

CUSTOMS PENALTIES AND CUSTOMS BROKERS: THE YEAR IN REVIEW UNDER 28 U.S.C. §§ 1581(g) AND 1582

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In keeping with tradition, the U.S. Court of International Trade (“CIT”) issued relatively few substantive decisions concerning two areas of its jurisdiction which would seemingly have a broader impact than they actually do in everyday practice: 28 U.S.C. § 1581(g) (concerning the CIT’s ability to review decisions of the Secretary of Homeland Security (and formerly the Secretary of the Treasury) to revoke U.S. customs broker’s licenses), and 28 U.S.C. § 1582 (concerning the CIT’s review of cases brought by U.S. Customs and Border Protection (“CBP” or “Customs”) to recover certain civil penalties, liquidated damages on a customs bond, or customs duties). The decisions issued in 2008 highlight once again the futility that defrocked customs brokers face when seeking to overturn administrative decisions resulting in the revocation of their licenses. These attempts are particularly difficult when the broker is a convicted felon. In these instances, the CIT tends to side with CBP in affirming in whole or in part the issuance of significant penalties for negligent or grossly negligent conduct—although CBP may now have a higher standard to meet based on the new interpretation of the broker negligence regulation imposed by the U.S. Court of Appeals for the Federal Circuit (“CAFC”) in the appeal of the UPS decision discussed *infra*. In a troubling development, however, the CIT also seems to have imposed a new standard of negligence on importers that fail to follow the advice of counsel—even when a legitimate issue exists with respect to the soundness of that advice.

I. CASES DECIDED PURSUANT TO THE COURT’S JURISDICTION UNDER 28 U.S.C. § 1581(g)

Section 1581, subsection (g), of title 28 of the United States Code gives the Court of International Trade exclusive jurisdiction over:

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[A]ny civil action commenced to review—(1) any decision of the Secretary of the Treasury to deny a customs broker’s license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker’s permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act; (2) any decision of the Secretary of the treasury to revoke or suspend a customs broker’s license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and (3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930.¹

During the 2008 term, the Court of International Trade only heard three cases pursuant to its § 1581(g) jurisdiction, and two of those cases were related. The three decisions are discussed below.

A. *Boynton v. United States*

The court issued two decisions in the matter of *Boynton v. United States*. The court’s first opinion (rendered in 2008) affirmed the decision of the Secretary of the Department of Homeland Security (“Secretary”) to revoke the plaintiff’s customs broker’s license.² The second decision (also rendered in 2008) denied plaintiff’s motion for a rehearing of the prior proceedings, which had resulted in the denial of Boynton’s broker’s license.³

In the first 2008 opinion, the court referenced its 2007 decision in this matter which discussed the problems that Ms. Boynton had in discharging her duties as a licensed customs broker, e.g., she failed to make timely deposits of duties and other fees for entries filed on behalf of her importer clients and failed to maintain properly executed powers of attorney for her employees. For these failures, Boynton was placed on both a “local” and “national” sanctions list by CBP, meaning that merchandise imported under Boynton’s filer code could not be released until all duties and fees had been paid to CBP.⁴ CBP then

1. 28 U.S.C. § 1581 (2006).

2. The DHS Secretary rendered the decision upon remand of the case from a 2007 CIT decision. *See Boynton v. United States*, 517 F. Supp. 2d 1349 (Ct. Int’l Trade 2007). The court reviewed the Secretary’s revocation decision pursuant to 19 U.S.C. § 1641(e)(1).

3. *Boynton v. United States*, 558 F. Supp. 2d 1317 (Ct. Int’l Trade 2008).

4. CBP’s normal procedure allows the broker to file the Entry Summary (Customs Form 7501) and pay the estimated duties and fees within 10 working days after the import date.

began formal revocation proceedings, which resulted in a hearing before an Administrative Law Judge and a recommendation that the Secretary revoke Boynton's license, which revocation followed. The CIT reviewed the findings of the Secretary and determined that some, but not all, of the Secretary's findings of violations were supported by the necessary evidentiary standard of "substantial evidence." The court therefore removed the unsupported violations from the record and remanded the case to the Secretary to determine what penalty was appropriate in light of the court's reduction in the number of regulatory violations. Upon remand, the Secretary determined that the remaining violations were still sufficient to support the revocation of the plaintiff's license.

In its first 2008 opinion, the court noted that although Customs regulations provide for the revocation of a broker's license for violations of Customs laws, the policy of the agency had been "to issue progressive penalties and to reserve revocation of a broker's license only for 'egregious' violations."⁵ Despite the fact that in this case the Secretary sought to revoke the plaintiff's license without first imposing less drastic penalties, the court was satisfied with the Secretary's determination that the broker's violations of "several Customs rule and regulations, often on multiple occasions," merited revocation of her license.⁶ Boynton contested the Secretary's decision by arguing that the revocation was "arbitrary and capricious," but the court found this argument lacked merit, noting that the court had previously determined that several of the Secretary's initial findings (examined in the 2007 case) were supported by substantial evidence.⁷

The court likewise dismissed Boynton's only other argument in support of her position—that she was denied due process because "new evidence," consisting of judgments she obtained against several witnesses, was not considered by the Secretary on remand.⁸ First, the court found that Boynton's belief that the record had "substantially changed" was misplaced because the Secretary made his remand decision based upon essentially the same record reviewed by the court in its 2007 decision—absent the charges which were found not to be supported by substantial evidence. The court stated that it was "unclear how this sort of change in the record could prejudice Boynton in any way,"⁹ espe-

5. *Boynton v. United States*, 536 F. Supp. 2d 1344, 1346 (Ct. Int'l Trade 2008).

6. *Id.* at 1346.

7. *Id.*

8. *Id.*

9. *Id.*

cially given that the revocation of the broker's license was based on the record that was stricken of the charges not supported by the substantial evidence standard.

Second, in dismissing the due process argument, the court stated that "reopening . . . an administrative record is an unusual step, generally taken only in extraordinary circumstances."¹⁰ The court determined that Boynton had failed to establish that the submission of her "new evidence" constituted such an extraordinary circumstance. Having disposed of both of Boynton's arguments, the court affirmed the Secretary's revocation decision.

In May of 2008, the court issued another decision in the same case.¹¹ This decision arose from the plaintiff's motion for a rehearing after the court ruled against her in the January, 2008 decision. Again at issue was the plaintiff's "new evidence" of judgments she obtained against several of her importer clients. Her motion argued that Customs subjected her to procedural unfairness when it refused to consider these judgments during her revocation proceedings.¹²

The court acknowledged that although it had the jurisdiction to grant a rehearing under USCIT Rule 59(a)(2), the purpose of a rehearing is not to give the plaintiff an opportunity to retry his or her case, but rather merely give the plaintiff an opportunity to correct "significant flaws in the conduct of the proceeding," and that the court would only overturn its prior decision upon finding that the decision was "manifestly erroneous."¹³ The court ruled that the evidence that the plaintiff desired to submit did not meet this high standard.

The evidence presented to the court consisted of state court judgments the plaintiff had secured against importers which did not pay duties on certain transactions. The plaintiff claimed that these transactions gave rise to some of the charges against her that led to the revocation of her broker's license.¹⁴ The court noted, however, that the charges stemming from these transactions were "not about the payment of duties but rather concern about [the plaintiff's] *failure to follow proper procedures* when payments are not made for any reason"¹⁵ i.e., plaintiff failed to follow Customs Bulletin 88-30 concerning methods for dealing with Customs Brokers which are not reimbursed for the

10. *Id.* at 1346-47.

11. *Boynton v. United States*, 558 F. Supp. 2d 1317 (Ct. Int'l Trade 2008).

12. *Id.* at 1318.

13. *Id.* at 1319.

14. *Id.*

15. *Id.* at 1318-19.

deposit of duties by the importer (brokers routinely make such deposits on their clients' behalf). Thus, evidence proving that the plaintiff's clients failed to pay duties owed would not absolve the plaintiff of her culpability in not following established Customs procedures.¹⁶

Additionally, the court noted that some of the charges against the plaintiff were completely unrelated to the transactions for which she had obtained the judgments. Because the Secretary had found that "any of the charges against [the plaintiff] would individually be sufficient to justify revoking her license," and because the court had previously upheld the Secretary's decision, the court deemed the new evidence insufficient, and denied the motion for a rehearing.¹⁷

B. Delgado v. United States

The only other decision issued by the CIT in 2008 pursuant to § 1581(g) was *Delgado v. United States*, decided in September 2008.¹⁸ In this action, customs broker Miguel Delgado challenged the Secretary's remand decision to revoke his broker's license after he was convicted (in a separate action) of felony charges arising out of his brokerage business. As discussed below, the court disagreed with the broker's arguments and sustained the Secretary's revocation of his license.

In 2001, Delgado was convicted of twenty-eight felony counts involving a scheme he created to divert liquor into the United States without paying federal liquor taxes.¹⁹ In 2004, Customs began proceedings against Delgado to seek the revocation of his broker's license.²⁰ Customs alleged that in executing his scheme, Delgado violated three different CBP regulations, including 19 C.F.R. § 111.53(b) (having been convicted of a felony either involving importation or exportation of merchandise or arising out of customs business).²¹ Delgado received a formal hearing before an Administrative Law Judge, who recommended that the Secretary revoke Delgado's license.²² The Secretary followed this advice, and the decision was reviewed by the CIT, which twice remanded the decision back to the Secretary.²³ The Secretary issued the third version of this decision in 2008, and that final decision

16. *Id.*

17. *Id.*

18. *Delgado v. United States*, 581 F. Supp. 2d 1326 (Ct. Int'l Trade 2008).

19. *Id.* at 1327.

20. *Id.* at 1327–28.

21. *Id.* at 1328.

22. *Id.*

23. *Id.*

was the subject of the court's review in this case.²⁴

After noting the applicable standard of review (that the Secretary's decision must be based on "substantial evidence"), the court turned to a discussion of the merits of Delgado's claims.²⁵ First, the broker argued that no "exportation" occurred as a matter of law, and that the Secretary's finding that his crimes "involved importation or exportation" was unsupported by substantial evidence.²⁶ The plaintiff relied on the oft-cited definition of "exportation" in the Supreme Court's decision in *Swan v. United States*, 190 U.S. 143, 145 (1903): "A severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country."²⁷ Based on this definition, Delgado claimed that he and his co-conspirators only wanted to give the *appearance* that an exportation had occurred when liquor purchased at a U.S. distillery was shipped to a company in Honduras that was 50 percent owned by Delgado.²⁸ From there, the liquor was shipped into a bonded warehouse in Miami operated by Delgado, or into his container freight station in Miami. Delgado then prepared the appropriate customs form indicating that the subject liquor would be shipped to Venezuela, when in fact it was diverted into the commerce of the United States without payment of the applicable federal excise taxes. Based on this scenario, Delgado claimed that because the "true intent [of the scheme] had always been to illegally divert the alcohol back into this country for illegal tax-free sales," his arrangement of rapidly shipping merchandise into and out of bonded warehouses in Honduras did not "indicate an 'intention to unite the merchandise into the mass of things belonging to that country'" (quoting the *Swan* definition of "exportation").²⁹

Even Judge Musgrave (known perhaps for being more receptive than some of his other CIT colleagues to "creative" arguments) could not accept this line of reasoning. The court found that Delgado's claim overlooked the fact that a jury had found him guilty of the "unlawful relanding" statute, in that the broker had "knowingly relanded or received within the jurisdiction of the United States distilled spirits which had been shipped *for exportation*."³⁰ The court also relied on the

24. *Id.*

25. *Id.*

26. *Id.* at 1329.

27. *Id.* (quoting *Swan & Finch, Co. v. United States*, 190 U.S. 143, 145 (1903)).

28. *Id.*

29. *Id.*

30. *Id.* at 1330 (citing 28 U.S.C. § 5608(b)).

statute's definition of "relanding" ("merchandise . . . considered as having been imported into the United States contrary to law") in ruling that Delgado's crimes involved the "importation or exportation" of merchandise.³¹

The court also addressed Delgado's attempt to parse the meaning of the word "involved" in claiming that no actual importation or exportation of merchandise was involved in his scheme. Citing the application of the CBP penalty statute,³² the court found that the "'unlawful conduct' underpinning the crime for which a broker is convicted 'must relate to . . . [i]mportation or exportation of merchandise' (emphasis added)."³³ Thus, the court found that the Secretary reasonably concluded from the record that the broker and his co-conspirators used "importation or exportation or the appearance thereof to create confusion and disguise the ultimate destination of the liquor, which was illegal reimportation into the commerce of the United States."³⁴

The court then turned to an examination of Delgado's arguments that his actions did not arise out of the conduct of "customs business."³⁵ The court quoted the entire definition of "customs business" found in 19 U.S.C. § 1641(a)(2), and noted that the standard was very broad, including not only actual transactions with CBP (such as the filing of Entry Summaries on Customs Form 7501, the most common broker transaction), but "activities involving transactions" with CBP, such as "preparation of documents intended to be filed" with CBP or "any activities relating to such preparation."³⁶ In short, the court found that the crime for which the broker was convicted need not *include* the specific activities listed in the statute; as long as the crime "arose out of the conduct of those activities," the license revocation was justified.³⁷

Based on this standard, the court found that the Secretary's decision was supported by substantial evidence.³⁸ For instance, regardless of whether the filing of Customs Form 7512 (warehouse entry) itself constituted "customs business," the court ruled that the *operation* of a bonded warehouse in Miami by Delgado's company Lancer "involves the entry and admissibility of merchandise and therefore involves

31. *Id.* (citing 18 U.S.C. § 544).

32. 19 C.F.R. § 111.53(b)(1) (2006).

33. *Delgado*, 581 F. Supp. 2d at 1330.

34. *Id.* at 1331.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1331–33.

‘[C]ustoms business.’”³⁹

The court further rejected Delgado’s argument that the bonded warehouse permit was issued to Lancer Corporation, and not to Delgado personally, and that to impute the shortcomings of the corporate entity to him as an individual would be a miscarriage of justice.⁴⁰ As the President of Lancer, the court noted that Delgado was responsible for the supervision and control of his corporate employees involved in conducting “customs business” by operating a bonded warehouse, and that this responsibility imposed a level of strict personal liability on Delgado for his failure to properly monitor the actions of his corporate employees.⁴¹ The court also found that the record was replete with evidence showing that Lancer (the bonded warehouse corporate operator) acted under the direct control of Delgado, that he personally operated the container freight station where the subject liquor was stored and received,⁴² and that he was thus engaged in “customs business” when he committed the crimes at issue.

Finally, the court noted that if the liquor had been properly entered and imported into the United States instead of being illegally diverted, the federal excise taxes owed would have been collected by CBP at the time of entry.⁴³ This action, the court found, also subjected Delgado’s actions to the definition of “customs business” because the scheme itself was connected to the “entry and admissibility of merchandise” and “the payment of duties, taxes, or other charges assessed or collected by [CBP] upon merchandise by reason of its importation” as set forth in the statute.⁴⁴ Thus, the court found that the Secretary’s decision in revoking Delgado’s customs broker’s license was not arbitrary and capricious, and was supported by substantial evidence in the record.⁴⁵

II. CASES DECIDED PURSUANT TO THE COURT’S JURISDICTION UNDER 28 U.S.C. § 1582

Section 1582 of title 28 of the United States Code gives the CIT exclusive jurisdiction over:

39. *Id.* at 1332.

40. *Id.* at 10–11.

41. *Id.* at 1332–33.

42. *Id.* at 1333.

43. *Id.*

44. *Id.*

45. *Id.*

[A]ny civil action which arises out of an import transaction and which is commenced by the United States—(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover customs duties.⁴⁶

Although the CIT decided relatively few cases based upon its jurisdiction under § 1582, two of these cases resulted in important decisions that should be of great interest to the international trade community. These cases, *United States v. UPS Customhouse Brokerage, Inc.*,⁴⁷ and *United States v. Optrex America, Inc.*,⁴⁸ are discussed in subsections B and C of this section, respectively. First, subsection A offers a brief summary of the more minor cases decided pursuant to the court's jurisdiction under § 1582.

A. Minor § 1582 Decisions

In *United States v. World Commodities Equipment Corp.*, the court considered: (1) a motion for out-of-time service of process; and (2) whether a third-party insurer may remain party to a suit, based on a violation of 19 U.S.C. § 1592(a), brought by the government, pursuant to § 1582, after the claim is dismissed against the insured party, i.e., the importer-defendant, and the insurer's co-defendant.⁴⁹

The court first considered CBP's motion requesting an extension of its time limit for serving process on defendant World Commodities Equipment Corp (WCE). At the commencement of the suit, WCE failed to waive formal service of process.⁵⁰ Apparently ignorant of this fact, Customs failed to serve process on WCE within the 120-day time limit proscribed by USCIT Rule 4(m).⁵¹ Upon realizing this procedural error, Customs filed the motion at issue in this case.

In considering CBP's motion, the court engaged in a required, two-part inquiry to decide if granting the motion would be proper

46. 28 U.S.C. § 1582 (2006).

47. *United States v. UPS Customhouse Brokerage, Inc.*, 558 F. Supp. 2d 1331 (Ct. Int'l Trade 2008).

48. *United States v. Optrex Am., Inc.*, 560 F. Supp. 2d 1326 (Ct. Int'l Trade 2008).

49. *United States v. World Commodities Equip. Corp.*, No. 07-00263, 2008 WL 748677 at *2, *5 (Ct. Int'l Trade Mar. 21, 2008).

50. *Id.* at *1.

51. *Id.*

under the circumstances.⁵² In the first part of the inquiry, the court examined whether “good cause” existed for granting Customs an extended deadline. Customs argued good cause did exist, based upon: (1) the injury of the government’s lead attorney; and (2) an allegation that WCE attempted to evade service.⁵³ The court considered both of these arguments, examined the supporting evidence, and dismissed them as insufficient to show “good cause.”⁵⁴

After determining that good cause for the delay of service did not exist, the court continued to the second part of the inquiry, examining whether “the circumstances of the case warrant[ed] the grant of a discretionary extension of time.”⁵⁵ Customs argued the circumstances did warrant an extension for a number of reasons, including the fact that if the claim were dismissed it could not be refiled against WCE due to the running of the statute of limitations.⁵⁶ The court rejected all of CBP’s arguments as inadequate, taking issue with the agency’s “complete inaction” regarding service, noting that “[e]xcept for the initial request for waiver of service, Customs apparently made no attempt whatsoever to serve WCE within the 120-day period.”⁵⁷ Furthermore, the court clearly felt that CBP exacerbated its position by waiting “until the last day of the five-year statute of limitations to file the action,” in addition to “[sitting] on its hands until two weeks *after* the passing of the 120-day service period.”⁵⁸ The court then formally denied CBP’s motion and dismissed the action against WCE.⁵⁹

After this dismissal, the court considered whether the case could still continue against the insurer Hartford, despite WCE’s removal from the case. Hartford argued that the case could not continue with it as the sole defendant.⁶⁰ Hartford based its argument on the idea that the government could not pursue a claim against it as a surety under 19 U.S.C. § 1592(d) unless it *first* established the elements of its claim against the *importer* under 19 U.S.C. § 1592(a).⁶¹ Thus, Hartford argued that once the court dismissed the suit against importer WCE, the government could not properly pursue its claim against it as WCE’s surety.

52. *Id.* at *4.

53. *Id.* at *4–5.

54. *Id.* at *6.

55. *Id.* at *7.

56. *Id.* at *8.

57. *Id.* at *6.

58. *Id.* at *7.

59. *Id.* at *9.

60. *Id.* at *9.

61. *Id.*

The court did not agree with Hartford, stating that “[a]lthough section 1592(d) required a ‘violation of subsection (a)’ as a prerequisite for an award pursuant to section (d), nothing in the plain language of section 1592(d) indicates that such a violation can only be established in a suit against the importer.”⁶² Explaining its reasoning, the court stated: “pursuant to the concept of joint and several liability that is the mainstay of the surety-principal relationship, as well as the language of the bond, Customs has the option to sue *either* party for duties.”⁶³ The court thus refused to bar CBP’s remaining suit against Hartford and denied Hartford’s motion to dismiss.⁶⁴

In *United States v. Canex International Lumber Sales, Ltd.*,⁶⁵ the court addressed the role of mitigation proceedings as an administrative remedy in an action brought by Customs to seek liquidated damages from an importer. Importer Canex imported lumber into the United States under HTSUS heading 4418.⁶⁶ Customs notified Canex that it believed the proper heading for the imported lumber was heading 4407 and re-classified the lumber into this heading after entry.⁶⁷ CBP then required Canex to produce the export permits required for imports under heading 4407 pursuant to the United States-Canada Softwood Lumber Agreement. Canex could not provide Customs with proof it had the required permits, prompting Customs to assess liquidated damages against Canex.⁶⁸ The importer then protested CBP’s classification and filed suit challenging CBP’s classification of the lumber after its protest was denied.⁶⁹

While Canex’s tariff classification suit was still pending with the CIT, the government filed the suit at issue in this decision, attempting to obtain the liquidated damages from Canex.⁷⁰ Canex moved to dismiss the suit, arguing Customs had failed to hold mitigation proceedings prior to seeking liquidated damages, and therefore had failed to exhaust its administrative remedies before pursuing litigation, thus invalidating the suit.⁷¹

62. *Id.* at *9–10.

63. *Id.*

64. *Id.* at *12.

65. *United States v. Canex Int’l Lumber Sales Ltd.*, No. 06-00141, 2008 WL 1911173 (Ct. Int’l Trade May 1, 2008).

66. *Id.* at *1.

67. *Id.*

68. *Id.* at *1 n.1.

69. *Id.*

70. *Id.*

71. *Id.* at *1–2.

Judge Restani disagreed with Canex and denied its motion, based on the permissive nature of CBP's mitigation proceedings, and the fact that under the proceedings, relief is granted at the discretion of Customs. The court stated that "although exhaustion of mandatory administrative remedies is generally required prior to action before the court . . . mitigation proceedings are permissive and need not be resolved prior to the commencement of a suit to recover liquidated damages."⁷² Thus, the court ruled that the voluntary nature of the proceedings meant that CBP was not *required* to engage in mitigation hearings before filing suit for liquidated damages.

Based upon the facts recited in the CIT opinion, Canex apparently had not actually requested mitigation proceedings prior to CBP's suit for liquidated damages. This omission led the court to note that "the Government was not required to postpone its filing of the instant action until Canex exercised its right to request mitigation proceedings."⁷³ This language in the court's brief opinion leaves some question as to how the court would have ruled had Canex requested mitigation proceedings before Customs filed the suit for damages. However, Canex's motion to dismiss may have still been denied, as the court further noted that "the payment obligation runs independently of the protest proceedings."⁷⁴

Finally, in *United States v. Matthews*, the court considered a motion for reconsideration filed by defendant-importers who lost a suit brought by the government for violations of 19 U.S.C. § 1592.⁷⁵ In an earlier decision, the court ruled that the defendants had violated § 1592 by fraudulently entering the country of origin for goods manufactured in China, in an effort to avoid paying antidumping duties. In this decision, the court denied the defendant's motion for reconsideration upon concluding that the defendant's arguments "do not satisfy the standard for reconsideration."⁷⁶ This standard, according to the court, is met only when the party challenging the decision can show that there was a "significant flaw' in the original proceedings."⁷⁷ Upon examining the defendants' arguments, the court concluded that nothing argued and submitted by the defendants in support of their motion presented "any flaw or error made by the parties or the court; the

72. *Id.*

73. *Id.* at *4

74. *Id.* at *2 (quoting *United States v. Ataka Am., Inc.*, 17 Ct. Int'l Trade 598, 607 (1993)).

75. *United States v. Matthews*, 580 F. Supp. 2d 1347, 1348 (Ct. Int'l Trade 2008).

76. *Id.*

77. *Id.* at 1349.

motion simply restates legal arguments that could have been, and in some cases were already made, by Defendants at the summary judgment stage.”⁷⁸ In addition, the court found that defendants’ argument relating to the “purity level” of the entries (which purportedly excluded them from the scope of the antidumping order) failed to identify any clear factual error or legal error in the original CIT decision.⁷⁹

B. United States v. UPS Customhouse Brokerage, Inc.

In *United States v. UPS Customhouse Brokerage, Inc.*, Customs sought penalties against defendant UPS for violating “the broker statute,” 19 U.S.C. § 1641 (section 641 of the Tariff Act of 1930).⁸⁰ To succeed in its claim, Customs was required to show, by a preponderance of the evidence, that the defendant was: (1) a licensed customs broker; instead of, (2) engaged in customs business; and (3) that it “failed to ‘exercise responsible supervision and control’ over its ‘customs business.’”⁸¹ The parties stipulated as to the first two elements; thus, the only element at issue in the case was the third element—whether UPS failed to exercise responsible supervision and control over its business.

Customs asserted this element was met when UPS repeatedly misclassified electronic merchandise NOT containing a cathode-ray tube (“CRT”) under HTSUS subheading 8473.30.9000.⁸² Customs alleged that UPS continued to misclassify merchandise within the category even after the broker received multiple warnings and remedial training from Customs.⁸³ UPS’s continued and persistent misclassification eventually prompted CBP to declare that UPS had failed to exercise responsible supervision and control over its customs business, and thus

78. *Id.* at 5.

79. *Id.*

80. *United States v. UPS Customhouse Brokerage, Inc.*, 558 F. Supp. 2d 1331 (Ct. Int’l Trade 2008).

81. *Id.* at 1335.

82. Customs had identified HTSUS subheading 8473.30.9000 as particularly problematic, finding that 99 percent of the merchandise classified within this subheading was classified in error. Customs mainly attributed this high error rate to brokers and importers who inappropriately used the subheading as a “convenience classification” or “basket provision” in an effort to expedite the clearance of imported goods. Because of this low compliance rate, Customs decided to carefully scrutinize entries submitted with merchandise classified under this subheading. *See id.* at 1339–40. As part of the decision, the court closely analyzed the text of heading 8473 and, upon doing so, affirmed CBP’s position that “as a matter of law, by operation of GRI 1, for merchandise to be classified under HTSUS subheading 8473.30.9000, the imported article must contain a CRT.” *Id.* at 1346.

83. *Id.* at 1335.

violated the broker statute.⁸⁴ For this alleged violation, Customs assessed \$90,000 in fines against the broker.⁸⁵ UPS paid \$15,000 of the fines and disputed the remaining \$75,000.

In deciding the case, the court noted that Customs had the burden to: (1) first establish that none of the merchandise in the entries at issue contained a CRT;⁸⁶ and (2) establish that this absence of a CRT did result in the merchandise being misclassified under HTSUS 8473.30.9000.⁸⁷ The court noted that without establishing these elements, Customs could not successfully assert that UPS misclassified goods under subheading 8473.30, and without proving UPS misclassified goods under the tariff schedule, Customs could not legitimately penalize UPS for violating the broker's statute.⁸⁸

The parties stipulated that 37 out of 45 entries at issue (all entered under HTSUS 8473.30.9000) did not contain a CRT. Customs withdrew an additional three entries, leaving five disputed entries which Customs had to show contained no goods with CRTs.⁸⁹ The court ruled that Customs successfully met its burden of proof through presentation of documentary evidence and the testimony of a customs import specialist, who the court declared was "a highly credible witness."⁹⁰

After ruling that Customs successfully established that the entries in question did not contain any goods with CRTs, the court then examined whether the goods were in fact misclassified under 8473.30.9000. The court first explained that "Customs' classification decisions are reviewed through a two-step analysis—first construing the relevant tariff headings, then determining under which of those headings the merchandise at issue is properly classified."⁹¹ The court then proceeded to engage in this analysis, closely analyzing the text of heading 8473 and rejecting UPS' "last antecedent" rule argument that somehow the language of subheading 8473.30 "[n]ot incorporating a CRT" applied only to the ADP machine itself and not the individual part.⁹² The court found this proffered construction of the tariff "in conflict with the plain language, grammar, punctuation, and organization of

84. *Id.*

85. *Id.*

86. *Id.* at 1336.

87. *Id.* at 1345.

88. *Id.*

89. *Id.* at 1336.

90. *Id.* at 1343.

91. *Id.* at 1345.

92. *Id.* at 1348.

subheading [sic] 8473.30.9000.”⁹³ At the conclusion of its analysis, the court determined that “as a matter of law . . . for merchandise to be classified under HTSUS subheading 8473.30.9000, the imported article must contain a CRT.”⁹⁴

Upon concluding that Customs had successfully established that the goods entered by UPS were in fact misclassified under the tariff schedule, the court turned to the “principal issue to be decided: whether UPS failed to exercise responsible supervision and control, in violation of 19 U.S.C. § 1641(b)(4), by repeatedly misclassifying imported merchandise under 30.90 when that merchandise did not contain CRTs.”⁹⁵ In order to decide this issue, the court first determined that it must examine the meaning of “responsible supervision and control” within the context of the Customs brokerage business.⁹⁶

To start its examination, the court noted that although the broker statute does not define the phrase “responsible supervision and control,” Customs has promulgated regulations that *do* define this critical phrase.⁹⁷ Specifically, 19 C.F.R. § 111.1 states, in part, that:

“Responsible supervision and control” means that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide. While the determination of what is necessary to perform and maintain responsible supervision and control *will vary depending upon the circumstances in each instance*, factors which Customs *will consider include, but are not limited to . . .*⁹⁸

The regulations provide a list of the ten non-exclusive factors.

After providing the text of the regulation, the court observed that the focus of the parties’ dispute in this case was on the *application* of this

93. *Id.*

94. *Id.* at 1348–49. While the court’s lengthy analysis of the language of heading 8473 is outside the scope of this article, it provides valuable insight into the ways that the language of the tariff code may be examined and parsed when the court determines issues of tariff classification. Curious readers seeking to gain insight into the court’s thought process regarding tariff classification issues would benefit from studying this part of the court’s opinion. *See id.*

95. *Id.* at 1349.

96. *Id.*

97. *See id.*

98. *Id.* at 1350 (citing 19 C.F.R. § 111.1 (2008) (emphasis added by court)).

regulation to the case at hand, rather than on the substance of the regulation.⁹⁹ Customs argued that the factors listed in § 111.1 were non-exclusive, *possible* factors for consideration when examining a broker's supervision and control, and that Customs was free to weigh each factor as it sees fit.¹⁰⁰ Customs further asserted that its determination that UPS failed to exercise responsible supervision and control, and thus violated the broker's statute, did *not* have to be supported by a finding that UPS had violated *each* of the ten factors.¹⁰¹ UPS, on the other hand, asserted that the regulation *required* Customs to consider *each* of the ten factors listed in the regulations. UPS supported this argument by claiming that the language of the regulation was non-discretionary, and that the phrase "factors which CBP *will consider* include" mandated such consideration of all factors by CBP.¹⁰²

The court disagreed with UPS's argument, stating that "where a rule states that an agency 'will consider' certain factors, this textual directive 'implies wide areas of judgment and therefore discretion.'"¹⁰³ Such discretion, the court stated, excused Customs from having to weigh each of the factors when considering whether UPS failed to exercise reasonable supervision and control of its brokerage business.¹⁰⁴ The court further noted that it is charged with "defer[ing] to Customs' reasonable interpretation of its own regulations. Customs has determined that the section 111.1 factors are not exclusive, but serve as guidance to the agency and the brokerage community."¹⁰⁵

After determining that Customs was not required to consider every one of the factors listed in § 111.1 in order to support its claim, the court turned its attention towards examining the factors that Customs *did* consider in order to evaluate whether the evidence gathered by Customs supported its finding that UPS violated the broker statute.

In summarizing CBP's supporting evidence, the court noted that

99. *Id.* at 1350.

100. *Id.* at 1350–51.

101. *Id.*

102. *Id.* at 1352.

103. *Id.*

104. *Id.*

105. *Id.* at 1353. This finding was later rejected by the Court of Appeals for the Federal Circuit, which found that "any interpretation of [19 C.F.R.] § 111.1 that does not require consideration of the listed factors is clearly inconsistent with the plain language of the regulation." *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009). The Court of Appeals for the Federal Circuit thus vacated that part of the CIT's decision imposing penalties on UPS, and remanded the case to the CIT for proceedings consistent with its holding that CBP must consider, at a minimum, all ten of the factors listed in the regulation.

“Customs presented a holistic, totality-of-the-circumstances application of section 111.1 to UPS’s persistent misclassification violations where no single listed factor dominated.”¹⁰⁶ Customs built its case on a wide variety of evidence that showed it carefully considered many of the § 111.1 factors. Particularly harmful to UPS’s case was documentation showing that Customs had engaged in a long-term campaign to increase broker compliance regarding the proper use of HTSUS 8473.30.9000, and that UPS was well aware of this campaign, having participated in multiple seminars and training sessions focused on the classification of goods under subheading 8473.30.¹⁰⁷ In fact, during one of the training sessions attended by UPS officials, Customs told attendees that goods classified under heading 8473.30 “*must contain a cathode ray tube*” and that “[8473.30] should *almost never be used*.”¹⁰⁸ Customs officials further cautioned attendees that “[u]sing 8473.30.9000 sends up the red flag to Customs to look at that entry—it is usually never correct!!!”¹⁰⁹ Predictably, the fact that UPS officials attended this training, received this information, and yet continued to classify merchandise under heading 8473.30 dealt a substantial blow to UPS’s defense.

Customs submitted other evidence to demonstrate that it carefully considered the § 111.1 factors before it determined that UPS violated the broker statute. For example, Customs sent UPS multiple warning letters and Notices of Action when UPS failed to “achiev[e] a 95% compliance rate in the use of heading 8473,” despite receiving repeated training sessions and multiple warnings.¹¹⁰ Additionally, the procedural steps UPS enacted to try to prevent misclassification of items under heading 8473 did not work in the long-term, prompting the court to note that “[i]t is clear from the facts found at trial that UPS failed to successfully stem the cascade of errors that resulted from supervisory neglect.”¹¹¹

106. *UPS*, 558 F. Supp. 2d at 1352.

107. *Id.*

108. *Id.* at 1340.

109. *Id.*

110. *Id.* at 1352.

111. *Id.* It should be noted that despite all of its training and education efforts to prevent the misuse of heading 8473 by its employees, UPS could only stop the misclassification at issue by removing tariff item 8473.30.9000 from its computer system so that its employees could not physically enter this tariff code onto an Entry Summary. This is a sad statement about the level to which UPS had to descend to attain broker compliance. Moreover, while this measure did reduce the number of entries containing goods classified under 8473.30.9000 for a short time, a computer upgrade led to the reappearance of the tariff code in UPS’ system. Once it returned to

UPS offered two main arguments in its defense. First, UPS argued that its overall compliance rate for the classification of computer parts under the tariff schedule was 80%, which it asserted was 15% higher than the national compliance average for this category of goods.¹¹² UPS argued that this rate, combined with the fact that it made approximately 2,900–3,000 entries per day during the time period in question (the year of 2000), established that UPS exercised a level of supervision that was reasonable for a high-volume Customs broker.¹¹³ The court was unmoved by this argument, indicating that UPS’s focus on a single statistic gathered during a relatively short period of time unconvincingly “disregard[ed] the totality of the facts and circumstances at issue here.”¹¹⁴

UPS’s second defense was that “it responsibly and actively responded to the various Customs warnings in a manner befitting a responsible broker.”¹¹⁵ The court found that the record lacked sufficient evidence to support this position, noting again that the reality of the situation was that “UPS fell down on the job in this instance because it failed to effectively correct the oft-repeated misclassification errors under [8473.]30.90[00], in accordance with its responsibilities as a customs broker under 19 U.S.C. § 1641(b)(4).”¹¹⁶ In rejecting both of UPS’s defenses, the court ruled that UPS did in fact violate the broker statute by failing to “exercise the control and supervision necessary to reasonably conduct its customs business.”¹¹⁷

Finally, the court turned its attention to determining whether the penalties assessed by Customs were justified in light of the violation. In order to reduce the amount of assessed penalties, UPS argued that its actions only constituted a *single* violation of § 1641(b)(4).¹¹⁸ Customs disagreed with this position, arguing that each entry misclassified by UPS “constituted a ‘separate and distinct violation’” of the statute, and that as such they warranted separate penalties.¹¹⁹ UPS countered this by stating that the language of § 1641(b)(4) does not contemplate

the system, UPS employees once again improperly used the tariff item despite CBP’s continued warnings not to do so. *See id.* at 1341–42.

112. *Id.* at 1353.

113. *See id.* at 1352–53.

114. *Id.* at 1353.

115. *Id.* at 1352–53.

116. *Id.* at 1354.

117. *Id.*

118. *Id.*

119. *Id.*

violations being tied to individual entries.¹²⁰ While the court acknowledged the possible accuracy of this statement, it rejected the argument based upon its insistence that it must defer, when proper, to CBP's authority to enforce its own regulations.¹²¹ The court concluded that "[t]o hold that Customs is limited to issuing only one penalty in instances . . . where the defendant continually engages in the same conduct would hamper [CBP's] enforcement authority, and read a restriction into 19 U.S.C. § 1641 that does not exist."¹²² Based upon this conclusion, the court validated the fines assessed by Customs, holding that they were "fair and reasonable" given the nature of the violations.¹²³

C. United States v. Optrex America, Inc.

The other major section 1582 case decided by the CIT in 2008, and the one which raises far more troubling issues than *UPS*, was *United States v. Optrex America, Inc.*¹²⁴ This case was the most recent decision in lengthy litigation between Customs and Optrex America, Inc. regarding the tariff classification of Liquid Crystal Display products ("LCDs") manufactured by Optrex.¹²⁵ The previous decisions involved the proper classification of Optrex's LCD "glass panels," with Optrex asserting that the goods were properly classified under HTSUS heading 8531 as "[e]lectric sound or visual signaling apparatus," while CBP asserted that the goods were properly classified under HTSUS heading 9013 as "[l]iquid crystal devices not constituting articles provided for more specifically in other headings."¹²⁶ A 2007 decision by the U.S. Court of Appeals for the Federal Circuit ("CAFC") settled the classification dispute, with the court affirming Customs' position and ruling that Optrex's LCD glass panels were properly classified under heading 9013.¹²⁷ Thus, the issue for the CIT to resolve in this case was not the

120. *Id.* at 1355.

121. *See id.*

122. *Id.* at 1356.

123. *Id.*

124. *United States v. Optrex Am., Inc.*, 560 F. Supp. 2d 1326, 1326 (Ct. Int'l Trade 2008).

125. Previous decisions rendered in this litigation are: *United States v. Optrex Am., Inc.*, 30 Ct. Int'l Trade 650 (2006); *United States v. Optrex Am., Inc.*, 29 Ct. Int'l Trade 1494 (2005); *United States v. Optrex Am., Inc.*, 28 Ct. Int'l Trade 1231 (2004); *United States v. Optrex Am., Inc.*, 26 I.T.R.D. (BNA) 1969 (Ct. Int'l Trade 2004); *United States v. Optrex Am., Inc.*, 26 I.T.R.D. (BNA) 1973 (Ct. Int'l Trade 2004).

126. *See Optrex*, 560 F. Supp. 2d at 1328–29.

127. *Id.* (citing *Optrex Am., Inc., v. United States*, 475 F.3d 1367, 1371–72 (Fed. Cir. 2007)).

proper classification of the goods at issue, but rather, “whether there was sufficient notice that LCD glass panels were properly classified under heading 9013 and whether Optrex acted with reasonable care in responding to these notifications.”¹²⁸

CBP argued that Optrex’s history of importing its LCD panels under heading 8531 (prior to the final classification decision by the CAFC) constituted a failure to exercise “reasonable care” regarding the tariff classification of imported goods, and sought civil penalties against the defendant, pursuant to § 1592(c).¹²⁹ Based upon the reasoning summarized below, the CIT ruled in favor of Customs, holding that Optrex was subject to civil penalties because it failed to “exercise reasonable care under the facts of this case, including the failure to follow the advice of counsel”¹³⁰

Optrex imported the LCD glass panels at issue in this case between October 1997 and June 1999.¹³¹ Throughout this period, Optrex classified all of the LCD glass panels it imported under heading 8531, the tariff heading for “electronic sound and visual signaling apparatus.” During this time period, Optrex did not seek the independent advice or assistance of its customs broker in classifying the LCD panels; rather, Optrex instructed its broker to classify the imported LCDs under heading 8531.¹³² In April of 1999, Customs notified Optrex “that it was under investigation for ‘alleged misclassification of imported merchandise, and failure to report indirect tooling payments and assists to [Customs].’”¹³³ This notice began the long, back-and-forth series of communications between Optrex and Customs that culminated in the subject litigation. At various times between 1999 and 2001, Customs requested information regarding Optrex’s importation of LCD panels, including copies of Optrex’s entry paperwork, any relevant documentation surrounding the tariff classification of the LCDs, and a list of Optrex employees responsible for classifying the LCDs.¹³⁴ CBP eventually wished to interview relevant Optrex employees in person, and issued a summons requesting the testimony of “the current Optrex employee or employees who can provide an explanation for Optrex classification decisions related to LCD products imported by or on

128. *Id.* at 1329 n.3.

129. *Id.* at 1328.

130. *Id.* at 1329.

131. *Id.* at 1330.

132. *Id.*

133. *Id.*

134. *Id.* at 1330–31.

behalf of Optrex between January 1, 1994 [and September 2001].”¹³⁵

The employee Optrex designated for testimony was an engineering manager for the company, and Customs interviewed this Optrex employee on two separate occasions. Neither interview proved satisfactory to CBP officials, as the engineer was unable to provide any specific information regarding Optrex’s classification decisions, and instead stated that “he was not qualified to respond to questions concerning classification of Optrex’s merchandise.”¹³⁶ In May 2002, two months after CBP’s unsatisfactory second interview with Optrex’s engineer, Customs issued a pre-penalty notice to the importer.¹³⁷ The notice stated that Optrex owed Customs money for both lost revenue (in the amount of \$2,033,562) and penalties (in the amount of \$4,067,124). This notice was followed by a formal penalty notice stating that by misclassifying its LCD panels under heading 8531, Optrex had made “material false statements and omissions culpable under 19 U.S.C. [§] 1592.”¹³⁸

In addition to the facts outlined above, several other facts were critical to the court’s ultimate decision in this case. The first of these centered on a 1991 “internal discussion” among various Customs officials regarding the proper tariff classification for LCD panels.¹³⁹ During the course of this debate, the National Import Specialist overseeing this category of merchandise concluded that the proper classification for Optrex’s LCD panels was under HTSUS heading 8531.¹⁴⁰ In May 1995, Optrex’s legal counsel further advised Optrex that, based upon meetings with Customs officials, its LCD panels were properly classified under heading 8531.¹⁴¹ Thus, during this time period, Optrex had a variety of support for its classification of LCD panels within heading 8531.

The situation changed in 1997, however, when the CAFC decided the case of *Sharp Microelectronics Technology, Inc. v. United States*.¹⁴² In *Sharp*, the court ruled that “certain LCD glass displays used in computers are properly classified under HTSUS heading 9013.”¹⁴³ After this

135. *Id.* at 1331.

136. *Id.* at 1331–32.

137. *Id.* at 1332.

138. *Id.*

139. *Id.* at 1333.

140. *Id.*

141. *Id.*

142. *Sharp Microelectronics Tech., Inc. v. United States*, 122 F.3d 1446 (Fed. Cir. 1997).

143. *Optrex*, 560 F. Supp. 2d at 1333.

decision, Optrex's legal counsel sent Optrex a letter stating that while the attorneys believed that Optrex's LCD panels were distinguishable from those at issue in *Sharp*, they nonetheless believed that Optrex should request a binding ruling from Customs regarding the correct tariff classification of Optrex's specific type of LCD goods.¹⁴⁴ The attorneys also advised Optrex to review its LCD product line to determine whether any of its glass panel LCDs were similar in design to those at issue in *Sharp*, and if so, then Optrex should immediately begin classifying those items under heading 9013.¹⁴⁵ Despite this advice from its legal counsel, Optrex did not seek a binding ruling from Customs, and instead continued to classify its LCD products under heading 8531, ultimately prompting CBP's investigation and subsequent legal action.¹⁴⁶

The main allegations against Optrex were that the importer, in violation of 19 U.S.C. § 1582, "negligently misclassified 535 entries of LCD glass panels and character display modules under HTSUS heading 8531, despite clear judicial guidance from *Sharp* and advice from counsel that such LCDs are properly classified under HTSUS heading 9013."¹⁴⁷ To succeed with the claim, Customs had the burden of proving that Optrex made a materially false statement or omission in classifying the LCD panels; once established, the burden then shifted to Optrex to prove that the material statement or omission did not occur as the result of its negligence.¹⁴⁸ The regulations governing penalties under § 1592 offer guidance regarding what constitutes negligence under the statute, and state that:

As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.¹⁴⁹

144. *Id.*

145. *Id.*

146. According to trial testimony, the decision to continue classifying Optrex's LCDs under heading 8531 was probably made by "Optrex's controller, engineering department, sales director, president, and [legal counsel]." *Id.* at 1334.

147. *Id.*

148. *Id.* at 1335.

149. 19 C.F.R. § 171 app. B(C)(1) (2008).

Optrex's main defense was that it exercised reasonable care in classifying its LCD panels (and thus was not guilty of negligence), and that Optrex and Customs had a legitimate "professional disagreement" regarding the correct classification of the goods.¹⁵⁰

Without extensive discussion, the court summarily concluded that Customs had established "by a preponderance of the evidence that Optrex made material false statements or omissions in its entry documents concerning LCD glass panels."¹⁵¹ These false statements consisted of the declarations that imported LCD glass panels were properly classified under HTSUS heading 8531, even after the *Sharp* decision ruled that purportedly similar LCDs were to be classified under heading 9013. The court further noted that material false statements on Customs' entry documentation *did* constitute a material false statement under the statute, because "the classification of merchandise as presented in customs entry documentation has the tendency to influence Customs' decision in assessing duties" ¹⁵²

Once it reached this conclusion, the court turned its attention to whether Optrex could successfully show that, despite its materially false statements regarding the classification of the LCDs, it was not guilty under the statute because it exercised reasonable care in classifying its products under heading 8531. During its examination, the post-*Sharp* advisory letter from Optrex's legal counsel proved to be a critical piece of evidence for the court, and seemingly led to Optrex's ultimate defeat. The court was particularly disturbed by Optrex's complete disregard of the legal advice of its counsel, stating that "the court finds no justification for Optrex's failure to act in accordance with the well-informed advice of its attorneys."¹⁵³ The court quoted the letter at length, highlighting what it considered to be particularly relevant language, including a passage stating that:

In keeping with the Sharp decision, there is a strong argument that any such LCD glass panels [imported by Optrex] are properly classifiable within tariff subheading 9013.80.60, HTSUS. We would recommend that Optrex immediately begin classifying any such LCD

150. *Optrex*, 560 F. Supp. 2d at 1335. Optrex also asserted two defenses of a procedural nature, which the court dismissed as unworthy of serious consideration. As these defenses do not substantively add to the importance of this decision, they are omitted from this discussion.

151. *Id.*

152. *Id.* at 1336–37.

153. *Id.* at 1337.

*glass panels within tariff subheading 9013.80.70, HTSUS in keeping with the Sharp decision.*¹⁵⁴

In its defense, Optrex highlighted other language of the letter, where its attorneys stated that “our understanding [is] that Optrex does not import any . . . panels similar to those described in the *Sharp* decision.”¹⁵⁵ Optrex argued that this language, expressing doubt regarding the similarity of its products to those at issue in *Sharp*, relieved it of any obligation to seek a binding ruling from Customs regarding proper tariff classification.¹⁵⁶ Optrex further argued that importers are not legally required to seek binding rulings from Customs in order to successfully demonstrate they exercised reasonable care. Optrex also asserted that, in consultation with numerous Customs professionals, it had developed an “accurate, reliable, and dependable . . . [tariff] classification system,” and that the existence of this system fulfilled its reasonable care duty under 19 U.S.C. § 1592.¹⁵⁷

In deciding against Optrex, the court first acknowledged that Optrex did indeed establish an internal tariff classification system.¹⁵⁸ The court likewise acknowledged that the classification of LCDs was particularly problematic, even for Customs (a fact reflected by Customs’ internal debate regarding the classification of LCD panels).¹⁵⁹ However, the court found these factors inadequate to “justify Optrex’s decision to disregard the formal legal advice of its attorneys.”¹⁶⁰ The court declared that its attorneys were Optrex’s “only source of credible advice regarding the classification of LCDs.”¹⁶¹ Optrex failed to use the expertise of its customs broker to assist with the classification of the LCDs, and instead dictated to the broker the heading it should use to classify the merchandise. Further, Optrex failed to produce any of its own employees that had any formal training in tariff classification, leading the court to conclude that the people who decided to continue to classify the LCDs under HTSUS heading 8531 were unqualified to make that decision.¹⁶²

154. *Id.* at 1338 (emphasis in original).

155. *Id.*

156. *Id.*

157. *Id.* at 1339.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

Because it determined that the letter from legal counsel was the only *credible* advice Optrex received regarding the classification of the LCDs, the court “assign[ed] considerable weight to the . . . Letter” and determined that it in face “plac[ed] an *affirmative duty* on Optrex to actively respond.”¹⁶³ In fact, the court was so unimpressed with Optrex’s failure to follow the advice of its attorneys that it concluded that this failure alone demonstrated a lack of reasonable care, despite the presence of some factors weighing in Optrex’s favor.¹⁶⁴ Summarizing both its reasoning and its conclusion on this issue, the court stated that:

While the act of consulting with an attorney, in itself, does not establish reasonable care under these circumstances . . . surely after receiving the formal advice of its attorneys, Optrex was under an obligation to actively pursue the issues raised, which it failed to do. As a result, Optrex continued to classify LCD glass panels under the false premise that classification under HTSUS heading 8531 was proper. This constitutes negligence.¹⁶⁵

Notably, the court did not agree with the government’s position that Optrex should be subject to penalties for its misclassification of LCD panels *prior* to receiving the attorneys’ opinion letter.¹⁶⁶ This disparate result again emphasizes the importance the court assigned to Optrex’s receiving, and then ignoring, professional legal advice regarding the tariff classification of its merchandise. Discussing Optrex’s misclassification of the LCD panels *after* the *Sharp* ruling *but before* the attorneys’ advisory letter, the court stated that it believed penalties were inappropriate for this period, as it was:

[S]ympathetic to Optrex’s view that the LCD glass panels at issue in *Sharp* were distinguishable based on their size and resolution. In this instance, the [attorneys’ letter] triggered a duty on the part of Optrex to *actively* investigate whether its classification of LCD glass panels was in accordance with law. [The letter] therefore established a dividing line between conduct that is negligent and conduct that could be construed as reasonable.¹⁶⁷

163. *Id.* at 1340 (emphasis added).

164. *Id.*

165. *Id.*

166. *Id.* at 1340–41.

167. *Id.* at 1341.

The court's rationale and holding of negligence based simply on the alleged failure to follow an attorney's advice regarding a highly fact-specific issue that was vigorously debated even within CBP is very disturbing. In the first place, CBP limits its rulings to the specific importer and specific merchandise before it in any ruling request, which also holds true for any ultimate disposition of the issue by the CIT, CAFC, or Supreme Court. Just because one importer's product is classified under a certain heading does not mean that all similar products will necessarily be classified in the same manner given the specific facts and circumstances of each case. This is such a basic tenet of tariff classification that no citations are needed to support this obvious proposition.

In addition, reasonable minds differ all the time on matters far less technical and complex than tariff classification. The decade-long debate about whether customs values can be based on income tax transfer pricing principles is but one example—and is an example where CBP has yet to formulate any coherent position. Even among global customs authorities, consistency in tariff classification through the sub-heading level (which is supposed to be “universal”) is often an elusive goal. If customs officials around the world in charge of tariff classification cannot even agree on a uniform subheading for a given product under the Harmonized System (on which the tariff schedules of all major trading nations, including the U.S., are based), how could an importer's “professional disagreement” with the advice of its counsel (which advice noted the differences between Optrex's LCD's and those of Sharp which were subject to the CAFC decision) rise to the level of negligence?

Finally, the court's holding fails to address the legislative history of the Customs Modernization Act,¹⁶⁸ which specifically states that consulting with an outside expert such as an accountant or lawyer is evidence that the importer has exercised reasonable care:

In meeting the “reasonable care” standard, the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program; *consulting with a Customs broker, a Customs consultant, or a public accoun-*

168. The “Mod Act” became law in 1993 as part of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3301, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

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tant or an attorney; using in-house employees such as counsel, a Customs administrator, or if valuation is an issue, a corporate controller, who have experience and knowledge of customs laws, regulations, and procedures; or, when appropriate, obtaining analyses from accredited labs and gaugers for determining technical qualities of an imported product.¹⁶⁹

Congress and CBP acknowledged, however, that turning to an outside expert for advice imposed obligations on the importer before the standard of “reasonable care” could be met. In selecting an expert, the importer was required to provide the attorney, consultant, etc. with full and complete information about the issue under consideration.¹⁷⁰ CBP also noted in its *Informed Compliance Publication* entitled “Reasonable Care (A Checklist for Compliance)” that:

[a] party’s selection of an expert, and the expert’s qualifications are part and parcel of the review of all of the facts and circumstances in the agency’s determination whether the party has exercised reasonable care. In Customs’ view, the party who retains the services of an “expert” bears some responsibility in ensuring that the party is qualified to render advice on Customs matter at issue.¹⁷¹

Both Congress and CBP were thus concerned that only *qualified* experts were retained, and that full and complete information was provided to the expert in order that a thorough analysis of the issue could be completed and a valid, well-reasoned opinion could be formed based on the facts and circumstances presented.

Thus, the court’s finding that “the act of consulting with an attorney, in itself, does not establish reasonable care under these circumstances,”¹⁷² glosses over the *real* issues involved when an importer hires an outside attorney for advice, i.e., whether the importer provided full, accurate, and complete information to the attorney about the issue in dispute, and whether that attorney was qualified to render advice in the field of customs law. Had the court addressed this “heart” of the

169. H.R. Rep. No. 103-361, at 120 (1993) U.S.C.C.A.N. 2552, 2670 (1993) (emphasis added).

170. *See id.* at 120.

171. Customs and Border Protection, *Informed Compliance Publication: Reasonable Care (A Checklist for Compliance)* (Feb. 2004) at 3.

172. *United States v. Optrex Am., Inc.*, 560 F. Supp. 2d 1326, 1340. (Ct. Int’l Trade 2008).

reasonable care issue when outside experts are retained, it could not have found any violation of the reasonable care standard: Optrex obviously provided full and accurate information to the law firm on this issue (which was not in dispute), and the law firm was obviously qualified to render advice in the field of customs law.

Instead, the real issue in Optrex boiled down to a simple professional disagreement between the importer and its counsel about the proper course of action recommended by counsel after conducting a thorough analysis of the issue. As Optrex may have experienced in its past dealings with outside advisors, “expert advice” can sometimes be wrong and does not always have to be followed. Even if Optrex agreed with counsel’s recommendations, corporate budgets are often short of the funds required to further engage attorneys to prepare ruling requests with government agencies and otherwise implement recommended corrective action, and thus defer any corrective action until funding has been achieved. Both of these outcomes are simply the result of professional judgment on the part of the importer. If the importer has a reasonable basis upon which to base its disagreement with the expert’s advice (as Optrex did here), nothing in the statute, the legislative history, CBP’s regulations, or any policy reason dictates that the importer must follow advice it believes to be erroneous. The court’s decision here essentially imposes a mandatory standard of following counsel’s advice, or subjecting oneself to a finding of negligence. This standard finds no support anywhere in the law.

After deciding that Optrex was indeed negligent in its misclassification of LCD panels between 1997 and 1999, the court turned its attention towards deciding how much money Optrex owed the government in lost duties and penalties.¹⁷³ The court first ruled that pursuant to 19 U.S.C. § 1592(d), Customs was entitled to the difference in duties properly owed under the correct HTSUS heading 9013, and the amount of duties Optrex actually paid on the merchandise under HTSUS heading 8531. This amount was \$959,635.04.¹⁷⁴

Regarding penalties, the court first noted that under 19 U.S.C. § 1592(c)(3), courts have the discretion to set penalties for a negligent tariff classification violations in an amount “not to exceed . . . the lesser of . . . the domestic value of the merchandise’ or ‘two times the lawful duties, taxes and fees of which the United States is or may be deprived’

173. *Id.* at 1342.

174. This amount was offset by approximately \$46,000 in penalties Optrex paid pursuant to a previous court ruling in this case. *See id.*

or ‘if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.’”¹⁷⁵ The court further noted that in exercising its discretion to set civil penalties, it may consider the presence of any mitigating factors.¹⁷⁶ In this case, the court decided that only four factors were relevant for its examination of potential penalty mitigation: (1) Optrex’s good faith effort (or lack thereof) to comply with the statute; (2) Optrex’s history of previous violations of U.S. Customs laws and regulations; (3) the public interest ensuring importers comply with the regulations at issue; and (4) any economic benefit Optrex gained through its violation of the statute.¹⁷⁷

Upon an examination of these factors, the court determined that the only factor weighing in favor of mitigation was the lack of evidence indicating that Optrex had ever previously violated U.S. Customs laws.¹⁷⁸ After a brief discussion, the court concluded that the other three factors acted more as *aggravating* factors in the penalty determination, rather than mitigating factors.¹⁷⁹ Particularly notable is the court’s language discussing the public interest factor. In reasoning that this factor weighed against mitigation, the court stated that “this particular decision will encourage the practice of ‘shared compliance,’ as Optrex’s liability for negligence arises in large part from its failure to request a binding classification ruling from Customs.”¹⁸⁰ After weighing all of the relevant mitigating and aggravating factors, the court ruled that Optrex owed Customs penalties equaling one and one-half times the duties, taxes, and fees it did not pay on the LCDs from 1997 through 1999.¹⁸¹

CONCLUSION

Despite the vast number of customs brokers actively engaged in “customs business” in the United States and the large number of importers and other entities which could potentially be subject to penalty and liquidated damages actions, such cases continue to be few and far between at the CIT. 2008 was no exception, in which even a convicted felon sought to keep his customs broker’s license (and

175. *Id.* at 1343 (citing 19 U.S.C. § 1592(c)(3)).

176. *Id.* at 1344. Previous CIT decisions have outlined 14 non-exclusive mitigating factors that the court may consider. *See* *United States v. Complex Mach. Works Co.*, 23 Ct. Int’l Trade 942 (1999) (citing *United States v. Modes, Inc.*, 17 Ct. Int’l Trade 627, 635–36, 639 (1993)).

177. *Optrex*, 560 F. Supp 2d at 1343–44.

178. *Id.* at 1343.

179. *Id.* at 1343–44.

180. *Id.* at 1343.

181. *Id.* at 1344.

failed), and in which a major freight forwarder and customs broker could not escape being penalized for failing to ensure the responsible execution of classification decisions by its employees engaged in customs business. *Optrex* will no doubt be viewed as the most problematic decision of 2008 because of the long-term ramifications it may engender with respect to the “reasonable care” standard and what an importer’s obligations are when it seeks legal advice from outside counsel. The unfortunate answer, based on the holding of *Optrex*, is that many importers may avoid seeking legal advice at all to avoid entirely the scenario presented in this decision.