Slip Op. 22-145

UNITED STATES COURT OF INTERNATIONAL TRADE

DIAMOND TOOLS TECHNOLOGY LLC,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

DIAMOND SAWBLADES MANUFACTURERS' COALITION,

Defendant-Intervenor.

Before: Timothy M. Reif, Judge

Court No. 20-00060

OPINION AND ORDER

[The court remands Customs' Final Remand Results in conformity with this opinion.]

Dated: December 16, 2022

Jay C. Campbell, White & Case LLP, of Washington, D.C., argued for plaintiff Diamond Tools Technology LLC. With him on the brief were Walter J. Spak, Dean A. Barclay, Ron Kendler and Allison J. G. Kepkay.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy, Director, and Franklin E. White, Jr., Assistant Director. Of counsel on the brief was Tamari J. Lagvilava, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

Daniel B. Pickard, Buchanan Ingersoll & Rooney PC, of Washington, D.C., argued for defendant-intervenor Diamond Sawblades Manufacturers' Coalition.

Reif, Judge: Before the court is the remand redetermination of U.S. Customs and Border Protection ("Customs") pursuant to the court's order ("Remand Order") in *Diamond Tools Tech. LLC v. United States* ("*Diamond I*"), 45 CIT __, 545 F. Supp. 3d 1324 (2021). *See* Final Remand Redetermination ("Remand Results"), ECF No. 70. In *Diamond I*, the court remanded in part Customs' Final Determination as to Evasion and Final Administrative Decision on Certain Diamond Sawblades and Parts Thereof from the People's Republic of China ("China"). *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356; TRLED Final Determination (7184) (Sept. 17, 2019) ("Final Determination"), CR 199, PR 220; REG AND RULINGS Final Administrative Determination for Diamond Tools (Jan. 29, 2020) PR 232. The court ordered Customs to make a finding consistent with the Remand Order as to whether Diamond Tools Technology LLC ("DTT USA" or "plaintiff") made any material and false statement or act, or material omission, pursuant to the second statutory requirement set forth in section 517(a)(5)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(a)(5)(A) (2018).[1] *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356. On remand, Customs continued to find that the DTT USA made material and false statements or acts, or material omissions, with respect to the subject diamond sawblades entered prior to December 1, 2017. *See* Remand Results at 1. For the following reasons, the court remands the Remand Results to Customs for reconsideration in conformity with this opinion.

[1] References to the U.S. Code are to the 2018 edition. Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code.

BACKGROUND

The court presumes familiarity with the facts of this case, as set out in *Diamond I*, and now recounts the facts relevant to the disposition of the instant action. On October 29, 2021, the court held that Customs' determination of evasion did not satisfy the requirement to establish that DTT USA entered covered merchandise by means of a material and false statement or act, or material omission. *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1351 (citing 19 U.S.C. § 1517(a)(5)(A)). In *Diamond I*, the court held that Customs did not explain how DTT USA's failure to seek clarification from Commerce constitutes a "material and false statement or act, or a material omission." *Id.* at 1354. Also, the court stated that Customs failed to reference any authority in its Final Determination and Final Administrative Decision that would create an obligation on DTT USA to seek a scope ruling from Commerce or to seek a clarification from Customs as to the applicability of the underlying antidumping duty ("AD") order. *Id.*; *see Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4, 2009) (antidumping duty orders) (the "2009 Order"). The court ordered Customs to make a finding consistent with the court's opinion as to whether DTT USA made any material and false statement or act, or material omission concerning the entry of diamond sawblades pre-dating December 2017. *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356.

On January 27, 2022, Customs filed its Remand Results. Remand Results at 1. In the Remand Results, Customs continued to find that DTT USA made material and

false statements or acts, or material omissions, with respect to its entries of diamond sawblades. *See id.*

On February 28, 2022, DTT USA provided comments on the Remand Results. *See* Pl.'s Comments in Opp'n to the Final Results of Redetermination Pursuant to Court Remand ("Pl. Br."), ECF No. 77. Plaintiff argues that Customs' finding is inconsistent with the Remand Order and that Customs' affirmative "evasion" determination continues to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See id.* at 1 (citing 19 U.S.C. § 1517(g)(2)(A)-(B)). On March 30, 2022, defendant United States (the "Government") and defendant-intervenor Diamond Sawblades Manufacturer's Coalition ("DSMC") responded to the comments of DTT USA. *See* Def.'s Reply to Pl.'s Comments on the Remand Redetermination ("Def. Br."), ECF No. 83; Def.-Intervenor's Comments in Supp. of Redetermination Pursuant to Court Remand ("Def.-Intervenor Br."), ECF No. 82.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c). The Enforce And Protect Act ("EAPA") requires the court to determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or an administrative review pursuant to 19 U.S.C. § 1517(f) was conducted "in accordance with those subsections" by examining whether Customs "fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(1)-(2). "While the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment

for that of the agency, the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). Further, "[i]n reviewing that explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Id.* at 31.

On remand, the court also reviews the Remand Results "for compliance with the court's remand order." *See Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted). "[I]n remand proceedings, an administrative agency must modify its original determination in accordance with the remand order." *Dorbest Ltd. v. United States*, 35 CIT 136, 145 (2011). Substantial evidence requires "more than a mere scintilla" of evidence. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Moreover, "[i]t is axiomatic that the remand redetermination . . . must stem from a good faith *reconsideration* . . . [I]t must be supported by findings of fact grounded in substantial evidence on the record of this review, and it must adhere to statutory requirements." *Union Steel v. United States*, 33 CIT 1392, 1399, 645 F. Supp. 2d 1298, 1305 (2009) (emphasis supplied)*, opinion set aside on reconsideration*, 35 CIT 1647, 804 F. Supp. 2d 1356 (2011) *judgment entered*, 37 CIT 1201 (Aug. 8, 2013).

LEGAL FRAMEWORK

The EAPA directs Customs to investigate allegations of evasion of AD and countervailing ("CVD") duties. *See* 19 U.S.C. § 1517. Customs must initiate an investigation within 15 days of receiving an allegation that "reasonably suggests that

covered merchandise has been entered into the customs territory of the United States through evasion." *Id.* § 1517(b)(1). The EAPA defines evasion as:

> [E]ntering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

Id. § 1517(a)(5)(A). The statute defines "covered merchandise" as merchandise that is subject to an AD or CVD order. *Id.* § 1517(a)(3)(A)-(B).

As the court stated in *Diamond I*, the purpose of the EAPA "was to empower the U.S. Government and its agencies with the tools to identify proactively and thwart evasion at earlier stages to improve enforcement of U.S. trade laws, including by ensuring full collection of AD and CVD duties and, thereby, preventing a loss in revenue."[2] *Diamond I,* 45 CIT at __, 545 F Supp. 3d at 1351 (citing H.R. Rep. No. 114-114, pt. 1 (2015)).

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[2] In 2015, the Committee on Ways and Means in the U.S. House of Representatives released a report on the Trade Facilitation and Trade Enforcement Act of 2015. H.R. Rep. No. 114-114, pt. 1 (2015). This report demonstrates that Congress intended for the EAPA to provide a specific timeline for evasion investigations. *Id.* Sander M. Levin, Ranking Member of the Committee, included the following statement in the Additional Views section of the report:

> There appears to be growing consensus that ENFORCE is the appropriate way to address allegations of evasion. Prior efforts to require Customs to enforce these allegations by using existing statutory provisions (e.g., Section 516 of the Tariff Act of 1930) have failed by not requiring Customs to act on a petition within a fixed period of time. The longer Customs takes, the more entries are liquidated — that is, they become final, and any additional duties owing are foregone.

Id. at 381; *see also* S. Rep. No. 114-45 at 12 (2015).

DISCUSSION

I. Whether Customs complied with the Remand Order in determining that DTT USA made a material and false statement or act, or material omission

A determination of evasion requires three elements: (1) entering covered merchandise into the United States; (2) by means of any document or data or information, written or oral statement, or act that is material and false, or any omission that is material; and (3) that results in any applicable cash deposit or other security being reduced or not applied to the merchandise. *See* 19 U.S.C. § 1517(a)(5)(A); *All One God Faith, Inc. v. United States*, Slip Op. 22-96, 2022 WL 3539511, *2 (CIT Aug. 18, 2022). In *Diamond I,* the court held that the diamond sawblades were properly categorized as "covered merchandise," but remanded to Customs to explain how DTT USA's entry of diamond sawblades prior to December 2017 as type 01 entries constituted a "statement. . . that is material and false" under the EAPA. 19 U.S.C. § 1517(a)(5)(A).

A. Positions of the parties

DTT USA argues that the Remand Results are inconsistent with the Remand Order and that Customs' affirmative "evasion" finding continues to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Pl. Br. at 1. First, DTT USA challenges Customs' conclusion that the EAPA does not have a culpability requirement. *See id.* at 4-11. DTT USA asserts that the court in *Diamond I* held that the plain meaning of material "false" statement or omission requires "some" degree of culpability. *Id.* at 3 (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1361). DTT USA further argues that Customs ignored the court's definition of "false" by

asserting that “false” means “[e]rroneous, wrong” as well as the court’s definition of “omission.” *Id.* at 4.

DTT USA also challenges Customs’ argument that the explicit culpability requirement of 19 U.S.C. § 1592(a) demonstrates that the absence of such an explicit culpability requirement in the EAPA means that the EAPA does not require *any* degree of culpability. *See id.* at 6-8. DTT USA further challenges Customs’ position that a culpability requirement would be inconsistent with the “covered merchandise referral” provision codified under 19 U.S.C. § 1517(b)(4)(A). *See id.* at 8-10.

DTT USA also contends that the Remand Results do not comply with the court’s conclusion in *Diamond I* that DTT USA was not obliged to request a scope ruling in light of Commerce’s determination in *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 Fed. Reg. 29,303 (Dep’t of Commerce May 22, 2006) (“2006 Final LTFV Determination”) and accompanying Issues and Decision Memorandum (“2006 IDM”). *See id.* at 10-15 (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1354-55). DTT USA challenges Customs’ finding that the 2006 IDM placed importers on notice of circumvention concerns by asserting it is inconsistent with the context of the 2006 IDM. *See id.* at 11-14. DTT USA asserts that Commerce in the 2006 IDM rejected the petitioner’s argument that the country of origin should be the location where the segments are produced — which the petitioner stated would pose circumvention concerns — and that Commerce instead determined that the country of origin is the location where the segments are joined to the core. *See id.* at 11-12. DTT USA argues that the court acknowledged Commerce’s

conclusion in the 2006 IDM, including the statement that Commerce retains authority to address circumvention, and found that Customs failed to reference any authority imposing an obligation on DTT USA to seek a scope ruling or clarification. *Id.* (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1354-55).

DTT USA further asserts that the claim that the importer lacked an obligation to request a scope ruling would not subvert the purpose of the EAPA to capture retroactively entries entered prior to an investigation. *See id.* at 14-15. DTT USA argues that Customs may suspend liquidation and require cash deposits only if it finds that the importer engaged in "evasion" under the EAPA. *Id.* (citing 19 U.S.C. §§ 1517(a)(5)(A), (c)(1), (d)(1)). Last, DTT USA contends that the Remand Results failed to establish that the importer made a false statement by disregarding the court's holding that importing diamond sawblades as Thai-origin was not an "erroneous," "untrue," or "deceitful" statement. *Id.* at 15 (citing *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1353).

On remand, Customs continued to find that DTT USA made material and false statements with respect to its entries of diamond sawblades imported prior to December 1, 2017. *See* Remand Results at 3-12. Customs concluded in particular that: (1) the EAPA does not require a finding of intent or culpability; and (2) the importer did not exercise reasonable care when it failed to seek a scope ruling. *See id*.

In regard to the first conclusion, Customs reasoned that had Congress required importer "intent" in the context of evasion under the EAPA, Congress would have explicitly included an intent requirement in the statute, as Congress did with respect to 19 U.S.C. § 1592(a). *Id.* at 3-5. Customs further explained that the EAPA is a "strict

liability statute" in view of the purpose of the statute to collect AD and CVD duties owed to the U.S. government. *Id*. at 5. Before the court, the Government asserts that Customs' conclusion is supported by statutory construction or, alternatively, that Customs' conclusion is entitled to *Chevron* deference, Def. Br. at 4-15 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). Moreover, if *Chevron* deference does not apply, the Government contends that Customs' interpretation still is entitled to deference under *Skidmore*. *Id*. at 15-17 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1366 (Fed Cir. 2005)).

In regard to the second conclusion, Customs stated that importers are required to exercise reasonable care when making an entry or submitting documentation to Customs pursuant to 19 U.S.C. § 1484. *See* Remand Results at 9. Customs concluded that DTT USA did not exercise reasonable care when it failed to seek a scope ruling despite being "on notice that Commerce had acknowledged potential circumvention concerns." *Id.* at 9-10.

DSMC agrees with Customs' conclusions in the Remand Results and argues that the court should sustain the Remand Results. *See* Def.-Intervenor Br. at 1.

B. Analysis

The court concludes that the Remand Results do not comply with the Remand Order that Customs provide an adequate explanation as to its determination that DTT USA made a material and false statement or act, or material omission. *See Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1356. As such, the court concludes that the Remand

Results are not in accordance with the Remand Order, not supported by substantial evidence and not otherwise in accordance with law.[3]

1. Whether Customs adequately explained that DTT USA made a material and false statement or omission

In its Final Determination, Customs claimed that DTT USA's failure to enter the diamond sawblades as covered by the AD order in this case constituted the introduction of covered merchandise "by means of any [. . .] statement, or act that is material and *false*, or any *omission* that is material," 19 U.S.C. § 1517(a)(5)(A) (emphases supplied) — and a consequent evasion of the 2009 Order. Final Determination at 8. In *Diamond I*, the court remanded this issue to Customs, noting that:

> Customs' conclusion appears to hinge either on (1) the presumption that entering covered merchandise without so declaring it is *per se* false or an omission, or (2) the legal conclusion that DTT USA was under an obligation to notify Customs of the Chinese origin of some of its cores and segments.

45 CIT at __, 545 F. Supp. 3d at 1353.

On remand, Customs claimed that "[s]electing an incorrect entry type constitutes a false statement." Remand Results at 11. Customs devoted significant space to its re-presenting its argument that there is a "[l]ack of [an] [i]ntent [r]equirement in the EAPA," *id.* at 3-7;[4] however, what Customs failed to

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[3] *See Prime Time Com. LLC v. United States*, 45 CIT__, __, 495 F. Supp. 3d 1308, 1313 (2021) ("The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014)), *aff'd,* No. 2021-1783, 2022 WL 2313968 (Fed. Cir. June 28, 2022).

[4] In support of this position, the Government states that the statute's design supports Customs' interpretation that "false" does not require "establishing a culpability level such as intent or negligence." Def. Br. at 8.

do was to provide "a well-buttressed and well-reasoned explanation of its conclusion," as the court directed, *Diamond I*, 45 CIT at __, 545 F Supp. 3d at 1355.

The court concludes for three reasons that Customs failed to demonstrate that DTT USA's classification of its entries constitutes a material and false statement or material omission under 19 U.S.C. § 1517(a)(5)(A). First, Customs' application in this case of the statute is inconsistent with its language and structure. Second, even if Customs' application of the statute were not inconsistent, Customs' interpretation of the statute is not entitled to deference in this case. Third, the terms of the statute do not encompass the particular present circumstances.

a. Statutory construction

Customs' application of the statute in this case violates a core maxim of statutory construction. It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (first quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000); and then quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).[5]

[5] The Government raises this principle by quoting language from the Supreme Court in reply to plaintiff's comments on the Remand Results. Def. Br. at 9 (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). The Government explains: "Applying this canon, Customs found that 'to require a finding of knowledge or intent in a case where [Customs] has made a covered merchandise referral to Commerce would be inconsistent with the covered merchandise referral process as outlined in the EAPA statute.'" *Id.* (quoting Remand Results at 6). The Government's effort in this case to apply longstanding maxims of statutory interpretation to support Customs' "strict liability" theory fails for the reasons discussed *infra*.

Customs' construction in both its Final Determination and Remand Results of the material and false statement or material omission provision of the statute would render that provision a nullity, thereby violating a core principle of statutory construction. The court reaches this conclusion because neither Customs' Final Determination nor its Remand Results provided an adequate explanation of Customs' determination.[6] Rather, Customs rests solely on its conclusion that DTT USA entered "covered merchandise" and represented it in entry documentation as merchandise that was not subject to an AD Order.[7] Remand Results at 7-9. As this court previously determined

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[6] In *Home Meridian Int'l Inc. v. United States*, 36 CIT 1279, 1293, 865 F. Supp. 2d 1311, 1324 (2012), the court held that:

> Commerce has insufficiently explained the connection between the selection of surrogate countries and the selection of bookend countries. Absent a new and persuasive explanation, on these facts Commerce's decision to reject contemporaneous data in favor of non-contemporaneous data is unreasonable. The court remands the selection of bookend countries for redetermination or further explanation.

In *USEC Inc. v. United States*, 27 CIT 489, 506, 259 F. Supp. 2d 1310, 1326 (2003), the court held that "Commerce's decision requires a more persuasive explanation than provided in the agency's determinations."

[7] Customs admonished DTT USA for failing to exercise "reasonable care" under 19 U.S.C. § 1484 and for what Customs described as DTT USA's "blind reliance" on Commerce's language in the 2006 IDM. Remand Results at 9. Then, Customs claimed that "it would have behooved" DTT USA to request a scope ruling concerning diamond sawblades. *Id*. The court finds this posture peculiar. The core purpose of a transparent administrative process is for Commerce, Customs and other agencies to provide clear decisions on which parties can rely in engaging in commercial transactions. *See, e.g.*, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2575-76 (2019) (explaining that "[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public"); *Wheatland Tube Corp. v. United States*, 17 CIT 1230, 1237, 841 F. Supp. 1222, 1228 (1993) (recognizing "the value and need for consistency and predictability in the administration of the trade laws").

in *Diamond I*, 45 CIT at __, 545 F. Supp. 3d at 1354, DTT USA's act in itself does not meet the standard for a material and false statement without an adequate explanation and elucidation from Customs.

At the time of entry, DTT USA's representation of the entry type of the diamond sawblades reflected an accurate understanding of the 2006 IDM issued by Commerce:

> [T]he Department has determined that it is the attachment of cores to segments that gives finished diamond sawblades their essential quality, not the manufacture of diamond segments. Even though there is a significant capital investment also associated with manufacturing diamond segments, given the fact that the attachment process imparts the essential quality of the diamond sawblade, coupled with the substantial capital investment and technical expertise that is required for the attachment process, we continue to find that the country of origin is determined by the location where segments and cores are attached to create finished diamond sawblades.

2006 IDM at Comment 4.

Commerce's words were unequivocal and left no doubt as to the meaning of the precise scope of the AD order in this case. What is more, in the 2006 IDM Commerce itself expressly rejected the petitioner's concern that Commerce's AD Order and accompanying IDM could lead to circumvention. *See* 2006 IDM at Comment 4. In response to the petitioner's stated concern — *i.e.*, that "the minimal capital investment required for the attachment process poses circumvention concerns," *see id*. — Commerce doubled down on its defense of its scope determination and concluded that the *petitioner's* proposed approach to determining the scope of the order was at least as likely to lead to circumvention issues:

> Petitioner argues that the minimal capital investment required for the attachment process poses circumvention concerns. As discussed above, the Department finds that the capital investment required for attaching segments to cores is substantial. In addition, country of origin determined by the location of segment manufacture would still pose circumvention

> concerns, as a producer of diamond sawblades could transfer aspects of segment manufacturing to third countries, *e.g.*, shipping pre-mixed bond powder and diamonds to third countries for pressing and baking into segments. In any event, the Department retains that statutory authority to address circumvention concerns as appropriate.[8]

2006 IDM at Comment 4.

The 2006 IDM was a core public decisional document to explain to the parties and the public the scope of the 2009 Order that was still in effect when DTT USA classified its covered merchandise at the time of entry prior to the circumvention determination[9] that later changed the scope of the Order.

Separately, Customs asserted that because 19 U.S.C. § 1592 delineates specific degrees of culpability,[10] the absence of terms designating intent and culpability in 19 U.S.C. § 1517 demonstrates that the language in § 1517 means that the EAPA is a "strict liability" statute. Remand Results at 5.

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[8] In the Remand Results, Customs stated that Commerce's wording in the 2006 IDM indicates that "Commerce reserved authority to address circumvention issues as they arose." Remand Results at 8. The court finds this portrayal of Commerce's explanation inapt. Commerce is not required to "reserve authority" to address circumvention concerns. Moreover, contrary to Customs' characterization, Commerce in the language quoted by Customs *refuted* the petitioner's concerns regarding Commerce's approach, rather than placing importers on notice regarding the petitioner's concerns in regard to the country of origin determinations. *See* 2006 IDM at Comment 4.

[9] Commerce published this affirmative final determination of circumvention in the Federal Register on July 16, 2019. *See* Commerce Scope Referral Memo (7184) (July 23, 2019), PR 211.

[10] 19 U.S.C. § 1592 sets forth levels of importer culpability and empowers Customs to determine whether a person has violated that provision by fraud, gross negligence or negligence. *See* 19 U.S.C. § 1592(a)(1). For its part, § 1517 does not contain parallel language enumerating specific levels of culpability, nor does the statute contain the term strict liability and the statute's legislative history does not indicate the application of that concept. *See id.* § 1517(a)(5)(A).

Customs' assertions are not supported by the EAPA's language or legislative history. Customs' observation that § 1592 specifies three levels of culpability does not relieve Customs (or the court) from the requirement to apply the terms material and false statement or omission in § 1517. The court may look to complementary statutes for context and interpretative guidance, but § 1592 as a direct comparison for § 1517 is inapposite. By its own admission, under Customs' application, that statutory requirement — the second of three — would exist perforce every time Customs found that the statutory requirement of merchandise being "covered" — the first of three — was found by Customs to exist. As noted, such an application of the statute would violate the canons of statutory construction.

Customs protests that "the purpose of the EAPA is to collect antidumping and countervailing duties (CVD) that are due to the U.S. Government, and that the U.S. Government has been deprived of because the importer failed to report its merchandise as subject to an applicable AD/CVD order." Remand Results at 5. The purpose of the EAPA is indeed to "collect antidumping and countervailing duties . . . that are due to the U.S. Government" *when* Customs finds, consistent with the terms of § 1517— namely, a finding based on substantial evidence and an adequate explanation that the three statutory criteria have been met — that the importer has *evaded* the order. *Id.*

DTT USA filling out the import documentation based on the explicit and clear terms of Commerce's order and the associated 2006 IDM, does not, in accordance with statutory construction, comprise a material and false statement or omission. It is not the role of the court to prognosticate what the term may mean in the abstract. It *is* the mandate and responsibility of the court to conclude, based on the record presented to

the court — in which Commerce not only was crystal clear but in fact doubled down on its clear conclusion and formulation — that filling out the forms in a way that tracked explicitly Commerce's IDM, does not constitute a material and false statement or omission. In fact, not only did the importer expressly and *verbatim* follow the terms of the Order, there was, in fact, no other possible interpretation of the scope of this Order.[11]

As noted, Customs' proposed approach is inconsistent with basic statutory interpretation and does not support a conclusion that DTT USA's entry for diamond sawblades constitutes a "material and false" statement or "omission that is material." 19 U.S.C. § 1517(a)(5)(A)

b. Deference to Customs' interpretation of the EAPA

The court concludes that Customs' finding that DTT USA provided a statement that is material and false or an omission that is material is not entitled to deference under *Chevron*, 467 U.S. 837, or respect under *Skidmore*, 323 U.S. 134*. See* Def. Br. at 4-5, 15.

Turning first to *Chevron*, as the court noted in *Diamond I*: "When reviewing an agency's interpretation of a statute, the court must first determine 'whether Congress has directly spoken to the precise question at issue.' If the court concludes that the statute does address the precise question, the court '"must give effect" to Congress's

[11] At oral argument, the Government stated that Commerce's 2006 IDM is irrelevant to the interpretation of the 2009 Order. Oral Arg. Tr. at 35:17-19, ECF No. 90. The court finds this argument unpersuasive and notes an apparent contradiction in Customs' urging the court to refer to Commerce's 2006 IDM while the Government argued at oral argument that the 2006 IDM is irrelevant in other parts of the Government's legal argumentation. *Id.*

unambiguous intent.'" 45 CIT at __, 545 F. Supp. 3d at 1349 (first quoting *Chevron*, 467 U.S. at 842; and then quoting *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (citing *Chevron*, 467 U.S. at 842-43)).

As discussed *supra*, Section I.B.1.a, Congress was unambiguous in establishing a three-part requirement for Customs to find evasion. 19 U.S.C. § 1517. Accordingly, *Chevron* does not apply in this case.

The Government in its final brief before the court also invokes deference under *Skidmore*, Def. Br. at 15-17, in the event that the court rejects deference under *Chevron*. *Id.* at 4-13. Customs' decision is not entitled to *Skidmore* respect. The Supreme Court has accorded "a measure of deference proportional to the 'thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140)). The Court added:

> [D]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Id. at 155.[12]

[12] Cases in which this court has afforded an agency respect under the standard set out in *Skidmore* stand in sharp contrast to the present case. *See Four Seasons Produce, Inc. v. United States*, 25 CIT 1395 (2001). In *Four Seasons*, the court stated that it would defer to Customs because, inter alia, of Customs': (1) "experience and informed judgment"; and (2) "thorough and carefully reasoned analysis." *Id.* at 1403. In the present case, the analysis presented in the Remand Results is neither thorough nor carefully reasoned and the consideration afforded to DTT USA on remand reflects legal

In this case, Customs, as already noted, has not provided an explanation of how DTT USA's entry of diamond sawblades under type 01[13] from Thailand constituted a false statement when Commerce itself instructed importers "that the country of origin should be determined by the location of where the segments are joined to the core."[14] 2006 IDM at Comment 4. Since Customs did not conduct a thorough reexamination and did not provide a clarification in the Remand Results, Customs' Remand Results are not entitled to *Skidmore* deference or respect. In fact, the timing of the Government's introduction of the *Skidmore* argument appears more suited as a "'convenient litigating position,' or a '*post hoc* rationalizatio[n].'" *Christopher*, 567 U.S. at 155 (first quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); and then quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

To conclude, the court recalls that it ordered Customs "to provide a well-buttressed and well-reasoned explanation of its conclusion." *Diamond I,* 45 CIT at __,

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argumentation rather than a reconsideration of the facts of the case. Finally, it is notable that the Government argued for *Skidmore* respect in its final response before this court on remand, suggesting a litigating posture and a *post-hoc* rationalization of Customs' decision presented by the Government that underscore the lack of serious reconsideration on remand by Customs. *See Christopher, infra,* 567 U.S. at 155

[13] The type 01 entry code constitutes merchandise intended for consumption that is not subject to an AD order.

[14] The court further notes that DTT USA, upon entering the subject merchandise could not have reported "Thailand" as the country of origin while also reporting the diamond sawblades as "type 03" (subject to AD orders), as Customs suggested DTT USA should have done. The court considers the impracticability — if not impossibility — of registering the diamond sawblades in this manner as a further indication of the lack of consideration Customs has afforded to the particular facts of this case and the legal issue presented in this case. Oral Arg. Tr. at 69:23-70:8.

545 F Supp. 3d at 1355.[15] Customs failed to provide such an explanation altogether, and therefore Customs' Remand Results are not entitled to deference under *Chevron*, or deference or respect under *Skidmore*.[16]

c. Intent or knowledge of falsity

Customs concluded that DTT USA's failure to select the correct entry type for its imports of diamond sawblades constituted a material and false statement and that "there is simply no language in the EAPA statute requiring [Customs] to find that an importer made false statements intentionally or with a degree of culpability." Remand Results at 14. Customs' response to the court's remand centered around Customs' legal argument protesting that Customs did not have to prove intent or culpability, Remand Results at 4, 14, and failed to provide reasoning adequate to support its conclusion.

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[15] In fact, the court elaborated that "[t]he fact that there may be additional consequences to an importer from a finding of evasion punctuates the need for Customs to provide a . . . well-reasoned explanation." *Diamond I,* 45 CIT at __, 545 F Supp. 3d at 1355. Customs claimed that "not all EAPA investigations may result in a penalty action." Remand Results at 6. Customs' attempt to respond to this aspect of this court's Remand Order by dismissing the exposure and potential liability to an exporter is not persuasive. In fact, Customs' own discussion confirms the accuracy and import of the court's initial statement: namely, that an affirmative finding of evasion by Customs creates exposure to additional consequences.

[16] A significant motivation for applying *Skidmore* respect is to promote uniformity and reliance on administrative agencies' decisions. *See Skidmore,* 323 U.S. at 140; *see also United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (iterating the "value of uniformity in [Customs'] administrative and judicial understandings of what a national law requires"). According *Skidmore* respect in this case would actually *undermine* the goals of uniformity and reliance identified by the Court. DTT USA relied on crystal clear language — language not susceptible of any other possible interpretation — in an administrative determination. To penalize DTT USA for doing so would harm not only DTT USA, but also the credibility of the administrative process.

There may be circumstances in which a determination by Commerce would create the need for a different responsive action by the importer, including instances in which an importer should request a scope ruling. Those circumstances could include instances in which Commerce was unclear, or expressly or by inference explained that the scope might need to evolve due to developments in the industry or in the manufacturing of the subject merchandise, or cases in which the scope covered multiple products or product varieties. Such a formulation could include, for example, Commerce basing its instructions on certain percentage values for the components or manufacturing processes, or the record indicating that these values might evolve and suggesting that the scope of the order might need to be revisited should the values change.

Whatever the possibility of any of these scenarios arising in the future, none is presented here. In this case, not only did Commerce issue a clear and precise scope determination regarding country of origin, Commerce also expressly asked and answered the question of possible circumvention in the accompanying IDM. *See* 2006 IDM at Comment 4. DTT USA relied on and followed Commerce's clear and specific instructions — including Commerce's explicit rejection of petitioner's circumvention concerns. In view of these points, DTT USA's entry of diamond sawblades under type 01 instead of type 03 does not constitute a material and false statement under the EAPA.

CONCLUSION

Directed by Guy Hamilton, *Diamonds Are Forever* is a 1971 spy film based on the novel of the same title, authored by Ian Fleming. The film features Agent 007 James Bond in his efforts to uncover a diamond smuggling operation and foil plans to launch a weaponized laser satellite. In one scene, after many failed attempts to subdue him, Bond is knocked out by two henchmen, Mr. Wint and Mr. Kidd. As they load Agent Bond into the trunk of their car to dump him in a pipe in the desert, they have the following exchange:

Mr. Wint: “If at first you don’t succeed, Mr. Kidd. . .”

Mr. Kidd: “Try, try again, Mr. Wint.”[17]

* * *

For the foregoing reasons, the court remands Customs’ Remand Results to Customs for reconsideration in conformity with this court’s opinion. The court directs Customs to reconsider its conclusion consistent with this decision and the facts of this case and, in particular, the applicability of the EAPA in the confined circumstance of an importer’s reliance on Commerce’s clear directive.

Based on the foregoing reasons, it is hereby

ORDERED that Customs’ Remand Results are remanded to Customs for reconsideration to make a finding in conformity with this opinion; it is further

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[17] DIAMONDS ARE FOREVER (Eon Productions 1971).

ORDERED that Customs shall file its remand results within 90 days following the date of this Opinion and Order; it is further

ORDERED that, within 14 days of the date of filing of Customs' remand results, Customs must file an index and copies of any new administrative record documents; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Customs files its remand results with the court.

/s/ Timothy M. Reif
Timothy M. Reif, Judge

Dated: December 16, 2022
New York, New York