No. 04-206

In the Supreme Court of the United States

SL SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the federal duty on "expenses of repairs" performed in foreign shipyards on vessels documented in the United States applies to expenses simultaneously incurred due to both dutiable and non-dutiable work.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 357 F.3d 1358. The opinion of the United States Court of International Trade (Pet. App. 13a-21a) is reported at 244 F. Supp. 2d 1359.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2004. A petition for rehearing was denied on April 12, 2004. On July 1, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 10, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1866, Congress has imposed a 50% *ad valorem* duty on "the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States." 19 U.S.C. 1466(a).[1] Congress later explained that it sought to "protect American labor," out of concern that imports "should not come into this country to the detriment of the American producers and wage earners." H.R. Rep. No. 7, 71st Cong., 1st Sess. 3, 4 (1929).

Congress has exempted some repair expenses from the duty under specified circumstances. For example, the Secretary of the Treasury may remit the duty if a "vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and * * * make such repairs, to secure the safety and seaworthiness of the vessel." 19 U.S.C. 1466(d)(1). In addition, "compensation paid to members of the regular crew of such vessel in connection with * * * the making of repairs, in a foreign country, shall not be included in the cost of * * * such repairs." 19 U.S.C. 1466(a).

2. Until 1994, the Customs Service (Customs) generally construed the term "expenses of repairs" to include only those expenses "directly involved" in the

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[1] 19 U.S.C. 1466(a) states in pertinent part:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

repairs, such as costs of parts and labor. Customs generally did not impose a duty on costs of docking a vessel during repairs.

In 1994, the Federal Circuit determined, in interpreting Section 1466(a), that "the language 'expenses of repairs' is broad and unqualified," and therefore covers "all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred." *Texaco Marine Servs., Inc.* v. *United States*, 44 F.3d 1539, 1544 (Fed. Cir. 1994). "Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work." *Ibid.*

Following the Federal Circuit's decision, the Customs Service announced that it would subsequently treat docking-related charges—including crane, dry docking, electricity, travel, transportation, launch, lodging, security, and staging—as dutiable costs under Section 1466(a), to the extent they were incurred in connection with dutiable repairs. Memorandum from Stuart P. Seidel, Assistant Comm'r, U.S. Customs Office of Regulations & Rulings, the to New Orleans Regional Director, Commercial Ops. Div. (Jan. 18, 1995), available at 1995 WL 64779.

3. In November and December 1995, the *Sea-Land Pacific*, a ship owned by petitioner SL Service, dry docked at the Hong Kong United Dockyards for the purpose of obtaining both dutiable repairs and non-dutiable inspections and modifications. Pet. App. 1a-2a. Pursuant to normal industry practice, petitioner decided months in advance to have dutiable and non-dutiable work done at the same time. See C.A. App. 44-46, 51. Petitioner undertook dutiable repairs that required dry docking during all or nearly all of the time the ship

remained in dry dock. See, *e.g.*, *id.* at 837 (SL Service record indicating that preparing and painting the hull lasted virtually the entire length of the dry docking); *id.* at 842 (SL Service record indicating that preparing and painting the hull was dutiable work that required dry docking).

When the *Sea-Land Pacific* returned to the United States two weeks later, Customs imposed the Section 1446(a) duty on repair expenses. In so doing, it noted that there was a "mixed justification" for the dry docking costs, in that petitioner dry docked the vessel for both dutiable and non-dutiable work. C.A. App. 105. Pursuant to its longstanding practice with other mixed-purpose expenses, Customs apportioned the costs of dry docking between the dutiable and non-dutiable work. *Ibid.* Customs assessed a total duty of $295,221; according to petitioner, $12,542 (approximately 4%) of that amount is attributable to dry docking expenses. See Pet. 10.

4. Petitioner SL Service filed this action in the Court of International Trade, contending that none of the "mixed-purpose" dry docking expenses should have been assessed with duties because petitioner allegedly would not have incurred them "but for" the non-dutiable inspections. Petitioner also argued that Section 1466(a) prohibits Customs from apportioning such expenses.

The Court of International Trade ruled that, while apportionment of dry docking expenses is proper under Section 1466(a), Customs' methodology is arbitrary, capricious, and contrary to law. Pet. App. 13a-21a. The court held that "only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/or modifi-

cations are dutiable under the *Texaco* test." *Id*. at 19a-20a.

5. The court of appeals reversed. Pet. App. 1a-12a. The court explained that "*Texaco* dealt with single-purpose expenses [*i.e.*, those incurred solely because of dutiable repairs] while the dry-docking of the Sea-Land Pacific was a dual-purpose expense." *Id.* at 4a. "As such, the 'but for' test, which was formulated for classification of single-purpose expenses, is inapplicable." *Ibid* After considering common law authorities on causation, the court of appeals concluded that "the dry-docking was equally *caused* by both the non-dutiable and dutiable work," and "just as the tortfeasor in concurrent causation cases is held responsible for the harm he causes, it is rational to consider the dry-docking an 'expense of repairs.'" *Id*. at 7a.

After concluding that the dry docking was a dutiable "expense of repairs," the court of appeals held that "it is rational to impose the duty only on that portion of the expense that is fairly attributable to the dutiable repairs." Pet. App. 7a. "Indeed, to impose the 50% *ad valorem* duty on the entire cost of dry-docking in this case would exceed the mandate of the statute." *Ibid*. Thus, "Customs' long-standing practice of apportioning the cost of various expenses between dutiable repairs and non-dutiable inspections and modifications comports with both the statute and common sense." *Id*. at 8a.

Judge Bryson dissented. Pet. App. He determined that the dry docking expenses were not dutiable under the "but for" test because they were incurred for non-dutiable "inspection and maintenance purposes as well as for repairs, and thus the expenses would have been incurred even without the occurrence of the dutiable repair work." *Id*. at 10a. Judge Bryson also concluded

that Customs' apportionment methodology "finds no support in the vessel repair statute," which "offers no guidance as to how such an apportionment should be conducted." *Id*. at 12a.

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or of any court of appeals. Further review is not warranted.

1. a. Petitioner contends that dry docking cannot be an "expense of repairs" when it is necessitated by something other than dutiable repairs. As petitioner conceded in the court of appeals, however (Appellee C.A. Br. 29 n.16), "[s]ome, but not all of the repair work required dry-docking." Thus, the dry docking was a necessary "expense of repairs."

Although petitioner frequently invokes the "plain language" of the statute (Pet. 13, 15-16, 17), petitioner does not (and can not) identify any statutory text even suggesting that an expense *required* to undertake a repair is anything other than an "expense of repair." Petitioner's argument that "[t]he statute contemplates that an expense either is or is not a dutiable expense of repair" (Pet. 18) sheds no new light on the problem: as the Federal Circuit held, the dry docking at issue here is a dutiable "expense of repairs" precisely because it was required by dutiable repairs and no exception applies. Pet. App. 7a.

b. Petitioner also errs in arguing that the Federal Circuit "abandoned the *Texaco* 'but for' test as the generally applicable plain-language interpretation of the statutory phrase 'expenses of repairs.'" Pet. 15. Rather than "abandon[ing]" the "but for" test, the Federal Circuit simply found it "inapplicable" on the facts of this case. Pet. App. 4a. In *Texaco*, the Federal Circuit

determined that "cleaning performed subsequent to dutiable repairs" and "work associated with protective coverings used during dutiable repairs" were "expenses of repairs" because "they would not have been incurred 'but for' dutiable repairs." *Ibid*. (quoting *Texaco*, 44 F.3d at 1541). As the Federal Circuit explained (*id.* at 4a):

> The most obvious difference between the facts here and those in *Texaco* is that *Texaco* dealt with single-purpose expenses while the dry-docking of the Sea-Land Pacific was a dual-purpose expense. As such, the "but for" test, which was formulated for classification of single-purpose expenses, is inapplicable.

In drawing this distinction, the Federal Circuit had good company: the common law has long recognized that the but-for test "fails," and "some other test is needed," in concurrent-cause situations. William Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984); see Restatement (Third) of Torts: Liability for Physical Harm § 27, cmt. b (Tentative Draft no. 2, 2002) ("Courts and scholars have long recognized the problem of overdetermined harms—harms produced by multiple sufficient causes—and the inadequacy of the but-for standard for this situation."). Far from conflicting with one another, the decisions in *Texaco* and this case complement one another in the same way that different common law doctrines of causation complement one another: costs are covered by the duty if they were necessitated solely by dutiable repairs (as in *Texaco*), and are apportioned if they were necessitated by both dutiable and non-dutiable work (as here). See Pet. App. 6a-7a.

Any other reading would conflict with *Texaco*'s reasoning. *Texaco* construed Section 1466(a) broadly,

according to its terms, to *expand* the category of costs traditionally considered to be "expenses of repairs." See *Texaco*, 44 F.3d at 1544. Under petitioner's reading, however, *Texaco* would have opened a massive loophole by enabling ship owners to evade the duty by undertaking dutiable and non-dutiable work at the same time. Nothing in *Texaco* reflects such a self-defeating intent.[2]

c. Petitioner also contends (Pet. 16) that "the repairs did not 'cause' the foreign dry-docking, or any part of it," because "it was undisputed that the reason the ship was dry-docked abroad was to comply with federal inspection mandates." That contention is incorrect.

Petitioner conceded below that "[a]s soon as a ship completes one dry-docking, the ship begins a file of work to be accomplished at the next docking." C.A. App. 51. Indeed, "ship owners and operators know months in advance of a dry-docking most of the repairs that will be made," and "solicit competitive bids from ship repair yards in advance of a scheduled dry-docking to obtain the best prices for the repair work." *Id.* at 44-45; see *id.* at 51. Thus, the record does not support petitioner's contention that the *Sea-Land Pacific* entered dry dock

[2] Nor is the decision below in conflict with *Sea-Land Service, Inc.* v. *United States*, 239 F.3d 1366 (Fed. Cir.), cert. denied, 533 U.S. 931 (2001), which addressed only the procedural question whether Customs should undertake a notice-and-comment proceeding, or *United States* v. *George Hall Coal Co.*, 134 F. 1003 (S.D.N.Y. 1905), aff'd, 142 F. 1039 (2d Cir. 1906) (per curiam), which, as the Federal Circuit noted, "addressed a jurisdictional question only. There were no findings with respect to the dutiability of dry-docking." Pet. App. 6a. While petitioner is correct that Customs did not generally collect a duty on docking expenses before the Federal Circuit decided *Texaco*, that change was occasioned by *Texaco*, not the decision below, and petitioner has not challenged *Texaco* in this Court or the court of appeals. Instead, petitioner has always *relied* on *Texaco* as the basis for its challenge to the duty imposed in this case.

solely for non-dutiable reasons; instead, the record demonstrates that ships enter dry dock for purposes of *both* dutiable and non-dutiable work. See Pet. App. 1a-2a. The court of appeals correctly relied on that fact as a premise for its decision. *Ibid.* (noting that the vessel "was dry-docked at the Hongkong [sic] United Dockyards *for the purpose of obtaining* * * * required inspections and modifications, which are non-dutiable, in addition to *dutiable repairs*") (emphases added); see *id.* at 4a ("the dry-docking of the Sea-Land Pacific was a dual-purpose expense").

Petitioner attempts to evade those facts by speculating that if the *Sea-Land Pacific* had not undergone inspection in Hong Kong in November and December 1995, it might have undertaken the repairs—which petitioner concedes were needed—at a different time or place. Pet. 10, 17. That speculation is unsupported by the record, and is irrelevant in any event. Regardless of the initial motivation for scheduling the dry dock in Hong Kong, petitioner chose to make dutiable repairs in Hong Kong that required dry docking. At the time the vessel was in dry dock, and was incurring dry dock charges, it was simultaneously incurring those charges for both dutiable and non-dutiable work. Thus, the dry docking charges were expenses of repairs. Cf. Restatement (Third) of Torts: Liab. for Physical Harm § 27, cmt. e (2002) (concurrent cause principles apply to events "operating and sufficient to cause the harm contemporaneously").

d. Petitioner's contrary arguments exalt form over substance in such a way as to undermine congressional intent. If petitioner had its way, ship owners could defeat the applicable portion of the duty by initially identifying only non-dutiable work as the reason for dry

docking, and later scheduling all of their needed dutiable repairs for the same docking. Indeed, ship owners could avoid *ever* paying duties on dry docking costs associated with dutiable repairs by always undertaking dutiable and non-dutiable work at the same time.

Petitioner unabashedly endorses that result, arguing that such an evasion of Section 1466 is fully consistent with congressional intent because it would save ship owners from the supposed "Hobson's choice" of paying the duty or having their ships repaired in the United States. Pet. 22 n.12. That curious argument stands congressional intent on its head: Congress enacted Section 1466 precisely in order to encourage ship owners to utilize American shipyards. Thus, the imposition of a financial cost for dry docking in a foreign shipyard, instead of undertaking repairs in an American shipyard, is the very *purpose* of the statute, not an unfortunate side effect of the court of appeals' ruling, as petitioner would have it. See H.R. Rep. No. 7, *supra*, at 3, 4 (explaining that Congress sought to "protect American labor," out of concern that imports "should not come into this country to the detriment of the American producers and wage earners").[3]

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[3] *South Corp.* v. *United States,* 690 F.2d 1368, 1372 (Fed. Cir. 1982) ("Congress sought to protect and encourage American ship repair facilities."); *Mount Wash. Tanker Co.* v. *United States,* 665 F.2d 340, 344 (C.C.P.A. 1981) (explaining that duty serves "to equalize * * * relative costs of repairs performed by foreign versus domestic labor, in order to encourage U.S. shipowners to employ U.S. labor whenever possible"); *Sea-Land Serv., Inc.* v. *United States,* 683 F. Supp. 1404, 1409 (Ct. Int'l Trade 1988) ("It is evident from the legislative history * * * that the basic purpose of the foreign repair statute was to protect American labor."); *Erie Navigation Co.* v. *United States,* 475 F. Supp. 160, 163 (Cust. Ct. 1979) ("It is clear that the purpose of section 1466(a) was to protect the American shipbuilding and

Petitioner counters (Pet. 23) that the merchant fleet is now in dire economic straits, and American shipyards are too busy and expensive for private cargo vessels. Those factual assertions are unproven conjecture: petitioner neither raised them below nor adduced any record evidence in support of them. In any event, the alleged state of the merchant marine in 2004 is irrelevant to the interpretation of the plain language of a statute enacted in 1866 to protect American shipyards. Petitioner's complaints are appropriately addressed to Congress, not the courts.[4]

2. a. In addition to contesting the imposition of a duty on multi-purpose expenses, petitioner challenges Customs' decision to apportion such expenses between dutiable and non-dutiable work (Pet. 19). The basis for that challenge is not clear. Petitioner notes that Section 1466 does not expressly reference apportionment, but petitioner does not identify any alternative to apportionment (short of exempting the relevant expenses from duty altogether). Because the dry docking expenses are "expenses of repairs" subject to the duty, Customs' only conceivable options were to impose a duty on the full

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repairing industry."); *United States* v. *Gissel*, 353 F. Supp. 768, 772 (S.D. Tex. 1973) (noting that "it was Congressional policy to encourage the obtaining of American flag vessel repairs in American shipyards"), aff'd, 493 F.2d 27 (5th Cir.), cert. denied, 419 U.S. 1012 (1974).

[4] Congress has exempted only one category of multi-purpose expenses from the duty: "compensation paid to members of the regular crew of such vessel in connection with * * * the making of repairs, in a foreign country." 19 U.S.C. 1466(a). Congress has also enacted an exemption for situations in which a ship cannot safely return to the United States. 19 U.S.C. 1466(d)(1). But it has never enacted an exemption for expenses incurred abroad simply because the vessel owner found it less expensive to use a foreign shipyard rather than a shipyard in the United States.

amount or to apportion equitably. Faced with this choice, Customs reasonably chose the option that benefitted petitioner.

Petitioner asserts (Pet. 19) that the court of appeals erred in deferring to Customs' apportionment methodology because, until *Texaco*, Customs historically did not impose any duty on docking expenses. That argument misses the point. The court of appeals held apportionment to be reasonable without regard to deference, in light of the statutory text and the equities, and by analogy to tort law. Pet. App. 7a. When the court of appeals went on to consider the apportionment methodology adopted by Customs, it had no reason to consider the treatment of docking-related expenses before *Texaco*, because the question of apportionment of such expenses did not arise in the pre-*Texaco* era. The relevant past practice, which the court of appeals correctly considered, is Customs' 40-year-old practice of employing apportionment in an analogous, mixed-purpose context in which Customs has long considered one of the purposes to be subject to duty. *Id.* at 8a-9a; C.A. App. 258, 273-274, 276, 284.

b. In addition to challenging the concept of apportionment, petitioner takes issue with two aspects of the apportionment methodology employed by the Customs Service (Pet. 19-21). Those claims are not encompassed in the question presented, which asks only whether the duty applies, not how the duty should be calculated. See Pet. (i); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-537 (1992). Petitioner also refrained from raising those claims in the court of appeals, and the court did not address them. This Court does not ordinarily grant a petition for a writ of certiorari to review claims that were

neither pressed nor passed upon below. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if those claims were properly presented, they would not warrant this Court's review. The particulars of Customs' methodology do not run afoul of Section 1466, which, as petitioner notes, "offers no guidance as to how such an apportionment should be conducted." Pet. 19 (quoting Pet. App. 12a (Bryson, J., dissenting)). Petitioner contends that apportionment should be based only on the costs of repairs that required dry docking, as opposed to the costs of all repairs (*id.* at 19-20), but all of the repairs were in fact performed in dry dock. Petitioner also notes that as the ratio of dutiable to non-dutiable work rises, the percentage of docking costs subject to duty rises in direct proportion (*id.* at 20-21), but there is nothing irrational about that result. In any event, the court of appeals had no occasion to consider those claims because petitioner did not present them below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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