially approved the protests<sup>76</sup> and reliquidated the entries with recalculated interest due. The importer then protested the interest assessed on reliquidation. While Customs admitted that the interest was incorrectly assessed, the protest was denied as untimely.<sup>77</sup>

The Court of Appeals for the Federal Circuit, reversing the Court of International Trade, was unpersuaded by the plaintiff's argument that the interest protest was timely because the liquidation was not "final" until the initial protest was decided. The court found that neither the regulations nor the statute differentiated between "final" and "preliminary" liquidation.<sup>78</sup> Additionally, the court found that since the amount of interest claimed was not at issue, the importer did not need to wait until reliquidation to protest the charge. Since the protest was not timely filed, the court lacked jurisdiction to remedy the (admittedly) wrongly assessed interest.

In *United States v. Cherry Hill Textiles, Inc.*,<sup>79</sup> Customs liquidated an entry as dutiable more than thirteen months after the importer made entry on a duty free basis. When the importer refused to pay the liquidated duties, and did not timely protest the liquidation, the government filed an enforcement action seeking the recovery of the assessed duties. The surety, relying on *United States v. Sherman & Sons Co.*,<sup>80</sup> argued that a protest is only necessary when the importer wishes to challenge a liquidation, in court, for the recovery of excess duties, and does not apply to government enforcement actions. The Federal Circuit, however, found *Sherman* to be limited to cases in which the government alleges fraud after the date of liquidation.<sup>81</sup> Further, the

73. 19 C.F.R. § 162.74(h) (1997).

74. 19 C.F.R. § 162.71(a)(1) (1997).

75. 126 F.3d 1460 (Fed. Cir. 1997).

76. *Id.* at 1460. It is unclear from the opinion whether the importer had filed a request to clarify the scope of the order with the Department of Commerce, or whether the tape had already been excluded by Commerce and Customs had inadvertently assessed antidumping duties.

77. 19 U.S.C. § 1514(c)(3) requires that protests be filed within ninety days of the challenged decision. If there is no timely protest of a protestable decision, the U.S. Court of International Trade lacks jurisdiction to hear any issue concerning the decision.

78. Liquidation is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1997).

79. 112 F.3d 1550, 1551 (Fed. Cir. 1997).

80. 237 U.S. 146 (1915) (holding that the importer is not required to protest a reliquidation based on a finding of fraud because the government must prove fraud in court and not through administrative action).

81. The Federal Circuit also distinguished two of its own cases. The Court found that neither *United States v. Utex Int'l, Inc.*, 857 F.2d 1408 (Fed. Cir. 1988) nor *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992), relate to questions of the payment of duties by the importer or its surety. *Utex* addressed whether an importer must protest a claim for liquidated damages and *St. Paul* addressed whether a surety needed to file a protest to be released from a bond as a result of the government's breach of the contract. *Utex*, 857 F.2d at 1414; *St. Paul*, 959 F.2d at 964.

legislative history to the current law, as well as a long line of cases<sup>82</sup> under the predecessor statute,<sup>83</sup> indicates a congressional intent that parties exhaust administrative remedies in enforcement actions. Lastly, the court found that the defendant's reading of the statute would encourage importers to refuse to pay the duties until the government brings suit and then collaterally challenge the liquidation.

All was not lost, however. The court found that the entry had been liquidated by operation of law a year after the date of entry and the liquidation in the thirteenth month was of no consequence.<sup>84</sup> While a number of cases have held that an importer must protest an incorrect liquidation to challenge it,<sup>85</sup> the court refused to require the importer to protest this "reliquidation" when Customs had not asserted any statutory basis for the reliquidation.

In *Koike Aronson, Inc. v. United States*,<sup>86</sup> the Court of International Trade considered whether a protest was sufficiently detailed to be jurisdictionally sound. The protest objected to the classification Customs assigned the merchandise but did not provide an alternative classification or detail the nature of the objection. Senior Judge Watson held that a protest must be "reasonably calculated to direct the mind of Customs to the full nature of a specific claim."<sup>87</sup> This protest did not meet that standard as it did not provide a preferred rate of duty or a preferred classification.

#### D. MISCELLANEOUS CASES

This year, the Court of International Trade examined whether the incorrect designation of foreign trade zone (FTZ) status was a mistake of fact correctable under 19 U.S.C. § 1520(c).<sup>88</sup> Ford Motor Company imported parts into its foreign trade subzone for the production of automobiles. Parts entered prior to zone admittance were dutiable at a rate of 3.3 percent, and would be designated with privileged domestic (PD) status. Alternatively, parts admitted into the FTZ under non-privileged foreign (NPF) status would be subject to the 2.6 percent *ad val.* duty rate if incorporated into automobiles, and 25 percent *ad val.* if incorporated into trucks.<sup>89</sup> Ford claimed that it intended to admit the parts for automobiles under NPF status and the parts for trucks under PD status, but accidentally admitted all parts under NPF status. Consequently, Customs liquidated the entries for parts incorporated into trucks at 25 percent *ad val.*, resulting in an excess of \$5,000,000 in duty.<sup>90</sup>

82. See, e.g., *Westray v. United States*, 85 U.S. (18 Wall.) 322, 329-30 (1873); *United States v. Schlesinger*, 14 F. 682, 685 (C.C.D. Mass. 1882), *aff'd*, 120 U.S. 109 (1887); and cases cited at *Cherry Hill*, 112 F.3d at 1552-53.

83. See Tariff Act of 1864, ch. 171, 13 Stat. 202, 214-15.

84. Entries that are not liquidated within one year are deemed liquidated as entered. 19 U.S.C.A. § 1504(a) (West Supp. 1998).

85. See, e.g., *Juice Farms, Inc. v. United States*, 68 F.3d 1344 (Fed. Cir. 1995); *Omni U.S.A., Inc. v. United States*, 840 F.2d 912 (Fed. Cir. 1988).

86. No. 97-130, 1997 WL 589401, at \*1 (Ct. Int'l Trade Sept. 16, 1997).

87. *Id.* at 2.

88. The statute provides: "Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—(1) a clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction; . . ." 19 U.S.C.A. § 1520(c) (West Supp. 1998).

89. *Ford Motor Co. v. United States*, 979 F. Supp. 874, 876 n.2. Alternatively, Ford could have obtained the "PD rate" by admitting the parts into the zone under Privileged Foreign Status (PFS) but as a matter of policy, Ford did not use PFS. *Id.*

90. *Id.* at 877-78.

The court refused to apply § 1520(c) in this situation since Ford had not established a mistake of fact. There was no evidence that Ford intended to enter the parts under PD status, and the company had not paid the duties prior to zone admittance. Additionally, Ford had not established the inventory and recordkeeping procedures required for maintaining goods in two different statuses within the subzone. The court noted that the Ford personnel responsible for declaring the goods' zone status were required to exercise more discretion than is required of a clerk.

Ford also argued that, since it had not received notices suspending liquidation, these entries had been deemed liquidated at the rate and amount of duty asserted at the time of entry.<sup>91</sup> The court found, however, that Ford's recordkeeping procedures were insufficient to overcome the presumption of regularity and delivery associated with the government's preparation and mailing of these notices.<sup>92</sup>

Finally, this year the Court of Appeals for the Federal Circuit determined whether the application of the interest provision of 19 U.S.C. § 1505<sup>93</sup> to goods entered before, but liquidated after, the provision's effective date would constitute retroactive application of the law.<sup>94</sup> The court found that the interest charge was triggered by the liquidation of the entries and not by the initial payment of estimated duties. The application of this statute, therefore, while requiring reference to antecedent events, would not constitute a retroactive application of the law.

91. See 19 U.S.C. § 1504(a) (1994).

92. See *A.N. Deringer, Inc. v. United States*, No. 92-02-00080, 1996 WL 467736, at \*1, \*7, \*12. (Ct. Int'l Trade, Aug. 13, 1996) (extensively examining Customs procedures and computer systems for the preparation and mailing of notices and determining that it is appropriate to attach the presumption of regularity even though the procedure is not direct proof that the extension notices were prepared or mailed).

93. This section, as amended by section 642 of the North American Free Trade Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, provides that "[I]nterest assessed due to an underpayment of duties . . . shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties . . . to the date of liquidation."

94. *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 750 (Fed. Cir. 1997).