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Deemed Liquidation: Whose Rate is this Anyway

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Abstract

This Note argues that there are many reasons to believe that Congress did intend section 504 to operate as a penalty on Customs for failure to liquidate in a timely manner. Part I discusses the process by which imports are liquidated and how section 504 has been implemented. Part II examines how the CIT has interpreted the statute. Part III argues that the practice of Customs and the CIT's interpretation conflict with the congressional intent behind section 504. Finally, this Note concludes that in order to conform to Congress' intent, the importer's asserted rate should be given effect in deemed liquidation situations.

DEEMED LIQUIDATION: WHOSE RATE IS THIS ANYWAY?

INTRODUCTION

As required by section 504 of the Tariff Act of 1930¹ (section 504) the United States Customs Service (Customs) must liquidate² entries³ of imported merchandise within one year of the time of entry.⁴ An entry not liquidated within one year "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record."⁵ Despite the statute's apparent clarity, in actual practice the rate of these liquidations by operation of law, or "deemed liquidations," is not necessarily the rate asserted by the importer. Rather, the rate used for deemed liquidations is more likely to be a rate insisted upon by Customs. Recent cases indicate that the United States Court of International Trade (CIT) has approved Customs' practice.⁶ Relying on the legislative history of section 504, the Court has reasoned that Congress could not have intended to impose a penalty on Customs for failure to liquidate in a timely manner.⁷

This Note argues that there are many reasons to believe that Congress did intend section 504 to operate as a penalty on Customs for failure to liquidate in a timely manner. Part I discusses the process by which imports are liquidated and how section 504 has been implemented by Customs. Part II exam-

1. 19 U.S.C. § 1504 (1982 & Supp. III 1985).

2. "'Liquidation' means the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1986). See 1 R. STURM, CUSTOMS LAW & ADMINISTRATION § 8 (3d ed. 1986).

3. An entry is defined under the Customs regulations as "that documentation required . . . to be filed with the appropriate Customs officer to secure the release of imported merchandise from Customs custody, or the act of filing that documentation." 19 C.F.R. § 141.0a(a) (1986).

4. The one year limitation was added to the Customs laws in 1978. The Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 209, 92 Stat. 888, 902 (codified as amended at 19 U.S.C. § 1504 (1982 & Supp. III 1985)) (the 1984 amendment substituted the term "importer of record" for "the importer, his consignee, or agent").

5. 19 U.S.C. § 1504(a).

6. See, e.g., *American Permac, Inc. v. United States*, 642 F. Supp. 1187 (Ct. Int'l Trade 1986); *Detroit Zoological Soc'y v. United States*, 630 F. Supp. 1350 (Ct. Int'l Trade 1986), *plaintiff's motion to supplement complaint granted in part, defendant's motion to dismiss denied*, No. 86-102, slip op. (Ct. Int'l Trade Oct. 14, 1986).

7. *Detroit Zoological Soc'y*, 630 F. Supp. at 1355 n.9.

ines how the CIT has interpreted the statute. Part III argues that the practice of Customs and the CIT's interpretation conflict with the congressional intent behind section 504. Finally, this Note concludes that in order to conform to Congress' intent, the importer's asserted rate should be given effect in deemed liquidation situations.

I. LIQUIDATION OF ENTRIES AND INTERPRETATION OF SECTION 504 BY THE CUSTOMS SERVICE

A. *The Liquidation Process*

Customs is required by statute to appraise and classify merchandise, determine the amount of duties to be paid, liquidate the entry, and give notice of such liquidation.⁸ The actual process by which this occurs has several basic steps. The importer, usually acting through his Customs broker, is required to file an entry within five days after arrival of the merchandise.⁹ If the information on the entry¹⁰ is acceptable to Customs officials,¹¹ the merchandise will be released to the importer's custody and a copy of the entry documentation returned to the importer.¹² Within ten days after filing the entry the importer must file the entry summary,¹³ which is a slightly more detailed version of the entry, with the original entry doc-

8. 19 U.S.C. § 1500 (1982). The Customs Courts Act of 1970 merged all decisions regarding value, quantity, classification and amount of duties into a single action, the liquidation. Pub. L. No. 91-271, § 207, 84 Stat. 274, 284 (codified at 19 U.S.C. § 1514). Liquidation is the basis for protest of a Customs' decision. *Id.* Denial of protest by Customs is grounds for invoking the jurisdiction of the Court of International Trade (CIT). 19 U.S.C. § 1514(a); 28 U.S.C. § 1581(a).

9. 19 C.F.R. § 141.5 (five day requirement for filing of entry).

10. Customs Form 3461 is normally used for entries. 19 C.F.R. § 142.3(a)(1). Required information includes, among other things, a description of the merchandise, quantity, value, and tariff classification.

11. *See* 19 C.F.R. § 152 (classification and appraisement of merchandise).

12. 19 C.F.R. § 142.16(a); *see* R. STURM, *supra* note 2, § 2.5 (1986).

13. "'Entry summary' means any other documentation [other than the entry documentation] necessary to enable Customs to assess duties, and collect statistics on imported merchandise, and determine whether other requirements of law or regulation are met." 19 C.F.R. § 141.0a(b). This definition is derived from 19 U.S.C. § 1484, which requires that the importer of record file within 10 days after the entry "such other documentation as is necessary to enable such officer to assess properly the duties on the merchandise, collect accurate statistics with respect to the merchandise, and determine whether any other applicable requirement of law . . . is met." 19 U.S.C. § 1484(a)(1)(B). Customs Form 7501 is normally used for the entry summary. 19 C.F.R. § 142.11(a).

umentation attached.¹⁴ This second set of documents is reviewed by Customs officials, usually within the one year required by section 504, and liquidation, the final assessment of duties, occurs.¹⁵ Notice of liquidation is posted in the customhouse and a courtesy notice is typically sent to the importer.¹⁶

If the importer disagrees with the determination of the amount of duties owed, he may file a protest with Customs.¹⁷ Protest must be filed within 90 days after, but not before, liquidation.¹⁸ If the protest is denied, then at that point all administrative remedies are considered exhausted and the importer may appeal Customs' decision to the CIT.¹⁹

When Customs fails to liquidate the entry within one year, the entry is "deemed liquidated" pursuant to section 504 at the rate asserted by the importer at the time of entry.²⁰ However, under its interpretation of the statute, Customs often disregards the importer's assertion in deemed liquidations.

14. 19 C.F.R. § 142.12(b) (ten day requirement for filing of entry summary).

15. See R. STURM, *supra* note 2, § 8.

16. Under the Customs regulations, bulletin notice of liquidation "shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry . . ." 19 C.F.R. § 159.9(b). In addition, Customs will endeavor to provide a courtesy notice of liquidation to importers or their agents. 19 C.F.R. § 159.9(d).

17. 19 U.S.C. § 1514.

18. *Id.*

19. 28 U.S.C. § 1581.

20. 19 U.S.C. § 1504. The full text of the statute follows:

§ 1504. Limitation on liquidation

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

(2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or

(3) the date of withdrawal from warehouse of such merchandise for consumption where . . . duties may be deposited after the filing of an entry or withdrawal from warehouse;

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of any entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving

B. *Customs' Interpretation of Section 504*

In actual practice, what rate is asserted and when it is asserted is largely determined by Customs. Because of its authority to review entries prior to acceptance²¹ and reject a form which appears to be erroneous,²² Customs officials may refuse to permit entry unless a rate acceptable to Customs is shown on the entry documentation.²³

Customs' authority to determine the rate asserted by the importer and to decide when it was asserted was further expanded by the Customs regulations issued pursuant to section 504(a).²⁴ In 1979, before promulgating the regula-

notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if—

- (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
- (2) liquidation is suspended as required by statute or court order; or
- (3) the importer of record requests such extension and shows good cause therefor.

(c) Notice of suspension

If the liquidation of any entry is suspended, the Secretary shall, by regulation, require that notice of such suspension be provided to the importer of record concerned and to any authorized agent and surety of such importer of record.

(d) Limitation

Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

Id.

21. 19 C.F.R. § 141.64. "Entry and entry summary documentation shall be reviewed before acceptance to ensure that all entry and statistical requirements are complied with and that the indicated values and rates of duty appear to be correct." *Id.*

22. 19 C.F.R. § 141.61(e)(4). "The district director shall reject a form . . . if the information provided clearly appears on its face, or is known to the Customs officer, to be erroneous." *Id.*

23. Telephone interview with J. DiSalvo, Head of Protest and Control Section, United States Customs Service, New York (Nov. 17, 1986) [hereinafter DiSalvo Interview] (author's notes available at the *Fordham International Law Journal*); see also R. STURM, *supra* note 2, § 2.9 (1986).

24. The regulations interpreting section 504 are codified at 19 C.F.R. § 159.11(a) (1986).

tions, Customs issued a bulletin interpreting the new statute.²⁵ According to this bulletin, deemed liquidations were to occur at the rate appearing in the entry summary²⁶ rather than the entry.²⁷ The bulletin also redefined the "time of entry."²⁸ Although the relevant statutes and regulations clearly define the time of entry as the time of release of the merchandise,²⁹ Customs decided that for purposes of deemed liquidation, the time of entry would be the time of filing the entry summary.³⁰ As a result, the regulations now state that deemed liquidations are to occur at the rate "asserted by the importer at the time of filing an entry summary for consumption in proper form, with estimated duties attached"³¹ In actual practice, therefore, Customs has two opportunities to review and reject the rate asserted by the importer: first upon entry, and again upon filing the entry summary.

The language of section 504 gives rise to three possible interpretations. One reading, favorable to importers, would

25. T.D. 79-221, 13 Cust. B. & Dec. 641 (1979).

26. See *supra* note 13 and accompanying text.

27. See T.D. 79-221, 13 Cust. B. & Dec. at 685-86. As stated in the Customs Bulletin:

[P]roposed sections 159.11(a) and 159.12(f) have been revised to reflect that an entry deemed liquidated by operation of law shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of filing the entry summary for consumption in proper form, with estimated duties attached

Id. at 685; see *supra* note 3.

28. *Id.*

29. Under 19 U.S.C. § 1484 the importer of record shall make entry "by filing with the appropriate customs officer such documentation as is necessary to enable such officer to determine whether the merchandise may be released from customs custody" 19 U.S.C. § 1484(a)(1)(A) (emphasis added). The Customs regulations similarly refer to the release of the merchandise. 19 C.F.R. § 141.0a(a); see *supra* note 3. Under the regulations, "[w]hen the entry documentation is filed in proper form without an entry summary, the 'time of entry' shall be: (1) The time the appropriate Customs officer authorizes the release of the merchandise or any part of the merchandise covered by the entry documentation" 19 C.F.R. § 141.68(a). Where the entry summary is filed at the time of entry, the time of entry is the time of filing the entry summary. 19 C.F.R. § 141.68(b); see C.S.D. 82-80, 16 Cust. B. & Dec. 822, 823.

30. T.D. 79-221, 13 Cust. B. & Dec. at 685-86. According to Customs, "'Time of entry' is used in section 209 of Public Law 95-410 (19 U.S.C. § 1504) to refer to the time the merchandise enters the commerce of the United States. Therefore, for purposes of liquidation, Customs believes this term has a different meaning than that set forth in proposed section 141.68." *Id.*; see *supra* note 29 (text of 19 C.F.R. § 141.68).

31. 19 C.F.R. § 159.11(a).

allow that whatever the importer asserted when attempting to obtain release of merchandise, whether or not Customs actually released the merchandise, would be the asserted rate. A second, more strict interpretation, following the language of the statute, would allow the rate that Customs accepted when releasing the merchandise to govern. The third interpretation, which has been adopted by Customs, is that the rate appearing on the entry summary, whether or not it was asserted by the importer at the time of entry, is the correct rate for deemed liquidation. The CIT has adopted this last interpretation.³²

II. INTERPRETATION OF SECTION 504 BY THE COURT OF INTERNATIONAL TRADE

The CIT has addressed the issue of deemed liquidation on several recent occasions.³³ In most instances, the CIT has avoided the issue of whose rate is proper either by denying jurisdiction³⁴ or holding that there was a valid extension of the initial one year period under section 504(b).³⁵ In *Detroit Zoolog-*

32. See *infra* notes 33-58 and accompanying text.

33. See, e.g., *Miller & Co. v. United States*, No. 86-110, slip op. at 3-4 (Ct. Int'l Trade Oct. 24, 1986); *Old Republic Ins. Co. v. United States*, 645 F. Supp. 943, 948-50 (Ct. Int'l Trade 1986); *American Permac, Inc. v. United States*, 642 F. Supp. 1187, 1191-97 (Ct. Int'l Trade 1986); *Philipp Bros., Inc. v. United States*, 630 F. Supp. 1317, *appeal dismissed*, No. 86-1122, slip op. (Fed. Cir. July 18, 1986), *decision on remand upheld*, No. 86-107, slip op. (Ct. Int'l Trade Oct. 22, 1986); *Pagoda Trading Co. v. United States*, 617 F. Supp. 96, 99-100 (Ct. Int'l Trade 1985); *Special Commodity Group v. Baldrige*, 6 Ct. Int'l Trade 264, 265-66 (1983).

34. See *Miller & Co.*, No. 86-110, slip op. (Ct. Int'l Trade Oct. 24, 1986); *Detroit Zoological Soc'y v. United States*, 630 F. Supp. 1350 (Ct. Int'l Trade 1986). Exhaustion of administrative remedies is a prerequisite to invoking the jurisdiction of the CIT, and thus denial of protest must occur before an importer can appeal to the court. See *supra* notes 17-19 and accompanying text. However, because liquidation is a prerequisite to the filing of a protest, where an extension is found to be valid, the court may deny jurisdiction on the ground that no valid protest was filed and no denial of protest occurred. *Miller & Co.*, No. 86-110, slip op. (Ct. Int'l Trade Oct. 24, 1986); *Detroit Zoological Soc'y*, 630 F. Supp. at 1350.

35. See *Old Republic Ins.*, 645 F. Supp. at 950; *American Permac*, 642 F. Supp. at 1191; *Philipp Bros.*, 630 F. Supp. at 1324. Under section 504(b), extension may occur for one of three reasons: (1) Customs requires additional information, (2) liquidation is suspended by statute or court order, or (3) the importer requests an extension. 19 U.S.C. § 1504(b). See *supra* note 20. Suspension of liquidation by statute or court order is distinct from extension and is but one of the three grounds upon which extension is permitted. See *Pagoda Trading*, 617 F. Supp. at 99; *Old Republic Ins.*, 645 F. Supp. at 948-49. Where liquidation is suspended by statute or court order, the surety must be notified. 19 U.S.C. § 1504(c). However where liquidation is extended for reasons other than suspension, there is no requirement of notice to the

ical Society v. United States, the CIT not only held that there was a valid extension, but also stated that the proper rate for deemed liquidation is the rate at which Customs permits entry.³⁶

In *Detroit Zoological Society*, the plaintiff was the consignee of a locomotive and coaches to be used in its zoo train and had attempted to classify the merchandise as duty free under Tariff Schedules of the United States (TSUS) number 862.10: "Articles imported for exhibition by any institution or society established for the encouragement of . . . education or science . . ." Customs, however, had insisted upon classification under TSUS 690.05 and 690.15 (transportation equipment), and 806.20 ("Articles exported for repairs or alterations . . . Inter-

surety. *Old Republic Ins.*, 645 F. Supp. at 949 n.14. Suspension must be authorized by statute or court order and may even extend beyond the four year limit. 19 U.S.C. § 1504(d). But there is no provision for extension beyond the four year limit where Customs requires information or the importer requests extension. 19 U.S.C. § 1504(b)(1) and (3). *American Permac*, 642 F. Supp. at 1191; *see also* 19 C.F.R. § 159.12.

It seems that the CIT favors finding a valid extension rather than permitting liquidation by operation of law. In adopting its stance, the court has relied on a ruling by the Court of Appeals for the Federal Circuit in *Ambassador Div. of Florsheim Shoe v. United States*. 748 F. 2d. 1560 (Fed. Cir. 1984). In *Florsheim Shoe*, the Court of Appeals reversed a decision of the CIT denying an extension of liquidation while an administrative review of countervailing duties was pending. The Court of Appeals found an "implied statutory requirement" that liquidations be suspended pending periodic review by the International Trade Administration (ITA) and that this constituted a valid ground for extension of liquidation under § 1504(b)(2). *Id.* at 1563. (Under 19 U.S.C. § 1675(a), the ITA must annually review all outstanding countervailing duty and antidumping duties, but there is no express requirement that liquidations be suspended pending such review. *Id.* at 1561-63.)

The later cases involving suspension of liquidation pending the results of administrative review have adopted the reasoning of *Florsheim Shoe*. *See, e.g., Miller & Co.*, No. 86-110, slip. op. (countervailing duty regarding Brazilian pig iron); *American Permac*, 642 F. Supp. at 1190-91 (antidumping duty regarding German drycleaning equipment); *Philipp Bros.*, 630 F. Supp. at 1324 (countervailing duty regarding Brazilian pig iron). Therefore, as a result of the "implied statutory requirement" rule of *Florsheim Shoe*, the CIT has not reached the question of the proper rate for deemed liquidations in cases involving suspension of liquidation due to administrative review of countervailing or antidumping duties.

It is interesting to note that even before the implied statutory requirement rule of *Florsheim Shoe*, the CIT had refused to permit deemed liquidation where administrative review of a countervailing duty was pending. *Special Commodity Group v. Baldrige*, 6 Ct. Int'l Trade 264 (1983). In *Special Commodity Group*, the court held, "Where administrative proceedings are in process, and the agency has not adopted a final decision, the matter is generally not ripe for judicial review." *Id.* at 269.

36. *Detroit Zoological Soc'y*, No. 86-102, slip op. at 8 (Ct. Int'l Trade Oct. 14, 1986) (granting plaintiff's motion to supplement complaint in part, denying defendant's motion to dismiss) (adopting footnote 9 of earlier opinion); 630 F. Supp. at 1355 n.9.

nal combustion engines").³⁷ Plaintiff deposited duties³⁸ and made a request for internal advice regarding the proper classification.³⁹

Customs failed to liquidate within one year, after which time plaintiff filed protest. Plaintiff then filed suit seeking liquidation by operation of law under section 504(a) at the rate actually asserted at the time of entry.⁴⁰ Because protest had not yet been denied, plaintiff did not meet the jurisdictional requirement of exhaustion of administrative remedies.⁴¹ Therefore plaintiff attempted to invoke the residual jurisdiction of the CIT⁴² which authorizes jurisdiction under special circumstances in order to avoid unjustified delays.⁴³ Having filed protest, plaintiff subsequently sought to amend its complaint to include an allegation of jurisdiction based on exhaustion of administrative remedies.⁴⁴ The immediate issues before the court were plaintiff's motion to amend its complaint with regard to jurisdiction and defendant's motion to dismiss for lack of jurisdiction.⁴⁵

The CIT held that Customs' extension of the period of liquidation was valid and therefore no jurisdiction existed because administrative remedies had not yet been exhausted.⁴⁶ The court reasoned that because plaintiff had made a request for internal advice, Customs had valid grounds for extending liquidation under section 504(b)(1) which authorizes an extension where "information needed for the proper appraisalment or classification of the merchandise is not available to the ap-

37. 630 F. Supp. at 1353; see *Tariff Schedules of the United States* (1985).

38. 630 F. Supp. at 1353; see 19 U.S.C. § 1505(a) (requirement that importer deposit duties).

39. 630 F. Supp. at 1356; see 19 C.F.R. § 177.11. A request for internal advice regarding proper application of the Customs laws is made by a Customs field office to Headquarters and will be made whenever an importer so requests. *Id.*

40. 630 F. Supp. at 1353. While most of the entries were filed as dutiable at the insistence of Customs officials, plaintiff claimed to have asserted duty free status for the merchandise in oral and written statements made to Customs officials at the time of entry. Plaintiff's Response in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, for Judgement on the Pleadings, and/or for Summary Judgement at 7-8, 630 F. Supp. 1350 (Ct. Int'l Trade) (No. 85-2-00275) (1986).

41. See *supra* notes 17-19 and accompanying text.

42. 28 U.S.C. § 1581(i).

43. 630 F. Supp. at 1353 n.6.

44. *Id.*; see also 28 U.S.C. § 1581(a).

45. 630 F. Supp. at 1353.

46. 630 F. Supp. at 1356-57; see 28 U.S.C. § 1581(a).

propriate customs officer."⁴⁷ The CIT further held that a delay of five to ten months to obtain internal advice was not unreasonable.⁴⁸ The court also denied plaintiff's claim of jurisdiction based on special circumstances.⁴⁹ However, the court did permit plaintiff ten days to present a plan for further discovery on the issue of the validity of the extensions.⁵⁰ Significantly, in its opinion the CIT stated that the proper rate for deemed liquidation is not what the importer asserted at the time of entry, but the rate accepted by Customs on the entry summary,⁵¹ adding that it was not convinced that Congress intended to "impose a harsh penalty on Customs for a failure to timely liquidate an entry."⁵²

After the court's opinion, Customs liquidated plaintiff's entries, whereupon the plaintiff filed protests which were subsequently denied.⁵³ Plaintiff once again moved to amend its complaint alleging jurisdiction of the CIT based on exhaustion of administrative remedies.⁵⁴ The court allowed jurisdiction

47. 19 U.S.C. § 1504(b)(1); 630 F. Supp. at 1356-58. According to the court, "The term 'information,' as it is used in the statute, 19 U.S.C. § 1504(b)(1) (1982) . . . should be construed to include whatever is reasonably necessary for proper appraisal or classification of the merchandise involved. When a request for internal advice of a classification decision is granted, the 'information' required to make the appropriate classification includes that advice. An extension of liquidation is thus justified in such a case if additional time is needed to obtain the internal advice and to consider it before making the classification decision." *Id.* at 1356-57.

48. *Id.* at 1357.

49. *Id.* at 1359; *see* 28 U.S.C. § 1581(i).

50. 630 F. Supp. at 1360.

51. *Id.* at 1355 n.9.

Although an entry liquidated by operation of law is "deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent," . . . this does not eliminate the possibility that this rate of duty and amount of duties will be contested through protest. For, as plaintiff seems to acknowledge, the rate of duty corresponding to the classification asserted "at the time of entry" is that which is on the entry summary accepted by Customs and contains not what the importer, his consignee, or agent necessarily desires but rather what Customs insists upon as a condition precedent to release of the merchandise [T]he legislative history of deemed liquidation clearly indicates that liquidation by operation of law is designed to expedite the process of liquidation. The court is not convinced, however, that Congress sought to impose a harsh penalty on Customs for a failure to timely liquidate an entry.

Id.

52. *Id.*

53. No. 86-102, slip op. at 2 (Ct. Int'l Trade Oct. 14, 1986).

54. *Id.*; *see* 28 U.S.C. § 1581(a).

but held that after reviewing the evidence, due to an ongoing dialogue between plaintiff and Customs, the original extensions were valid and no deemed liquidation had occurred.⁵⁵ The court adopted footnote nine of its earlier opinion⁵⁶ and stated that deemed liquidation was to occur "at the rate of duty set forth in the entry papers, as required by the Customs Service, not at the rate at which the importer indicates to Customs he wishes to enter the merchandise."⁵⁷ In *Detroit Zoological Society*, for the first time the CIT directly stated its position on the question of the proper rate for deemed liquidation. Importantly, this stance was later explicitly adopted in *American Permac, Inc. v. United States*.⁵⁸

The significance of the holding in *Detroit Zoological Society* is that the CIT directly addressed the issue of whose rate was proper in deemed liquidation situations⁵⁹ and decided that

55. No. 86-102, slip op. at 6-7.

56. *See supra* note 51.

57. No. 86-102, slip op. at 8.

58. 642 F. Supp. 1187, 1195 n.12 (Ct. Int'l Trade 1986).

59. It is also quite significant that the court refused to allow deemed liquidation even though the delay was merely administrative. Based on this and other cases, it seems that the CIT is disinclined to permit deemed liquidation. *See supra* note 35.

One exceptional case, however, was *Pagoda Trading Co. v. United States*, in which the court ordered Customs to liquidate at the rate asserted by the importer at the time of entry. 617 F. Supp. 96 (Ct. Int'l Trade 1985). This holding, however, cannot be viewed as inconsistent with what may be viewed as the court's disinclination toward deemed liquidation, in that Customs had committed several administrative errors in handling the importer's entry, including failure to liquidate after suspension had been revoked and sending an erroneous notice of suspension to the importer. *Id.* at 98-99. Despite Customs' argument that liquidation should be based on valuation at the American Selling Price, the court ordered Customs to "assess duties as proposed upon entry . . ." *Id.* at 100. Although the case involved a suspension of liquidation due to administrative review of countervailing duties, the rule of *Florsheim Shoe* did not apply because the suspension had already been revoked. *See supra* note 35.

In another case of administrative failure, however, the court refused to permit deemed liquidation. In *Old Republic Insurance Co. v. United States*, the court decided that despite Customs' failure to notify the surety of extension of liquidation as required under section 504(c), it would not allow deemed liquidation to occur. 645 F. Supp. 943 (Ct. Int'l Trade 1986). The court advanced four basic arguments: (1) the surety was not prejudiced in any tangible way, (2) Customs' reversal of a previous ruling discharging the plaintiff surety need not have met the notice requirements of 19 C.F.R. § 177.10(c), (3) Congress had expressly omitted sureties from the list of parties required to be notified in the event of extension, and (4) extension of the liquidation did not materially increase the surety's risk, despite the fact that the court held the requirements of 19 C.F.R. § 159.12 (extension of liquidation) were incorporated into the surety bond and were a contractual obligation. *Id.* at 954-55. *Old Re-*

there was authority in the law for Customs to determine the rate asserted at the time of entry.⁶⁰ In reaching its conclusion, the court relied on congressional intent, citing the Senate Report on The Customs Procedural Reform and Simplification Act of 1978 (Senate Report).⁶¹ However, the Senate Report does not necessarily support the court's contention that the extension was valid, and nowhere addresses the issue of the proper rate for deemed liquidation in a reject situation.⁶² A closer look at the history of section 504 reveals more clearly what Congress intended.

III. GIVING EFFECT TO SECTION 504: DEEMED LIQUIDATION AT THE IMPORTER'S ASSERTED RATE

As stated by the United States Customs Court:

It is the function of this court on judicial review to interpret and apply the tariff laws in light of the intent of Congress. In the performance of this function, the court cannot defer to an administrative interpretation or application of a statute if it is inconsistent with the statutory language or congressional intent.⁶³

Despite the inconsistency its interpretation creates with the statutory language,⁶⁴ Customs has interpreted and applied section 504 in a manner designed to protect the revenue of the

public Insurance illustrates the willingness on the part of the CIT to hold an extension valid despite the failure of Customs to follow statutory requirements regarding liquidation by operation of law.

The two cases involving administrative failure, *Pagoda Trading* and *Old Republic Insurance*, may be distinguished by the relative degrees of administrative failure. Where there is gross failure, as in *Pagoda Trading*, the CIT has ordered deemed liquidation at the importer's asserted rate. Where Customs has merely failed to follow the notice requirements of section 504, as in *Old Republic Insurance*, the court has found a valid extension, rather than permit liquidation by operation of law. But where delay in liquidation is due to simple administrative delay on the part of Customs, as in *Detroit Zoological Society*, the issue becomes much more problematic.

60. See *supra* note 51. Contrary to the court's finding, the rate asserted in order to obtain release of the merchandise is not that which is on the entry summary, but that which is on the entry. See *supra* notes 9-13 and accompanying text.

61. 630 F. Supp. at 1355; S. REP. NO. 778, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2211, 2242-43 [hereinafter SENATE REPORT]. See *infra* notes 86-93 and accompanying text.

62. SENATE REPORT, *supra* note 61, at 2242-43.

63. *C.B.S. Imports Corp. v. United States*, 80 Cust. Ct. 61, 66 (1978).

64. See *supra* notes 21-32 and accompanying text.

United States.⁶⁵ Moreover, Congress clearly intended section 504 to alleviate administrative delay and was willing to accept a reduction in revenue in the interest of protecting the importer.⁶⁶

A. Purpose of Section 504: Alleviation of Administrative Delay

Prior to 1978, there was no time limit on liquidations.⁶⁷ As a result, entries often remained unliquidated for several years,⁶⁸ leaving importers and sureties in a position of prolonged uncertainty regarding liability for duties on past importations.⁶⁹ Section 504 was passed in order to remedy this situation.⁷⁰

In 1975, the accumulation of a substantial backlog of unliquidated entries provided the impetus for a change in the law regarding liquidations. In that year the House Subcommittee on Trade held hearings on customs administration reform.⁷¹

65. See *infra* note 104.

66. See *infra* notes 94-101 and accompanying text.

67. See SENATE REPORT, *supra* note 61, at 2242.

68. *Dart Export Corp. v. United States*, 43 C.C.P.A. 64, *cert. denied*, 352 U.S. 824 (1956) (importer claiming retroactive assessment of duties after four year delay in liquidation constituted deprivation of property without due process of law); *United States v. St. Paul-Mercury Indem. Co.*, 194 F.2d 68 (3d Cir. 1952) (in the absence of any statutory limit on liquidation, court denies surety's claim that provision in bond limited liability to three years after entry); *Miles v. United States*, 290 F. Supp. 395, 397 (Cust. Ct. 1968) (court holds date of liquidation is beyond control of prospective complainant). Interestingly, in a very early case, a federal court of appeals denied an importer's request that a one year limit be imposed on liquidation, holding that the proposition was without any statutory or other legal support. *Gandolfi v. United States*, 74 F. 549, 551 (2d Cir. 1896).

69. See SENATE REPORT, *supra* note 61, at 2242-43. As stated in the Senate Report:

Reason for Change.—The provisions adopted by the committee would increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction. Under the present law, an importer may learn years after goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation. Surety companies, which are jointly liable with importers for additional duties, would be better able to control their liabilities. Sureties would also be better protected against losses resulting from the dissolution of their principals in instances where there has been undue delay in liquidating entries.

Id.

70. *Id.*

71. *Customs Administration and Valuation of Imports: Hearings on H.R. 9220 Before the*

One of the immediate concerns of the subcommittee members was the four-year delay in liquidation of entries of imported automobiles.⁷² The subcommittee addressed the question of whether or not Customs should expedite liquidations of outstanding automobile entries in order to avoid the retroactive assessment of anti-dumping duties.⁷³ It is clear that Congress' immediate concern was administrative delay, and the hostility of some of the subcommittee members to Customs is quite evident from the transcripts of the hearings.⁷⁴

The 1975 hearings led to the proposed Customs Modernization Act of 1975⁷⁵ which included a provision that would have deemed a protest denied if not actually denied within two years after filing.⁷⁶ While this provision would have expedited access to the CIT, it did nothing to force Customs to liquidate in a timely manner. Customs criticized the measure as unnecessary.⁷⁷ Other witnesses before the committee criticized the measure as a penalty on the importer⁷⁸ and several suggested

Subcomm. on Trade of the House Comm. on Ways and Means, 94th Cong., 1st Sess. (1975) [hereinafter 1975 Hearings].

72. *Id.* at 3.

As indicated in the press release announcing these hearings, specific problem areas regarding customs administration have been brought to the subcommittee's attention. One such area is the appraisal of automobile imports. It was learned that some [US]\$5.5 billion in entries of automobiles have not been liquidated since July 1971. That is, a final assessment of duties has not been made on entries of automobiles entered during the past 4 years, totaling [US]\$5.5 billion or approximately one-third of the total dutiable value of automobile imports during that period.

Id. (opening statement of Congressman William J. Green, Chairman of the Subcommittee).

73. *Id.*

74. Mr. David R. MacDonald, Assistant Secretary of the Treasury for Enforcement, Operations, and Tariff Affairs, suggested in a written statement submitted to the subcommittee that to change the rules to expedite the automobile liquidations might be inconsistent "with traditional American ideas of fairplay." Chairman Green responded sharply, "[W]hat rules? . . . Are there standards? . . . [N]one of these guidelines by which you make these determinations are published anyplace? In other words, these determinations can be just as arbitrary as you might want them to be?" *Id.* at 11.

75. H.R. 9220, 94th Cong., 2d Sess. (1976).

76. *Id.* § 210.

77. *Customs Modernization Act and Section 592 of The Tariff Act of 1930: Hearings on H.R. 9220 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 94th Cong., 2d Sess. 106-07 (1976) [hereinafter 1976 Hearings]* (statement of David R. MacDonald, Assistant Secretary for Enforcement, Operations, and Tariff Affairs).

78. *Id.* at 198, 252, 279, 289-90, 352, 407-08. The proposed statute received

instead that where Customs failed to act on a protest within two years, the protest should be deemed allowed.⁷⁹

Due to heavy criticism from all sides, the proposed Customs Modernization Act was subsequently dropped and a task force formed to investigate customs administration.⁸⁰ As a result of the efforts of the task force, the subcommittee proposed "deemed liquidation" in lieu of "deemed denial of protest." This was incorporated into the act which was finally passed the following year, known as the Customs Procedural Reform and Simplification Act of 1978.⁸¹ The deemed liquidation measure was supported by both Customs and private industry,⁸² with the one significant point of contention being the absence of any notice requirement for deemed liquidations.⁸³ Despite the objections of the private industry spokesmen, the final version of the statute included a provision that no notice need be given of deemed liquidations,⁸⁴ a fact which strongly implies that since deemed liquidation was expected to occur at the importer's actual asserted rate, lack of notice would not prejudice his rights.

It is clear from the evolution of section 504 that Congress was primarily concerned with administrative delay and sought to force Customs to act in a timely manner. It may be argued that in *Detroit Zoological Society*, the CIT failed to give adequate consideration to legislative intent, with the result that the decision serves as an endorsement of delays in Customs administration.⁸⁵

little or no support in the hearings. The following industry organizations opposed the measure: The American Importers' Association, National Customs Brokers and Forwarders Association of America, Philadelphia Freight Brokers, Forwarders & Customs Brokers Association, Inc., The Electronic Industries Association, The British-American Chamber of Commerce, The Association of the Customs Bar, The Foreign Trade Association of Southern California, The Los Angeles Area Chamber of Commerce World Trade Committee, and The Los Angeles Customs and Freight Brokers Association. *Id.*

79. *Id.* at 198, 289-90, 407-08.

80. See *Customs Procedural Reform Act of 1977: Hearings on H.R. 8149 Before the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 1-3, 184 (1977)* [hereinafter *1977 House Hearings*].

81. See *supra* note 4.

82. *1977 House Hearings, supra* note 80, at 56, 117, 276, 375, 451 (1977).

83. *Id.* at 68, 117, 276, 377, 451, 575.

84. 19 U.S.C. § 1504(a). However, the Customs Regulations require that bulletin notice of deemed liquidation be provided. 19 C.F.R. §§ 159.11(a), 159.9(c)(2)(ii).

85. The court's argument that delay due to processing of a request for internal

B. *Congressional Intent: Whose Rate is this Anyway?*

The Senate Report⁸⁶ states that deemed liquidation is to occur at the rate asserted "in the entry document and import documents filed with Customs under section 484 of the Tariff Act at the time of entry."⁸⁷ Section 484 of the Tariff Act⁸⁸ clearly distinguishes those documents necessary to be filed at the time of entry from those documents which constitute the entry summary.⁸⁹ This distinction was added to the Customs laws at the same time as deemed liquidation, both provisions being part of the Customs Procedural Reform and Simplification Act of 1978.⁹⁰ Therefore, Congress seems to have been aware of the meaning of the language of section 504 and in-

advice constituted valid grounds for extension seems to negate the purpose of the law. Moreover, there is no requirement of reasonableness in section 504(b), so the court's holding that a five to ten month delay was not unreasonable may not be relevant in light of the legislative history or the plain language of the statute.

The fact that Congress was responding to delays in liquidation due to pending anti-dumping reviews might even call into question the holding of the Federal Circuit in *Florsheim Shoe*. Ambassador Div. of Florsheim Shoe v. United States, 748 F.2d 1560 (Fed. Cir. 1984); see *supra* note 35. However, in *Florsheim Shoe*, the court advanced several policy arguments which, even when viewed in light of the legislative history, strongly justify its holding. The court there invoked the "absurd-consequences" doctrine of statutory interpretation. *Florsheim Shoe*, 748 F.2d at 1564 (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)). It concluded that section 504 cannot be interpreted so as to negate the effect of the countervailing duty laws and that the deemed liquidation statute must be interpreted in harmony with these laws. *Florsheim Shoe*, 748 F.2d at 1565. The potential adverse consequences resulting from a contrary holding in *Florsheim Shoe* would be that importers would be able to avoid anti-dumping or countervailing duties through deemed liquidation.

By contrast, *Detroit Zoological Society* presents a clear case of simple administrative delay, where substantial adverse consequences probably would not follow from a holding in the importer's favor. The court acknowledged that the importer had provided Customs with sufficient information to liquidate. *Detroit Zoological Soc'y*, 630 F. Supp. at 1356. Yet the court held that the importer's request for internal advice justified an extension. *Id.* at 1356-57. The court said that it "need not determine whether a request for internal advice is tantamount to a request for an extension of liquidation." *Id.* at 1356 n.12. Yet it gave no suggestion as to what would or would not constitute permissible administrative delay. Rather than encourage administrative delay by permitting extensions, the court should simply allow deemed liquidation to occur. It would seem that in such situations policy should favor deemed liquidation.

86. SENATE REPORT, *supra* note 61.

87. *Id.* at 2243.

88. 19 U.S.C. § 1484 (1982).

89. 19 U.S.C. § 1484(a)(1)(A)-(B); see *supra* note 13.

90. Pub. L. No. 95-410, § 102(a)(1), 92 Stat. 888 (codified at 19 U.S.C. § 1484); see *supra* note 4.

tended to use the rate actually asserted at the time of entry, rather than the rate shown in the entry summary for deemed liquidation.⁹¹ The specific question raised in *Detroit Zoological Society*, is whether the proper rate is that which the importer attempted to file or that which Customs accepted.⁹² When considering section 504, Congress did not discuss the situation where Customs rejects the importer's original assertion. Yet according to the CIT, Congress intended that only the rate accepted by Customs may be given effect because deemed liquidation was not intended to be a penalty on Customs.⁹³

There is reason to believe, however, that deemed liquidation *was* intended to be a penalty on Customs. Even the CIT has referred to deemed liquidation as a penalty on Customs⁹⁴ and that it was designed to benefit the importer.⁹⁵ The record of the hearings indicates Congress' hostility towards Customs.⁹⁶ But more significantly, Congress expected that the

91. Congress was concerned with the precise meaning of the term "entry." At one point in the early hearings, Customs specifically defined the term for the subcommittee. *1975 Hearings*, *supra* note 71, at 18.

92. 630 F. Supp. at 1355 n.9.

93. *Id.*

94. *American Permac, Inc. v. United States*, 642 F. Supp. 1187, 1192-94 (Ct. Int'l Trade 1986) ("[N]othing in the text or history of § 1675(a) shows that Congress intended to impose the penalty of deemed liquidation when a review is not completed after four years [T]he Senate Finance Committee . . . did not specify deemed liquidation as a penalty for non-compliance [with the countervailing duty laws]."); *Philipp Bros. Inc. v. United States*, 630 F. Supp. 1317, 1324 (Ct. Int'l Trade 1986) ("[I]n this situation, the court is unable to conclude that the statute imposes a penalty of deemed liquidation for the delay.").

95. *Pagoda Trading Co. v. United States*, 617 F. Supp. 96, 99 (Ct. Int'l Trade 1985) ("There is no doubt that the statutory provision for liquidation by operation of law was designed for the benefit of importers."); *see also* *Peugeot Motors of America, Inc. v. United States*, 8 Ct. Int'l Trade 167, 171 (1984).

96. *See supra* note 74. In *Detroit Zoological Society*, the court cited an article by Mr. Leonard Shayne, who, as Chairman of the National Customs Brokers and Forwarders Association of America, Inc., was a participant in the congressional hearings. *Detroit Zoological Soc'y*, 630 F. Supp. at 1355 n.9 (citing Shayne, *Deemed Liquidated*, *AMERICAN IMPORT-EXPORT BULLETIN*, July 1979 at 37-40); *see 1976 Hearings*, *supra* note 77, at 249; *Customs Procedural Reform Act of 1977, Hearings Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 95th Cong. 2d Sess. 86 (1978) [hereinafter *1978 Senate Hearings*]. According to Mr. Shayne, Congress was extremely hostile to Customs and intended to impose a penalty for failure to liquidate within one year. Moreover, despite the fact that his article called for an amendment to section 504, Mr. Shayne believes that, in the interest of justice, the rate of deemed liquidation should be the rate actually asserted by the importer. Telephone interview with L. Shayne, President, Leading Forwarders, Inc. (Dec. 15, 1986) (author's notes available at the *Fordham International Law Journal*).

deemed liquidation provision would result in a revenue loss to the government.⁹⁷ The Senate Report indicates an estimated annual revenue loss of \$9.5 million.⁹⁸ This figure was derived from written testimony presented by Customs to the congressional subcommittee on the proposed law⁹⁹ and was accepted by Congress and subsequently incorporated into the Senate Report. Customs believed that due to the normal ratio of rate advances to declines occurring when Customs actively liquidated entries, a revenue loss would result from passage of the measure, because deemed liquidation was to occur at the rate asserted by the importer.¹⁰⁰ While it may be argued that Customs nevertheless expected that deemed liquidation would occur at the rate asserted in the entry summary rather than the entry, it seems unlikely that they did, since the question of the proper rate in reject situations was not even raised until the 1979 Customs Bulletin was issued—after section 504 was already law. But even if Customs did originally intend to use the entry summary, in actual practice the rate asserted by the importer is usually the same as the rate shown in the entry summary.¹⁰¹ Consequently, Customs' calculation of the expected revenue loss would not be significantly altered by deemed liquidation at the importer's asserted rate. On this basis, it may be argued that Customs expected that the importer's actual assertion would determine the rate of deemed liquidation and the result would still be a loss of revenue to the government.

97. SENATE REPORT, *supra* note 61, at 2243.

98. *Id.*

99. 1978 Senate Hearings, *supra* note 96, at 68 (written testimony of U.S. Customs in response to questions submitted to Robert E. Chasen, Commissioner of Customs):

For those entries automatically liquidated under this provision, there is a potential duty loss. Of the approximately 540,000 entries to be automatically liquidated annually, roughly 15 percent or 81,000 will have had errors, which would have resulted in a rate advance or rate decline had they not been automatically liquidated. The current ratio of rate advances to declines is 2 to 1. The average value of duty for a changed entry is [US]\$350.00 (for both rate advances and deliveries). This calculates out to a maximum potential duty loss of [US]\$9.5 million.

Id.

100. *Id.*

101. DiSalvo Interview, *supra* note 23. Most entries are routinely processed with the importer asserting his rate in the entry, obtaining release of the merchandise, and then filing the same rate in the entry summary which is accepted by Customs. *Id.* The controversy in *Detroit Zoological Society* will occur where the importer's original assertion conflicts with the information on the entry summary.

Therefore, it seems likely that because Congress anticipated a loss of revenue, deemed liquidation was expected to operate as a penalty on Customs for failure to liquidate within one year.

The 1979 Customs Bulletin¹⁰² issued prior to issuance of the regulations may be viewed as the point at which Customs deviated from the intent of Congress.¹⁰³ It is subject to several criticisms.¹⁰⁴ First, the Bulletin stated that for purposes of liquidation, the time of entry should be regarded as "the time the merchandise enters the commerce of the United States" and therefore the entry summary should be used for determining the rate of deemed liquidation.¹⁰⁵ This reasoning is suspect. Most logically, the merchandise would enter commerce at the time it is physically released to the importer, not the time of filing the entry summary documentation ten days later. Second, while the bulletin states "for purposes of liquidation," it must be assumed that this means for purposes of *deemed* liquidation, because for active liquidations the time of entry would normally be the date of release of the merchandise.¹⁰⁶ Furthermore, in actual practice Customs uses the date of release for purposes of timing the statutory one-year period.¹⁰⁷ Yet section 504 does not authorize Customs to use the "time of entry" for determining the date of entry and the "time of entry summary" for determining the rate asserted by the importer.¹⁰⁸

According to one authority, when engaging in statutory interpretation courts must take into account the congressional intent,¹⁰⁹ including the audience to which the law is di-

102. T.D. 79-221, 13 Cust. B. & Dec. 641 (1979).

103. See *supra* notes 24-31 and accompanying text.

104. DiSalvo Interview, *supra* note 23. According to one Customs official, the language in T.D. 79-221 is ambiguous in that it refers to the rate "claimed and indicated" by the importer and yet concludes that the entry summary should be used for determining the asserted rate. *Id.*; see T.D. 79-221, 13 Cust. B. & Dec. at 685-86. In the interest of "protecting the revenue," Customs officials will use the rate shown in the entry summary. DiSalvo Interview, *supra* note 23.

105. T.D. 79-221, 13 Cust. B. & Dec. at 685-86.

106. *Id.*; see 19 C.F.R. § 141.68(a)(1); *supra* note 30 and accompanying text.

107. 19 C.F.R. § 141.68(a); 19 C.F.R. § 159.9(c)(2); DiSalvo Interview, *supra* note 23.

108. See 19 U.S.C. § 1504(a).

109. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

rected.¹¹⁰ The CIT has relied upon congressional intent and concluded that Congress could *not* have intended what the statute plainly says. But based on the legislative history of section 504, a strong argument may be made that the statute means exactly what it says. Arguably, the statute was written for the use of Customs officials, so when Congress mandated that Customs liquidate at the expiration of one year at the rate asserted "at the time of entry," Customs officials may have been incorrect to assume they meant "at the rate shown in the entry summary."

While rejected entries and extensions of liquidation do not preclude further administrative remedies,¹¹¹ these practices force importers to seek a remedy by filing protest, and with denial of protest, to appeal to the CIT.¹¹² The difficulty here is twofold. First, there is a statutory presumption of correctness with regard to decisions of Customs officials.¹¹³ Second, an importer is faced with a difficult burden of proof when challenging a Customs classification in the CIT.¹¹⁴ The importer must prove not only that Customs' classification is wrong, but that the importer's proposed classification is right.¹¹⁵ In light of the legislative history of section 504, in rejecting a "deemed denial of protest" provision in favor of

110. *Id.* at 536. As stated by Justice Frankfurter:

We must, no doubt, accord the words the sense in which Congress used them. . . . It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation "The word was addressed to the Indian mind." If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists.

Id. (citation omitted).

111. *See supra* notes 17-19 and accompanying text.

112. *Id.*

113. 28 U.S.C. § 2639; *see United States v. New York Merchandise Co.*, 435 F.2d 1315, 1318 (C.C.P.A. 1970); *see also* *Edge Import Corp. v. United States*, 484 F. Supp. 906, 910 (Cust. Ct. 1979).

114. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir.), *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984); *see generally*, Note, *Customs Court Act—Burden of Proof—Proper Application of the Dual Burden of Proof in Customs Classification Disputes*, 9 SUFFOLK TRANSNAT'L L.J. 97, 99 (1985) (recent modification of the dual burden of proof).

115. *Id.* at 99-100; *Jarvis Clark*, 733 F. 2d at 876; *see* R. STURM, *supra* note 2, §§ 46, 57.1.

deemed liquidation,¹¹⁶ Congress may have intended the law to operate conclusively on Customs, thereby obviating the need for further appeal by the importer.

C. Procedures for Giving Effect to the Importer's Assertion

If Congress believes that to give effect to the importer's actual assertions would be opening a "Pandora's box," then they should amend section 504 to state explicitly that the correct rate for deemed liquidations is the rate appearing on the entry summary. In the absence of such an amendment, the CIT should permit deemed liquidation to occur at the rate actually asserted by the importer.¹¹⁷ This may be accomplished in two ways. First, under a procedural approach, the importer should be permitted to attach his original rejected entry to the entry summary documentation accepted by Customs. In this way, if Customs fails to liquidate within one year, the importer's assertions will have been preserved from the time of entry to the time of deemed liquidation.¹¹⁸ Such a procedure would require an amendment to the regulations to the effect that the importer may attach a rejected entry form to his entry summary, which would be used to determine the effective rate of deemed liquidation.¹¹⁹ Second, under a judicial approach,

116. See *supra* notes 75-81 and accompanying text.

117. The Pandora's box of deemed liquidation at the importer's asserted rate would conceivably be that importers will attempt to enter merchandise at little or no duty in the hope that Customs will fail to liquidate within one year. Using the importer's rate for deemed liquidation, however, would not preclude Customs' use of the fraud provisions of section 592 of the Tariff Act of 1930 where appropriate. 19 U.S.C. § 1592. In addition, Customs may reliquidate on account of fraud within two years after liquidation. 19 U.S.C. § 1521.

118. By statute the entry must contain sufficient information in order to enable Customs to liquidate. 19 U.S.C. § 1484(d). Customs Form 3461 (Entry/Immediate Delivery) contains substantially the same information as Form 7501 (Entry Summary). In order to make entry and obtain release of merchandise, the importer must file the 3461, evidence of the right to make entry, commercial invoice, packing list, any special documents required for a particular shipment, and a bond. 19 C.F.R. § 142.3(a)(1)-(5). When filing the entry summary, the importer is not required to include any additional documents except the 7501. 19 C.F.R. § 142.16(a). In other words, there is sufficient information filed at the time of entry to provide a basis for liquidation by operation of law.

119. It is assumed that, in the absence of fraud, Customs would not be able to reliquidate a liquidation by operation of law. See R. STURM, *supra* note 2, § 8.3. Under 19 U.S.C. § 1501, a Customs officer may reliquidate those entries originally liquidated under 19 U.S.C. § 1500. There is no provision for reliquidation of entries liquidated under 19 U.S.C. § 1504.

the CIT should allow an importer to bring a declaratory judgment action and prove his original assertion by his own evidence. Where an importer's asserted rate conflicts with that shown on the entry summary, the absence of any administrative remedy should not preclude an importer from availing himself of the protection of the statute.

CONCLUSION

Despite the plain language of section 504, in the interest of protecting the revenue U.S. Customs has interpreted the statute so that Customs officials have an opportunity to determine the rate of deemed liquidation. The CIT has upheld Customs' interpretation on the basis of congressional intent. A close look at the legislative history, however, reveals that Congress clearly intended to alleviate administrative delay and fully expected that deemed liquidation would operate as a penalty on Customs. For these reasons, in cases where failure to liquidate within one year is due to mere administrative delay, the court should permit deemed liquidation at the rate actually asserted by the importer at the time of entry.

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