

UNITED STATES COURT OF INTERNATIONAL TRADE

TOYOTA MOTOR SALES, U.S.A., INC. :
: Plaintiff, :
: v. : Before: Richard K. Eaton, Judge
: Court No. 04-00643
UNITED STATES, :
: Defendant, :
: :
: :
: :

OPINION and JUDGMENT

[Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted.]

Dated: September 8, 2011

Page Fura, P.C. (Jeremy Page and Shannon Fura), for plaintiff Toyota Motor Sales, U.S.A., Inc.

Tony West, Assistant Attorney General; Barbara S. Williams, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Saul Davis); Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection (Yelena Slepak), of counsel, for defendant.

Eaton, Judge: Plaintiff Toyota Motor Sales, U.S.A., Inc.

("Toyota" or "plaintiff") commenced this action to challenge Customs and Border Protection's ("Customs" or "CBP") denial of Toyota's claims for duty drawbacks on entries of automobile service parts imported into the United States and later exported to Canada.¹ Now before the court are Toyota's and defendant the

¹ According to plaintiff, these imports involve "certain automotive service parts for distribution to Plaintiff's

United States' cross-motions for summary judgment pursuant to USCIT R. 56. The court has jurisdiction under 28 U.S.C. § 1581(a) (2006). For the reasons stated below, Toyota's motion is denied, and defendant's motion is granted.

BACKGROUND

Toyota is the U.S. based sales and service arm of the Toyota Motor Corporation. The company regularly imports service parts into the United States, and subsequently exports some of these parts to Canada for distribution to Canadian Toyota dealerships and customers. Toyota, therefore, routinely files drawback claims, seeking reimbursement of a substantial portion of the duties paid upon importation.

Plaintiff commenced this action to challenge Customs' denial of Protest No. 2704-03-100090 (the "Protest"), which sought reversal of Customs' denial of its drawback claims on forty-two entries of service parts exported from the United States to Canada between 1996 and 1999. At issue is Toyota's compliance with Customs' regulation 19 C.F.R. § 191.14 (2011), which governs the use of inventory accounting methods to identify drawback eligible merchandise, and Customs regulations 19 C.F.R. §§ 191.51

wholesale distributors and franchised dealers. The service parts are varied in nature, and include such items as hoses, gaskets, gears and gearing, fasteners, brackets, body stampings, mirrors, moldings, valves, pipes, filters, belts, injectors, and other vehicle-related assemblies." Compl. ¶ 37.

and 191.52, which govern the time for filing and amending drawback claims. See Compl. ¶¶ 38-60.

I. Drawback Under NAFTA

Under 19 U.S.C. § 1313(j)(1),² an importer can receive a refund of ninety-nine percent of the amount of the duty, tax, or fee paid on unused merchandise imported into the United States, if the merchandise is exported within three years from the date of importation. Because Toyota's drawback claims concern unused merchandise exported to Canada, its claims arise under 19 U.S.C. § 1313(j)(4), which governs drawbacks for merchandise exported from the United States to its co-signatory countries under the North American Free Trade Agreement ("NAFTA Drawbacks"). NAFTA

² Pursuant to 19 U.S.C. § 1313(j)(1):

If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation -

(A) is, before the close of the 3-year period beginning on the date of importation -

(I) exported, or

(ii) destroyed under customs supervision; and

(B) is not used within the United States before such exportation or destruction;

then upon such exportation or destruction 99 percent of the amount of each duty, tax, or fee so paid shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

Drawbacks are generally prohibited, unless the exported merchandise qualifies for an exception under 19 U.S.C. § 3333(a)(1)-(8). The parties do not dispute that the service parts could qualify for NAFTA Drawback under Section 3333(a)(2),³ which permits drawbacks on goods that were "exported to a NAFTA country in the same condition as when imported into the United States."

Because § 1313(j)(4) prohibits so-called substitution

³ 19 U.S.C. § 3333(a) provides:

"Good Subject to NAFTA drawback" defined. For purposes of this Act and the amendments made by subsection (b), the term "good subject to NAFTA drawback" means any imported good other than the following:

(2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph

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(A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it in its same condition, shall not be considered to change the condition of the good, and

(B) . . . if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.

drawbacks⁴ for exports to NAFTA countries, reimbursement may only be claimed if the merchandise itself is actually (1) imported, (2) dutiable, and (3) subsequently exported. See *Merck & Co., Inc. v. United States*, 499 F.3d 1348, 1357 (Fed. Cir. 2007).

Pursuant to § 3333(a)(2)(B), a drawback claimant may, however, identify drawback eligible merchandise using inventory accounting methods, as set forth by regulation, to establish that the merchandise has been imported into the United States, that duties were paid thereon, and that it was exported within the time limits for drawbacks provided for in § 1313(j)(1). In other words, in submitting claims for NAFTA Drawback, a claimant need not track merchandise on a unit-specific basis if it can identify those exports eligible for drawback through an approved accounting method.

II. The Use of Inventory Accounting Methods to Identify Drawback Eligible Merchandise

Section 3333(a)(2)(B) provides that, for imported goods that are "commingled with fungible goods⁵ and exported in the same

⁴ Substitution drawbacks are generally permitted by 19 U.S.C. § 1313(j)(2), which provides that a drawback is permitted on exported merchandise for which no duty has been paid if such merchandise is "commercially interchangeable" with other merchandise that the party claiming drawback has paid duties on.

⁵ While Toyota now concedes that all of its service parts do not constitute a fungible whole, it continues to believe that it can take advantage of 19 C.F.R. § 191.14 because individual parts are fungible with each other.

condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title." Pursuant to this statutory authority, Customs promulgated 19 C.F.R. § 191.14 to "provide[] for the identification of merchandise or articles for drawback purposes by the use of accounting methods." See 19 C.F.R. § 191.14(a).⁶

In accordance with § 191.14(a), if an importer maintains fungible inventories consisting of both drawback eligible and ineligible merchandise (e.g., domestically produced products), any merchandise subject to drawback may be identified by inventory accounting methods. Using these methods, a drawback claimant may establish that, based on its inventory records, dutiable merchandise must have been exported within three years of importation, as required by § 1313(j)(1). Because Toyota commingled imported service parts on which it paid import duties and subsequently exported to Canada unused ("drawback eligible merchandise") with other service parts for which no drawback was available (e.g., domestically produced service parts or duty-free service parts), it sought to identify its drawback eligible merchandise using the inventory accounting methods set forth in § 191.14(c). It is Toyota's compliance with § 191.14 that is a

⁶ The regulation specifically states that its provisions apply only "to situations . . . in which substitution is not allowed." 19 C.F.R. § 191.14(a). As noted, 19 U.S.C. § 1313(j)(4) prohibits substitution drawbacks for exports to NAFTA countries.

significant issue in this action.

III. The Low-to-High Accounting Method

One of the permitted accounting methods for identifying drawback eligible merchandise under § 191.14(c) is the low-to-high method. Toyota's claims raise issues with respect to two variations of the low-to-high method, as set forth in § 191.14(c) - first, the low-to-high blanket method (the "Blanket Method"); and second, the low-to-high method with established inventory turn-over period (the "Inventory Turnover Method"). In general, the low-to-high method attributes the lowest available drawback amount to merchandise withdrawn from the inventory during a specified period of time. Like the other accounting methods set forth in § 191.14(c), this method can only be applied to an inventory of fungible merchandise. See 19 C.F.R. § 191.14(b)(1) ("The lots of merchandise or articles to be so identified must be fungible. . . ."). A fungible inventory is one that consists solely of commercially interchangeable merchandise. See 19 C.F.R. § 191.2(o).⁷ Thus, any variation of the low-to-high method

⁷ The Federal Circuit has explained that "commercial interchangeability" is determined by a "market-based consideration of the primary purposes of the goods in question. . . [and] must be determined objectively from the perspective of a hypothetical reasonable competitor; if a reasonable competitor would accept either the imported or the exported good for its primary commercial purpose, then the goods are "commercially interchangeable'" See *Texport Oil Co. v. United States*, 185 F.3d 1291, 1295 (Fed. Cir. 1999) (citations omitted).

may only be applied when an importer has commingled fungible drawback eligible and ineligible merchandise in a single inventory.

When applying the Blanket Method variation of the low-to-high method:

all receipts into and all withdrawals for export are recorded in the accounting record and accounted for so that each withdrawal is identified by recordkeeping on the basis of the lowest drawback amount per available unit of the merchandise or articles received into inventory in the period preceding the withdrawal equal to the statutory period for export under the kind of drawback involved (e.g., . . . 3 years under 19 U.S.C. § 1313(j) . . .). Drawback requirements are applicable to withdrawn merchandise or articles as identified (for example, if the merchandise or articles identified were attributable to an import more than . . . 3 years . . . before the claimed export, no drawback could be granted).

19 C.F.R. § 191.14(c)(iv)(A). Thus, under the Blanket Method, the low-to-high procedures are applied during the three year period preceding the drawback claim, which is equal to the statutory limitation period for drawback claims on unused merchandise. Because all of the merchandise identified through the use of accounting must also comply with the basic drawback requirements, the accounting is only applied to merchandise that is imported and exported during that three year period.

The Inventory Turnover Method variation of the low-to-high method is applied to commingled, fungible inventory over a period equal to the average turnover of the entire inventory. For example, if, on average, the entire inventory of a particular

product were depleted every thirty days, the low-to-high method would be applied to units of that product taken into and withdrawn from inventory during a thirty day period. See 19 C.F.R. § 191.14(c)(3)(iii)(D). By applying this method to every thirty day period over the course of three years, a drawback claimant could demonstrate that all of the drawback eligible merchandise was both imported and exported within that period of time.

IV. Toyota's Drawback Claims

For some years, Toyota sought and received drawback using the Blanket Method. Beginning in April 1999, however, the company pursued a new accounting method⁸ - *i.e.*, the Inventory Turnover Method - to identify its drawback eligible merchandise, pursuant to § 191.14(c)(3)(iii). Pl.'s Rule 56.1 Statement ¶¶6-7; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶6-7. According to Toyota, it switched from the Blanket Method to the Inventory Turnover Method because the latter would "serv[e] to meet the system considerations and constraints" of the company's outside drawback specialist. See Protest at 2.

On April 5, 1999, Toyota filed an application with Customs

⁸ On March 5, 1998, part 191 of the Customs regulations was amended to include the Low-to-High Method with Established Inventory Turnover Period as among the acceptable inventory accounting methods for identifying drawback eligible merchandise. 63 Fed. Reg. 10,970, 11,013 (Dep't of Treasury March 5, 1998).

for a Waiver of Prior Notice of Intent to Export⁹ and for the privilege of Accelerated Payment¹⁰ for drawback claims based on its use of the Inventory Turnover Method for the forty-two entries at issue here. Customs granted Toyota's application on June 11, 1999. The effect of Customs' approval was to permit Toyota to claim drawbacks on exports without first affording Customs an opportunity to inspect it. Accelerated Payment meant that Toyota would be able to receive payment of drawback amounts sought, even though Customs had yet to verify its compliance with applicable statutory and regulatory requirements. Def.'s Rule 56.1 Statement ¶¶8-9; Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶¶8-9.

In its application, Toyota proposed to use a "days of

⁹ Pursuant to 19 C.F.R. § 191.35, a party seeking to export merchandise that will be the subject of a drawback claim must provide Customs with notice of the intent to export, and an opportunity to inspect the merchandise prior to export. Under 19 C.F.R. § 191.91, however, a party may submit an application to Customs for a waiver of this notice requirement. After waiver of the notice requirement has been granted, "Customs may propose to revoke the approval of an application for waiver of prior notice of intent to export . . . for good cause (noncompliance with the drawback law and/or regulations)." 19 C.F.R. § 191.91(e).

¹⁰ Pursuant to 19 C.F.R. § 191.92, a party seeking drawback may apply for accelerated payment, which allows it to receive, upon the filing of its drawback claims, the amount sought prior to Customs' verification of its drawback claims. While this expedites payment of drawbacks to the applicant, "[a]ccelerated payment of a drawback claim does not constitute liquidation of the drawback entry." 19 C.F.R. § 191.92(a). Accordingly, if Customs determines that the applicant was not entitled to drawback, accelerated payment amounts must be refunded to Customs.

supply" method¹¹ for calculating an inventory turnover period of forty-eight days to be used in applying the Inventory Turnover Method to its inventory records. In granting Toyota's application for Waiver of Prior Notice and Accelerated Payment, Customs stated that "[i]n approving this request, the U.S. Customs Service expresses no opinion as to the entitlement of drawback and makes no assurances, rulings, or decisions that may be relied upon to anyone's detriment." Def.'s Rule 56.1 Statement ¶2; Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶2.

On August 27, 1999, Toyota confirmed to Customs its intention to withdraw its earlier claims under the previously used Blanket Method for merchandise imported after October 1996, and its intention to resubmit its drawback claims, using the Inventory Turnover Method. Pl.'s Rule 56.1 Statement ¶11; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶11.

Around September of 1999, a Customs drawback specialist contacted Toyota to request additional information regarding Toyota's average inventory turnover period. In addition, the

¹¹ According to the affidavit testimony of Toyota's former Customs Manager, the "days of supply" method was a calculation "which reflected the average number of days required for the service parts inventory maintained by [Toyota] to undergo an inventory turn." Under this method, "it computed the inventory turn-over period based on *all service parts found in inventory*" because Toyota "considered all such service parts to be one type of merchandise for drawback identification, tracking and claim purposes." See Declaration of Marian Duntley ¶9, attached as Ex. 1 to Pl.'s Mot. S.J. (emphasis added).

specialist told Toyota that Customs was unsure whether Toyota's accounting using the Inventory Turnover Method complied with the regulations. Beck Dep. 19:14-20:14 (July 21, 2009). On October 15, 1999, Toyota submitted a memorandum to Customs offering further explanation for why it believed that its proposed "days of supply" calculation of the average inventory turnover period met the requirements of § 191.14(c)(3)(iii)(C).¹² Pl.'s Rule 56.1 Statement ¶13; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶13.

On November 23, 1999, Customs' Drawback Office filed a request for internal advice¹³ with Customs' Office of Regulations

¹² 19 C.F.R. § 191.14(c)(3)(iii)(C) provides:

Establishment of inventory turn-over period. For purposes of this section, average inventory turn-over period is based on the rate of withdrawal from inventory and represents the time in which all of the merchandise or articles in the inventory at a given time must have been withdrawn. To establish an average of this time, at least 1 year, or three (3) turn-over periods (if inventory turns over less than 3 times per year), must be averaged. The inventory turn-over period must be that for the merchandise or articles to be identified, except that if the person using the method has more than one kind of merchandise or articles with different inventory turn-over periods, the longest average turn-over period established under this section may be used (instead of using a different inventory turn-over period for each kind of merchandise or article).

¹³ Pursuant to 19 C.F.R. § 177.11(a), "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transaction may be requested by Customs Service field offices from the Headquarters Office at any time, whether the transaction

and Rulings ("OR&R") "to confirm the validity of the accounting methodology used by Toyota to identify its imported merchandise for drawback." Letter from Customs (R. Andrejko) to Toyota (M. Duntley) (July 25, 2000) ("July 25, 2000 Letter"), attached as Ex. 6 to Pl.'s Mot. S. J. ("Pl.'s Mot.").

In addition to the October 15, 1999 memorandum, on January 5, 2000, Toyota provided Customs with additional information concerning its proposed inventory turnover period calculation. Pl.'s Rule 56.1 Statement ¶14; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶14. On July 25, 2000, Customs informed Toyota that "we have yet to receive a response from the [OR&R] on our internal advice request [of] November 23, 1999 concerning" Toyota's use of the Inventory Turnover Method. In the letter, Customs admonished Toyota that due to OR&R's "heavy workload . . . it may be some time before we receive a response to our request" and "[w]hile it is certainly possible that a favorable ruling may be issued, we would like to caution you that an adverse ruling by our Headquarters could affect Toyota's drawback eligibility for your claims currently on file." July 25, 2000 Letter. According to Toyota, this was the first time it was

is prospective, current, or completed. . . . Advice or guidance will be furnished by the Headquarters Office as a means of assisting Customs personnel in the orderly processing of Customs transactions under consideration by them and to insure the consistent application of the Customs and related laws in the several Customs districts."

informed that Customs' drawback office had made a request for internal advice.

In accordance with the statute, Toyota had three years from the date of exportation in order to file a completed drawback claim for its exports. Thus, as of July 25, 2000, time remained for Toyota to amend its drawback claims for, at least, some of the entries - *i.e.*, those exported after July 25, 1997. From August 1999 and January 2000 there were numerous interactions between representatives of Customs and Toyota concerning Toyota's proposed inventory turnover period calculation, but

at no time did [Customs] indicate that [Toyota's] selected "days of supply" approach for establishing inventory turn-over was improper or otherwise not in accordance with all applicable legal and regulatory requirements. Nor, for that matter, was any suggestion or recommendation made to [Toyota] to cease use of this approach. In fact, on several occasions, the Drawback Office stated to [Toyota] that [Toyota's] method was "probably okay."

Declaration of Marian Duntley ("Duntley Decl.") at ¶ 12, attached as Ex. 1 to Pl.'s Mot. S.J.

On August 30, 2001, Customs notified Toyota of its intention to revoke the company's drawback privileges because insufficient information had been provided to enable OR&R to rule on the request for internal advice. See Letter from Customs (R. Andrejko) to Toyota (M. Duntley), dated August 30, 2001, attached as Ex. 8 to Pl.'s S.J. Mot. (the "August 30 Letter"). Specifically, Customs informed Toyota that

[w]e have received a response . . . from [OR&R] to our . . . November 23, 1999 inquiry as to whether or not the accounting methodology used by [Toyota] satisfies the [Inventory Turnover Methodology] requirements of 19 C.F.R. § 191.14(c)(3)(iii)(c). OR&R believes that the days-of-supply method, as described by [Toyota], does not meet the [Inventory Turnover Method]. OR&R, however, did not make a formal ruling because [Toyota] failed to provide adequate inventory records to support their position. . . . Based on the response from OR&R, it appears that the method for identifying imported merchandise for drawback employed by [Toyota] is most likely invalid. Accordingly, all the claims filed to date by [Toyota] would be ineligible for payment since they would have been based on a flawed methodology. Therefore, we are proposing to deny the drawback and rebill the accelerated payments for all the [Toyota] claims currently on file with this office.

August 30 Letter. Customs also provided Toyota with a copy of HQ 228671, which was a communication from Customs Headquarters ruling on the request for internal advice, dated July 24, 2001 (the "Internal Advice Ruling"). Plaintiff was granted time to submit additional information to Customs in response to the Internal Advice Ruling and the August 30 Letter. Pl.'s Rule 56.1 Statement ¶¶16-17; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶16-17.

On October 26, 2001, Toyota submitted a response to the August 30 letter and the Internal Advice Ruling, in which the company provided additional information to Customs in support of its "days of supply" calculation for establishing an average inventory turnover period. In addition, a meeting between Toyota and Customs' Drawback Office personnel was held on November 20, 2001 to further discuss Toyota's drawback claims. During this

meeting, Customs informed Toyota that, after reviewing the additional information submitted, Toyota's "days of supply" method still did not appear to comply with Customs' regulations because it treated non-fungible service parts as one inventory in calculating the average inventory turnover period. Pl.'s Rule 56.1 Statement ¶¶18-19; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶18-19. It is important to note that, before the court, Toyota does not dispute that the "days of supply" method did not comply with the requirements for establishing an average inventory turnover period under § 191.14(c)(3)(iii)(C). See Tr. of Oral Argument, dated April 6, 2011 ("Oral Arg. Tr.") 12:5-13:8.

On November 29, 2001, Customs issued a letter revoking Toyota's drawback privileges on the grounds that the company's Inventory Turnover Method claims, using the "days of supply" approach, were noncompliant with § 191.14(c)(3)(iii)(c). Pl.'s Rule 56.1 Statement ¶20; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶20. On December 21, 2001, Plaintiff appealed this decision to Customs' Office of Field Operations, Office of Trade Programs. On June 7, 2002, the Office of Trade Programs denied the appeal, agreeing that Toyota's inventory turnover calculation did not comply with § 191.14(c)(3)(iii)(c) because it considered several different kinds of service parts as part of a single inventory. On June 18 and 27, 2002, Toyota wrote the Office of Trade Programs to express its disagreement with this decision.

Pl.'s Rule 56.1 Statement ¶¶21-23; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶21-23.

Toyota then asked that it be permitted to perfect¹⁴ its drawback claim by using a different inventory accounting method provided for in § 191.14(c), *i.e.*, the Blanket Method that it had historically employed. Pl.'s Rule 56.1 Statement ¶¶21-23; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶21-23.

On July 29, 2002, the Office of Trade Programs informed Toyota that it would treat its request to perfect as a request to amend its drawback claim.¹⁵ Accordingly, the Office of Trade

¹⁴ Perfection refers to the submission of additional information in support of an otherwise completed drawback claim, usually at the request of Customs. Thus, a party's submission of additional information to Customs is a "perfection" when it supplements a completed drawback claim. An "amendment" is made when information is submitted that is in addition to the information and materials required for a completed drawback claim under 19 C.F.R. § 191.51(a). Pursuant to § 191.52(b), a drawback claimant may perfect its claims "more than 3 years after the date of exportation or destruction of the articles which are the subject of the claim."

¹⁵ Amendment, as distinct from perfection, occurs when a party seeks to make changes to information or submissions that are required in 19 C.F.R. § 191.51(a) as part of a completed drawback claim. "[A]ll documents necessary to complete a drawback claim, including those issued by the Customs Service, shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction of the articles on which drawback is claimed Claims not completed within the 3-year period shall be considered abandoned. No extension will be granted unless it is established that the Customs Service was responsible for the untimely filing." 19 U.S.C. § 1313(r)(1); *see also* 19 C.F.R. § 191.52(c) ("Amendments to claims for which the drawback entries have not been liquidated must be made within three (3) years after the date of exportation or destruction of the articles which are the subject of the original

Programs determined that the request was barred by the three-year time limit for amending drawback claims pursuant to 19 C.F.R. § 191.52(c). Pl.'s Rule 56.1 Statement ¶24; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶24. On October 11 and 25, 2002, Customs denied Toyota's drawback claims, and sought repayment of amounts previously paid pursuant to the accelerated payment mechanism. Pl.'s Rule 56.1 Statement ¶25; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶25. On January 8, 2003, Toyota timely filed its Protest and an application for further review¹⁶ challenging Customs denial of its drawback claims. Pl.'s Rule 56.1 Statement ¶26; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶26.

V. Custom's Protest Ruling

On June 3, 2004, Customs issued Headquarters Ruling 229938 (the "Protest Ruling") in response to Toyota's Protest and request for further review. The Protest Ruling addressed, what

drawback claim.").

¹⁶ Pursuant to 19 C.F.R. § 174.23, a protestant may accompany a protest with an application for further review. If, upon review, the port director at the port of entry determines that the protest will be granted, no further review is deemed necessary. If, however, the port director determines that the protest should be denied, in whole or in part, further review of the protest is undertaken by Customs' Headquarters, rather than the applicable port director, so long as one of the criteria for further review, set forth in 19 C.F.R. § 174.24, are met. See 19 C.F.R. § 174.26. Customs Headquarters then instructs the port director as to the disposition of the protest. 19 C.F.R. § 174.27.

it identified as, three separate issues raised by the Protest: (1) "whether [Toyota's] calculation of the [Inventory Turnover Method] to the 42 subject entries [was] consistent with 19 CFR 191.14(c)(3)(iii)(c)"; (2) "whether [Toyota] [could] perfect the 42 subject entries to apply the low-to-high blanket method in accordance with 19 CFR 191.52(b)"; and (3) "whether [Toyota's] application of the low-to-high blanket method [was] consistent with 19 CFR 191.14(c)(3)(iv)(A)." Protest Ruling at 3, attached as Ex. 2 to Pl.'s Mot. S.J.

With respect to issue (1), Customs denied the Protest, finding that Toyota's Inventory Turnover Method did not comply with Customs' regulations because, in using the forty-eight day inventory turnover period based on its "days of supply" calculation, Toyota "applied an average turn-over period for all service parts rather than an average turn-over for each distinct part." Protest Ruling at 5. In so finding, Customs rejected Toyota's argument that all of its service parts constituted "the same kind of merchandise." Customs explained its determination as follows:

The establishment of the average inventory turn-over period "is based on the rate of withdrawal from inventory and represents the time in which all of the merchandise in the inventory at a given time must have been withdrawn." 19 CFR 191.14(c)(iii)(c). This is based on a single inventory where the goods have been identified. However, this same provision also provides an option for an inventory of more than one kind of good. The "except" clause in 19 CFR 191.14(c)(iii)(c) provides for this option which states that ' . . . if

the person using the method has more than one kind of merchandise or articles with different inventory turn-over periods, the longest average turn-over period established under this section may be used" Therefore, instead of having different inventory periods for each good, the regulation permits the person to use the longest average turn-over period. However, [Toyota] did not apply the longest average turn-over period but chose to establish an average inventory period based on its entire inventory of service parts, treating them as one kind of merchandise.

. . . .

[A]pplication of an inventory management method to identify a particular good requires that the goods to be identified be fungible. The evidence of the different names, different part numbers and different prices convey that the parts covered by the term "service parts" are not interchangeable or identical in all situations. Consequently, the port's denial of [Toyota's] use of an average inventory turn-over period that would treat the category of service parts as one inventory was proper.

Protest at 4-5. In other words, Customs determined that Toyota's treatment of all of its various service parts (e.g., brake hoses, door bezel, shift lock stopper) as part of the same inventory, rather than treating each type of service part separately, violated the regulation because only fungible goods, i.e., parts of the same type, could be treated as part of a single inventory.

As to issue (2), Customs reversed the decision of the Office of Trade Programs, and found that changing inventory methods would constitute a perfection, rather than an amendment to Toyota's drawback claim. Thus, Toyota was permitted to "perfect" its drawback claims by substituting the Blanket Method for the

Inventory Turnover Method. In reaching this decision, Customs found that, because Toyota's use of a different inventory accounting method would be applied to the same documentation it had originally submitted, it would perfect the drawback claims under 19 C.F.R. § 191.52(b):

[d]emonstrating the identity of a particular imported good as being the good exported by a different inventory management method than by the method originally used, perfects, rather than amends a claim. That is, the new inventory management method is applied to identify the same good[s] in the claim as originally filed without any change of the import entries and export shipments. Perfection generally consists of the submission of additional information for what is already a complete claim.

Protest Ruling at 5. Put another way, Toyota could change from using the Inventory Turnover Method to using the Blanket Method, so long as its claim continued to relate to the same goods and it did not attempt to submit new information relating to different entries or different exported goods. Thus, although Toyota labeled its attempt to change accounting methods, while using the same previously submitted documentation, as an amendment, Customs found that Toyota was actually seeking to perfect its claims.

Having determined that the Office of Trade Programs' refusal to allow Toyota to substitute the Blanket Method for the Inventory Turnover Method was erroneous, Customs considered the merits of Toyota's claims under the Blanket Method. In resolving issue (3), however, Customs found that Toyota's drawback claims under the Blanket Method did not comply with 19 C.F.R.

§ 191.14(c)(3)(iv) and, thus, Toyota's drawback claims were denied. This conclusion was reached based on Customs' review of the inventory records submitted by Toyota in support of its drawback claims. On review, Customs found that:

those records fail to show that [Toyota] properly identified the imported parts on which the claim was based on as having been the parts exported to Canada. . . . The application of the low-to-high blanket method using the 'Import Price History' provided by [Toyota] fails to demonstrate the export of the imported parts on which the claims was based in compliance with 19 U.S.C. § 1313(j)(1) and 19 U.S.C § 3333(a)(1).

Protest Ruling at 6-7. Therefore, Customs found that the inventory records submitted by Toyota in support of its Blanket Method failed to demonstrate that the imported service parts, for which it sought drawback, were actually exported to Canada within the three year time period required for NAFTA Drawbacks. Thus, although Toyota was permitted to "perfect" its drawback claims pursuant to 19 C.F.R. § 191.52(b) by substituting the Blanket Method for the Inventory Turnover Method, the company's claims were ultimately denied because they did not comply with the substantive requirements of §§ 3333(a) and 1313(j).

VI. The Parties' Cross-Motions

Toyota does not dispute any of the three findings made by Customs in the Protest Ruling. Rather, plaintiff claims that it should have been permitted to perfect its drawback claims under

the Inventory Turnover Method using a three-year inventory turnover period. Compl. ¶¶38-52. According to Toyota, this argument was raised in its Protest, but was not addressed by Customs in the Protest Ruling. Pl.'s Mem. 13 (citations omitted).

In the alternative, Toyota insists that it should be permitted to amend its drawback claims to submit new documentation in support of its use of the Blanket Method. According to Toyota, this untimely amendment should be permitted pursuant to 19 C.F.R. § 191.51(e)(1), which allows out-of-time amendments to drawback claims when Customs is responsible for the delay in submitting an amended claim. Compl. ¶¶53-60. This precise issue was not raised by Toyota in the Protest.¹⁷

Defendant responds that Toyota's first claim fails because the governing statutes and regulations do not permit the use of a three year turnover period under the facts of this case. In addition, Defendant insists that Toyota's second claim fails as a matter of law because there is no evidence in the record to

¹⁷ In the Protest, Toyota asserted that it was permitted to untimely amend its drawback claims by substituting the Blanket Method for the Inventory Turnover Method because Customs was responsible for Toyota's failure to amend within the time required by 19 U.S.C. § 1313(r) and 19 C.F.R. §§ 191.51 and 191.52. As noted, in the Protest Ruling Customs reversed its prior decision, and found that Toyota was permitted to substitute the Blanket Method because the substitution was a perfection, not an amendment and, therefore, not subject to the time limitations for amending drawback claims.

support a finding that Customs was responsible for Toyota's untimely amendment to its drawback claims.

The parties have cross-moved for summary judgment. Oral argument was held on April 6, 2011. See generally Oral Arg. Tr.

STANDARD OF REVIEW

The court reviews Customs' denial of a protest *de novo*. 28 U.S.C. § 2640(a)(1). "Under *de novo* review, the court does not examine the reasonableness of Customs' conduct but instead presumes that the factual determinations made by Customs are correct." See *Jazz Photo Corp. v. United States*, 502 F. Supp. 2d 1277, 1293, 31 C.I.T. 1101, 1118 (2007); 28 U.S.C. § 2639(a)(1). This presumption of correctness, however, does not apply to Customs' legal determinations, which the court reevaluates anew.¹⁸ *Universal Elecs. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) ("[A]s a practical matter, the presumption carries no force as to questions of law."); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483-84 (Fed. Cir. 1997) ("[T]he statutory presumption of correctness under § 2639 is irrelevant where there is no factual dispute between the parties.").

"Summary judgment is appropriate if 'there is no genuine

¹⁸ It appears that Toyota's new arguments before the Court would constitute merely "new grounds" because they concern the same entries and the same administrative decision, and are, therefore, permissible under 28 U.S.C. § 2638.

issue as to any material fact,' and 'the movant is entitled to judgment as a matter of law.'" *Citizen Watch Co. of Am., Inc. v. United States*, 34 CIT __, __, 724 F. Supp. 2d 1316, 1319 (2010) (quoting USCIT R. 56(c)). Here, there is no dispute between the parties as to any material fact and, thus, summary judgment is appropriate.

DISCUSSION

I. Perfection of Drawback Claims Using a Three Year Average Inventory Turnover Period

Toyota's first claim, for which it seeks summary judgment, is that it should be permitted to perfect its drawback claims under the Inventory Turnover Method by using a three year average inventory turnover period. As noted, Toyota used a forty-eight day turnover period in its drawback claims, based on its "days of supply" calculation. Because Customs found that the calculation of this period did not comply with § 191.14(c), Toyota now seeks to perfect its claim by using a different inventory turnover period. As authority for its use of this three year period, Toyota relies on the following language in 19 C.F.R.

§ 191.14(c)(3)(iii)(C):

The inventory turn-over period must be that for the merchandise or articles to be identified, except that if the person using the method has more than one kind of merchandise or articles with different inventory turn-over periods, the longest average turnover period established under this section may be used (instead of using a different inventory turn-over period for each

kind of merchandise or article).

(emphasis added). Toyota argues that this provision allows it to use a three-year inventory turn-over period because its inventory of one part, a starter switch repair kit, did not turnover for more than three years. According to Toyota:

In the case of Plaintiff's service parts inventory, the sheer diversity of merchandise did not permit Plaintiff to practically track inventory turn-over on a part-specific basis. As a result, establishing inventory turn-over based on the "longest average turn-over period" for such merchandise presented the only viable option available to Plaintiff. At the same time, the duration of that time period is effectively constrained by the overarching limitation of the drawback statute which requires unused merchandise drawback claims to be made within three (3) years of the date of importation.

Pl.'s Mem. 12. Hence, Toyota maintains that it can use a three year turnover period because it may use the longest single inventory turnover period for any one service part as the average inventory turnover period for all parts when using the Inventory Turnover Method. In addition, Toyota insists that, if the inventory turnover period for the one part is longer than three years, using a three year inventory turnover period in applying the Inventory Turnover Method is the only way to "foster harmony" between § 191.14(c)(3)(iii)(c) and § 1313(j)(1)(A).

Specifically, Toyota asserts:

19 C.F.R. § 191.14(c)(3)(iii)(c) establishes that "the longest average turn-over period" may be used when claimant has more than one kind of merchandise or articles with different inventory turn-over periods. At the same time, 19 C.F.R. § 191.31(b) implements the

provisions of 19 U.S.C. § 1313(j)(1)(A) requiring merchandise encompassed within an unused merchandise drawback claim to be exported within three (3) years of its original importation ("three year import to export"). At their heart, these two regulatory provisions present the opportunity for conflict when - as in the case of Plaintiff's service parts inventory - a part found within an unused merchandise drawback claim retains an inventory turn-over period longer than the "three year import to export" time horizon established under Section 191.31(b).

To foster regulatory harmony, therefore, the only means by which these two ostensibly conflicting provisions may be reconciled is to permit the "three year import to export" time horizon mandated under 19 U.S.C. § 1313(j)(1)(A) and 19 C.F.R. § 191.31(b) to dictate the "longest inventory turn-over period" applicable under 19 C.F.R. § 191.14(c)(3)(iii)(C).

Pl.'s Mem. 14. Thus, for plaintiff, if it can demonstrate that the inventory turnover period of a particular service part was in excess of three years then, "to foster regulatory harmony," it may use three years as the inventory turnover period for purposes of the Inventory Turnover Method.

Defendant responds that Toyota's proposed three year inventory turnover period does not comply with the statutory and regulatory provisions governing NAFTA Drawback. Defendant recognizes that "the origin of the goods as imported dutiable merchandise could be determined through inventory methods authorized by regulations." Def.'s Mem. 18 n.8. But, according to defendant, "Toyota relied on the inventory methods authorized by the Customs regulations, but did not comply with the mandatory terms of those regulations." Def.'s Mem. 18. Defendant's

primary argument is that Toyota has not established that the exports for which it seeks drawback were actually (1) dutiable, *i.e.*, a duty was paid upon import, and (2) exported within three years of import, as required for NAFTA Drawbacks.

The court agrees that Toyota's use of a three year inventory turnover period based on one part remaining in inventory for longer than three years is inconsistent with the statutory and regulatory requirements for NAFTA Drawbacks. "Drawbacks are a privilege, not a right." *Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 793 (Fed. Cir. 2002) (citing *United States v. Allen*, 163 U.S. 499, 504 (1896)). As a "statutory privilege," drawback is "due only when enumerated conditions are met." *GUESS?, Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991). In this case, entitlement to drawback benefits are expressly conditioned, by statute, on compliance with § 191.14. See 19 U.S.C. § 3333(a)(2)(B) ("[I]f a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title."); *Id.* § 1313(1) ("Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as [Customs] shall prescribe"); *Graham Eng'g Corp. v. United States*, 510 F.3d 1385, 1389 (Fed. Cir. 2007) ("The rulemaking

authority vested in the agency by subsection (1) explicitly conditions allowance of the benefits of section 1313 on compliance with regulations Customs has prescribed."). Accordingly, Toyota is entitled to duty drawback only to the extent that it complies with the applicable regulatory requirements.

Toyota's proposed use of a three year inventory turnover period is inconsistent with at least two requirements of § 191.14. First, the Inventory Turnover Method requires that a drawback claimant establish an average inventory turnover period for each specific type of merchandise or article for which it seeks duty drawback. Even where, as here, a claimant has several kinds of merchandise, and seeks to use the longest average inventory turnover period of any one product to identify the drawback eligible units of several different products, an average turnover period still must be calculated for each part in order to determine which is the longest. To establish this average inventory turnover period, § 191.14(c)(3)(iii)(C) requires that "at least 1 year, or three (3) turn-over periods (if inventory turns over less than 3 times per year), *must be averaged.*" (Emphasis added).

Toyota's proposed average inventory turnover period,

however, is not an average at all.¹⁹ Rather, it is simply an assigned period based on its contention that 448 of its starter switch repair kits remained in inventory for more than the three year period for submitting drawback claims under § 1313(j). Thus, rather than averaging several turnover periods for its starter switch repair kits, Toyota merely observed that one turnover period was longer than three years. Accordingly, Toyota's proposed inventory turnover period is inconsistent with § 191.14(c)(3)(iii)(C).

Toyota's reliance on the exception for inventories consisting of "several kinds of merchandise" also misses the point. Section 191.14(c)(3)(iii)(C) would permit the use of the longest average inventory turn-over period, calculated on a part-specific basis, to be applied separately to its inventory of each kind of service part. In order to take advantage of this exception, however, Toyota must first calculate the longest

¹⁹ In other words, Toyota did not take an average of the length of time it took for its inventory of starter kits, or any other service part, to be depleted. Rather, Toyota sought to use the period of time that it took its inventory of 57,900 starter kits to turnover. The purpose of requiring an average turnover period appears to be to prevent a drawback claimant from taking an aberrational or atypical turnover period, that might lead to greater drawback than a claimant is entitled to, and using this turnover period to identify drawback eligible merchandise under the Inventory Turnover Method. Here, the average inventory turnover period might well have been less than three years for starter switch repair kits. However, there is no way to determine this because of Toyota's failure to calculate an average.

average inventory turnover period for a particular part, and, second, apply this established inventory turnover period separately to each of its part-specific inventories. That is, had Toyota established an average inventory turn-over period for starter switch repair kits, and if that period were the longest average inventory turnover period for any of the company's service parts, then Toyota could have applied this period to front brake hoses, door bezels, shift lock stoppers, and other service parts. Thus, using this method, once the longest average inventory turnover period for any one service part was determined, Toyota could use that period as the inventory turnover period in applying the Inventory Turnover Method on a part-specific basis to identify the drawback eligible units of each kind of service part.

Toyota has failed to meet these regulatory requirements. As noted above, Toyota has not calculated the longest average inventory turnover period for any specific service part. Consequently, the company has not identified the longest average inventory turnover period for any particular service part, and, having failed to do so, it cannot apply this period to its other service parts. Accordingly, Toyota's claim that it should be permitted to perfect its claim by applying the Inventory Turnover Method using a three year inventory turnover period is inconsistent with the averaging requirements of

§ 191.14(c)(3)(iii)(C), and with the requirement to calculate a turnover period for each type of part in order to determine which is the longest.

In addition, in using any variation of the low-to-high inventory accounting method to identify drawback eligible merchandise "if the merchandise or articles identified were attributable to an import more than . . . 3 years . . . before the claimed export, no drawback could be granted." 19 C.F.R. § 191.14(c)(3)(i). Consequently, drawback eligible merchandise may only be identified through inventory accounting when the chosen accounting method will definitively demonstrate that dutiable imports were actually withdrawn from inventory for exportation within the three year time limit for drawbacks set forth in 19 U.S.C. § 1313(j).

Toyota's proposed methodology would not demonstrate that its merchandise was exported within three years of importation. Using a three year turnover period based on the idea that the turnover period for a particular part was longer than three years could result in Toyota receiving drawback for merchandise actually imported more than three years prior to exportation. Therefore, the three-year inventory turn-over period proposed by Toyota would not "represent[] the time in which all of the merchandise or articles in the inventory at a given time must have been withdrawn." 19 C.F.R. § 191.14(c)(3)(iii)(C). Because

Toyota's proposed inventory turnover period does not represent the length of time it takes for its inventory to actually turnover, using its proposed method would not establish the time in which all of the merchandise in a given inventory was imported and subsequently withdrawn for export. 19 C.F.R.

§ 191.14(c)(3)(iii)(C). Accordingly, since at least one of the service parts for which it seeks drawback was in inventory for nearly five years, under Toyota's proposed inventory turn-over period calculation, there is a strong likelihood that it would receive duty drawbacks for goods that were imported more than three years prior to export, in contravention of § 1313(j)(1)(A).

Thus, Toyota's attempt to perfect its drawback claim using the inventory Turnover Method fails because its proposed three year inventory turnover period does not comply with the requirements of § 191.14.

II. Untimely Amendment of Drawback Claims Using the Blanket Method

Toyota argues that, if it is not permitted to perfect its drawback claims under the Inventory Turnover Method, it should be allowed to amend its drawback claims and submit new documentation in support of its claims under the Blanket Method. Toyota concedes that the time for amending its drawback claims has expired. See Pl.'s Mem. 15 ("Plaintiff should be permitted to untimely amend its drawback claims"). Nevertheless, the

company insists that it should be permitted to make this untimely amendment pursuant to 19 C.F.R. § 191.51(e)(2), because Customs was responsible for its failure to timely amend its drawback claims. According to Toyota, "Plaintiff's inability to timely substitute the [Blanket Method] for the [Inventory Turnover Method] is proximately caused by [Custom's] failure to efficiently evaluate and administer Plaintiff's drawback claims." Pl.'s Mem. 16.

At bottom, Toyota argues that Customs was responsible for its failure to file new paperwork to further back up its drawback claims using the Blanket Method²⁰ by inducing Toyota to believe that its original Inventory Turnover Method claims would be allowed because "numerous exchanges between Plaintiff and [Customs], . . . resulted in Plaintiff's understanding (either through direct statements or otherwise) that its drawback claims were 'probably okay.'" Pl.'s Mem. 21. According to Toyota, Customs delay in processing and ruling on Toyota's claims meant that, by the time Toyota's claims were formally denied, the three-year window for amending its claims had closed. Therefore, Toyota maintains that Customs led it to believe that its drawback claims were proper as originally filed, which caused it to forego

²⁰ As set forth *supra*, Customs did permit Toyota to perfect its claims by substituting the Blanket Method but found that the perfection failed to demonstrate that the merchandise was actually exported to Canada. Further, as noted, Toyota does not dispute this determination.

any opportunity to amend its claims to correct any deficiencies, and then delayed in ruling on Toyota's claim, which prevented it from amending its claims within the time frame afforded under § 191.52(c).

Pursuant to 19 U.S.C. § 1313(r) and 19 C.F.R. § 191.51(a), a completed drawback claim must be filed within three years from the date of exportation of the merchandise for which drawback is sought. A "complete drawback claim" generally must include the "drawback entry on Customs Form 7551, applicable certificate(s) of manufacture and delivery, applicable Notice(s) of Intent to Export, Destroy, or Return Merchandise for Purposes of Drawback, applicable import entry number(s), coding sheet unless the data is filed electronically, and evidence of exportation or destruction under subpart G of this part." 19 C.F.R. § 191.51(a); see also *Delphi Petroleum, Inc. v. United States*, 33 CIT __, __, 662 F. Supp. 2d 1348, 1351-52 (2009). In addition, a drawback claim must also include a correct calculation of the amount of reimbursement sought. See *Aectra Ref. & Mktg., Inc. v. United States*, 565 F.3d 1364, 1371 (Fed. Cir. 2009). A party may amend an unliquidated drawback claim at anytime within three years of the exportation of the merchandise for which drawback is sought. See 19 C.F.R. § 191.52(c). No amendment is permitted, however, for drawback claims after the expiration of this three year period "unless it is established that Customs was

responsible for the untimely filing." 19 U.S.C. § 1313(r); 19 C.F.R. § 191.51(e). Accordingly, the dispositive issue is whether Customs was responsible for Toyota's failure to timely amend its claims.²¹

Customs has not promulgated any regulation defining what it means for "Customs to be responsible for the late filing," as set forth in § 191.51(e)(2). In addition, Customs has not had the opportunity to determine whether it is responsible for Toyota's untimely amendment, as this precise issue was not raised in Toyota's Protest.²² Nevertheless, the court "shall make determinations upon the basis of the record made before the court

²¹ It should be noted that Toyota has not placed before the court the documents it seeks to submit to Customs and so has provided no evidence that its amended claims would be compliant with the applicable statutes and regulations or, indeed, that they would be an amendment to its drawback claims. In this connection, the court will rely on plaintiff's representation that the documents would constitute an amendment.

²² The court, nevertheless, has jurisdiction over Toyota's claim because it merely constitutes "new grounds" on which it challenges Customs' decision to deny its drawback claims. Under 28 U.S.C. § 2638, "[i]n any civil action . . . in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground- (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision listed in [19 USC § 1514] that was contested in the protest." In this case, Toyota's second claim meets this criteria, as it seeks drawback for the same merchandise that was subject to its protest, which challenged the same administrative decision-the refusal to grant drawback under 19 U.S.C. § 1514(a)(6). See *Hanover Ins. Co. v. United States*, 25 C.I.T. 447, 451-51 (2001) (not reported in Federal Supplement).

. . . ." 28 U.S.C. § 2640(a).

The court holds that plaintiff has failed to produce sufficient evidence for it to find that Customs was responsible for Toyota's failure to file proper drawback claims in the first instance, or its failure to timely amend its drawback claims. That is, viewing the facts in the light most favorable to Toyota, the evidence is insufficient for the court to find that Toyota was induced by Customs to believe that its drawback claims would be allowed. See *Aegis Sec. Ins. Co. v. Fleming*, 33 CIT __, __, 593 F. Supp. 2d 1346, 1349-50 (2009). Rather, the evidence demonstrates that Customs notified Toyota early on in the process that it had doubts as to whether Toyota's drawback claims complied with the governing regulations. Def.'s Rule 56.1 Statement ¶5 ("During the period after plaintiff's August 27, 1999 letter to Customs and before plaintiff's October 15, 1999 memorandum to Customs . . . [the agency] told Toyota that they were not sure if Toyota's 'accounting method was completely in accordance with the regulations.'"); Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶5. Beck Dep. 19:14-20:14 ("Q. Did you contact [Toyota] at this time for additional information? A. We did contact them to get additional information. Q. At that time did you tell them the reason why that information was necessary? A. Yes. Q. And what was the reason that you told them? A. We were not sure if their accounting method was completely in

accordance with the regulations."). Moreover, Toyota, as a sophisticated party with its own drawback specialists, was aware of its obligations as a drawback claimant. See Def.'s Rule 56.1 Statement ¶¶35-42; Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶¶35-42; Dep. M. Duntley (July 22, 2009) 48:9-12 ("Q. Were importers required to be fully knowledgeable of the regulations . . . if they sought to make claims for [drawback]? A. Yes, they were.").

When Customs granted Toyota's application for a waiver of notice in June 1999, it expressly advised the company that the granting of those privileges was not to be taken as an indication of Customs' acceptance of Toyota's proposed Inventory Turnover Method calculation. Def.'s Rule 56.1 Statement ¶2 ("In approving this request, the U.S. Customs Service expresses no opinion as to the entitlement of drawback and makes no assurances, rulings, or decisions that may be relied upon to anyone's detriment."); Pl.'s Resp. to Def.'s Rule 56.1 Statement ¶2. Shortly after Toyota's filing of its original drawback claims under the Inventory Turnover Method, Customs informed Toyota that it had doubts as to the validity of Toyota's inventory turnover period calculations. Beck Dep. 19:14-20:14; Def.'s Rule 56.1 Statement ¶5 ("During the period after plaintiff's August 27, 1999 letter to Customs and before plaintiff's October 15, 1999 memorandum to Customs . . . [the agency] told Toyota that they were not sure if Toyota's

'accounting method was completely in accordance with the regulations."). Toyota was aware of these concerns, and, on several occasions, submitted additional information to Customs in an effort to support its proposed inventory turnover period calculation. Pl.'s Rule 56.1 Statement ¶¶13-14; Def.'s Resp. to Pl.'s Rule 56.1 Statement ¶¶13-14.

By July 25, 2000, at the latest, Customs had informed Toyota that it had sought internal advice regarding whether Toyota's use of the Inventory Turnover Method complied with applicable regulations, and admonished Toyota that an adverse ruling could result in the rejection of Toyota's drawback claims. July 25, 2000 Letter ("[W]e would like to caution you that an adverse ruling by our Headquarters could affect Toyota's drawback eligibility for your claims currently on file."). At that time, Customs also informed Toyota that it might be some time before a ruling was issued from Customs Headquarters on the request for internal advice. *Id.* Under these facts, Toyota's knowledgeable staff should have recognized that, *at a minimum*, there was a possibility that its drawback claims would not be approved. At that point, Toyota still had time to amend its drawback claims covering merchandise that was exported after July 25, 1997. See 19 C.F.R. § 191.52(c) ("Amendments to claims for which the drawback entries have not been liquidated must be made within three (3) years after the date of exportation or destruction of

the articles which are the subject of the original drawback claim.").

Importantly, up to that point, Customs had not given any indication as to the sufficiency of Toyota's claims, other than, according to Toyota, its failure to indicate that they were deficient, and the vague oral comment that the claims were "probably okay." Duntley Decl. at ¶12. Knowing that Customs had expressed doubt as to the validity of its Inventory Turnover Method claims, and the deadlines for amending those claims, Toyota could have reviewed its claims internally and determined whether to continue to pursue them as filed.

Despite having experienced personnel submitting drawback claims on its behalf, however, Toyota continued to pursue claims using the Inventory Turnover Method, rather than seeking an alternative course after being apprised of Customs' ambivalence as to the validity of its claims.

Toyota argues that it was unable to effectively evaluate its own claims because Customs failed to adequately inform the trade community as to the requirements for calculating an inventory turnover period. The regulation is clear, however, that the inventory turnover period must be calculated for an inventory of fungible goods. See 19 C.F.R. § 191.14(b)(1) ("The lots of merchandise or articles to be so identified must be fungible"). The meaning of "fungible" in this context is clearly set forth in

19 C.F.R. § 191.2(o). No additional explanation was necessary. As the Protest Ruling demonstrates, Toyota's calculation was noncompliant because, *inter alia*, it failed to meet the fungibility requirement set forth in § 191.14(b) because it used several kinds of service parts (*e.g.*, hoses, gaskets, valves, belts) - parts that were not commercially interchangeable - to calculate an average inventory turnover period. Toyota should have known that these service parts were not fungible. Accordingly, Toyota should have known that calculating an inventory turnover period based on the turnover of all of its service parts did not comply with the fungibility requirement. Indeed, Toyota now concedes that its original "days of supply" inventory turnover period calculation was at odds with the requirements of § 191.14(b). See Oral Arg. Tr. 12:3-13:17. Nevertheless, the company did not seek to correct its claims (by amendment or perfection) until after November 2001, when Customs determined that its claims were noncompliant.

Based on the undisputed facts, it is clear that Toyota voluntarily chose to abandon the Blanket Method and pursue the Inventory Turnover Method, and that Customs did not cause it to believe that its claims complied with the applicable regulations, or induce Toyota to forego amending its claims to substitute the Blanket Method for the Inventory Turnover Method until after the expiration of the three year period for amending drawback claims.

Indeed, Customs cautioned Toyota that its new methodology might not be allowed. In this respect this case is dramatically different from *Delphi Petroleum*, where the Court found that untimely drawback claims for certain harbor tariffs were the responsibility of Customs when a Customs officer directed the drawback claimant to wait until it filed its protest to assert these claims for the first time.

Indeed, *Delphi Petroleum* stands for the proposition that Customs' delay in ruling on Toyota's claims does not, by itself, render Customs responsible for plaintiff's filing of claims that did not comport with the applicable law. See *Delphi*, 33 CIT at ___, 662 F. Supp. 2d at 1354 (finding that Customs' "delay in liquidating claims," without more, did not render Customs responsible for delay in amending drawback claims).

Having determined that Customs did not induce Toyota to believe that its Inventory Turnover Method claims would be allowed, the court finds no merit to Toyota's claim that Customs' delay in ruling on Toyota's drawback claims render it responsible for Toyota's failure to seek the timely amendment of those claims.

CONCLUSION

For the foregoing reasons, the court finds that there are no genuine issues as to any material facts and all of Toyota's claims lack merit as a matter of law. Therefore, plaintiff's

motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED. Accordingly, it is hereby

ORDERED that judgment is entered in favor of defendant, and this case is hereby dismissed.

/s/ Richard K. Eaton
Richard K. Eaton

Dated: September 8, 2011
New York, New York