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THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNITED STATES SHOE CORPORATION,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Appeal of a Final Judgment of the United
States Court of International Trade

BRIEF OF PLAINTIFF-APPELLEE, UNITED STATES SHOE CORPORATION

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RULE 47.5 STATEMENT OF RELATED CASES

This case is a continuation of United States Shoe Corp. v. United States, 907 F.Supp. 408 (Ct. Int'l Trade 1995), aff'd 114 F.3d 1564 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). The appeal number in that earlier case was 96-1210, which was decided on June 3, 1997, by a five Judge panel of this court consisting of Chief Judge Mayer, Circuit Judges Bryson, Michel, and Rader, and the late Senior Judge Edward S. Smith. Appellee respectfully requests that this appeal be heard by the same panel consisting of the four judges who participated in the earlier appeal and a fifth judge to replace the late Senior Judge Smith. Appellee otherwise agrees with the Rule 47.5 Statement of Related Cases included in the brief of Appellant, the United States.

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BRIEF OF PLAINTIFF-APPELLEE, UNITED STATES SHOE CORPORATION

STATEMENT OF THE ISSUES

1. Whether the government's collection of the unconstitutional HMT constituted a taking of private property under the Fifth Amendment entitling United States Shoe Corporation to an award of interest as just compensation?

2. Whether United States Shoe Corporation is entitled to interest as part of the monetary relief for an Export Clause violation?

3. Whether this Court in IBM erroneously interpreted 26 U.S.C. § 4462(f) so as to limit the authority of the lower court to award interest on the refund of the unconstitutional tax?

4. Whether United States Shoe Corporation is entitled to interest under this Court's powers in equity?

STATEMENT OF THE CASE

On December 4, 1995, in Slip Op. 95-197, the United States Court of International Trade ("CIT") entered a money judgment for the United States Shoe Corporation ("U.S. Shoe") in the amount of $8,281.87, representing the amount of the Harbor Maintenance Tax ("HMT") paid by U.S. Shoe on its exports during the second quarter of 1994, plus "interest and costs as provided by law." United States Shoe Corp. v. United States, 19 CIT 1413 (1995). Joint Appendix at 45-46 ("JA"). On appeal, this Court held that the CIT correctly exercised jurisdiction under 28 U.S.C. § 1581(i) and affirmed "the judgment invalidating the HMT as applied to exports and ordering a refund to U.S. Shoe." United States Shoe Corp v. United States, 114 F.3d 1564, 1571 (Fed. Cir. 1997). The Supreme Court affirmed the decision of this Court with respect to the constitutional issue brought before it. United States v. United States Shoe Corp., 523 U.S. 360 (1998). After the case was remanded to the Court of International Trade, the CIT issued a second judgment on June 26, 1998, holding that

U.S. Shoe was entitled to the payment of interest on its refund under 28 U.S.C. § 2411 (interest from the date of payment to the date of refund calculated at rates established under 26 U.S.C. § 6621). JA at 1-3.

The United States filed its notice of appeal of the CIT's judgment with respect to the award of interest on August 7, 1998. JA at 72. The appeal in this case was stayed pending proceedings in International Business Machines Corp. v. United States, Appeal 98-1590 ("IBM"). In IBM, this Court held that the United States ("the government") was not required to pay interest to IBM upon refund of the HMT pursuant to 28 U.S.C. § 2411, and reversed the judgment of the CIT. International Business Machines Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000), cert. denied, 531 U.S. 1183 (2001). This Court denied claims that two other statutes, 19 U.S.C. § 1505 and 28 U.S.C. § 2644, might provide for interest, because IBM had not filed a protest with the Customs Service. 201 F.3d at 1374.

On May 8, 2001, the Court lifted the stay in this appeal. The government filed its motion for summary reversal and U.S. Shoe filed an opposing motion to dismiss the appeal on grounds of *res judicata*. On July 31, 2001, the Court denied both motions. The government filed its opening brief on October 1, 2001.

STATEMENT OF THE FACTS

Other than the government's prayer for relief requesting that the CIT's June 26, 1998, judgment be reversed, U.S. Shoe agrees with the government's statement of the facts.

SUMMARY OF THE ARGUMENT

U.S. Shoe may raise any argument to support the lower court's judgment awarding interest. An appellate court may affirm a judgment of a lower court on any ground the law and record will support so long as the ground would not expand the relief granted below. U.S. Shoe is urging an affirmation of the CIT's award of interest under 28 U.S.C. § 2411 and on other grounds, and is not requesting an expansion of the relief granted below.

The Fifth Amendment's Takings Clause mandates the payment of just compensation when the government "takes" private property for public use. Here, the government's collection of the unconstitutional HMT constituted a confiscation of U.S. Shoe's property and, therefore, was a "taking" under the Fifth Amendment. As just compensation, the Takings Clause requires the government to refund the unconstitutional HMT with interest calculated from the date of collection to the date of the refund.

The Export Clause of the Constitution also supports the award of interest in this case. Similar to the Compensation Clause, when a violation of the Export Clause

occurs, the Constitution requires a prompt restoration of the monies unlawfully exacted. U.S. Shoe respectfully requests that this Court view the Court of Federal Claims' award of interest to Article III judges under the Compensation Clause in Hatter v. United States, 38 Fed. Cl. 166 (1997) as appropriate and similarly affirm the award of interest to U.S. Shoe on the unconstitutional HMT. Moreover, a failure to award interest to U.S. Shoe would constitute a continuing burden on U.S. Shoe's exports, which is of itself a violation of the Export Clause.

If the Court finds that the foregoing constitutional arguments do not support the lower court's judgment, U.S. Shoe respectfully requests that the Court revisit and overrule International Bus. Mach. Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000). When the Supreme Court held in this case that the HMT was unconstitutional, as applied to exports, it struck down 26 U.S.C. §§ 4461-62 in their entirety, as applied to exports. Therefore, § 4462(f) does not limit the authority of the court to award interest under 28 U.S.C. § 2411. Moreover, if not overruled, this Court's holding in IBM will result in disparate treatment of exporters with respect to entitlement of interest on refunds of the unconstitutional tax based solely on the jurisdictional predicate alleged in their complaints. Finally, the IBM Court's reliance on the "no interest rule" was inappropriate because the government's unconstitutional acts conferred no sovereign immunity.

Alternatively, this Court also may affirm the CIT's award of interest based on the equitable doctrine of restitution. Restitution is awarded to prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff. Here, the government has earned interest on the unconstitutional HMT collected from U.S. Shoe. If the government is not required to pay interest, the Court will allow the government to profit from its unconstitutional imposition of the HMT. To prevent this unjust enrichment, this Court should affirm the award of interest to U.S. Shoe, thereby, requiring the government to disgorge itself of any benefit it received from assessing the unconstitutional tax.

ARGUMENT

I. U.S. SHOE MAY RAISE ANY ARGUMENT IN SUPPORT OF ITS JUDGMENT BELOW, WHETHER OR NOT IT WAS CONSIDERED BY THE COURT OF INTERNATIONAL TRADE.

The government's contention that U.S. Shoe is precluded from raising arguments in support of the judgment below, which were not considered by the lower court, is untenable. Indeed, the government's brief concedes the point when it states: "[a]s a general proposition, an appellate court may affirm a judgment of a district court on any ground the law and the record will support so long as that ground would not expand the relief granted." Glaxo, Inc. v. Torpharm, Inc., 153 F.3d 1366, 1371 (Fed. Cir. 1998) (emphasis added) (citing A-Transport Northwest Co. v. United States, 36 F.3d 1576,

1580 n.7 (Fed. Cir. 1994)). Defendant's Brief at 16. ("Def. Br."). An alternate ground for the same relief originally granted is not an expansion of relief, as the cases cited make clear. The Glaxo Court also stated that additional legal grounds fully vetted on appeal could be considered in addition to grounds rejected by the trial court as acceptable bases to affirm a judgment below. Glaxo, 153 F.3d at 1371. U.S. Shoe seeks no less and no more here.

The arguments presented by U.S. Shoe in this brief do not seek to enlarge the judgment below. The relief granted U.S. Shoe was the payment of interest calculated in accordance with 28 U.S.C. § 2411, which provides for calculation from the date of payment to the date of refund at the rate set by 26 U.S.C. § 6621, the rate routinely utilized in both tax and customs administration. Even assuming 28 U.S.C. § 2411 is not available to U.S. Shoe, it can raise other arguments in support of the judgment below. As recognized by this Court in Carnival Cruise Lines, Inc. v. United States, 200 F.3d 1361, 1364-65 (Fed. Cir. 2000), an appellee is not required to defend its judgment on the basis of the lower court's reasoning. U.S. Shoe is not limited in asserting alternate grounds in support of its judgment below. Dandridge v. Williams, 397 U.S. 471, 476 (1970) ("the prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court").

II. THE COLLECTION OF THE UNCONSTITUTIONAL HMT CONSTITUTED A TAKING UNDER THE FIFTH AMENDMENT.

The Constitution's Fifth Amendment mandates that interest be paid to U.S. Shoe. The Fifth Amendment's Takings Clause states: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V (emphasis added). A "classic takings" is one whereby the government directly appropriates private property for its own use. See Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998) ("Eastern Enterprises"). This case presents such a "taking" because the government has confiscated U.S. Shoe's property by collecting the unconstitutional HMT on exports. Therefore, U.S. Shoe is entitled to "just compensation."

A. The Collection of the HMT Constitutes a Taking of Private Property under the Fifth Amendment.

The government posits that the collection of the HMT does not violate the Fifth Amendment because neither an obligation to pay money nor an unconstitutional act may constitute a taking. Def. Br. at 24. These arguments must fail because the government's unlawful collection of the HMT on exports amounts to a confiscation of property and an unconstitutional tax violating the Export Clause is a taking within the purview of the Fifth Amendment.

1. The collection of the HMT on exports amounts to a confiscation of private property.

It is well settled that when Congress validly exercises its constitutional power to lay and collect taxes, it "takes" income, but not in the sense of the Fifth Amendment's Takings Clause. Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir. 1986); see also Eastern Enterprises, 524 U.S. at 540 (Kennedy, J., concurring). However, Congress's power to tax is not absolute. It is subject to the limitation set forth in the Export Clause of the Constitution. Fairbank v. United States, 181 U.S. 283, 296 (1901) ("Fairbank"). The Export Clause forbids taxation on exports. U.S. CONST. art. 1, § 9, cl. 5. When Congress enacted the HMT, it attempted to exercise this forbidden power and, therefore, the HMT was never a valid exercise of the constitutional power to tax.

The Supreme Court has held that when a taxing statute is not a proper exercise of the taxing power, but, rather, "the direct exertion of a different and forbidden power, as, for example, the confiscation of property," it is a violation of the Fifth Amendment. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (emphasis added); see also Brushaber v. Union Pac. R.R., 240 U.S. 1, 24-25 (1916) ("although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment."); Quarty v. United States, 170 F.3d 961, 969 (9th Cir. 1999) ("Levying of taxes does not

constitute a Fifth Amendment taking unless the taxation is so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . . .'"). These precedents establish that a valid tax may be so arbitrary and excessive that it becomes a confiscation of property and a taking under the Fifth Amendment. The HMT on exports was more than an excessive or arbitrary tax. It was the assessment of a forbidden tax. Any taxation on exports, no matter how small, is necessarily excessive and confiscatory. United States v. International Bus. Mach. Corp., 517 U.S. 843, 859 (1996) (The Export Clause "disallows any attempt to raise federal revenue from exports . . . ."); Fairbank, 181 U.S. at 291.

The government's proportionality argument, Def. Br. 29-30, is without merit and its reliance on United States v. Sperry, 493 U.S. 52 (1989) ("Sperry") is misplaced. Sperry stands for the proposition that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." Id. at 63. However, this Court in U.S. Shoe II has already held that "the HMT is not based on a fair approximation of use and . . . is not a permissible user fee . . . . Since the HMT is not a valid user fee, it must be a tax." U.S. Shoe II, 114 F.3d 1564, 1574 (Fed. Cir. 1997). Likewise, in affirming this Court's holding, the Supreme Court stated that Sperry "involved constitutional provisions other than the Export Clause, however, and thus do[es] not govern here." U.S. Shoe III, 523 U.S. at 368; see also Phillips v.

Washington Legal Foundation, 524 U.S. 156, 171 (1998) ("the State does not, indeed cannot, argue that its confiscation of respondent's interest income amounts to a fee for services performed."). It is, therefore, inappropriate for the government to continue to refer to the HMT as if it were a valid "user fee."

Moreover, the rate of tax is not relevant to this discussion. As the Supreme Court stated in Fairbank:

> The constitutional language [of the Export Clause] is "no tax or duty." A ten cent tax or duty is in conflict with that provision as certainly as an hundred dollar tax or duty. The question is never one of amount but one of power.

181 U.S. at 291 (emphasis added). Therefore, no matter how small the amount of the tax, it cannot be viewed as reasonable. As applied to exports, the HMT was an unlawful confiscation of U.S. Shoe's property, in violation of the Fifth Amendment.

2. The Unconstitutional HMT was a taking under the Fifth Amendment.

It is a well settled principle that an unconstitutional law is void and is "as inoperative as if it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); Reynoldsville Casket Co. v. Hyde,

514 U.S. 749, 760 (1995) (Scalia, J., concurring) ("if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful and provides a remedy."); Chicago, I. & L. Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913); Hopkins v. Clemson Agric. College of S.C., 221 U.S. 636, 644 (1911). In view of the Supreme Court's affirmance of this Court's holding in this case that the HMT, as applied to exports, violated the Export Clause, the imposition and collection of the tax was an unlawful taking of U.S. Shoe's property. United States v. United States Shoe Corp., 523 U.S. 360, 370 (1998) ("U.S. Shoe III") (affirming United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997) ("U.S. Shoe II") and United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) ("U.S. Shoe I")).

The government argues that interest should not be paid on a refund of an unconstitutional tax, such as the HMT, because an illegitimate exercise of Congress' taxing authority cannot be a taking under the Fifth Amendment. Def. Br. at 30. The government cites Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949) for the proposition that "unlawful actions, including those that are unconstitutional, are not takings." Def. Br. at 30-31. Larson provides no support for

the government's novel proposition.[1] In Larson, the plaintiff sought an injunction against the War Assets Administration from selling coal to others in violation of his supply contract. Id. at 684, 688. The case did not involve an unconstitutional tax, nor was the payment of monetary damages at issue. Larson did not address the question of whether an unconstitutional tax may be a taking, nor did it even mention the long line of confiscatory tax cases, such as Magnano and Brushaber, much less overrule them.

In support of its argument for a limited application of the Fifth Amendment, the government also cites this Court's holdings in Dureiko v. United States, 209 F.3d 1345 (Fed. Cir. 2000), Short v. United States, 50 F.3d 994 (Fed. Cir.1995) and Tabb Lakes Ltd., v. United States, 10 F.3d 796 (Fed. Cir. 1993), that an unconstitutional tax cannot be a taking in violation of the Fifth Amendment. Def. Br. at 31. These Tucker Act cases are all ultimately based upon the holding expressed in Hooe v. United States, 218 U.S. 322 (1910), where the Supreme Court stated:

> The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government.

---

[1] Larson is, however, germane to the government's claim of sovereign immunity, as discussed infra. If the Court accepts the government's argument, it must follow that the government concedes that sovereign immunity does not apply to unconstitutional statutes and that the government cannot hide behind the cloak of sovereign immunity.

Id. at 335. The HMT on exports is not a case where federal officers acted without Congressional authority. In enacting 26 U.S.C. §§ 4461-62, Congress purportedly acted under its constitutional power to lay and collect taxes, imposed tax liability on exporters and importers, and instructed the Customs Service to collect the HMT. Therefore, such collections were authorized within the meaning of Hooe and Customs officers were not acting beyond the scope of their statutory authority in making such collections. Indeed, such collections continued, as authorized by Congress, until the Supreme Court in U.S. Shoe III ultimately affirmed that the HMT on exports was unconstitutional.

This Court's precedent confirms that the Supreme Court's ultimate nullification of the HMT on exports did not retroactively convert its collection to ultra vires government action for takings purposes:

> While this court has on occasion referred to 'invalid' or 'illegal' government conduct as 'unauthorized' for purposes of determining whether the conduct may give rise to Tucker Act liability [under the Takings Clause], *see Short v. United States*, 50 F.3d 994, 1000 (Fed. Cir. 1995); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993), we understand those references to require a showing that the conduct was *ultra vires*, i.e., it was either explicitly prohibited or was outside the normal scope of the government officials' duties. Neither the Supreme Court nor this court has held that government conduct is 'unauthorized,' for purposes of takings law, merely because the conduct would have been found legally erroneous if it had been challenged in court.

Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363 (Fed. Cir. 1998) ("Del-Rio"). Customs officials' collections of the HMT was neither expressly prohibited by Congress nor outside the scope of their duties. As such, the conduct was authorized for takings purposes, albeit ultimately determined by the courts to be unlawful.

Indeed, the Del-Rio Court expressly rejected the lower court's finding in that case that the Takings Clause is implicated "[o]nly if the action is 'valid,' i.e., unassailable on some independent constitutional, statutory or procedural ground," id. at 1363, which is precisely what the government argues here. As this Court noted:

> if the government has taken property and has done so in a legally improper manner, it has committed two violations of the property-owner's rights. The two separate wrongs give rise to two separate causes of action, and the property-owner may elect to sue for just compensation or to seek relief for the legal improprieties committed in the course of the taking.

Id. at 1363-64. Recently, in Rith Energy, Inc. v. United States, 247 F.3d 1355 (Fed. Cir. 2001) ("Rith"), this Court elaborated upon Del-Rio and explained that there are circumstances in which takings claimants must litigate the lawfulness of government action prior to pursuing a takings claim. The Rith Court explained:

> if the plaintiff claims that its property was taken *regardless* of whether the agency acted consistently with its statutory and regulatory mandate, *Del-Rio* stands for the proposition that the takings claim can be litigated . . . without the need first to litigate the issue of lawfulness in [other

> congressionally-prescribed proceedings]. On the other hand, to the extent that the plaintiff claims it is entitled to prevail *because* the agency acted in violation of statute or regulation, *Del-Rio* does not give the plaintiff a right to litigate that issue in a takings action rather than in [other congressionally-mandated proceedings].

Rith, 247 F.3d at 1365-66 (emphasis in original). With regard to the latter scenario, the Rith court noted that if the takings claimant does not first litigate its challenge to the lawfulness of the government's action in accordance with congressionally-mandated procedures, it will not be allowed to renew that challenge under cover of the takings claim and will, in those circumstances, have to make its takings argument "on the assumption that the [government] action was both authorized and lawful," the consequence of which may be to defeat the takings claim. Id. at 1366. Consistent with Del-Rio and Rith, in the case at bar, where U.S. Shoe's takings claim is admittedly dependent upon the unconstitutionality of the HMT as applied to exports, U.S. Shoe established such unconstitutionality in separate proceedings prior to asserting that a taking occurred. See U.S. Shoe III, 523 U.S. 360. Thus, far from barring U.S. Shoe from asserting a Fifth Amendment taking, the unconstitutionality of the export HMT affirmatively establishes that such a taking in fact occurred. See discussion section II.A.1, supra.

U.S. Shoe does not claim that it is entitled to double recovery for the Export Clause and Takings Clause violations that occurred when the government

unconstitutionally imposed the HMT on exports. U.S. Shoe is, however, entitled to interest on its recovery pursuant to long-standing Takings Clause precedent.

B. The Fifth Amendment Requires the Payment of "Just Compensation" When Private Property Is "Taken."

While the government has refunded the HMT monies collected on exports pursuant to U.S. Shoe III, U.S. Shoe has not received just compensation under the Fifth Amendment.[2] The measure of just compensation is not the value that the government gains but the value lost by persons whose property was taken. See, e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). Just

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[2] The government contends that under McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), "the remedy for an unconstitutional tax need not be a repayment of the tax, but instead may be the levying of an additional tax to remedy the discrimination that caused the tax to be unconstitutional." Def. Br. at 26. Here, it is not possible to remedy the HMT by levying an additional tax because the Export Clause prohibits not only discriminatory taxes, but rather explicitly prohibits all taxes on exports. United States v. International Bus. Mach. Corp., 517 U.S. 843 (1996).

More importantly, the Supreme Court has stated: "[t]he Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." Monongahela Navigation Co. v. United States, 148 U.S. 312, 317 (1893). In this case, the CIT ordered and this Court and the Supreme Court affirmed the refund of the HMT payments by exporters with interest. United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995), aff'd, 114 F.3d 1564 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). Thus, the courts in this case have properly provided a remedy for the unconstitutional HMT. Indeed, as this Court noted, "the Supreme Court's U.S. Shoe decision makes clear that the Export Clause includes a correlative right to money damages as a remedy for its violation." Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1374 (Fed. Cir. 2000) (emphasis added).

compensation "entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation." United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947) (citing Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923)); see also Albrecht v. United States, 329 U.S. 599, 602 (1947) ("just compensation" is the "fair market value at the time of taking plus interest from that date to the date of payment."); Erskine v. Van Arsdale, 82 U.S. 75, 77 (1872) ("Where an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest in the event of recovery, from the time of the illegal exaction.").

The U.S. Court of Appeals for the Fourth Circuit, in Mary Helen Coal Corp. v. Hudson, 235 F.3d 207 (4th Cir. 2000), recognized the judiciary's obligation to ensure full compensation where the government imposes an unconstitutional monetary burden. In that case, the plaintiff, a former coal operator, received repayment of all outstanding premiums paid under the Coal Industry Retiree Benefit Act of 1992, which the Supreme Court held was unconstitutional in Eastern Enterprises, 524 U.S. 498. In holding that an award of prejudgment interest was necessary to fully compensate the plaintiff, the Fourth Circuit stated:

> We have already determined that the Coal Act's premium requirement, as applied to [plaintiff], violated the Fifth Amendment of the Constitution. Awarding prejudgment interest to [plaintiff], therefore,

> would simply give full effect to the Supreme Court's decision in *Eastern* and this court's holding in *Mary Helen I*, by providing full compensation for the harms suffered.
>
> The usual rule that "interest follows principal" is long and well established. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 162 (1980) . . . . Read together, therefore, *Eastern* and *Phillips* indicate that [plaintiff] receive prejudgment interest on the premiums it paid. It is undisputed that after *Eastern* the Trustees had to refund the principal amounts paid . . . . That the Trustees collected the premiums in good faith does not change the fact that doing so violated [plaintiff's] constitutional rights. Thus, to deny an award of prejudgment interest would undercut the Supreme Court's jurisprudence.
>
> Prejudgment interest is simply an "element of [plaintiff's]" "complete compensation." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1987) . . . . Thus, an award of prejudgment interest is a critical component of [plaintiff's] recovery.
>
> [Plaintiff] is thus presumptively entitled to an award of prejudgment interest.

Mary Helen Coal, 235 F.3d at 210 (citations omitted). Thus, interest is an intricate part of the just compensation due the taxpayer to remedy the imposition of an unconstitutional tax.

III. THE EXPORT CLAUSE MANDATES THAT INTEREST BE PAID ON HMT REFUNDS.

The Export Clause states "no Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. "The necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of

money unlawfully exacted . . . . the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause." Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000) ("Cyprus Amax"); see also U.S. Shoe III, 523 U.S. 360. Here, the government concedes that the Constitution requires a return of the unconstitutional HMT on exports as part of the monetary remedy, but disputes that the remedy should include interest. This Court's analysis in both Cyprus Amax, 205 F.3d 1369 and Hatter v. United States, 953 F.2d 626 (Fed. Cir. 1992) ("Hatter I"), as well as the subsequent decision of the Court of Federal Claims in Hatter v. United States, 38 Fed. Cl. 166 (1997) ("Hatter II") all support U.S. Shoe's claim that interest must be paid as part of the remedy for the government's violation of the Export Clause. Any other interpretation of the Export Clause would allow the government to perpetuate the monetary burden placed on U.S. Shoe and result in a continuing violation of the Export Clause.

In holding that the Export Clause provides a self-executing monetary remedy, the Cyprus Amax Court followed an earlier holding in Hatter I, 953 F.2d 626. See Cyprus Amax, 205 F.3d at 1374. In Hatter I, this Court held that the Compensation Clause provided a self-executing monetary remedy to several Article III judges who successfully claimed that the imposition of social security taxes on their salaries

violated the Constitution's Compensation Clause.[3] The Cyprus Amax Court found that Hatter I "addressed the same issue" and held that Hatter I was controlling because both the Export Clause and the Compensation Clause "speak in absolute and unconditional terms, and both protect pecuniary interests." Cyprus Amax, 205 F.3d at 1375. Indeed, the Court drew a direct parallel between the two clauses: "The Export Clause provides that 'no Tax or Duty shall be laid,' while the Compensation Clause states that 'Compensation . . . shall not be diminished." Id. (citations omitted, emphasis in original). In holding that these respective constitutional provisions presuppose the payment of money damages, the Cyprus Amax and Hatter I Courts emphasized that the only way to effectuate the absolute proscriptions of the clauses was to infer a prompt and proper remedy for their violation. In Hatter I, this Court stated:

> This provision [the Compensation Clause] of the Constitution, fairly interpreted, mandates the payment of money in the event of a prohibited compensation diminution. This provision states, in mandatory and unconditional terms, that judges' salaries 'shall not be diminished during their Continuance in Office.' This language presupposes damages as the remedy for a governmental act violating the compensation clause. Only a timely restoration of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries.

Hatter I, 953 F.2d at 628 (emphasis added). Similarly, in interpreting the Export

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[3] The Compensation Clause provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

Clause, the Cyprus Amax Court stated:

> The Framers' decision to phrase the Export Clause in unconditional language serves to free all exports from such a burden, and the recognition of a monetary remedy furthers that purpose. Indeed, absent a prompt restoration of money unlawfully exacted, the Export Clause would be more hollow than real because in the event that Congress imposed export taxes, equitable relief alone could not ameliorate the harm.

205 F.3d at 1374. (citations omitted) (emphasis added). Thus, an affirmative monetary remedy is implicit in both clauses, for only a timely restoration of the prohibited taxes would remedy the constitutional violations in each case.

The Court of Federal Claims, in Hatter v. United States, 38 Fed. Cl. 166 (1997) (Hatter II), found that the remedy for the federal government's diminution in judicial salaries prohibited by the Compensation Clause necessarily included interest in addition to the return of the tax payments. The Court of Federal Claims stated:

> We find no principled basis to distinguish the constitutionally based entitlement to interest of takings plaintiffs from the constitutional position of federal judges. Both the Fifth Amendment and Article III affirmatively require the payment of compensation. If recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense.

Hatter II, 38 Fed. Cl. at 182 (emphasis added). The court found that denying interest would threaten the primary purpose of the Compensation Clause, namely, to maintain judicial independence. Without an award of interest, Congress could "delay

indefinitely the payment of the principal amount of protected compensation leaving the judges with no remedy for the delay." Id. at 183. The Court held that the "[r]esolution of the interest issue should not turn on whether the term 'compensation' means the same thing in the Just Compensation Clause as in the Compensation Clause. Rather, the common denominator is that both clauses are contained in the Constitution." Id.[4] The Hatter II plaintiffs' entitlement to interest is no longer in dispute, for although the government appealed the Court of Federal Claims' judgment, it did not appeal the award of interest.[5]

We submit that the rationale of the Court of Federal Claims in Hatter II for the award of interest is sound and should be adopted by this Court in this case. Hatter II is fully consistent with the Supreme Court's reasoning in Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), a seminal case explicating the rationale for

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[4] Because Article III judges are to be paid compensation "at stated Times" under the Compensation Clause, the Court found that the Constitution provides an even "sounder basis for interest on delayed compensation protected under Article III than on just compensation guaranteed by the Fifth Amendment." 38 Fed. Cl. at 182. However, the "critical factor" to the award of interest in Hatter II was that the right to compensation was constitutionally protected. Id.

[5] In connection with the underlying damages award, the Supreme Court in United States v. Hatter, 523 U.S. 557 (2001), affirmed in part, reversed in part, and remanded the case back to this Court. The Supreme Court held that the Compensation Clause prohibited the government from imposing social security taxes but not Medicare taxes, on the judges' salaries.

interest under the Takings Clause. The government mischaracterizes Monongahela as standing for the proposition that interest is required under the Takings Clause solely because of the adjective "just" which precedes the word "compensation" in that clause, and erroneously maintains that although the Takings Clause's reference to compensation connotes a monetary remedy, it is the adjective "just" which mandates a complete remedy. See Def. Br. at 19-20. To the contrary, the very passage from Monongahela that the government quotes in its brief confirms precisely the opposite — that even if the Framers had omitted the adjective "just," the Takings Clause's compensation requirement alone would mandate interest. The Supreme Court noted:

> The noun 'compensation' standing by itself, carries the idea of an equivalent . . . . So that, if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.'

148 U.S. at 326. (emphasis added). The "equivalent of the property" is the value of the property and the use thereof, i.e., interest. See Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923). Thus, the adjective "just" simply makes "emphatic" that which is already inherent in the concept of compensation. Monongahela, 148 U.S. at 326. This Court has concluded that the Export Clause provides a self-executing right to monetary compensation no less than the Compensation Clause (or for that matter,

the Takings Clause), notwithstanding that the Export Clause does not expressly reference "compensation." See Cyprus Amax, 205 F.3d at 1376 (characterizing the absence of the word "compensation" from the Export Clause as a "semantic distinction" that is "ephemeral"). The principle that the constitutional right to monetary compensation includes interest is therefore applicable here as well.

Similar to the Court's concern in Hatter II, if this Court denies interest on the HMT refunds, it would frustrate the dual purpose of the Export Clause, as described by the Supreme Court in Fairbank v. United States, 181 U.S. 283 (1901):

> [T]he purpose of the restriction is that exportation, all exportations, shall be free from national burden . . . . [I]t is clear that the framers of the Constitution intended not merely that exports should not be made a source of national revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Id. at 292-93 (emphasis added). The government still retains some benefit, i.e., interest, from its unconstitutional assessment and collection of the HMT as applied to exports. See Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999, Table 6, JA at 76, 98. In accordance with 26 U.S.C. § 9602, the Secretary of the Treasury has invested the unconstitutional export HMT in interest-bearing securities of the United States, and the interest generated has been credited to the Harbor Maintenance Trust Fund pursuant to 26 U.S.C. § 9505. Those interest funds are commingled and used for harbor projects that this Court found were

not based on a fair approximation of use by individual exporters. U.S. Shoe II, 114 F.3d at 1573-74. As long as the government retains this benefit, the taxes themselves are necessarily still being used contrary to the protections for individual exporters intended by the Export Clause, rendering it "more hollow than real." Cyprus Amax, 205 F.3d at 1374. Moreover, U.S. Shoe's own ability to conduct its export business remained subject to an unconstitutional tax burden that deprived it of the benefit of the funds themselves, diminishing its capacity to engage in export activity, from 1994 to 1998, not just at the time of payment. The only means for the Court to remedy this continuing interference with U.S. Shoe's export business is to provide U.S. Shoe complete monetary relief, which includes interest from the date the HMT was collected. Were the Court to do otherwise, it would effectively sanction the government's self-enrichment at the expense of U.S. Shoe and other exporters. The Framers could not possibly have intended such an anomalous result, whereby the Export Clause absolutely shields exports from taxation yet permits the imposition of what amounts to an interest-free loan by virtue of that very taxation.

IV. THIS COURT'S DECISION IN IBM IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND SHOULD BE OVERRULED *EN BANC*.

In the event this Court does not agree that U.S. Shoe is entitled to interest on the refunded tax under the Takings Clause or the Export Clause, U.S. Shoe urges that the

decision of the three judge panel of this Court in IBM, 201 F.3d 1367, reversing the CIT's award of interest under 28 U.S.C. § 2411, be overruled. In accordance with Rule 35 of the Rules of this Court, U.S. Shoe respectfully requests a hearing *en banc* for this purpose.

In IBM, the Court reviewed the CIT's judgment in International Bus. Mach. Corp. v. United States, 22 CIT 519 (1998), awarding interest pursuant to 28 U.S.C. §2411 for the reasons stated in United States Shoe Corp. v. United States, 20 CIT 206 (1996) ("U.S. Shoe IV"). In U.S. Shoe IV, the CIT interpreted 26 U.S.C. § 4462(f)(3) to apply in the limited situation where an agency engages in routine administration and enforcement. According to the CIT, the legislative history "explains that the underlying purpose of both § 4462(f)(1) and (3) was to confirm which agency was to have responsibility for collecting and processing the HMT payments." U.S. Shoe IV, 20 CIT at 208. The court also found, however, that 28 U.S.C. § 2411 governed the judiciary and judicial procedures and that a judicial award of interest was not administration and enforcement under § 4462(f). Id. Applying traditional rules of statutory interpretation to § 4462 and 28 U.S.C. § 2411, the lower court held:

> Reading the applicable statutes in pari materia and finding defendant's interpretation of 28 U.S.C. § 2411 and 26 U.S.C. § 4462 as read together unreasonable, the court must construe the statutes, keeping in mind that "all statutes must be construed in light of their purpose." The court finds that in actions brought under 28 U.S.C. § 1581(i), Congress intended to

> provide interest on payments of the HMT for exports pursuant to section 2411, but that related administrative actions would be performed by Customs.

Id. at 209 (citations omitted).

On appeal, this Court addressed whether there was a statutory basis for the award of interest to IBM. At the outset, the IBM Court assumed, incorrectly in our view, that the "no interest rule," as discussed in Library of Congress v. Shaw, 478 U.S. 310 (1986) ("Shaw") infra, applied. The Court acknowledged that the HMT was an excise tax under the Internal Revenue Code and that § 2411 provided ample authority for interest.[6] IBM, 201 F.3d at 1370-71. However, the IBM Court noted that paragraph 1 of subsection § 4462(f) provides that all administrative and enforcement provisions of the customs laws and regulations shall apply to the HMT "as if such tax was a customs duty" and that paragraph 3 directs that the HMT "shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. § 4462(f)(1) and (3). Rejecting the CIT's conclusion that 4462(f)(1) and (3) were solely directed at agency action, the IBM Court found that the phrase "administration and enforcement"

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[6] Section 2411 provides "[i]n any judgment of any court rendered . . . for any overpayment in respect of any internal revenue tax, interest shall be allowed . . . ." and has been construed as a waiver of sovereign immunity. See Shaw, 478 U.S. at 318.

also encompassed judicial enforcement of the tax laws, thus precluding a judicial award of interest on HMT refunds under 28 U.S.C. § 2411.

U.S. Shoe submits that the IBM Court's interpretation of § 4462(f) as controlling the "refund process" of the unconstitutional tax is inconsistent with well settled principles of constitutional law. It is also inconsistent with this Court's affirmance of the judgment order entered by the CIT in U.S. Shoe I, the Supreme Court's affirmance of the same in U.S. Shoe III, and with approximately three thousand stipulated judgment orders subsequently entered by the CIT in reliance upon the Supreme Court's decision. IBM's interpretation of § 4462(f) as a limitation on the judiciary's authority with regard to the "refund process" also results in disparate treatment of exporters who properly invoked the jurisdiction of the court under 28 U.S.C. § 1581(i) with respect to their right to interest on the refunded tax.

A. IBM Is in Direct Conflict with U.S. Shoe and Supreme Court Precedent.

The Supreme Court has previously ruled in this case that the HMT is an unconstitutional tax on exports. U.S. Shoe III, 523 U.S. at 367. This ruling struck down not merely the imposition of the export tax, but its administration and enforcement as well. It is well settled that an unconstitutional law is void and "inoperative as if it had never been passed." Norton v. Shelby County, 118 U.S. 425,

442 (1886); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 760 (1995) (Scalia, J., concurring); Chicago, I. & L. Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913); Hopkins v. Clemson Agric. College of S.C., 221 U.S. 636, 644 (1911). Indeed, the government recognized that there was nothing to administer and enforce with regard to the HMT, as applied to exports, when it issued a General Notice to the public on May 1, 1998, in response to the Supreme Court's decision in U.S. Shoe III. 63 Fed. Reg. 24,209 (1998). This notice, entitled "Harbor Maintenance Fee No Longer To Be Collected on Cargo Loaded for Export," announced that, as of April 25, 1998, Customs had ceased enforcement of the HMT on exports and, further, that:

> the Customs Service will not decide or respond to any protest alleging that the export-related Harbor Maintenance Fees are prohibited by the Export Clause of the United States Constitution. Any person who previously received correspondence from Customs concerning any such protests should disregard such correspondence and will not receive further communications regarding such protests.

63 Fed. Reg. 24209 (1998). Clearly, as of May 1998, Customs had not only discontinued collection (i.e., enforcement) of this unconstitutional tax, but had ceased processing protest claims for a refund of the tax under the usual refund procedures of the customs laws.[7]

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[7] On July 2, 2001, Customs adopted new regulations for processing administrative refund claims of HMT on exports, theoretically allowing a refund of the tax back to the date of its imposition in 1987. Time Limitation for Requesting Refunds of Harbor Maintenance Fees, 66 Fed. Reg. 64,813-19 (2001). These

Nearly two years after the Supreme Court had permanently relegated the HMT as applied to exports to the graveyard of unconstitutional statutes, this Court in IBM resurrected § 4462 to impose a limitation on the lower court's authority to award interest, as if § 4462 as applied to exports was still a valid law. This holding is in direct conflict with Supreme Court precedent on the viability of unconstitutional statutes, including the Supreme Court's decision in this case. U.S. Shoe submits that when the tax as applied to exports was struck down as unconstitutional, there remained only the need for the court to fashion an appropriate remedy to address the wrong, i.e., a refund of the unconstitutional tax with interest as provided by law.

B. IBM's Continued Enforcement of § 4462 Would Preclude the Issuance of Refunds of the Unconstitutional Tax.

In IBM, this Court held that a judicial award of interest is "administration and enforcement" of the HMT, which, pursuant to § 4462(f), must be authorized under the customs laws. The Court stated:

> Accordingly, we are forced to conclude that Congress intended the phrase "administration and enforcement" to encompass not only agency action, but also judicial enforcement of the tax laws, including a judicial award of interest on tax refunds.

This interpretation is consistent with the other paragraph of

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regulations were adopted in response to the decision of this Court in Swisher Int'l, Inc. v. United States, 205 F.3d 1358 (Fed. Cir. 2000), which expanded the period of limitations beyond the two years recognized in U.S. Shoe.

> subsection (f) of the HMT statute, § 4462(f)(1), quoted above, which provides that "all administrative and enforcement provisions of the customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty."

IBM, 201 F.3d at 1373.

The Court's interpretation of "administration and enforcement," as broadly encompassing the HMT "refund process," necessarily includes both the issuance of refunds and interest on those refunds. Under the IBM analysis then, any refund of the tax also must be authorized under the customs laws.

With respect to refunds of customs duties,[8] section 1520(a)(1) and (2) of Title 19, United States Code, authorizes the Secretary of the Treasury to refund duties or other receipts in the following cases:

> **(1) Excess deposits**
>
> Whenever it is ascertained on liquidation or reliquidation of an entry or reconciliation that more money has been deposited or paid as duties than was required by law to be so deposited or paid;
>
> **(2) Fees, charges, and exactions**
>
> Whenever it is determined in the manner required by law that any fees, charges, or exactions, other than duties and taxes, have been erroneously or excessively collected;

19 U.S.C. § 1520(a)(1) and (2). Section 1520(a)(1), on its face, does not authorize a

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[8] According to IBM, § 4462(f) requires that the export tax be treated as a customs duty. IBM, 201 F.3d at 1374.

refund of the export tax because there is no liquidation or reliquidation of a customs entry upon which to base such a refund. On this point, the IBM Court's analysis of 19 U.S.C. § 1505(c) is instructive. Section 1505(c) provides interest "from the date the *importer of record* deposits estimated duties, fees and interest . . . to the date of *liquidation or reliquidation* of the applicable *entry* or reconciliation." IBM, 201 F.3d at 1374. In rejecting this statute as a basis for an award of interest to IBM, the Court stated:

> [o]n its face, the statute contemplates an entirely different factual scenario from the one before us. However, amici suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and Customs' acceptance of the HMT payment for "liquidation," we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended . . . .

Id. Like § 1505(c), § 1520(a)(1) requires that there be a liquidation or reliquidation of a customs entry to refund excessive duties and the absence of a liquidation or reliquidation of a customs entry precludes the use of §1520(a)(1) as a basis for a refund of the unconstitutional tax in this case.

Section 1520(a)(2) also cannot apply in this situation. While a liquidation or reliquidation of a customs entry is not required, § 1520(a)(2) is limited to refunds of fees, charges and exactions that are not duties or taxes. In this case, both the Supreme Court and this Court have affirmed the CIT's finding that the HMT on exports was a

tax. Therefore, by its express terms, § 1520(a)(2) also does not authorize the refund of the export HMT. If, as IBM appears to hold, § 4462(f) survived the finding of unconstitutionality in U.S. Shoe III, and requires that the process for refunding the tax be carried out in conformity with the customs laws, then we are at an impasse, for, as the IBM Court itself noted, the customs refund laws do not fit this situation.[9] Id. at 1371-72. We submit that the inability to refund the unconstitutional tax would be an absurd result and one clearly not intended or even contemplated by Congress.[10]

This Court's analysis of the impact of § 4462(f) on the judiciary's ability to order refunds of the unconstitutional tax fails to take into account the nature of the judgment order entered by the CIT in U.S. Shoe I and affirmed by this Court and the Supreme Court in U.S. Shoe II and III. As regards to a refund of the unconstitutional tax, the CIT entered the following order:

> ORDERED that a money judgment is awarded plaintiff in the

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[9] The government has recognized the lack of authorization under the customs laws to refund the tax, for the Department of Justice ruled that refunds to exporters were to be paid out of the fund established by 31 U.S.C. § 1322. See Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999, February 28, 2001, at 9, JA at 76, 87.

[10] When a court engages in statutory construction, it should avoid an interpretation which leads to an absurd result. Witco Chem. Corp. v. United States, 742 F.2d 615, 619 (Fed. Cir. 1984); Ambassador Div. of Florsheim Shoe v. United States, 748 F.2d 1560, 1564 (Fed. Cir. 1984) (citing Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

amount of $8,281.87, together with interest and costs as provided by law.

United States Shoe Corp. v. United States, 19 CIT 1413 (1995). The CIT had the authority to enter a money judgment against the United States under 28 U.S.C. § 2643(a). That statute, which is not part of the customs laws of the United States, provides as follows:

> **§ 2643. Relief**
>
> (a) The Court of International Trade may enter a money judgment –
>
> (1) for or against the United States in any civil action commenced under section 1581 or 1582 of this title . . . .

Moreover, in the months following the Supreme Court's affirmance in U.S. Shoe III, and prior to this Court's ruling in IBM, the CIT issued literally thousands of money judgments against the United States ordering refunds of the unconstitutional tax. The only authority cited in all of these judgment orders was the Supreme Court's ruling in U.S. Shoe III.[11] In none of these cases did the CIT purport to act under the customs laws.[12]

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[11] The CIT adopted a uniform claims resolution procedure for handling the cases filed under 28 U.S.C. § 1581(i), which included a judgment order agreed to by all claimants and the United States. See United States Shoe Corp. v. United States, 22 CIT 880 (1998). JA at 67-70.

[12] In contrast to the HMT refunds, when the CIT orders a refund of customs duties, it typically directs the Customs Service to reliquidate the subject entries and to refund the excess duties, with interest. See, e.g., Midwest of Cannon Falls, Inc.

The authority of the Court of International Trade to enter a money judgment against the United States in this case in the amount of the illegally collected tax is clear and beyond dispute. It is equally clear that this authority derives not from the customs laws, but from the express authority granted in Title 28, section 2643(a). If a judicially ordered refund of the unconstitutional tax is not dependent upon the customs laws, U.S. Shoe submits that the lower court's authority to award interest on the refunded tax is likewise not limited by the customs laws in these circumstances.

In order to avoid the impasse that necessarily would follow from the imposition of § 4462(f) on the judicial refund process and to be consistent with the Supreme Court's affirmance in U.S. Shoe III, this Court should overrule IBM, find § 4462(f) as applied to exports inoperative, and affirm the lower court's award of interest under 28 U.S.C. § 2411.[13]

C. Disparate Treatment Of Exporters Is An Unintended Consequence of IBM.

In this case, the Supreme Court and this Court have affirmed the CIT's finding

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v. United States, 22 CIT 454 (1998).

[13] If the Court insists that § 4462(f) still applies to the judicial refund process, then U.S. Shoe respectfully submits that the customs laws in general and 19 U.S.C. § 1505 in particular must be interpreted to accommodate the export HMT in accordance with the Supreme Court's analysis in U.S. Shoe III, as discussed in the amicus brief of E.I. DuPont de Nemours & Co.

that it had jurisdiction under 28 U.S.C. § 1581(i) to hear U.S. Shoe's constitutional challenge to the HMT. U.S. Shoe I, 907 F. Supp. 408, 421 (Ct. Int'l Trade 1995), aff'd, 114 F.3d 1564, 1570 (Fed. Cir. 1997), aff'd, 523 U.S. 360, 366 (1998). In rejecting the government's argument that jurisdiction could only lie under 28 U.S.C. § 1581(a), all three courts found that Customs' acceptance of HMT payments was not a protestable decision. As the Supreme Court stated:

> the Federal Circuit correctly noted that the protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liability"; instead, Customs "merely passively collects" HMT payments.

U.S.Shoe III, 523 U.S. at 366. In the absence of a denied protest, a plaintiff cannot obtain jurisdiction under § 1581(a). See Mitsubishi Elec. Am., Inc. v. United States, 44 F.3d 973, 976 (Fed. Cir. 1994).

Subsequently, in Swisher Int'l, Inc. v. United States, 205 F.3d 1358 (Fed. Cir. 2000) ("Swisher"), this Court expanded the jurisdictional basis to challenge the constitutionality of the HMT to include § 1581(a). It did so by distinguishing U.S. Shoe on procedural grounds. The Court found that, unlike U.S. Shoe, in Swisher Customs had denied a refund request and thus rendered a protestable decision. The Court accepted Swisher's refund claim under § 1581(a) even though it covered HMT payments well beyond the two-year limitations period applicable in suits under 28

U.S.C. § 1581(i), stating:

> [a]llowing exporters to seek refunds of all HMT paid since 1987 also avoids a fundamental unfairness to those exporters who did not have the resources to mount test litigation in the district court or the Court of International Trade on the constitutionality of the export HMT. In contrast, if we were to hold that a request for refund was not a protestable decision, Swisher, and others, would be limited to recovering only that HMT paid within two years before filing suit in the Court of International Trade.

205 F.3d at 1368. The Swisher Court's desire to ensure that all exporters are treated fairly with respect to refunds of the HMT is appropriate and commendable. Unfortunately, it appears that the combination of this Court's holdings in Swisher and in IBM, if the latter is allowed to stand, will result in one inequity or unfairness being substituted for another.

As noted above, the decision in IBM requires that any award of interest be authorized under the customs laws. The IBM Court cited 28 U.S.C. § 2644 as a possible basis for such an award.[14] Section 2644 authorizes the CIT to award interest in actions filed under 28 U.S.C. § 1581(a) to contest the denial of administrative

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[14] Section 2644, Title 28, authorizes the payment of interest calculated from the date of the filing of the summons in the CIT, and not from the date of the illegal exaction as discussed in the just compensation argument above. Consistent with 28 U.S.C. § 2411, § 2644 requires that "interest be allowed at the annual rate established under section 6621 of the Internal Revenue Code." Moreover, both § 2411 and § 2644 are part of Title 28 of the United States Code which contains laws relating to the "Judiciary and Judicial Procedures" and not Title 19 which contains laws relating to "Customs Duties."

protests. The IBM Court concluded, however, that 28 U.S.C. § 2644 did not apply in that case because IBM's action was filed under 28 U.S.C. § 1581(i) — the jurisdictional predicate approved by the Supreme Court in U.S. Shoe III. Thus, when read together with U.S. Shoe III, IBM denies interest to exporters who invoked the jurisdiction of the court under § 1581(i), but when read together with Swisher, IBM allows interest to those who invoked jurisdiction under § 1581(a). Accordingly, the Court's decision in IBM leads to disparate treatment of claimants solely on the basis of the jurisdictional predicate alleged in the complaint. It denies interest to U.S. Shoe and other exporters who accepted the burden of challenging the constitutionality of the HMT through proceedings in the Supreme Court, but rewards other exporters who may have stood on the side until the substantive issue was favorably resolved.[15]

To resolve this disparity and to avoid the inherent unfairness that flows therefrom, we urge this Court to affirm the lower court's award of interest to U.S. Shoe under 28 U.S.C. § 2411. In § 2411, Congress has provided a broad basis upon which any court may award interest in any judgment rendered for any overpayment of taxes. Under § 2411, interest would be calculated from the date of payment or collection of

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[15] According to the government's status reports to the lower court, as of September 15, 1999, approximately 3000 refund claims had been processed under U.S. Shoe. In contrast, as of November 13, 2001, the total number of claims filed under Swisher was 188. Relevant portions of these reports are presented in the appendix to this brief.

the tax to the date of the refund for all exporters regardless of their jurisdictional predicate. Accordingly, this statute would treat all exporters the same in providing a remedy for the unconstitutional HMT. Furthermore, this measurement of interest is entirely consistent with the measure of interest mandated by the Fifth Amendment's Just Compensation Clause, i.e., interest from the date of taking to the date of payment. Thus, an award of interest under § 2411 is clearly appropriate.

D. The No Interest Rule Does Not Apply To Unconstitutional Taxes.

Another flaw in the IBM analysis is the Court's application of the no interest rule from Shaw, 478 U.S. at 314. The rule is derived from the doctrine of sovereign immunity, id. at 315; as such, it has no application in a case involving unconstitutional acts by the sovereign.

It is well settled that the federal government "is a Government of enumerated powers [and] it has full attributes of sovereignty within the limits of those powers." Ruppert v. Caffey, 251 U.S. 264, 301 (1920). The Constitution provides the proper scope of federal sovereign immunity. As the Supreme Court stated in North Am. Co. v. SEC, 327 U.S. 686, 704-05 (1946):

> "[t]his power [to regulate interstate commerce], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than that prescribed in the constitution." This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the

> Constitution, such as § 9 of Article I [the Export Clause] and the Bill of Rights. (citations omitted.) (emphasis added.)

See also U.S. Shoe II, 114 F.3d at 1575. Thus, the Export Clause's prohibition of taxation of exports is an express limitation on sovereign immunity.

In Owen v. Independence, 445 U.S. 622, 649 (1980), the Supreme Court held that common law sovereign immunity does not apply with regard to constitutional violations because there can be no discretion to violate the Constitution. The Owen Court further stated that the exertion of governmental power in contravention of rights guaranteed by the Constitution is a proper subject for judicial inquiry, id. at 650, and that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." Id. at 651. Although Owen did not involve the United States as a party, U.S. Shoe submits that the "vindicat[ion] of cherished constitutional guarantees" is no less important when the United States violates the Constitution.

Long-standing Supreme Court precedent establishes that the United States cannot violate the Constitution and then hide behind sovereign immunity, as it is attempting to do here. In Hopkins v. Clemson Agricultural College of S.C., 221 U.S. 636, 644 (1911), the Supreme Court stated:

> But a void act is neither law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce

> unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense . . . .

(Emphasis added).

The HMT on exports violated the Constitution and, thus, was an unlawful act outside the scope of any sovereign immunity provided by the Constitution. Contrary to the holding in IBM, the no interest rule is not a bar to an award of interest to U.S. Shoe in this case. Indeed, even Shaw recognizes that the no interest rule only applies "[a]part from constitutional requirements." Shaw, 478 U.S. at 317. As aptly stated by amici Sony/Arbon, interest has been a requirement in tax refund cases for more than one hundred years. Section 2411, Title 28 codifies the long-standing, common law rule that interest must be paid on refunds of excessive taxes. A fortiori, interest must also be paid on refunds of unconstitutional taxes.

V. ALTERNATIVELY, THIS COURT SHOULD ORDER THE GOVERNMENT TO DISGORGE ALL INTEREST IT ACCUMULATED FROM THE COLLECTION OF THE HMT ON EXPORTS UNDER THE EQUITABLE DOCTRINE OF RESTITUTION.

If this Court does not find a constitutional ground to award interest and is not inclined to overrule IBM, it should use its equitable powers to require the government to disgorge itself of the benefits of the unconstitutional HMT and to award U.S. Shoe interest on such monies. As Judge Learned Hand stated in Procter & Gamble Distrib. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924):

> [I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all . . . . [I]n modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

A refund of the HMT without interest does not provide U.S. Shoe with a proper remedy.

The equitable doctrine of restitution requires the government to disgorge itself of any HMT interest belonging to U.S. Shoe. This doctrine has long been a remedy invoked where a defendant must disgorge and restore something which, in good conscience, belongs to the plaintiff. See generally DAN B. DOBBS, LAW OF REMEDIES, 431-41 (2d ed. 1993). There can be no better circumstance for this Court to apply its equitable powers, than the present case.

Typically, restitution has been invoked where a property interest was obtained by compulsion or coercion.[16] Id. at 5. "Although an award of restitution may in fact

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[16] The HMT is a tax exacted by compulsion. An exporter or shipper who failed to pay the HMT was subject to penalties in the form of financial sanctions. 19 C.F.R. § 24.24(h) (1987). See McKesson Corp. v. Div. of Alcohol and Tobacco, 496 U.S. 18, 38 n.21 (1990) ("We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure.").

provide compensation for plaintiff . . . the restitutionary goal is to prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff. So restitution is measured by the defendant's gains, not by plaintiff's losses."[17] Id. at 4. Where the defendant has had the benefit of the wrongful use of plaintiff's money, the equitable doctrine of restitution requires the plaintiff to be paid the consequential gain to the defendant. Id. at 431.

The Supreme Court, in Harris Trust and Sav. Bank v. Salomon Smith Barney, 530 U.S. 238 (2000), reaffirmed the continuing vitality of the equitable doctrine of restitution holding:

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[17] Traditionally, restitution has included "not only the restoration or giving back of something to its rightful owner, and returning to the status quo, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or the loss or injury caused to another." 66 AM. JUR. 2D Restitution and Implied Contracts § 1 (2001) at 598. Thus, courts have required the person obligated to make restitution "to account for the direct product of the subject matter received while in that person's possession, and to pay an additional amount as compensation for the use of the subject matter as will be just to both parties . . . even though the transferred property itself has previously been recovered, and an action is brought solely to recover the income or value of the use of the subject matter or interest upon the amounts of its value." Id. at § 188 at 759-60 (citing Restatement, RESTITUTION §157). Moreover, "a person who has a duty to pay the value of a benefit which he or she has received is also under a duty to pay interest upon such value from the time that person committed a breach of duty in failing to make restitution if, and only if, the benefit consisted of a definite sum of money . . . or payment of interest is required to avoid injustice." Id. (citing Restatement, RESTITUTION §§ 156, 157). In addition, exemplary damages have been awarded where "restitution alone could have little or no deterrent effect." Id. at §189 at 760.

> "Whenever the legal title to property is obtained through means and under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same . . . a court of equity has jurisdiction to reach the property . . . .'"

Id. at 251 (emphasis added)(citation omitted). There is no more unconscionable usurpation of property than when the government obtains it in violation of the Constitution.

The U.S. Courts of Appeals for the Sixth and Ninth Circuits have recently exercised their equitable power to require the government to disgorge interest and prevent the government from benefitting from monies obtained by judgments that were subsequently set aside.[18] In United States v. $515,060.42 in United States Currency, 152 F.3d 491, 504 (6th Cir. 1998), the Sixth Circuit addressed to what extent an owner may recover the government's profit from the use of seized property when the government later finds it had no proper claim to the property. In deciding to award interest on the $515,060.42, the court held:

> While sovereign immunity customarily precludes the Government's liability for interest prior to a judgment, to the extent that the Government

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[18] It should be noted that there is a split between the U.S. Courts of Appeals. Some have declined to recognize an equitable exception to the "no interest" rule. See, e.g., United States v. $30,006.25 in United States Currency, 236 F.3d 610, 614-15 (10th Cir. 2000); United States v. $7,990.00 in U.S. Currency, 170 F.3d 843, 845-46 (8th Cir. 1999).

> has actually or constructively earned interest on seized funds, it must disgorge those earnings along with the property itself when the time arrives for a return of the seized *res* to its owner . . . . [T]here is no issue of sovereign immunity because the Government is not being asked to pay interest, but to disgorge property . . . ."

Id. at 504 (citations omitted).

The Ninth Circuit, in two forfeiture cases, also applied its equitable powers to award interest. In United States v. $133,735.30 Seized From U.S. Bancorp Brokerage Account, 139 F.3d 729 (9th Cir. 1998), the Court acknowledged that the government is not generally liable for damages or interest prior to judgment because of sovereign immunity. Notwithstanding this, the court was "offended by the notion that the Government could profit from [the] use of a claimant's property by (actually or constructively) earning interest on money," and upheld the award of interest stating the "Government benefitted from [the] use of [plaintiff's money] . . . . [W]hen seized currency is deposited into an interest-bearing Treasury account, the Government must only return with the *res* the interest earned by the Fund at the prevailing rate." Id. at 732-33.

In United States v. $277,000 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995), the Ninth Circuit examined whether the government should return property with interest when it ultimately discovers it had no claim to seize the property. In its analysis the court stated:

> shifting from one pocket to another cannot obscure the fact that in either case, the government obtained tangible and calculable financial benefit from the retention of [plaintiff's] money. This is the money that is constructively part of the *res*, and that must be returned to [plaintiff].

Id. at 1496. Thus, the court held that "to the extent the funds were deposited in the Treasury . . . those funds should be considered as constructively earning interest at the government's alternative borrowing rate." Id.

The government argues these cases do not provide this Court with a basis to exercise its equitable powers to provide U.S. Shoe with interest earned on the HMT Fund. Def. Br. at 42-43. It attempts to distinguish these cases by claiming that the HMT involved routine cash payments and was not a *res* seized. However, the assessment of the unconstitutional HMT on exports was not a routine cash payment, but an unlawful confiscation of U.S. Shoe's monies. Under the Export Clause, Congress was explicitly prohibited from assessing the HMT on exports. Thus, the government's collection of the unconstitutional HMT from U.S. Shoe is akin to an unlawful seizure and the Sixth and Ninth Circuits' decisions are applicable to this case.

To date, the government has disgorged itself only of the HMT collected but not the interest accumulated thereon. Thus, the Court should at least require the government to disgorge all interest accumulated on monies collected under the

unconstitutional HMT on exports.

CONCLUSION

For the foregoing reasons, United States Shoe Corporation respectfully requests that this Court affirm the U.S. Court of International Trade's judgment awarding interest on refunds of the Harbor Maintenance Tax.

Respectfully submitted,

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Dated: November 26, 2001

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7), I, Kevin J. Sullivan, counsel for United States Shoe Corporation, hereby certify that Times New Roman 14-point type was used in the preparation of the foregoing brief. I also certify that this brief was prepared using WordPerfect 8 and contains 12,168 words.

_____
Kevin J. Sullivan

Dated: November 26th, 2001

CERTIFICATE OF SERVICE

I, Kevin J. Sullivan, counsel for United States Shoe Corporation, hereby certify that I caused two copies of the foregoing to be served by overnight courier on the 26th day of November, 2001, addressed as follows:

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