JUDGE RESTANI AND THE PREMATURE COMPUTER-GENERATED LIQUIDATION NOTICES

*By Patrick C. Reed**

In the 1993 Customs Modernization Act,[1] Congress amended the statutes governing administrative procedures of the U.S. Customs Service ("Customs") "by substituting 'Customs' for 'the appropriate customs officer' to reflect automation and computerization realities …."[2] These "automation and computerization realities" were, of course, that computers were replacing customs officials in many important tasks and would continue to do so. *LG Electronics U.S.A., Inc. v. United States,*[3] which applied the pre-1993 law, illustrates the legal problems that resulted from using computers in import entry procedures before Congress modernized the statutes. Judge Restani ruled that, under the statute in effect at the time, an importer facing a potential loss of refunds as a result of computer difficulties was entitled to relief on a substantial part of its claim. The importer would not have received this relief if customs officials had taken the same action or if the 1993 amendments already applied.

The case involved imported color televisions subject to an antidumping duty order. The importer, LG Electronics U.S.A. (the "importer" or "plaintiff"), deposited estimated antidumping duties with Customs at the time of entry, and the U.S. Commerce Department ("Commerce") suspended liquidation ("the final computation or ascertainment of the duties … accruing on an

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1 Pub. L. No. 103-182, title VI, 107 Stat. 2057, 2170 (1993).

2 H.R. Rep. No. 103-361, pt. 1, 103d Cong., 1st Sess. 137 (1993). The amendments include Pub. L. No. 103-182, § 638, 107 Stat. at 2203 (amending 19 U.S.C. § 1500), and § 645, 107 Stat. 2206 (amending 19 U.S.C. § 1514). The U.S. Customs Service has been renamed U.S. Customs and Border Protection.

3 991 F. Supp. 668 (Ct. Int'l Trade 1997) (before Restani, J.). Although the case was decided in 1997, pre-1993 law applied because the merchandise was imported before 1993.

entry"[4]) pending its determination of the proper antidumping duty rate. The final antidumping duties were lower than the estimates deposited at entry. Commerce issued liquidation instructions to Customs directing it to liquidate the entries at the lower rate and refund the difference between the liquidation rate and the deposit rate.

Customs declined to issue refunds on 57 of the importer's entries. According to Customs, these 57 entries had already been liquidated at the deposit rate, even though these liquidations were premature and contrary to the Commerce instructions to suspend liquidation. Customs records showed that during the period in which liquidation was supposed to be suspended, the Customs computer system had generated notices of liquidation at the deposit rate for the 57 entries.

The importer had not filed protests with Customs against the purported liquidations promptly after the liquidation notices were issued. When the importer learned that Customs would not pay the expected refunds in accordance with the Commerce instructions, it sued in the U.S. Court of International Trade. The Government argued that the entries had been liquidated and that the court lacked jurisdiction because the importer had not filed timely protests within the required period after liquidation (at the time, 90 days) as specified by statute in 19 U.S.C § 1514(a).

The importer presented the novel argument that 54 of the entries had not been liquidated at all.[5] Instead, according to the importer, the only thing that happened was that the Customs computer system had generated erroneous liquidation notices, without any actual "decision" to liquidate the entries having been made. This argument focused on the then-existing statutory

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[4] 19 C.F.R. § 159.1 (cited in LG Electronics, 991 F. Supp. at 672).

[5] On three of the original 57 entries, the importer could not show that it had ever deposited estimated duties, so the claim on these entries was lost. LG Electronics, 991 F. Supp. at 670 n.2. In developing the importer's legal arguments on the other 54 entries, we (the importer's lawyers) concluded that there would be little or no change of success if we conceded that the entries had been liquidated, since appellate precedents had previously rejected the potentially available arguments such as "void liquidation" or equitable tolling of the 90-day protest period. See Juice Farms. Inc. v. United States, 68 F.3d 1344 (Fed. Cir. 1995); United States v. A.N. Deringer, Inc., 66 CCPA 50, 593 F.2d 1015 (1979); see also US JVC Corp. v. United States, 15 F. Supp.2d 906 (Ct. Int'l Trade 1998) (similar and approximately contemporaneous case to *LG Electronics*, also discussed in note 22 infra).

language stating that a protest is used to challenge "*decisions* of the appropriate customs officer … as to …liquidation … of an entry …."[6] Thus, the importer claimed that the entries were still unliquidated and asked the court to order Customs to liquidate them in accordance with the Commerce instructions and pay the appropriate refunds.

Judge Restani began by accepting the importer's threshold premise that "the court must consider whether a liquidation has in fact occurred such as to trigger the 90 day period."[7] She ruled that "Customs decisions are 'substantive determinations involving the application of pertinent law and precedent to a set of facts ….'"[8] The case involved three different types of liquidation notices to which this legal standard would be applied: notices of "no change" liquidation of 25 entries; notices of "automatic" liquidation of 27 entries; and notices of "deemed" liquidation of two entries.

Judge Restani determined based on an examination of agency procedures that in the "no change" liquidations, "Customs decided for each 'no change' entry that the rate of duty imposed at the time of deposit was correct and that the entry should be liquidated at that rate."[9] Being actual decisions, "Customs' actions satisfy the test for liquidation."[10] Judge Restani recognized that "[t]he liquidations were illegal, however, because there were suspensions of liquidation in

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[6] 19 U.S.C. § 1514(a) (1988) (italics added) (prior to 1993 amendment). My colleague Yong Hak Kim deserves the credit for devising the "no decision" argument. As we were developing the importer's case, this theory seemed promising in that it had not been rejected in appellate precedent (cf. supra note 5) and was firmly based on the statutory language. At this point, I said we shouldn't just rely on a promising theory: we also needed to find legal authority that arguably supported our idea that no "decision" had been made in our case. We found Pagoda Trading Co. v. United States, 9 CIT 407, 617 F. Supp 96 (1985), *aff'd*, 804 F.2d 665 (Fed. Cir. 1986), which held that an erroneous computer-generated notice of extension of liquidation was invalid to extend liquidation. We noted the serendipity that Judge Restani herself had decided *Pagoda* in the Court of International Trade.

[7] *LG Electronics*, 991 F. Supp. at 672. The importer invoked the court's grant of residual jurisdiction in 28 U.S.C. § 1581(i), under which the action was timely because it was commenced within 2 years (the allowed period) after Commerce issued its liquidation instructions to Customs. *LG Electronics*, 991 F. Supp. at 672 n.5.

[8] Id. at 673 (citing United States Shoe Corp. v. United States, 114 F.3d 1564, 1569-70 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998) (the Harbor Maintenance Tax litigation). When *LG Electronics* was decided, the Supreme Court had granted certiorari in *United States Shoe* but had not yet rendered its decision.

[9] *LG Electronics*, 991 F. Supp. at 673.

[10] Id. at 674.

place at the time."[11] Nevertheless, "whether legal or illegal, a liquidation not protested within 90 days becomes final as to all parties."[12] Judge Restani granted summary judgment for the Government on the "no change" entries "because of plaintiff's failure to protest the liquidations and the resulting lack of jurisdiction under 28 U.S.C. § 1581(a)."[13]

Turning to the "automatic" liquidations, Judge Restani determined that this type of liquidation was performed by the Customs computer system, which is programmed so that "[i]f not suspended or extended, the automated system would automatically liquidate the entries on the 50th week [after entry] …."[14] Judge Restani concluded that the notices of automatic liquidation of the television set entries had been issued because of a "programming error" and found "no evidence that anyone at Customs decided to liquidate these entries."[15] Therefore, Judge Restani ruled that "[a]ll that occurred here was the triggering of a notice without any individualized decision of any Customs officer to act on the entries," and "[t]his is not a liquidation under the statute …."[16]

As for the two notices of "deemed" liquidation, Judge Restani explained that "[l]iquidation is deemed to occur by operation of law one year after entry,"[17] but the statute expressly provides exceptions "in cases of extension, suspension or court order."[18] Judge Restani ruled that since

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11 Id.

12 Id. (citing 19 U.S.C. § 1514; Juice Farms. Inc. v. United States, 68 F.3d 1344 (Fed. Cir. 1995); United States v. A.N. Deringer, Inc., 66 CCPA 50, 593 F.2d 1015 (1979)).

13 Id.

14 Id. (quoting a Customs administrative directive).

15 Id. at 674.

16 Id. at 674-75. Three "automatic" liquidation notices presented the additional wrinkle that the notices had been issued at a time when liquidation was preliminary enjoined by court order during judicial review of the Commerce determination. Judge Restani ruled that even if there had been an actual Customs decision to liquidate these entries, the liquidation need not have been protested because "[a]n importer is entitled to rely on a preliminary injunction." Id. at 675. In a footnote, Judge Restani decided that "the court will not begin the unwieldly process of determining whether the violations of the court order involve contempt." Id. at 676 n.14.

17 Id. at 676.

18 Id.

liquidation was suspended when the notices were issued, "as a matter of law, no deemed liquidation … occurred."[19]

In sum, the court found that "each party [was] correct as to certain entries and therefore "grant[ed] summary judgment in part to plaintiff and in part to defendant."[20] The importer won on the purported "automatic" and "deemed" liquidations: Customs was ordered to liquidate the entries in accordance with the Commerce liquidation instructions and refund the excess deposits to the importer.[21] But "[i]n the case of the 'no change liquidations,' the liquidations, while illegal, were not timely protested," and the court "lack[ed] jurisdiction over such entries."[22]

In hindsight, the lesson of *LG Electronics* is that Customs started using computers in its procedures before it had a statutory framework that allowed computer-generated actions to replace human decisions. Judge Restani decided the case before her by scrupulously interpreting and applying the existing statutory language "decisions of the appropriate customs officer" that had not yet been amended to reflect the needs of computerization and automation in customs transactions. And the principle that automatic liquidations are not decisions of customs officers remains consistent with current law under which automatic liquidations are given no weight in determining whether Customs has adopted a precedential administrative "treatment" of a series of transactions because automatic liquidations do not represent an actual determination by a customs official.[23]

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[19] Id.; see also id. ("[a]n erroneous computer-generated notice … has no effect") (citing Pagoda Trading Co. v. United States, 9 CIT 407, 617 F. Supp 96 (1985), *aff'd*, 804 F.2d 665 (Fed. Cir. 1986)).

[20] Id. at 670.

[21] Id. at 677.

[22] Id. Neither party appealed. In an approximately contemporaneous lawsuit by a different importer of color televisions whose entries had been prematurely liquidated as entered, there were no "automatic" or "deemed" liquidations and the court denied the importer's argument for equitable tolling of the protest period. See US JVC Corp. v. United States, 15 F. Supp.2d 906 (Ct. Int'l Trade 1998).

[23] See 19 U.S.C. § 1625(c) (giving statutory protection to an administrative "treatment previously accorded" in a series of customs transactions); 19 C.F.R. § 177.12(c)(1)(ii) (providing that in determining whether a treatment existed, "Customs will give no weight whatsoever ... to ... entries or transactions which Customs, in the interest of

commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review."). In Kent Int'l Inc. v. United States, 17 F.4th 1104 (Fed. Cir. 2021), the court held that under this regulation no weight is given to automatic liquidations, also known as bypass liquidations.