

**CUSTOMS PENALTIES, LIQUIDATED DAMAGES,
AND RESPONSIBLE SUPERVISION:
DEVELOPMENTS IN 28 U.S.C. § 1582 IN 2010**

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This article reviews the decisions issued by the U.S. Court of International Trade (CIT) in 2010 where the United States government was the plaintiff. Known as “1582 cases” in reference to 28 U.S.C. § 1582, the section granting the CIT jurisdiction over certain types of collection actions brought by the United States government, the CIT’s decisions in 2010 offer three main teachings to the trade community. First, the Court continues to ensure that the government follows appropriate administrative procedures before taking the more drastic step of initiating a collection action against a private party. Second, the government also must take care in following appropriate judicial procedures and requirements if it is to successfully sue private parties for violations of U.S. trade laws. Third, Customs must follow its own administrative rulings and practice and not change them without notice to the trade community.

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I. INTRODUCTION

In 2010, the U.S. Court of International Trade (CIT) issued decisions in seven cases where the United States government was the plaintiff. Known as “1582 cases” in reference to 28 U.S.C. § 1582, the section granting the CIT jurisdiction over certain types of collection actions brought by the United States government,² the CIT’s decisions

2. 28 U.S.C. § 1582 (2006). The statute provides:

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

in 2010 offer three main teachings to the trade community. First, the Court continues to ensure that the government follows appropriate *administrative procedures* before taking the more drastic step of initiating a collection action against a private party. Second, the government also must take care in following appropriate *judicial procedures* and requirements if it is to successfully sue private parties for violations of U.S. trade laws. Third, U.S. Customs and Border Protection (Customs) *must follow its own administrative rulings and practice and not change them without notice* to the trade community.

II. THE GOVERNMENT MUST FOLLOW APPROPRIATE ADMINISTRATIVE PROCEDURES BEFORE TAKING COLLECTION ACTION AGAINST A PRIVATE PARTY

A. United States v. Tip Top Pants, Inc.

1. *Tip Top I*

In the first 1582 decision issued in 2010, *United States v. Tip Top Pants, Inc. (Tip Top I)*³ the CIT considered whether the government was entitled to summary judgment in a penalty collection action brought against a corporate importer and its Chief Executive Officer. Customs alleged that both Tip Top Pants, Inc. (Tip Top) and its Chief Executive Officer (CEO) had violated Section 1592 in connection with a *single* importation of cotton denim shorts.⁴ Suing in the CIT, the government sought to collect penalties of approximately \$55,000.⁵ Thus, Tip Top

Id.

3. 32 I.T.R.D. (BNA) 1106 (Ct. Int'l Trade 2010).

4. *Id.* at 1106-07. 19 U.S.C. § 1592 provides, in relevant part:

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—

- (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of -
 - (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
 - (ii) any omission which is material, or
- (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592(a)(1). Penalties for violating § 1592(a) depend upon the violator's level of culpability. *Id.* § 1592(c).

5. *Tip Top I*, 32 I.T.R.D. (BNA) at 1109.

and the CEO found themselves in federal court over a single importation. The Court ultimately rules in favor of Tip Top and its CEO.

i. Background

To understand why the CIT ruled against the government, it is necessary to review the administrative proceeding against Tip-Top and its CEO. At the time of importation/entry, Tip Top asserted that the shorts qualified for preferential tariff treatment under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 9802.00.90.⁶ This tariff provision gives duty-free treatment for certain apparel goods assembled in Mexico from fabric components wholly formed and cut in the United States.⁷ During a routine inquiry by local Customs officials, known as a Request for Information or Customs and Border Protection Form (CBP Form) 28, Customs advised Tip Top that “[d]ue to the fact that this office is already reviewing your invalid claims, you are no longer eligible for the provisions set forth under 19 C.F.R. 162.74.”⁸ Section 162.74 of Title 19 Code of Federal Regulations (C.F.R.) allows importers to make “prior disclosures” to Customs so as to drastically reduce the penalties set forth in Section 1592, Title 19 U.S. Code (U.S.C.).⁹ For a prior disclosure to be valid, it must be done without knowledge of and prior to commencement of any investigation.¹⁰ Thus, the Request for Information sought to cut off Tip Top’s ability to file a prior disclosure. When Tip Top did not timely respond to the CBP Form 28, Customs proceeded to issue a second notice to Tip Top, known as a Notice of Action or CBP Form 29.¹¹ The CBP Form 29 advised that since Tip Top had failed to respond to the CBP Form 28, Customs was going to give Tip Top twenty more days to supply the information requested in the CBP Form 28.¹² It also stated that Customs would disallow Tip Top’s claims for duty-free treatment under HTSUS subheading 9802.00.90, that duties of 16.8% would be assessed, and that Customs believed Tip Top had made false claims under HTSUS subheading 9802.00.90, thereby rendering Tip Top subject to

6. *Id.* at 1107.

7. U.S. INT’L TRADE COMM’N, PUB. NO. 3477, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES subheading 9802.00.9000 (2002).

8. *Tip Top I*, 32 I.T.R.D. (BNA) at 1107.

9. 19 C.F.R. § 162.74 (2011).

10. 19 U.S.C. § 1592(c)(4) (2006); 19 C.F.R. § 162.74(a)(1) (2011).

11. *Tip Top I*, 32 I.T.R.D. (BNA) at 1107.

12. *Id.*

possible penalties.¹³

Subsequently, Customs issued a pre-penalty notice to Tip Top. Customs' pre-penalty notice stated that Tip Top had negligently made materially false statements, acts and/or omissions.¹⁴ In the section of the pre-penalty notice labeled "Material Facts Establishing Violation," the pre-penalty notice cited only that Tip Top had failed to reply to the CBP Form 28.¹⁵ Tip Top maintained that its shorts were eligible for duty-free treatment under NAFTA, and ultimately provided Customs with a NAFTA certificate of origin covering the shorts.¹⁶

Despite Tip Top's claims that the goods were eligible for NAFTA, Customs proceeded to issue a penalty notice to Tip Top.¹⁷ The penalty notice, like the pre-penalty notice, stated that the basis for the penalty was Tip Top's failure to respond to the CBP Form 28.¹⁸ Customs accompanied issuance of the penalty notice with a cover letter.¹⁹ The cover letter admonished that Customs found that the failure to timely provide a NAFTA certificate of origin demonstrated negligence and affected its ability to orderly and properly assess duties.²⁰ In response to the penalty notice, Tip Top offered a number of reasons as to why the penalty should be cancelled or substantially mitigated, including the fact that the goods qualified for NAFTA, Tip Top relied on its customs-house broker and other trade professionals, and this was Tip Top's first violation of the customs laws.²¹

Customs did not issue any response to Tip Top's petition.²² Instead, three years later, prior to filing suit, the government issued an "amended" penalty notice that was the same as the original penalty notice, except for the addition of one sentence.²³ The additional sentence stated "[t]he fact that the fabric was cut and assembled in Mexico disqualifies you from claiming 9802.00.9000; therefore, your HTS 9802.00.9000 claim was false."²⁴ Tip Top did not pay the amended penalty notice and litigation ensued.

13. *Id.*

14. *Id.*

15. *Id.* at 1107-08.

16. *Id.* at 1108.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1108-09.

22. *Id.* at 1109.

23. *Id.*

24. *Id.*

Following completion of discovery, the government moved for summary judgment.²⁵ Tip Top and its CEO moved to have the penalty action dismissed with respect to the CEO and also argued the government's motion should be denied due to the government's failure to comply with the statute and regulations pertaining to the issuance of penalties.²⁶

ii. Customs' Failure to Comply with the Statutory and Regulatory Requirements for Issuance of a Penalty

Observing that Section 1592(b)(2) (as well as 19 C.F.R. § 171.21 (2009)) requires Customs to issue a written statement setting forth the agency's final determination, including findings of fact and conclusions of law on which the agency's determination is made, Judge Stanceu reasoned that Customs' failure to comply with Section 1592(b)(2) precluded the government's ability to obtain summary judgment.²⁷ In so ruling, the Court reasoned that the amended penalty notice neither stated it was a final determination, nor responded to Tip Top's arguments in its penalty mitigation petition.²⁸ Thus, the Tip Top decision confirms that in order for the government to collect penalties in a Section 1582 case, it must be able to demonstrate adherence to the statutory and regulatory procedures involving the assessment of penalties.

iii. Dismissal of the Case Against Tip Top's CEO

Evidence of the CIT's insistence that Customs follow proper procedure is also seen in its dismissal of the lawsuit against Tip Top's CEO. In what can only be taken as a rebuke to Customs, Judge Stanceu reasoned (a) Customs had only alleged one fact with regard to the CEO, namely, that he was the CEO and (b) the government had conducted discovery for several years yet not amended its complaint with respect to the CEO and how he had violated Section 1592.²⁹ Noting that Section 1592 prohibits any person from entering, introducing, or attempting to enter or introduce merchandise into the commerce of the United States by materially false statements, acts, or omissions that were the result of negligence, gross negligence, or fraud, Judge Stanceu found

25. *Id.*

26. *Id.*

27. *Id.* at 1109-10.

28. *Id.*

29. *Id.* at 1112.

the government's complaint completely devoid of any allegations as to what the CEO did or did not do.³⁰

To be sure, the Court recognized that in prior cases corporate officers have been held liable for Section 1592 violations committed in the capacity of their employment, but it found those cases distinguishable.³¹ For example, the Court found *United States v. Priority Products, Inc.*,³² not to be on point. In that case, the Court of Appeals for the Federal Circuit held that Customs' failure to serve corporate officers, directors, or shareholders with written pre-penalty or penalty notices during the administrative penalty proceeding does not deprive the CIT of subject matter jurisdiction over a complaint against those persons to recover a civil penalty originally assessed against the corporation.³³ The Federal Circuit also concluded in *Priority Products* that failure to include corporate officers and directors in the pre-penalty and penalty notices, where those individuals had actual notice of a proceeding, was not a deprivation of due process.³⁴ However, Judge Stanceu noted that the case did not establish the broader proposition that serving as an officer at the time a corporation imports merchandise is sufficient, by itself, to establish that officer's liability for acts committed by the corporation that are found to violate Section 1592.³⁵ Judge Stanceu also observed that the *Priority Products* case did not involve the sufficiency of government pleadings.³⁶

Turning to two other cases offered by the government against the dismissal of the CEO from the case, *United States v. Matthews*,³⁷ and *United States v. Golden Ship Trading*,³⁸ Judge Stanceu again found them distinguishable.³⁹ His rationale was that *Matthews* did not address sufficiency of pleadings and, in any event, the defendants in *Matthews* had committed specific acts that were part of the Section 1592 violation.⁴⁰ With respect to *Golden Ship*, Judge Stanceu noted that the complaint in that case, unlike the one in *Tip Top*, contained specific

30. *Id.* at 1112-13.

31. *Id.* at 1113.

32. 793 F.2d 296 (Fed. Cir. 1986).

33. *Id.* at 300.

34. *Id.* at 301.

35. *Tip Top I*, 32 I.T.R.D. (BNA) at 1113.

36. *Id.*

37. 533 F. Supp. 2d 1307 (Ct. Int'l Trade 2007).

38. 22 Ct. Int'l Trade 950 (1998).

39. *Tip Top I*, 32 I.T.R.D. (BNA) at 1113.

40. *Id.*

allegations as to what the corporate officials did.⁴¹

2. *Tip Top II*

Having suffered defeat in *Tip Top I*, the government, pursuant to Rule 59 of the Rules of the CIT, moved for reconsideration.⁴² The basis for the government's motion was that no procedural violation occurred and that, in the alternative, even if one did occur, it should be disregarded because Tip Top suffered no prejudice.⁴³ The Court denied the government's motion.⁴⁴

Claiming the government's failure to reconsider its decision in *Tip Top I* would result in manifest injustice, the government urged the Court to take into account that (a) Customs issued an amended penalty notice, (b) Tip Top never responded to the amended penalty notice, and (c) Tip Top never contended that Customs failed to follow procedures.⁴⁵ With regard to (b) and (c) the Court noted that these facts were not in the government's Rule 56(h) Statement of Material Facts Not in Dispute and that the Court would not, on a motion to reconsider, entertain introduction of new facts.⁴⁶ Even if they would have been included, the Court advised it would not cure the procedural defects in the government's case since Tip Top did not have a legal obligation to respond to the amended penalty notice.⁴⁷ The cases offered by the government in support of its position that Tip Top was not prejudiced either did not involve Section 1592 or, if they did, did not involve statutorily required determinations.⁴⁸

Finally, with regard to the issuance of the amended penalty notice, the Court disagreed and reminded the government that it had, in fact, discussed the impact of the amended penalty notice on the procedural defect.⁴⁹ Moreover, the Court observed that Customs itself had issued the amended penalty notice because Customs agreed that the original penalty determination was invalid.⁵⁰ Judge Stanceu instructed that

41. *Id.* at 1113-14.

42. *See* United States v. Tip Top Pants, Inc. (*Tip Top II*), 32 I.T.R.D. (BNA) 1818 (Ct. Int'l Trade 2010).

43. *Id.* at 1819.

44. *Id.*

45. *Id.* at 1822.

46. *Id.* at 1822 n.3.

47. *Id.* at 1822.

48. *Id.* at 1824.

49. *Id.* at 1822.

50. *Id.*

issuance of the amended penalty notice did not cure the defect of Customs' failure to issue a written determination in response to Tip Top's petition for mitigation or remission of the penalty.⁵¹

B. United States v. UPS

1. *UPS I*

The second 1582 decision issued in 2010, *United States v. UPS Customhouse Brokerage, Inc. (UPS I)*,⁵² also confirms that Customs must adhere to proper administrative procedures during the penalty process. The January 2010 *UPS* decision continued litigation between the government and UPS Customhouse Brokerage, Inc. (UPS) over whether the government was entitled to collect \$75,000 in penalties against a customs broker, UPS, as a result of UPS' alleged violation of 19 U.S.C. § 1641(b)(4).⁵³ Section 1641 requires customs brokers to exercise responsible supervision and control over their business and Customs believed UPS had violated Section 1641. The CIT's January 2010 decision in *UPS* followed a remand by the Federal Circuit from earlier litigation.

i. Background

A brief review of the background of the *UPS* litigation helps put the CIT's decision in context. In 2004, the government filed suit to collect \$75,000 in penalties against UPS.⁵⁴ Customs assessed the penalties because it believed UPS incorrectly classified imported merchandise on the customs declarations UPS filed in connection with the importations.⁵⁵ The CIT agreed with Customs and found that UPS had not exercised responsible supervision in violation of Section 1641.⁵⁶ In ruling for the government, the CIT considered Section 111.1 of Title 19 of the Code of Federal Regulations.⁵⁷ Section 111.1 defined "responsible supervision and control" as: "That degree of supervision and control necessary to ensure the proper transaction of customs business

51. *Id.*

52. 686 F. Supp. 2d 1337 (Ct. Int'l Trade 2010).

53. *Id.* at 1342.

54. *Id.*

55. *Id.* at 1343.

56. *United States v. UPS Customhouse Brokerage, Inc.*, 558 F. Supp. 2d 1331, 1354 (Ct. Int'l Trade 2008).

57. *Id.* at 1349; 19 C.F.R. § 111.1 (2011).

by a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide.”⁵⁸

Section 111.1 further states that the determination regarding responsible supervision and control will vary depending upon the circumstances in each instance and that “the factors which Customs *will consider* include, but are not limited to” (emphasis added):

1. The training records of employees of the broker
2. The issuance of written instructions and guidelines to employees of the broker
3. The volume and type of business of the broker
4. The reject rate for the various customs transactions
5. The maintenance of current editions of the Customs Regulations, the Harmonized Tariff Schedule of the United States, and Customs issuances
6. The availability of an individually licensed broker for necessary consultation with employees of the broker
7. The frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have a resident individually licensed broker
8. The frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker
9. The extent to which the individually licensed broker who qualifies the district permit is involved in the operation of the brokerage
10. Any circumstances which indicates that an individually licensed broker has a real interest in the operations of a broker.

The CIT’s original decision in UPS reasoned that each of Section 111.1’s ten factors did not have to be individually considered in every case or that Customs must weigh each and every one.⁵⁹ Instead, it ruled that Customs was able to consider them or look beyond them and consider the totality of the circumstances on a case by case basis.⁶⁰

On appeal, the Federal Circuit reversed the CIT’s decision that each factor does not have to be individually weighed and considered.⁶¹

58. 19 C.F.R. § 111.1 (2011).

59. 558 F. Supp. 2d at 1353.

60. *Id.*

61. *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1381 (Fed. Cir. 2009).

Specifically, the Federal Circuit found that the word “will” in the phrase “will consider” in Section 111.1 meant that Customs was obligated to consider each of the ten factors.⁶² Because the appellate record was bereft of any evidence that Customs had considered each of the ten factors, the appellate court vacated the CIT’s decision that UPS had not exercised responsible supervision and control and remanded the case back to the CIT.⁶³ The Court’s January 2010 decision contained the results from the Federal Circuit’s remand.

ii. Customs’ Failure to Comply with the Regulatory Requirements for Issuance of a Penalty Against the Broker

In light of the Federal Circuit’s decision that Customs *must* consider each of the ten factors listed in Section 111.1, and that the CIT had erred in upholding Customs’ determination, the CIT viewed the issue before it on remand as: “what impact does Customs’ failure to follow 19 C.F.R. § 111.1 have on Plaintiff’s action to recover monetary penalties against UPS under 28 U.S.C. § 1582(1)? Put another way, can Customs correct its error and demonstrate that it should be permitted to recover the penalty under Section 1582(1)?”⁶⁴

Importantly, the CIT reasoned that its role was not to impose penalties on a defendant, but to instead determine whether to permit the government to recover penalties already imposed.⁶⁵ As the CIT put it, “[t]o demonstrate that a penalty has been properly imposed . . . Plaintiff must establish both that the broker committed a violation of Customs law as the predicate for the penalty, and that all formal requirements of the procedure for imposing the penalty were properly followed by Customs.”⁶⁶ Ultimately, the CIT found that Customs did not adhere to all formal procedural requirements and dismissed the case.⁶⁷

Prior to dismissing the case, the CIT reviewed the various administrative procedural steps involved in issuance of a penalty against a customs broker.⁶⁸ These include:⁶⁹

62. *Id.* at 1382.

63. *Id.* at 1383.

64. *UPS I*, 686 F. Supp. 2d at 1345.

65. *Id.* at 1346.

66. *Id.*

67. *Id.* at 1351-52.

68. *Id.* at 1347-49.

69. *See generally* 19 U.S.C. § 1641(d)(2)(A) (2006); 19 C.F.R. §§ 111, 171 (2011).

1. Allegations or complaints that CBP makes indicating that a broker has violated Section 1641
2. A pre-penalty notice issued to the broker advising the broker of CBP's intent to assess a penalty that conveys to the broker the allegations or complaints of a violation of law along with opportunity for the broker to respond
3. A decision made with respect to whether the broker violated the law, including consideration of whether or not the broker exercised reasonable supervision and control and such decision must be issued to the broker in writing indicating the findings of fact and conclusions of law upon which the decision is based
4. The broker must be given an opportunity to request remission or mitigation of any penalty
5. Customs must refer the matter to the Department of Justice in the event the broker does not pay the penalty.

The CIT found that during the above administrative process CBP did not consider each of the Section 111.1 factors and requested that the government and UPS brief whether the CIT should:

1. Dismiss the case in light of the Federal Circuit's vacatur of the liability and penalty findings as a simple case in which the government failed to meet its burden of proof
2. Remand the case to Customs and, if so, what issues Customs should be instructed to address, or
3. Grant the government's request to reopen proceedings and allow the government to present additional testimony from the government's key witness on responsible supervision and control.⁷⁰

The CIT decided that it would dismiss the case. Its rationale was essentially that the government failed to prove at trial that Customs had considered each of the ten Section 111.1 factors.⁷¹ It rejected remanding the case because the Court was authorized by 28 U.S.C. § 2640(a) (6) to decide issues on a *de novo* basis.⁷² It also noted that its discretionary power to remand the case on a discretionary basis was inappropriate since the CIT had to decide the case based upon the record established

70. *UPS I*, 686 F. Supp. 2d at 1351.

71. *Id.* at 1352.

72. *Id.* at 1351.

before the Court and allowing a remand would allow the government, which, bore the burden of proof in the litigation, to create a factual record *after* trial, thereby rendering the government's burden of proof to be meaningless.⁷³

2. *UPS II*

As in *Tip Top*, the government moved for reconsideration pursuant to Rule 59 of the Rules of the Court of International Trade.⁷⁴ In support of its motion for reconsideration, the government asserted three arguments:⁷⁵

- a. That the Federal Circuit's decision announced a new controlling legal standard regarding the correct interpretation of Section 111.1 and that the CIT erred by not providing the government a chance to satisfy the new standard by either taking further trial evidence from the government or by remanding to Customs for further proceedings
- b. That the CIT improperly construed Customs' regulations without first giving Customs the chance to interpret its own regulations
- c. That Customs' error was harmless and correctable at trial *de novo* unless UPS could show substantial prejudice and UPS made no such showing.

The CIT's June 2010 decision denied the government's request for reconsideration.⁷⁶ The CIT found it to be wholly within its discretion as to whether or not to grant a motion for reconsideration and that such motions are not to be used to repeat arguments already made or litigated.⁷⁷ In essence, the CIT found that the government's Rule 59 motion was nothing more than a rehash of arguments previously presented and that the government knew that its compliance with Section 111.1 was at issue even prior to issuance of the Federal Circuit decision.⁷⁸

73. *Id.*

74. *United States v. UPS Customhouse Brokerage, Inc. (UPS II)*, 714 F. Supp. 2d 1296 (Ct. Int'l Trade 2010).

75. *Id.* at 1298.

76. *Id.* at 1301-06.

77. *Id.*

78. *Id.*

III. THE GOVERNMENT MUST FOLLOW APPROPRIATE JUDICIAL PROCEDURES
BEFORE TAKING COLLECTION ACTION AGAINST A PRIVATE PARTY

A. United States v. Callanish, Ltd.

In addition to insisting that Customs follow appropriate administrative procedures, the CIT's 1582 decisions in 2010 also illustrate that the government must follow judicial procedures. The Court's decision in *United States v. Callanish*⁷⁹ is of interest for this reason. It also is of interest because too often parties believe that only the importer may be liable for civil penalties. The decision serves to remind those involved in international trade that foreign suppliers, as well as importers, may be liable to the government for false statements, acts or omissions made in connection with an import transaction.

1. Background

The relevant facts of the *Callanish* decision are fairly straightforward. Starting in February 1985, the U.S Food and Drug Administration ("FDA") had instructed Customs that imports of evening primrose oil ("EPO") were to be denied entry since the FDA had not approved EPO for importation into the United States.⁸⁰ The government alleged that from 1988 to 1992 Callanish, Ltd. ("Callanish") shipped EPO to the United States.⁸¹ Callanish was the foreign supplier and companies other than Callanish acted as importer of record with Customs (one or more of which ultimately pled guilty to criminal violations resulting from the importation).⁸² Customs contended that when Callanish shipped the EPO to the United States Callanish (1) did not list or describe the product on the related commercial documentation as EPO, (2) listed a buyer on invoices for the goods as other than the true buyer, and (3) engaged in dual invoicing whereby the invoice presented to Customs did not describe the imported merchandise as EPO but a parallel actual invoice presented for payment did describe the merchandise as EPO.⁸³ Furthermore, Customs alleged that Callanish knew that (a) the importation of EPO into the United States was illegal and (b) the EPO would be imported under the cover of false docu-

79. *United States v. Callanish, Ltd.*, 32 I.T.R.D. (BNA) 2145 (Ct. Int'l Trade 2010).

80. *Id.* at 2146.

81. *Id.*

82. *Id.*

83. *Id.* at 2146-47.

ments.⁸⁴ Customs assessed Callanish a civil penalty in the amount of \$17,734,926 for violating 19 U.S.C. § 1592.⁸⁵ According to Customs, Callanish had fraudulently made materially false statements, acts, and/or omissions so Customs sought to collect a penalty equivalent to the domestic value of the merchandise.⁸⁶

When Callanish did not enter an appearance or otherwise answer the government's allegations in the CIT proceedings, the government sought and obtained an entry of default, a prerequisite for obtaining a default judgment.⁸⁷ Subsequently, the government sought entry of a default judgment.⁸⁸ The CIT denied the request, ruling that the government had not established it was entitled to a default judgment. According to the CIT, the government had not pled sufficient facts in its complaint to establish that Callanish had acted fraudulently.⁸⁹ In so ruling, the CIT afforded the government the opportunity to amend its complaint, and on July 31, 2009, the government filed an amended complaint.⁹⁰ The CIT's decision in 2010 reviewed whether the government's amended complaint had pled sufficient facts to support a default judgment.

2. Dismissal of the Government's Case Due to Failure to Adhere to Judicial Requirements for Entry of a Default Judgment

In its 2010 opinion, the CIT again rejected the government's motion for a default judgment. It found that the government had not sufficiently pled a necessary element of a Section 1592 violation, namely, the domestic value of the merchandise in question.⁹¹ The Court rejected the government's method for establishing the domestic value since the government had simply doubled the imported value and otherwise provided only a conclusory statement regarding domestic value.⁹² In sum, the Court dismissed the government's motion for failure to adhere to judicial requirements for entry of a default judgment. In so ruling, it notified the government that unless a new

84. *Id.* at 2147.

85. *Id.* at 2147.

86. *Id.* at 2146.

87. *Id.*

88. *Id.* at 2147.

89. *Id.* *see generally* United States v. Scotia Pharmaceuticals Ltd., 31 I.T.R.D. (BNA) 1500 (Ct. Int'l Trade 2009) (giving detailed factual background).

90. *Callanish*, 31 I.T.R.D. (BNA) at 2147.

91. *Id.*, 2147-48.

92. *Id.*

amended complaint as filed within sixty days of the date of the CIT's opinion, it would dismiss the case entirely.⁹³

B. United States v. Wilfran Agricultural Industries, Inc.

While the *Tip-Top* and *UPS* cases involved failures by the government at the administrative level to adhere to statutory and regulatory requirements for the imposition of penalties, and *Callanish* involved the government's failure to adhere to judicial procedure, the CIT's decision in *United States v. Wilfran*⁹⁴ involved the opposite. Namely, the *Wilfran* case demonstrates that Customs may collect penalties when it does comply with judicial rules.

1. Background

In *Wilfran*, the government sought to collect penalties it believed were owed in connection with the classification Wilfran Agricultural Industries, Inc. used to import certain dairy products on four entries of merchandise.⁹⁵ According to the government, the incorrect classification Wilfran used resulted in an underpayment of duties of approximately \$216,000.⁹⁶ Prior to issuance of the August 2010 slip opinion, entry of default had been made against Wilfran.⁹⁷ In the August 2010 decision, Judge Carman reviewed whether the CIT could properly exercise personal jurisdiction over the defendant, Wilfran, since in prior procedural wrangling Wilfran had suggested it was never properly served.

According to Wilfran's President, Wilfran had ceased doing business in April 2000.⁹⁸ The government attempted to personally serve a copy of the summons and amended complaint by delivering a copy to Wilfran's president's residence (the president's wife accepted service of process) and a copy to the president's principal place of business (Wilfran's president threatened to call the police if the process server did not leave the property immediately).⁹⁹ Records from the Pennsylva-

93. *Id.* at 2148.

94. *United States v. Wilfran Agric. Indus., Inc.*, 716 F. Supp. 2d 1352 (Ct. Int'l Trade 2010).

95. First Amended Complaint at 1, *United States v. Wilfran Agric. Indus., Inc.*, 716 F. Supp. 2d 1352 (Ct. Int'l Trade 2010) (No. 07-231).

96. *Id.* at 2.

97. *Wilfran*, 716 F. Supp. 2d at 1353.

98. *Id.* at 1354.

99. *Id.* at 1353-54.

nia Department of State Records did not indicate that Wilfran had ceased operations and listed a sole officer, a company president.¹⁰⁰ Wilfran's president, however, refused to accept service asserting that Wilfran had been defunct since 2000 and by 2003 had wound up business and liquidated its assets.¹⁰¹ Thus, the issue in *Wilfran* essentially was whether a corporate defendant was properly served with a summons and complaint.

2. The Government Successfully Served Wilfran

Judge Carman found service of process on Wilfran to be proper. Noting that, per Rule 4(g)(1) of the Rules of the CIT, a corporation could be served by delivering a copy of the summons and complaint to an officer and that state law controlled regarding service, Judge Carman observed that Pennsylvania state law required service to be effected by "handing a copy to . . . an executive officer . . . of the corporation" and barred service to be made to an adult at the recipient's abode.¹⁰² While no prior CIT case had involved facts where a company officer rejected service of process, Judge Carman found that there was no requirement that service be forced upon the defendant corporation's officer, particularly where the officer had threatened the process server with police action.¹⁰³ In so ruling, the Court also observed that Wilfran had received due process since its president was advised of the nature of the lawsuit and clearly understood the nature of the proceeding as evidenced by a motion to intervene and other filings by the company's president.¹⁰⁴ Furthermore, no evidence was produced to demonstrate that the president of the company was not, in fact, the company's president.¹⁰⁵ Finally, as the issue of service of process where a company officer refuses process and the documents are not left in the officer's immediate vicinity had also not been decided on Pennsylvania law, the Court declined to engage in a novel interpretation of Pennsylvania state law and instead rested its conclusion upon the Court's interpretation of Rule 4 of the Rules of the CIT.¹⁰⁶

100. *Id.* at 1355, 1358.

101. *Id.* at 1354-55.

102. *Id.* at 1356.

103. *Id.* at 1356-57.

104. *Id.* at 1357.

105. *Id.* at 1358.

106. *Id.*

IV. CUSTOMS MUST FOLLOW ITS OWN ADMINISTRATIVE RULINGS AND PRACTICE AND NOT CHANGE THEM WITHOUT NOTICE TO THE TRADE COMMUNITY

A. United States v. Pressman-Gutman Co.

Unlike most of the other Section 1582 cases issued in 2010, which involved either administrative or judicial procedural matters, the CIT's decision in *United States v. Pressman-Gutman*¹⁰⁷ involved an issue of substantive customs law, e.g., when does a conditional release period end, thereby triggering Customs' deadline for requesting delivery of merchandise it had previously conditionally released to the importer? *Pressman-Gutman* also addressed an issue rarely visited by the CIT, namely, that of conflicts of interest under rules of professional responsibility.

1. Background

In *Pressman-Gutman*, the government sought to recover \$120,000 in liquidated damages from an importer and/or its surety.¹⁰⁸ The government initiated the litigation after the importer failed to redeliver merchandise to Customs' custody.¹⁰⁹ Since timely redelivery of merchandise is a contractual obligation importers make under the terms of their import bond, the government claimed that Pressman-Gutman's failure to redeliver the goods was a contractual breach allowing the government to collect \$120,000 from the importer or the surety that issued the import bond.¹¹⁰

The facts of *Pressman-Gutman* are straightforward. Pressman-Gutman imported textile fabrics on two occasions (i.e., filed two entries).¹¹¹ Soon after importation, Customs issued Pressman-Gutman a Request for Information (CBP Form 28) for each entry.¹¹² On the CBP Form 28, Customs requested samples so that Customs could verify the classifica-

107. *United States v. Pressman-Gutman*, 721 F. Supp. 2d 1333 (Ct. Int'l Trade 2010).

108. *Id.* at 1334.

109. *Id.*

110. *Id.* Companies that import commercial merchandise into the United States are generally required to post a bond to ensure compliance with all statutory and regulatory requirements. *See* 19 C.F.R. § 113 (2011). Since bonds create contractual obligations, which in the case of import bonds are generally spelled out in 19 C.F.R. § 113.62 (2011), breaches of the bond are called "liquidated damages."

111. *Pressman-Gutman*, 721 F. Supp. 2d at 1336.

112. *Id.*

tion and quota category applicable to the merchandise.¹¹³ Pressman-Gutman complied with the request.¹¹⁴ Subsequent to receiving the samples, a local customs official in the port where the goods were imported issued a second set of CBP Form 28's stating: "[Samples] sent to the lab for analysis. Conditional release period extended for 90 days pending lab analysis. Failure to retain merchandise during the conditional release period can result in liquidated damages."¹¹⁵

As the Court noted, after Pressman-Gutman submitted the samples "one month passed, followed by another, and yet another."¹¹⁶ Three to four months after the samples were submitted, Customs demanded redelivery, claiming the goods were entered in the wrong quota category.¹¹⁷ Entry in the correct quota category (or at least the one Customs believed to be applicable) required presentation of a new document, known as a visa, that, due to the passage of time, could no longer be obtained.¹¹⁸ Thus, the goods were inadmissible and Customs demanded redelivery, effectively requiring Pressman-Gutman to either export or destroy the goods.¹¹⁹ Unfortunately for Pressman-Gutman, the fabric had already been distributed to its customers so it was not able to redeliver the goods and Customs proceeded to assess liquidated damages.¹²⁰ When Pressman-Gutman and its surety did not pay the claim for liquidated damages, the government initiated suit.¹²¹

2. The CIT Finds Customs Failed to Adhere to its Own Position and Policy Regarding Conditional Release Periods and When They End

In what can only be described as a strong rebuke to the government, the CIT found it "not just implausible that the government could prevail in this case; it is impossible."¹²² The Court added "the government's theory of this case is bankrupt The government has no colorable claim here. This is an action that never should have been brought."¹²³

113. *Id.*

114. *Id.*

115. *Id.* at 1337.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1338.

123. *Id.* at 1336.

A brief review of the regulations and agency practice at issue in the *Pressman-Gutman* case helps explain the CIT's frustration with the government. Under Customs' regulations, "any demand for redelivery . . . [must] be made no later than 30 days after the date that the merchandise was released or 30 days after the end of the conditional release period (whichever is later)."¹²⁴ Customs must issue redelivery demands "promptly."¹²⁵ Customs regulations do not define what constitutes "promptly," but over 20 years of administrative agency pronouncements, including issuance of a document to the trade known as *What Every Member of the Trade Community Should Know About: Entry*, established Customs' position that "promptly" meant, in the case where samples were requested, within thirty days of Customs' receipt of the samples.¹²⁶

The government argued that nothing in the language of Section 113.62(d) prevented the local Customs officials from extending the conditional release period so long as a demand for redelivery was made within thirty days after the conditional release period ended.¹²⁷ The Court found this argument unpersuasive since Section 113.62(d) does not define the phrase "conditional release period" and Customs' pronouncements over twenty years had established a clear agency practice whereby the "conditional release period" ends upon Customs' receipt of samples.¹²⁸ The Court appeared particularly frustrated that the government offered no citation or authority to dispute the "unambiguous and unequivocal" agency interpretation of Section 113.62(d).¹²⁹ To be sure, the Court noted that Customs was free to change its practice, but that such a change must be effected properly.¹³⁰ In the *Pressman-Gutman* case, the Court noted Customs failed to acknowledge, much less proffer, any rationale for the change.¹³¹ Indeed, the Court observed that there was "no indication that the individual Customs staffer in this case recognized that the demands for redelivery here were bucking 20 years of settled Customs Headquarters precedent."¹³²

Similarly, the government also argued that nothing in the language

124. 19 C.F.R. § 113.62(d) (2011).

125. 19 C.F.R. § 141.113(b) (2011).

126. *Pressman-Gutman*, 721 F. Supp. 2d at 1338-43.

127. *Id.* at 1343-48.

128. *Id.* at 1348.

129. *Id.* at 1345.

130. *Id.* at 1346.

131. *Id.*

132. *Id.* at 1346-47.

of Section 141.113(c), which requires the government to make demands for delivery “promptly,” imposes a specific timeline for doing so; accordingly, it urged that the local official issued the demand for redelivery promptly.¹³³ Again, the CIT rejected the government’s argument noting that such an interpretation was inconsistent with over twenty years of agency statements that defined “promptly” to mean within thirty days of receipt of samples.¹³⁴ The CIT did not fail to notice that the government did not cite a single administrative ruling that permitted redelivery to be made more than thirty days after receipt of the sample.¹³⁵

Finally, the government urged the Court to find in its favor since three administrative decisions had indicated that Customs must demand redelivery within thirty days of receipt of the samples “or take other appropriate action,” and Customs actions with respect to Pressman-Gutman constituted permissible “other appropriate action” permitted under the decisions.¹³⁶ In rejecting the government’s argument, the CIT again observed that the government “cites no case law or Customs Headquarters rulings to support its claim that the actions of the Customs staffer here excused the agency from issuing a demand for redelivery within 30 days of the agency’s receipt of the requested samples.”¹³⁷ The Court also found that there was no authority for interpreting the phrase “other appropriate action” so as to eviscerate the “hard-and-fast 30-day limitation on the issuance of demands for redelivery set forth in 20 years of Customs Headquarters rulings. In fact, all authority is quite to the contrary.”¹³⁸ The Court reasoned that the very rulings cited by the government “flatly and unequivocally—with no hedging whatsoever” defined “promptly” to mean within thirty days of receipt of samples. “Period. Full stop.”¹³⁹

3. The Surety’s Claim Against Pressman-Gutman

An interesting ancillary aspect of the CIT’s decision in *Pressman-Gutman* involved refereeing a dispute between the importer and its surety over whether the importer was required to post collateral

133. *Id.* at 1348-49.

134. *Id.* at 1349.

135. *Id.* at 1349 n.11.

136. *Id.* at 1349-54.

137. *Pressman-Gutman*, 721 F. Supp. 2d at 1350.

138. *Id.*

139. *Id.* at 1351.

security in favor of the surety and whether the importer was required to pay for the surety's legal fees.¹⁴⁰ The CIT ruled that the surety's motion to compel payment of the collateral security was mooted by the CIT finding in favor of the importer on the underlying issue of the timeliness of Customs' redelivery notice.¹⁴¹ With regard to legal fees, Pressman-Gutman claimed that it should not have to reimburse the surety for legal fees incurred by the surety since the law firm representing the surety had previously represented Pressman-Gutman during administrative proceedings involving the redelivery notice.¹⁴²

By way of background, as noted above, companies that import commercial shipments into the United States are required to post a bond to ensure that all regulatory and statutory obligations associated with the importations are satisfied. One of the clauses in the bond signed by Pressman-Gutman essentially required Pressman-Gutman to reimburse the surety for attorneys fees in the event litigation ensued in connection with the bond.¹⁴³ The bond also stated that the mere demand upon the surety for payment under the bond triggered an obligation by Pressman-Gutman to place funds as collateral security to cover the surety's potential liability to the government.¹⁴⁴ Thus, when Customs alleged that Pressman-Gutman had violated the bond by not timely redelivering merchandise, the surety notified Pressman-Gutman that it was invoking the collateral security clause of the bond.¹⁴⁵ Pressman-Gutman, however, did not post the collateral security believing, in essence, that Customs' demands were not legal.¹⁴⁶

As discussed above, the government ultimately sued both the surety and Pressman-Gutman for non-payment of the liquidated damages.¹⁴⁷ At the time of the government's lawsuit (six years after the original importations), Pressman-Gutman had changed counsel to a different law firm and Pressman-Gutman's prior law firm was retained by the surety.¹⁴⁸ Pressman-Gutman moved to disqualify its prior law firm from representing the surety in the litigation based on the prior law firm's conflict of interest.¹⁴⁹ Pressman-Gutman's prior law firm eventually

140. *Id.* at 1355-68.

141. *Id.* at 1355.

142. *Id.*

143. *Id.* at 1356.

144. *Id.*

145. *Id.* at 1357.

146. *Id.*

147. *Id.* at 1358.

148. *Id.*

149. *Id.*

withdrew its appearance on behalf of the surety and new counsel appeared on behalf of the surety.¹⁵⁰ Notwithstanding the change in counsel, Pressman-Gutman asserted that the indemnity agreement it had originally signed with the surety did not require it to pay attorneys' fees and expenses "generated by a law firm whose representation [of the surety] would give rise to a conflict of interest cognizable under the New York Lawyer's Code of Professional Responsibility."¹⁵¹

The CIT, for the most part, agreed with Pressman-Gutman. First, the CIT referred to New York Lawyer's Code of Professional Responsibility Disciplinary Rule (DR) 5-108, which governs an attorney's continuing duty to a former client and states, in relevant part:

"... [A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client."

The CIT found it clear that Pressman-Gutman never consented to its prior law firm representing the surety, a point the surety did not dispute.¹⁵² It also agreed with Pressman-Gutman that it was "beyond cavil" and "patently clear" that its prior law firm's engagement with the surety was on "the same or a substantially related matter" under DR 5-108(A).¹⁵³ With regard to the last element of DR 5-108(A), namely, that the interests of the new client be "materially adverse" to the interests of the former client, the CIT found the surety's contention that there was no conflict at the time the law firm previously represented Pressman-Gutman to be a bald, conclusory assertion not borne out by the record of the case.¹⁵⁴ Having found that the prior law firm had a conflict of interest when it represented the surety, the CIT ruled that Pressman-Gutman did not have to reimburse the surety under the terms of the indemnity agreement for legal fees incurred by the surety.¹⁵⁵ The CIT found that to do so would be "inappropriate."¹⁵⁶

150. *Id.*

151. *Id.* at 1359.

152. *Id.* at 1361.

153. *Id.* at 1362.

154. *Id.* at 1363.

155. *Id.* at 1367.

156. *Id.*

V. CONCLUSION

The CIT's 1582 cases in 2010 demonstrate that the CIT will continue to be vigilant in protecting traders against improperly initiated collection lawsuits. The cases teach that any government collection action must follow statutory, regulatory, and administrative requirements. Of course, the cases also demonstrate that the government will be able to enforce the customs laws when it follows these requirements.