United States v. UPS Customhouse Brokerage, Inc.: The Status of Remedies Under the CBP Broker Penalty Statute

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I. INTRODUCTION

When the United States Court of Appeals for the Federal Circuit rendered its decision in *United States v. UPS Customhouse Brokerage, Inc.* (*UPS V*),[1] the community[2] was left with an unanswered question: What is the maximum penalty United States Border and Customs Protection (CBP) can assess against a customs broker for failing to exercise responsible supervision and control as required by the Broker Penalty Statute?[3]

At the trial level, the three main questions were (1) whether UPS misclassified certain computer parts, (2) whether its repeated misclassifications of the computer parts constituted a single violation or multiple violations of the Customs Brokers' Statute, and (3) whether a multiplicity

1. 575 F.3d 1376 (Fed. Cir. 2009). Before reaching the Federal Circuit, this litigation had produced four decisions by the United States Court of International Trade (CIT): *United States v. UPS Customhouse Brokerage, Inc.* (*UPS I*), 30 Ct. Int'l Trade 808 (2006) (denying UPS's motion for partial summary judgment and CBP's motion to strike); *United States v. UPS Customhouse Brokerage, Inc.* (*UPS II*), 30 Ct. Int'l Trade 1612 (2006) (granting UPS's motion to certify question), *appeal denied*, 213 F. App'x 985 (Fed. Cir. 2006); *United States v. UPS Customhouse Brokerage, Inc.* (*UPS III*), 31 Ct. Int'l Trade 1023 (2007) (denying CBP's motion for summary judgment); *United States v. UPS Customhouse Brokerage, Inc.* (*UPS IV*), 558 F. Supp. 2d 1331 (Ct. Int'l Trade 2008).

2. This Article uses the word "community" to denote affected parties at large, e.g., importers, customs brokers, CBP, as well as international trade lawyers and judges.

3. *See* 19 U.S.C. § 1641(d)(2)(A) (2006).

of violations breached UPS's statutory duty to exercise responsible supervision and control.[4]

These three issues, in turn, subsumed additional questions: Can CBP impose penalties aggregating more than $30,000?[5] Does the Broker Penalty Statute limit the number of penalties CBP may assess?[6] Should repeated misclassification be treated as a pattern of conduct and, thus, be penalized as one instance,[7] or may CBP construe each misclassified entry as a separate and distinct violation of the Broker Penalty Statute?[8] Does the doctrine of multiplicity serve as a good theory in civil and administrative cases?[9]

With the foregoing in mind, the goal of this Article is twofold: (1) to outline the root of this controversy, and (2) to discuss whether the Court of International Trade (CIT) correctly held that there are no limitations on the number of penalties CBP can issue under the Broker Penalty Statute. The root of the litigation was the failure of Congress and CBP to define the phrase "violation or violations" in the Broker Penalty Statute[10] and in the regulations,[11] respectively.

Part II of this Article provides a detailed factual, procedural, and substantive background of the *UPS* case(s). Part III analyzes the litigants' contentions on the issue of violation of the Broker Penalty Statute, the issue that was raised and left unresolved in the controversy. Part IV summarizes the state of the law following the litigation, whereas Part V provides the gist of this Article: the authors' opinion that the CIT was correct when it held that under the current Broker Penalty Statute, CBP can issue an unlimited number of penalties.

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4. *UPS V*, 575 F.3d at 1377.

5. 19 C.F.R. § 111.91 (2010) ("[CBP] may assess a monetary penalty or penalties as follows: (a) In the case of a broker, in an amount not to exceed an aggregate of $30,000.").

6. *UPS IV*, 558 F. Supp. 2d at 1354–56.

7. *Id.*

8. CBP argued that each shipment of merchandise is a discreet event comprised of different merchandise from unique importers. *Id.* at 1354–55.

9. The CIT deferred to Congress to decide. *Id.* at 1354-55 nn.25-26.

10. 19 U.S.C. 1641(d)(2)(A) (2006).

11. 19 C.F.R. § 111.1 (2010).

II. FACTUAL, PROCEDURAL, AND SUBSTANTIVE HISTORY OF THE *UPS* CASE(S)

A. Administrative Proceedings

This controversy commenced more than ten years ago.[12] On May 15, 2000,[13] CBP issued three prepenalty notices to UPS for violations of the Broker Penalty Statute.[14] Subsequently, CBP issued three penalty notices, and UPS paid CBP a total of $15,000 in penalties.[15]

These payments did not conclude the matter. Prepenalty and penalty notices kept coming. Between July and August 2000, CBP issued five prepenalty notices followed by penalty claims in a total amount of $75,000.[16] UPS did not pay the penalties, thereby prompting the government to file suit to collect the penalties.[17]

All the penalty claims alleged the same violation: UPS failed to exercise "responsible supervision and control" over the classification of merchandise entered between January 10 and May 10, 2000.[18]

B. Factual, Procedural, and Substantive History at the United States Court of International Trade: UPS IV

Because UPS refused to pay the $75,000, the government filed a complaint against it, seeking to enforce the monetary penalties.[19] In turn, UPS attempted to put the fight to rest in a summary judgment motion.[20] UPS argued that the Broker Penalty Statute bars CBP from collecting more than a single monetary penalty for all violations of § 1641

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12. *See UPS I*, 30 Ct. Int'l Trade 808, 809 n.1 (2006) (relating that the parties were confused about the year when CBP issued the first pre-penalty notice).

13. "Based upon the record before it, the Court presumes that [CBP] concurrently issued three separate pre-penalty notices on May 15, 2000." *Id.*

14. The Brokers' Statute requires that CBP notify a customs broker prior to enforcing a penalty against the broker for a violation of the statute. 19 U.S.C. § 1641(d)(2)(A).

15. *UPS I*, 30 Ct. Int'l Trade at 809. UPS remitted the payment on October 1, 2001. *Id.*

16. *Id.* at 810.

17. *Id.* The government filed a complaint against UPS on December 17, 2004. On February 14, 2006, the government filed its first amended complaint seeking to recover $75,000, in total, for the five unpaid penalties assessed against UPS. *Id.* On April 21, 2005, UPS filed its answer to the government's complaint. The answer included nine affirmative defenses and no counterclaims. *Id.*

18. *Id.*

19. *Id.*

20. The CIT noted that despite the title "Summary Judgment," UPS did not seek to dispose of all of the issues. *Id.* at 810 n.8. With that, the court treated the motion as partial motion for summary judgment. *Id.*

preceding the issuance of a prepenalty notice.[21] In accord with this reasoning, UPS also asserted that it was owed a refund of $10,000 (from the $15,000 UPS had paid to CBP in 2001).[22] The CIT denied the motion.[23]

A bench trial took place in December of 2007.[24] In its briefs and at trial, CBP alleged that UPS failed to "exercise responsible supervision and control" over its "customs business"[25] when it repeatedly misclassified entries of merchandise under subheading 8473.30.9000,[26] the subheading that provides for electronic merchandise containing a cathode-ray tube (CRT). CBP sought enforcement of its $75,000 penalty claim.

The ultimate issue before the court was whether UPS had failed to "exercise responsible supervision and control."[27] The CIT found that UPS had failed to do so.[28] The government argued that even after CBP had warned UPS about the incorrect classification and had provided remedial training, UPS continued to classify merchandise not containing CRTs under 8473.30.90.[29] These persistent misclassifications prompted CBP to declare that UPS had failed to exercise responsible supervision and control over its customs business, thereby violating the Broker Penalty Statute.[30]

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21. *Id.* at 810. It is also worth mentioning that the National Customs Brokers & Freight Forwarders Association of America (NCBFFAA) appeared as amicus curiae arguing the same on behalf of UPS, albeit to no avail. *Id.* at 811.

22. *Id.* at 810-11.

23. *Id.* at 831.

24. *UPS IV*, 558 F. Supp. 2d 1331, 1335 (Ct. Int'l Trade 2008).

25. 19 U.S.C. § 1641(b)(4) (2006).

26. *UPS IV*, 558 F. Supp. 2d at 1335; U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, at XVI (2011), http://www.usitc.gov/publications/docs/tata/hts/bychapter/0600c84.

27. In order to prevail, CBP needed to satisfy the statutory requirement of 19 U.S.C. § 1641(d)(1)(C), which allows CBP to impose a monetary penalty when a broker "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision." 19 U.S.C. § 1641(d)(1)(C). Section 1641(b)(4) requires that CBP prove by preponderance of the evidence that (1) entity charged is a "customs broker," that (2) entity charged was engaged in "customs business," and that (3) the entity failed to "exercise responsible supervision and control" over its "customs business." *Id.* § 1641(b)(4). Here, the parties stipulated to the first and second issues. *UPS IV*, 558 F. Supp. 2d at 1335.

28. *Id.* at 1354.

29. *Id.* at 1335. Subheading 8473.30.9000 provides for "parts and accessories of automated data processing machines." *Id.*

30. *Id.*

1. The United States Court of International Trade's Preliminary Findings

Before resolving the ultimate issue, the CIT had to dispense with the preliminary factual and substantive findings. To that end, CBP had to prove that the imported electrical merchandise did not contain CRTs.

CBP met its burden. The parties stipulated that thirty-seven out of forty-five entries did not contain a CRT.[31] Because CBP withdrew three entries from consideration, it only had to prove the absence of a CRT in the merchandise covered by the remaining five entries.[32] The CIT was satisfied with the evidence CBP provided and found that the electrical merchandise did not contain CRTs.[33]

Next, the CIT determined that the goods were not classified in 8473.30.90. To arrive at that finding, the CIT used a two-step analysis: (1) it construed the relevant tariff headings and then (2) determined under which of those headings the merchandise at issue is properly classified.[34] At the conclusion of the analysis, the CIT determined that, as a matter of law, for merchandise to be classified under 30.90 subheading, the imported article must contain a CRT and that the merchandise at issue thus was improperly classified.[35] Finished with the preliminaries, the CIT took on the ultimate task.

2. The Ultimate Findings

As has been mentioned earlier, the ultimate question was that of responsible supervision and control pursuant to the Broker Penalty Statute.[36] First, the court examined the meaning of "responsible supervision and control" in the context of the customs brokerage business.[37] While the Broker Penalty Statute does not define the phrase "responsible supervision and control," CBP defined it in the implementing regulations. Specifically, § 111.1,[38] in relevant part, states:

> "Responsible supervision and control" means that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an

31. *Id.* at 1336.
32. *Id.* at 1338 n.8.
33. *Id.* at 1349.
34. *Id.* at 1345.
35. *Id.* at 1349.
36. *Id.*
37. *Id.* at 1349–50.
38. 19 C.F.R. § 111.1 (2010).

> employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide.[39]

The regulations explain that "the determination of what is necessary to perform and maintain responsible supervision and control will vary depending upon the circumstances in each instance."[40] They also list ten nonexclusive factors to help that determination.[41]

The CIT observed that the parties actually argued about application of the Broker Penalty Statute and its regulations to the facts of the matter rather than the substance of the regulations—the definition of "responsible supervision and control."[42]

While CBP argued that the factors listed in § 111.1 were discretionary and nonexclusive, UPS insisted that CBP failed to show its deficiency in any of the factors.[43] CBP maintained that because the regulations were discretionary—the listed factors provided guidance only—and thus did not require CBP to consider each of the ten factors to determine whether a customs broker failed to exercise responsible supervision and control.[44]

Conversely, UPS asserted that the regulations required CBP to consider all factors listed in the regulations.[45] According to UPS, the regulations' language—"factors which [CBP] *will consider*"—was mandatory rather than discretionary.[46] (The Federal Circuit concurred with UPS's position several months later.)

The CIT deferred to the agency's interpretation, thereby disagreeing with UPS. Although the court agreed that the text "will consider" is

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39. *Id.*
40. *Id.*
41. *Id.* These factors are:

> The training required of employees of the broker; the issuance of written instructions and guidelines to employees of the broker; the volume and type of business of the broker; the reject rate for the various customs transactions; the maintenance of current editions of the CBP Regulations, the Harmonized Tariff Schedule of the United States, and CBP issuances; the availability of an individually licensed broker for necessary consultation with employees of the broker; 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; the frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker; the extent to which the individually licensed broker who qualifies the district permit is involved in the operation of the brokerage; and any circumstance which indicates that an individually licensed broker has a real interest in the operations of a broker.

Id.

42. *UPS IV*, 558 F. Supp. 2d at 1350.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

ambiguous, it stated that as long as the author of the regulations—CBP—interprets the provision as discretionary, the court should defer to that interpretation when the interpretation is reasonable, and the CIT found that the interpretation was reasonable.[47]

In conclusion, the CIT upheld CBP's administrative finding concerning UPS.[48] Because the court found that the factors were mere guidance, it examined the factors that CBP actually had considered.[49] When summarizing CBP's evidence, the CIT stated that the evidence "presented a holistic, totality-of-the-circumstances application of section 111.1 to UPS's persistent misclassification violations where no single listed factor dominated."[50] In particular, CBP won the CIT over with evidence of a long-term campaign aiming to increase brokers' awareness with respect to the proper use of the subheading 8473.30.90, as well as with a showing that CBP provided training to UPS on the use of 8473.30.90.[51] During one of the training sessions attended by UPS officials, CBP informed the attendees that goods classified under heading 8473.30.90 "*must contain a cathode ray tube*" and that "[8473.30.90] should *almost never* be used."[52] Apparently, the fact that UPS officials attended the training, received this information, and seemingly ignored it by classifying merchandise under heading 8473.30.90, significantly hurt UPS's defense.[53]

After considering the factors issue and finding that UPS failed to exercise responsible supervision and control, the court also upheld the

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47. *Id.* at 1350-51. The CIT noted that first of all "[CBP's] definition of 'responsible supervision and control' . . . is reasonable." *Id.* at 1351. The court disagreed with UPS, stating that "where a rule states that an agency 'will consider' certain factors, this textual directive 'implies wide areas of judgment and therefore discretion.'" *Id.* at 1352 (citing Carolina Tobacco Co. v. Bureau of Customs & Border Prot., 402 F.3d 1345, 1350 (Fed. Cir. 2005)). Such discretion allowed CBP to weigh only some of the factors when considering whether UPS failed to exercise reasonable supervision and control of its brokerage business. *Id.* at 1353. The court further noted that it is charged with "defer[ing] to [CBP's] reasonable interpretation of its own regulations." *Id.* Here, CBP established that the § 111.1 factors were not exclusive, but served as guidance to the agency and the brokerage community. *Id.*

48. *Id.* at 1356.

49. *Id.* at 1352.

50. *Id.*

51. *Id.*

52. *Id.* at 1340. CBP officials further cautioned attendees that "[u]sing 8473.30.9000 sends up the red flag to [CBP] to look at that entry—it is usually never correct." *Id.*

53. *See id.* at 1352. Other evidence added to the blow: CBP sent UPS multiple warning letters and Notices of Action when UPS failed to "achiev[e] a 95% compliance rate in the use of heading 8473," despite receiving training sessions. *Id.* Additionally, the work processes at UPS did not work long-term, prompting the court to note that "UPS failed to successfully stem the cascade of errors that resulted from supervisory neglect." *Id.*

penalty amounts.[54] The CIT dismissed UPS's argument that repeated misclassifications of computer parts constituted a single violation of 19 U.S.C. § 1641.[55] The court merely deferred to the agency's interpretation, which was that each misclassified entry "constitutes a 'separate and distinct violation' of the broker statute," warranting separate penalties.[56] The CIT held for CBP on all three issues.[57] UPS appealed.

C. The Appeal: UPS V

Although presented with essentially the same issues as the trial court, the Federal Circuit resolved only the threshold inquiry, i.e., it upheld the CIT's finding that UPS had misclassified computer parts.[58] The Federal Circuit did not reach the other issues,[59] including the issue of whether the CIT correctly held that there is no limitation on the number of penalties CBP can issue under the Broker Penalty Statute, the issue that is the focus of this Article.

At the outset, the Federal Circuit affirmed the CIT's determination that UPS misclassified merchandise under subheading 8473.30.90.[60] But rather unexpectedly, perhaps, the court agreed with UPS's argument that the "will consider" language in § 111.1 was mandatory rather than discretionary.[61]

The Federal Circuit found that CBP is required to consider all of the factors when considering a broker's exercise of supervision and control. Having found inconsistency in CBP's interpretation of § 111.1, the Federal Circuit had its hands untied to interpret the regulations.[62] Honing the meaning of "will consider," the Federal Circuit found not only that the term was mandatory, but that the term plainly meant that CBP must consider "*at the least* the ten listed factors."[63] The court held that because CBP had not considered all ten factors listed in 19 C.F.R. § 111.1, it

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54. *Id.* at 1356.
55. *Id.* at 1354-56.
56. *Id.*
57. The court concluded, "To hold that [CBP] is limited to issuing only one penalty in instances . . . where [UPS] continually engages in the same conduct would hamper [CBP's] enforcement authority, and read a restriction into 19 U.S.C. § 1641 that does not exist." *Id.* at 1356.
58. *UPS V*, 575 F.3d 1376, 1377-78 (Fed. Cir. 2009).
59. "Because [CBP] did not consider all ten factors listed in 19 C.F.R. § 111.1, its determination that UPS violated [the Broker Penalty Statute] was improper. Accordingly, we vacate that portion of the [CIT's] judgment and remand for further proceedings." *Id.* at 1383.
60. *Id.* at 1381.
61. *Id.* at 1382.
62. *Id.*
63. *Id.*

improperly determined that UPS had violated the Broker Penalty Statute.[64] The Federal Circuit then remanded the case to the CIT.[65]

Despite clarifying the factors issue, the Federal Circuit declined to reach the other two issues: (1) whether there were in fact multiple violations of the Broker Penalty Statute and (2) whether CBP can impose penalties aggregating more than $30,000.[66] Although the Federal Circuit acknowledged the importance of these issues to the parties and the community, it noted that "deciding them would be premature."[67] The next Part of this discussion summarizes the arguments the parties advanced before the CIT and on appeal regarding these issues.

III. PARTIES' ARGUMENTS ON THE ISSUES OF "VIOLATION" AND "PENALTIES"

UPS advanced two arguments in support of its "single violation" position. Although in *UPS I* UPS relied on statutory interpretation for support, in *UPS IV*, it advanced a pattern of conduct argument, probably because the CIT had rejected the plaintiff's statutory interpretation in *UPS I* (UPS's motion for summary judgment). Subpart A below revisits the statutory interpretation the importer advanced in *UPS I* and Subpart B describes UPS's "pattern of conduct" argument.

A. UPS's Textual Interpretation of the Broker Penalty Statute and Regulations

Initially, UPS relied on a textual interpretation of the Broker Penalty Statute. It contended that CBP was statutorily[68] barred from pursuing a

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64. *Id.* at 1383.

65. *Id.*

66. *Id.*

67. *Id.* The Federal Circuit vacated the CIT's judgment addressing these issues. *Id.* at 1378.

68. The statute, in relevant part, provides:

> Unless action has been taken under subparagraph (B), the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a *monetary penalty not to exceed $30,000 in total for a violation or violations of this section*.

19 U.S.C. § 1641(d)(2)(A) (2006) (emphasis added). Section 111.91 of the CBP regulations, in relevant part, provides:

> [CBP] may assess a monetary penalty or penalties as follows:
> (a) In the case of a broker, in an amount not to exceed an aggregate of $30,000 for one or more of the reasons set forth in §§ 111.53 (a) through (f) other than those listed in § 111.53(b)(3), and provided that no license or permit suspension or revocation proceeding has been instituted against the broker under subpart D of this part for any of the same reasons; or

penalty case against UPS because the Broker Penalty Statute limited the government to either:

> (1) a *single* monetary penalty against a broker for any violation or violations of the broker statute that precede the pre-penalty notice, which penalty [UPS] has satisfied; *or*
> (2) a maximum penalty of $30,000 for all alleged violations that occurred prior to the first pre-penalty notice [CBP] issued, of which amount [CBP] has already collected $15,000.[69]

UPS asserted that the phrase "for a violation or violations" makes clear that CBP is "limited to the issuance of a single penalty . . . , subject to the $30,000 maximum, even where the broker has committed multiple violations" of the statute.[70] UPS also argued that on its face the statement imposed a cap of $30,000 on the penalty CBP may impose.[71]

To drive its argument home, UPS turned to the legislative history. Specifically, UPS quoted the President of the National Customs Brokers and Freight Forwarders Association of America (NCBFFA) before the House Ways and Means Subcommittee,[72] saying that (1) "[t]he first sentence of [the Broker Penalty Statute] specifies a *$30,000 maximum monetary penalty*" and that (2) "[t]his maximum amount [was] *intended to apply to all violations committed prior to the date of issue of notice*" under the Broker Penalty Statute.[73] UPS added that the language in question was the result of negotiations of the customs brokerage industry with CBP[74] and that to uphold CBP's varied interpretation would be to "undo the delicate balance struck by Congress, the industry and the agency at the time of enactment":[75] a common understanding among the "three groups that the agency is authorized to issue a single penalty, not to exceed $30,000, . . . applicable to *all violations committed prior to the date of* [*the p*]*re-penalty* [*n*]*otice under* [the Broker Penalty Statute]."[76]

> (b) In the case of a person who is not a broker, in an amount not to exceed $10,000 for each transaction or violation referred to in § 111.4 and in an amount not to exceed an aggregate of $30,000 for all those transactions or violations.

19 C.F.R. § 111.91 (2010). Note that 19 C.F.R. § 111.53(c) embraces the violation of the "responsible supervision and control" requirement. 19 C.F.R. § 111.53(c).

69. *UPS I*, 30 Ct. Int'l Trade 808, 814-15 (2006).

70. *Id.* at 815.

71. *Id.*

72. *Id.* In its brief, UPS provided a quote from William J. St. John's testimony. Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 8 n.10, UPS Customhouse Brokerage, Inc. v. United States, No. 04-00650 (Ct. Int'l Trade filed Aug. 2, 2005).

73. *UPS I*, 30 Ct. Int'l Trade at 815.

74. *Id.* at 815-16.

75. *Id.* at 815 (internal quotation marks omitted).

76. Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *supra* note 72, at 17.

B. UPS's "Pattern of Conduct" Argument and United States Customs and Border Protection's Counterargument

While the previous Subpart described UPS's arguments in its motion for summary judgment, at the trial UPS argued that the overall *pattern of conduct* should be deemed a "violation." UPS invoked a principle of criminal law—the prohibition of the multiplicitous indictment—analogizing to it and arguing against a finding of multiple penalties for the same violation or violations.[77]

UPS maintained that because CBP had already charged a violation of the Broker Penalty Statute based on the same pattern of conduct and UPS paid the $15,000 penalty, CBP created a classic multiplicity problem.[78] UPS argued that it had already satisfied its penalty obligation.[79] While CBP maintained that *each misclassified entry* constituted a "separate and distinct violation" for the purposes of the Broker Penalty Statute,[80] UPS leaned on the rationale of the Broker Penalty Statute, arguing that the statute addresses broader concepts and "does not speak in terms of individual entries being a violation" of § 1641.[81]

C. United States Customs and Border Protection's Interpretation of the Broker Penalty Statute and Its Regulations

CBP maintained the same argument during this litigation, the position that secured the CIT's decision favorable to CBP. In *UPS I*, the government argued that (1) the Broker Penalty Statute is clear and unambiguous; (2) the legislative history does not support UPS's position; (3) CBP's interpretation of the statute is reasonable and is entitled to deference; (4) "[t]he statute, existing regulations, administrative procedures, mitigation guidelines, and *de novo* review by [the CIT] act . . . to prevent [CBP] from abusing its discretion"; and (5) UPS's interpretation would prevent CBP from enforcing the laws.[82]

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77. An indictment is multiplicitous if it charges multiple counts for a single offense. *UPS IV*, 558 F. Supp. 2d 1331, 1354 n.25 (Ct. Int'l Trade 2008). The CIT dismissed this argument calling this principle inapposite in administrative and civil law. *Id.* at 1355 n.26.

78. *Id.* at 1354.

79. *Id.*

80. *Id.*

81. Defendant UPS Customhouse Brokerage, Inc.'s Post-Trial Brief at 25, UPS Customhouse Brokerage, Inc. v. United States, No. 04-00650 (Ct. Int'l Trade filed Feb. 7, 2008).

82. *UPS I*, 30 Ct. Int'l Trade 808, 816 (2006).

CBP interpreted the Broker Penalty Statute to require that (1) each penalty be preceded by a written prior notice, i.e., a prepenalty notice, and that (2) no single penalty exceed $30,000.[83]

The following Part summarizes the state of the law on the issue of limitations on the number of penalties CBP can issue under the Broker Penalty Statute. The Part then conjectures whether the Federal Circuit would adopt Judge Carman's interpretation of the regulations if given another chance, followed by a brief discussion of the unique circumstances of this case, distinguishing it from the past cases involving broker penalty cases.

IV. CONCLUSIONS ON THE STATE OF THE LAW

A. Can United States Customs and Border Protection Issue Multiple Penalties Under the Broker Penalty Statute?

Currently, there is no binding precedent on this point. In *UPS I*, the CIT answered this question in the affirmative; it did the same in *UPS IV*. As discussed earlier, however, on appeal, the Federal Circuit vacated the CIT's decision in *UPS IV* on the issue of multiple penalties. Because subsequent litigation did not address this issue,[84] the current state of the law is CBP's interpretation of its regulations and the mitigation guidelines.

It would be helpful to summarize the history of the judicial review on the issues of multiple violations and penalties. At the start of the litigation, although the CIT found the Broker Penalty Statute ambiguous (thus, agreed with UPS), it disagreed with UPS's interpretation of the statute.[85] The CIT agreed with CBP's interpretation of the statute because the court found it to be reasonable. Because the interpretation was reasonable, CBP was entitled to *Chevron* deference.[86] The court stated:

> Separate and apart from its brief, [CBP] articulated its interpretation of [the Broker Penalty Statute] in its regulations, and the mitigation guidelines. . . . [T]he regulations state that "[CBP] may assess a penalty or *penalties* . . . in an amount not to exceed an aggregate of $30,000 for one or more" violations of the broker statute. In promulgating the broker penalty regulations, which were subject to notice and comment, [CBP] clearly adopted the position that it was entitled to impose more than one monetary penalty for violations of the broker statute. Although the regulation might

83. *Id.*

84. *See* United States v. UPS Customhouse Brokerage, Inc. (*UPS VI*), 686 F. Supp. 2d 1337, 1366 (Ct. Int'l Trade 2010).

85. *UPS I*, 30 Ct. Int'l Trade at 828.

86. *Id.* at 828-29.

> be read to limit any penalties imposed to an aggregate of $ 30,000, [CBP] clarified its position in the mitigation guidelines, which state that [CBP] may penalize a broker "a maximum of $ 30,000 for any violation or violations of the statute in *any one* penalty notice." While the mitigation guidelines were not subject to notice and comment, they are "still entitled to some deference, since [they are] a 'permissible construction of the statute.'"
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> Neither the broker penalty statute nor [CBP] regulations place any temporal restriction on a penalty issued by [CBP], and this Court sees no reason to read one into the statute. This Court also does not read the statute as prescribing a limit on the number of pre-penalty notices [CBP] may issue. This Court finds that the regulations and mitigation guidelines[87] express a reasonable interpretation of the broker penalty statute. Accordingly, [CBP's] reading of the broker penalty statute is owed deference by this Court. If the statute is not written in a manner consistent with the understanding of Defendant and the NCBFFAA, this Court is not the proper venue in which to attempt to effect a change.[88]

In *UPS IV*, Judge Carman ordered that the company pay the penalty for its failure to exercise responsible supervision and control.[89] The court stated:

> [B]ased on the relevant law and the totality of the factual circumstances presented here before the Court, penalties are warranted. . . . *UPS I*, 442 F. Supp. 2d at 1309 ("[CBP] may penalize a broker 'a maximum of $ 30,000 for any violation or violations of the statute in *any one* penalty notice.'").
>
> This Court adopts the penalties as calculated and imposed by [CBP], and finds the same fair and reasonable . . . for a total of $75,000.[90]

In the end, however, the Federal Circuit vacated the portions of the CIT's judgment that related to the violations and the penalties.[91] The litigation that followed did not reach these issues, leaving it for a future case. In other words, the customs brokerage community must rely on the CIT's de

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87. The mitigation guidelines provide that "[i]f a broker is penalized to the maximum the statute will allow and continues to commit the same violation or violations, revocation or suspension of [the broker's] license would be the appropriate sanction. Barring such revocation or suspension action, he may again be penalized to the maximum the statute will allow." 19 C.F.R. pt. 171, app. C, XII(B) (2010).

88. *UPS I*, 30 Ct. Int'l Trade at 828-29 (citations omitted). Later in litigation, the CIT certified its decision for interlocutory appeal, but the Federal Circuit denied the petition for permission to appeal. *UPS V*, 575 F.3d 1376, 1378 n.2 (Fed. Cir. 2009).

89. *UPS IV*, 558 F. Supp. 2d 1331, 1356 (Ct. Int'l Trade 2008).

90. *Id.* (citations omitted).

91. *UPS V*, 575 F.3d at 1383. The Federal Circuit vacated the CIT's decisions on these issues: (1) whether UPS's continuous misclassifications were in fact multiple violations and (2) whether CBP can impose penalties aggregating more than $30,000. *Id.* "Although these issues are important to the parties and the industry, deciding them would be premature." *Id.*

novo review of penalty cases to ensure that CBP does not abuse its discretion.[92] Put another way, the community is back to where it started over ten years ago when the litigation commenced.

B. What Would Be the Outcome of a Case on the Issues of Penalties and Violations, If Given Another Chance at the United States Court of Appeals for the Federal Circuit?

What if a case with the similar issues to be resolved became ripe for an appeal in the Federal Circuit, would the Federal Circuit adopt Judge Carman's position on in *UPS I* and *UPS IV*? This Article answers in the affirmative. Not only does (1) CBP appears to reasonably interpret its regulations and mitigation guidelines, but (2) Judge Carman's decision also conforms to the overall scheme of the penalty cases.

In *UPS IV*, CBP argued that each shipment of merchandise is "a discreet event comprised of different merchandise from unique importers."[93] Among other points, the government argued that (1) the Broker Penalty Statute is clear and unambiguous, and (2) CBP's interpretation of the statute is reasonable and is entitled to deference.[94] Moreover, the government is likely to convince the Federal Circuit that CBP will not abuse its discretion. Broker Penalty Statute, regulations, administrative procedures, mitigation guidelines, and finally, the de novo review by the CIT comprise the system of the checks and balances that counter any possible abuse of discretion by CBP.

If history is any indication, these checks and balances have been effective. After all, the Broker Penalty Statute has been available to CBP for many years, and yet this was the first time the case challenging enforcement of the statute came before the CIT. In the words of Judge Carman:

> [I]t is apparent to this Court that [CBP] has not taken advantage of or abused the penalty authority the agency was granted in the [Broker Penalty Statute]. Had [CBP] been in the practice of imposing multiple penalties for violations that occurred prior to the issuance of the first pre-penalty notice, this Court certainly would have expected to have had this issue presented before now. Indeed, accepting—as it must—the facts in the light most favorable to Plaintiff, Defendant's own allegedly egregious flaunting of its

92. The Federal Circuit answered one of the questions: What is CBP's burden of proof under the Broker Penalty Statute? CBP must consider all ten factors listed in 19 C.F.R. § 111.1 in order to show that a broker has violated 19 U.S.C. § 1641. *See id.*

93. *UPS IV*, 558 F. Supp. 2d at 1355.

94. *Id.*

> responsibilities under the broker statute after repeated training and warning by [CBP] precipitated the agency's monetary sanctions.[95]

He added:

> Further, [CBP] should not be hamstrung by Defendant's narrow reading of the broker penalty statute. Were this Court to accept Defendant's interpretation, [CBP] would be required to ferret out all possible broker violations before issuing its one-and-only-one pre-penalty notice. . . . Over time, circumstances and information may give rise to [CBP] gaining knowledge of various broker indiscretions. . . . Were this Court to embrace Defendant's one-and-only-one penalty concept, [CBP] would have to choose between missing an opportunity for swift, corrective action whilst foregoing sanction for other potential, prior errors or waiting to amass information concerning other violations whilst the broker continues to contravene its obligations under the broker penalty statute. This Hobson's choice is neither efficient nor effective in carrying out the main objective of the broker penalty statute, which is to "apply penalties more effectively when brokers have violated the terms of their licenses."[96]

Judge Carman's view of CBP enforcement is also consistent with the rather draconian statutory scheme of CBP penalties as exemplified by 19 U.S.C. § 1592. Based on the violator's culpability, the maximum penalties under § 1592 are the domestic value of the merchandise (fraud),[97] the lesser of the domestic value of the merchandise or four times the loss of revenue (gross negligence),[98] and the lesser of the domestic value of the merchandise or two times the loss of revenue (negligence).[99] For nonrevenue loss violations, the maximum penalties are 40% of the dutiable value (gross negligence)[100] and 20% of the dutiable value (negligence).[101]

For example in a case with $200,000 loss of revenue, this statutory scheme would result in a maximum penalty of $1,600,000 for fraud, $800,000 for gross negligence, or $400,000 for negligence. The violator must also pay the loss of revenue.

Through the administrative procedures applicable to § 1592 cases, CBP will usually mitigate the penalty to an amount that is acceptable to

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95. *UPS I*, 30 Ct. Int'l Trade 808, 829 (2006) (footnote omitted).

96. *Id.* at 829-30.

97. 19 C.F.R. pt. 171, app. B(F)(2)(a)(i) (2010). The maximum penalty claimed by CBP in fraud cases is often eight times the loss of revenue. *Id.*

98. *Id.* pt. 171, app. B(F)(2)(b)(i). The loss of revenue is equal to the total of the underpaid duties, taxes and fees resulting from the violation. *See id.* pt. 171, app. B(I).

99. *Id.* pt. 171, app. B(F)(2)(c)(i).

100. *Id.* pt. 171, app. B(F)(2)(b)(ii).

101. *Id.* pt. 171, app. B(F)(2)(c)(ii).

the violator. If the violator cannot obtain adequate mitigation from CBP, it can refuse to pay and take its chances on de novo review by the CIT.

Thus, it would appear that CBP's interpretation of the Broker Penalty Statute is consistent with the penalties prevalent in the CBP laws.

C. The Unique Circumstances of the Case

The unique circumstance of this case is that UPS acted as both the importer of record and the customs broker on the shipments involved in this case. It is unique, for this procedure is often used to facilitate the entry and release of air courier shipments. Because of the unique circumstance of this case, it is also likely that the courts will never have the opportunity to answer the unresolved questions. The air waybill used for these shipments provides that the courier is named as the consignee by the shipper. Section 484 of the Tariff Act of 1930, as amended (19 U.S.C.A. § 1484), provides that the consignee can appoint a licensed customs broker to act as the importer of record.

When merchandise is misclassified, CBP would normally initiate a § 1592 penalty case to recover the lost revenue and assess a penalty. However, the guidelines used by CBP to impose and mitigate § 1592 penalties provide:

> If a customs broker commits a section 592 violation and the violation involves fraud, or the broker commits a grossly negligent or negligent violation and shares in the benefits of the violation to an extent over and above customary brokerage fees, the customs broker will be subject to these guidelines. However, if the customs broker commits either a grossly negligent or negligent violation of section 592 (without sharing in the benefits of the violation as described above), the concerned [CBP] field officer may proceed against the customs broker pursuant to the remedies provided under 19 U.S.C. 1641.[102]

These guidelines were applicable to UPS's situation because it violated § 1592 by misclassifying the merchandise. But because UPS was the broker, the violation did not involve fraud, and UPS did not share in the benefits of the violation, CBP was limited to the remedies provided under the Broker Penalty Statute.

Thus, the unique circumstances of this case may never recur to the extent that a broker is compelled to seek de novo review in the CIT and the questions left unanswered in the UPS litigation may remain so.

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102. *Id.* at 171, app. B(K).

V. CONCLUSION

Although an important question to the customs brokerage community, the Federal Circuit did not reach it in *United States v. UPS Customhouse Brokerage, Inc.* The unanswered question was: what is the maximum penalty CBP can assess against a customs broker for failing to exercise responsible supervision and control as required by the Broker Penalty Statute? With that, the goal of this Article has been twofold: to provide the details concerning this controversy and to discuss whether the CIT reasonably, if not correctly, interpreted the Broker Penalty Statute when it agreed with CBP's position.

The authors agree with the CIT's findings that (1) each shipment of merchandise is a discreet event comprised of different merchandise from unique importers, that (2) penalties can aggregate, and that (3) CBP has interpreted the Broker Penalty Statute reasonably. The courts position is consistent with a statutory scheme of CBP penalties. And because history tends to indicate either that CBP generally does not abuse its discretion or that the importers have recourse, i.e., mitigation and judicial oversight, a broad reading of the Broker Penalty Statute is justified.