

United States Court of Appeals for the Federal Circuit

**ERWIN HYMER GROUP NORTH AMERICA, INC.,
FKA ROADTREK MOTORHOMES, INC.,**
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2018-1282

Appeal from the United States Court of International
Trade in No. 1:16-cv-00133-CRK, Judge Claire R. Kelly.

Decided: July 22, 2019

JOHN MICHAEL PETERSON, Neville Peterson LLP, New
York, NY, argued for plaintiff-appellant. Also represented
by RICHARD F. O'NEILL.

MARCELLA POWELL, International Trade Field Office,
Commercial Litigation Branch, Civil Division, United
States Department of Justice, New York, NY, argued for
defendant-appellee. Also represented by AMY RUBIN;
JEANNE DAVIDSON, JOSEPH H. HUNT, WASHINGTON, DC;
MICHAEL W. HEYDRICH, Office of the Assistant Chief Coun-

sel, United States Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

Before DYK, REYNA, and CHEN, *Circuit Judges*.

REYNA, *Circuit Judge*.

Erwin Hymer Group North America, Inc., appeals the final judgment of the United States Court of International Trade granting the Government’s motion for judgment on the agency record. The Court of International Trade’s assertion of residual jurisdiction under 28 U.S.C. § 1581(i) was improper because a civil action for contesting the denial of protests could have been available under 28 U.S.C. § 1581(a), and the remedy provided under § 1581(a) is not manifestly inadequate. Because the Court of International Trade lacked jurisdiction, we reverse and remand with instructions to dismiss.

BACKGROUND

In 2014, Erwin Hymer Group North America, Inc., (“Hymer”) imported 149 vehicles into the United States from Canada. In 2015, the United States Customs and Border Protection (“Customs”) liquidated the entries, classifying them under subheading 8703.24.00 of the Harmonized Tariff Schedule of the United States (2014) (“HTSUS”). Subheading 8703.24.00 applies a tariff of 2.5% *ad valorem* to “motor vehicles principally designed for transporting persons” and with a “spark-ignition internal combustion reciprocating piston engine . . . [o]f a cylinder capacity exceeding 3,000 cc.” Customs assessed duties accordingly.

In October 2015, Hymer timely filed a protest under 19 U.S.C. § 1514, contesting Customs’ classification of the vehicles. The protest materials included, among other

things, a cover letter, a standard form (“Protest Form”),¹ and a memorandum in support of the protest. Hymer argued in its protest that the entries were entitled to duty-free treatment under HTSUS subheading 9802.00.50 and Article 307 of the North American Free Trade Agreement, a provision known as “American Goods Returned.” This provision generally relates to preferential tariff treatment for qualifying goods that reenter the United States customs territory after repairs or alterations in Canada or Mexico. *See* 19 C.F.R. § 181.64(a).

In the cover letter attached to its protest, Hymer requested that Customs “suspend action on th[e] protest” until the Court of International Trade (“CIT”) issued a decision in a different case, *Roadtrek Motorhomes, Inc. v. United States*, No. 11-00249. *See* J.A. 5, 51. The CIT had stayed the *Roadtrek* case pending final disposition of a test case on the issues raised: *Pleasure-Way Indus., Inc. v. United States*, 38 I.T.R.D. 1889 (BNA), 2016 WL 6081818 (Ct. Int’l Trade 2016) (“*Pleasure-Way I*”), *aff’d*, 878 F.3d 1348 (Fed. Cir. 2018) (“*Pleasure-Way II*”).²

In *Pleasure-Way I*, the CIT’s jurisdiction was based on 28 U.S.C. § 1581(a). The CIT addressed whether certain van-based motorhomes—similar to the vehicles at issue in this case—qualified for preferential tariff treatment under HTSUS subheading 9802.00.50. *Pleasure-Way I*, 2016 WL

¹ Hymer refers to the Protest Form as the “CF 19 Protest Form,” and the Government refers to it as the “CBP Form 19.” Appellant Br. 4; Appellee Br. 3.

² Hymer, formerly known as Roadtrek Motorhomes, Inc., was the plaintiff in the *Roadtrek* case. In addition, Hymer’s counsel in this case also represented Roadtrek and Pleasure-Way in those cases. All three cases involve essentially the same issue: whether the vehicles in question qualify for duty-free treatment under HTSUS subheading 9802.00.50. In both *Roadtrek* and *Pleasure-Way*, CIT jurisdiction was asserted under 28 U.S.C. § 1581(a).

6081818, at *3. The CIT decided that HTSUS subheading 9802.00.50 did not apply, and on January 5, 2018, this court affirmed that decision. *Pleasure-Way II*, 878 F.3d at 1349–50. Subsequently, entries of the vehicles were liquidated at a rate of 2.5% *ad valorem*, the same rate that Customs argues should apply in this case.

While *Pleasure-Way* was pending, a Customs Import Specialist reviewed Hymer’s protest, and on December 31, 2015, checked a box labeled “Approved” in Field 17 of the Protest Form. Customs sent a copy of the Protest Form with the checked box to Hymer but did not include a refund check or offer any explanations.

On January 5, 2016, a Customs Entry Specialist forwarded Hymer’s protest for review by a supervisor. On January 11, 2016, while the matter was pending before the Entry Specialist, Hymer received a copy of the Protest Form with the “Approved” box checked. On the same day, a Supervisor Import Specialist emailed an Entry Director asking her to locate Hymer’s protest and explaining that reliquidation should not occur because the protest was suspended. The Entry Director in turn advised other Customs employees not to reliquidate the entries. The following day, on January 12, 2016, the Entry Director informed the Supervisor Import Specialist that the protest had been returned to the Import Specialist who initially reviewed the protest because the protest had not been signed by the Supervisor Import Specialist. On January 21, 2016, the Import Specialist updated Customs’ electronic system to reflect that, per Hymer’s request, the protest was suspended pending resolution of the *Roadtrek* case.

On March 17, 2016, Hymer’s counsel emailed the Import Specialist indicating that, on January 11, 2016, counsel had received a copy of the Protest Form with the “Approved” box checked, and asked whether the protest was suspended. On March 27, 2016, the Import Specialist

replied and confirmed that the protest was suspended pending resolution of *Roadtrek*.

On July 18, 2016, approximately 7 months from the date it learned of the checked-box, no-refund-check circumstance, Hymer sued the Government in the CIT, seeking an order of mandamus directing Customs to reliquidate the entries of the vehicles under HTSUS subheading 9802.00.50. Hymer asserted CIT jurisdiction under 28 U.S.C. § 1581(i)(1) and (i)(4),³ and on grounds that Customs' failure to provide a refund check constituted unlawfully withheld action under the Administrative Procedure Act, 5 U.S.C. § 706(1). The Government answered the complaint, and both parties filed competing motions for judgment in their favor.

Hymer argued that the "Approved" box on the Protest Form constituted an "allowance" under 19 U.S.C. § 1515(a),⁴ requiring Customs to refund Hymer's excess

³ In relevant part, 28 U.S.C. § 1581(i) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

...

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

⁴ In relevant part, 19 U.S.C. § 1515(a) provides:

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