

Fed. Circ. Ruling Could Increase Importers' Evidence Access

By **Sydney Mintzer, Ellen Aldin and Jennifer Parry** (August 18, 2023, 3:35 PM EDT)

In the recent *Royal Brush Manufacturing Inc. v. U.S.* decision, the U.S. Court of Appeals for the Federal Circuit ruled that U.S. Customs and Border Protection's refusal to provide the target of an anti-dumping evasion action with the confidential business information that CBP used in reaching its decision violated the target's due process rights.

The July 27 decision paves the way for importers accused of evading anti-dumping duty orders to access confidential information through methods similar to the administrative protective orders in place for the U.S. Department of Commerce's anti-dumping and countervailing duty proceedings.

Case Background

In 2018, CBP investigated pencil importer Royal Brush Manufacturing Inc. for transshipping pencils from China through the Philippines and wrongly claiming that the pencils originated in the Philippines to avoid anti-dumping orders in place on Chinese pencils.[1]

The investigation was brought under the Enforce and Protect Act and corresponding customs regulation, Title 19 of the Code of Federal Regulations, Part 165.

During the EAPA investigation, CBP conducted a verification site visit to Royal Brush's Filipino supplier and issued a verification report concluding that the manufacturer lacked the capability to produce pencils in large enough quantities to account for the pencils that Royal Brush had imported into the U.S.

Based on this report, CBP determined that Royal Brush was evading the Chinese anti-dumping duty order.[2] However, the verification report provided to Royal Brush redacted critical information pertaining to the Filipino manufacturer, including images of the production line and production statistics, on the basis that the information was the Filipino manufacturer's confidential business information.[3]

Royal Brush appealed CBP's decision to the U.S. Court of International Trade in 2019, arguing, among other claims, that CBP "denied Royal Brush procedural due process and redacted material evidence in an arbitrary and capricious manner." [4]



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CBP argued that the EAPA statute and regulations do not permit the disclosure of confidential business information.[5]

The CIT held that, while Royal Brush was not "entitled to receive business confidential information," the regulations set forth in Title 19 of the Code of Federal Regulations, Section 165.4 require CBP to provide Royal Brush with a public summary of the confidential information provided in the report.[6]

On remand, CBP provided a summary with generic descriptions of photographs and indications that a number was included in brackets.[7]

Royal Brush again appealed to the CIT, arguing that this summary was inadequate. The CIT upheld CBP's summary, finding that CBP had provided the public information required under the regulations, and Royal Brush had not adequately established that CBP had denied the company due process.[8] Royal Brush appealed this decision to the Federal Circuit in December 2021.

Federal Circuit Decision

The Federal Circuit overturned the CIT's second decision, holding that withholding the Filipino manufacturer's business confidential information from Royal Brush violated Royal Brush's due process rights.

The Federal Circuit stated that in administrative proceedings, due process "includes the right to know what evidence is being used against one"[9] and that CBP clearly used statistics marked as confidential in making its determination against Royal Brush.[10]

The Federal Circuit added that there is no legitimate government interest in withholding this confidential business information outside of protecting sensitive information, which may be remedied through an administrative protective order.[11]

The Federal Circuit also dismissed the government's argument that the EAPA and its implementing regulation do not permit administrative protective orders in these investigations.[12]

The court noted that the government generally has the authority to implement protective orders to balance due process rights with confidentiality concerns and that the EAPA statute and legislative history do not contain any restrictions on CBP's inherent authority to implement a protective order.[13]

It added that the government had not identified how a protective order would "impair the function of the EAPA process."[14]

Finally, the Federal Circuit rejected the government's claim that Royal Brush failed to demonstrate that its lack of access to the confidential business information "caused it prejudice."[15]

The court stated that "when a due process violation has occurred because of a denial of access to new and material information upon which an agency relied, no additional showing of prejudice is required."[16]

The court added that, regardless, "the denial of access to the redacted information" is "on its face ... prejudicial because it denied" Royal Brush access to the "information on which the agency relied" when

finding evasion.[17]

Next Steps and Implications

To avoid future decisions like this one, it is highly likely that CBP will implement procedures for administrative protective orders in EAPA investigations. Under these protective orders, importers that are subjects of duty evasion cases will have access to manufacturing information that may strengthen their ability to contest any adverse findings by CBP.

This holding could also have implications beyond EAPA duty evasion proceedings. CBP does not have procedures in place for administrative protective orders in other proceedings, such as forced labor detentions and investigations.

Similar to targets in EAPA investigations, importers whose goods are detained under allegations that the goods are made in whole or in part with forced labor often do not know the evidence CBP used to identify and detain the shipment.

This holding suggests that importers in these situations also have a right to know the evidence used against them in these proceedings,[18] and an administrative protective order would permit this evidence to be shared in a way that does not violate the confidentiality of the party from whom the evidence was derived.

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[1] Royal Brush Manufacturing, Inc. v. United States, Dixon Ticonderoga Company, No. 22-1226 (Fed. Cir., July 27, 2023) at 1.

[2] Id. at 2.

[3] Id. at 3-4.

[4] Royal Brush Mfg. v. United States, 483 F. Supp. 3d 1294, 1297 (Ct. Int'l Trade 2020).

[5] Royal Brush, No. 22-1226, at 5.

[6] Id. at 5.

[7] Id. at 5.

[8] Id. at 6.

[9] Id. at 12, citing Robbins v. U.S. R.R. Ret. Bd., 594 F.2d 448, 452 (5th Cir. 1979).

[10] Id. at 13-14.

[11] *Id.* at 14.

[12] *Id.* at 17-18.

[13] *Id.* at 17-19.

[14] *Id.* at 19.

[15] *Id.* at 20.

[16] *Id.*, citing *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999).

[17] *Id.*

[18] *Id.* at 10.