No. 00-415

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SWISHER INTERNATIONAL, INC.

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

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent is incorrect in contending (Br. in Opp. 1, 13-14) that the position taken by the United States concerning the importance of the jurisdictional issue in *this* case is inconsistent with the position that we took concerning the importance of the jurisdictional issue in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). In our petition in *United States Shoe*, we noted that the question whether jurisdiction existed under 28 U.S.C. 1581(a) or instead under 28 U.S.C. 1581(i) was not critical in *that* case because the taxpayer in that particular case had timely preserved claims under *both* jurisdictional theories. See 97-372 Pet. at 7 n.2. In the present case, however, the taxpayer did *not* timely preserve its claim under the statute of limitations that

applies to claims brought within the "residual" jurisdiction of the Court of International Trade under 28 U.S.C. 1581(i). See Pet. 9, 21. Under the holding of this Court in *United States Shoe*, respondent's claims come within the "residual" jurisdiction of the Court of International Trade under Section 1581(i) and should therefore be dismissed because they are barred by the statute of limitations. See Pet. App. 25a-26a. This case thus presents two important issues that were *not* presented in *United States Shoe*: (i) whether the court of appeals erred in refusing to follow the holding of *United States Shoe* that the "residual" jurisdiction of Section 1581(i) applies in these refund cases and (ii) whether the court of appeals incorrectly held that jurisdiction may exist *simultaneously* under both Section 1581(a) and Section 1581(i).

The first of these two questions is of obvious recurring importance, for the Federal Circuit should not be allowed to contradict the decisions of this Court that establish the proper operation of the federal statutes that authorize and limit monetary recoveries against the United States. When, as here, "a precedent of this Court has direct application in a case," the courts of appeals are to "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

The second jurisdictional issue described above is also of broad and recurring importance, for that holding of the court of appeals would make the exhaustion of available administrative remedies discretionary, rather than mandatory, for claimants in the Court of International Trade. The conclusion of the court of appeals that a claimant may elect to proceed under the "residual" provision of Section 1581(i) even if it had failed

to exhaust a "protest" within the court's jurisdiction under Section 1581(a) violates the established principle, correctly recognized by the trial court, that "if one had the opportunity for access to the court under 28 U.S.C. § 1581(a), * * * there is no § 1581(i) jurisdiction." Pet. App. 27a. See also *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988). This holding of the court of appeals would also, for the reasons carefully explained in this case by the Court of International Trade, allow claimants to manipulate and avoid the statutes of limitations enacted by Congress to govern such claims. See Pet. App. 32a-33a; Pet. 20-21.

2. Respondent states that it is "unremarkable" that the court of appeals concluded that "different administrative procedures may provide different bases for jurisdiction" in the Court of International Trade because a single type of Customs action is often subject to review under different portions of the jurisdictional provisions of Section 1581 (Br. in Opp. 12, 18-19). While administrative actions may sometimes yield different jurisdictional options under Section 1581(a)-(h), that is plainly *not* the case when the "residual" jurisdiction of Section 1581(i) is invoked. In enacting this "residual" jurisdiction, it is clear that "Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service." *United States* v. *Uniroyal, Inc.*, 687 F.2d 467, 471 (C.C.P.A. 1982). See Pet. 17 n.6. Indeed, as even respondent ultimately acknowledges, "Congress did not intend this residual jurisdiction, which was first created in 1980, to encompass causes of action that were the traditional and

exclusive province of protest jurisdiction" (Br. in Opp. 6).

By allowing a claimant to elect whether or not to exhaust available remedies—and thereby providing the claimant with the power to determine whether (and when) the statute of limitations on its claim commences to run—the decision in this case is both "remarkable" and unprecedented. As the Court of International Trade stated in rejecting respondent's novel jurisdictional theory, a claimant should not be permitted to "unilaterally grant itself a new limitations period by making a refund request whenever it so chooses." Pet. App. 33a.

3. Respondent attempts to mask its fundamental disagreement with the decision in *United States Shoe* by contending that it has pursued a "third" jurisdictional option that was not addressed in that case (Br. in Opp. 17). But the "third" option that respondent describes is simply a "protest" from the denial of a refund request. If such a "protest" option is available to respondent, it would also have been available to the claimant in *United States Shoe*. And, if such a protest option were available to the claimant in *United States Shoe*, then "residual" jurisdiction would not have existed in that case—for, if the exporters "could have taken steps" to protest but failed to do so, the "residual" jurisdiction of the Court of International Trade cannot apply. *Miller & Co.* v. *United States*, 824 F.2d at 963. See also *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984).

Respondent is also incorrect in asserting (Br. in Opp. 15-16) that its jurisdictional theory was neither presented nor considered in the *United States Shoe* case. In fact, respondent's jurisdictional theory was ex-

pressly considered and squarely rejected in that case (as well as in the present case) by the Court of International Trade. *United States Shoe Corp.* v. *United States*, 19 Ct. Int'l Trade 1284, 1300 (1995), aff'd, 114 F.3d 1564 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). In the *United States Shoe* case, respondent appeared as an *amicus curiae* and presented its jurisdictional arguments not only to the Court of International Trade but also to the Federal Circuit. Pet. App. 26a. In addressing and resolving this jurisdictional issue in *United States Shoe*, this Court was, of course, fully aware of the reasoning and conclusions of the lower courts which had specifically addressed and rejected respondent's theory in that case. And, of course, the record of *United States Shoe* contained the *amicus* briefs that respondent filed in the lower courts in that case. In concluding that the "residual" jurisdiction of the Court of International Trade applied in *United States Shoe*, 523 U.S. at 365, this Court necessarily rejected the availability of *all* avenues of protest jurisdiction—including the route that respondent had raised, and that the lower courts had rejected, in that very case.

Respondent is clearly wrong in suggesting that this Court elected silently to "waive the exhaustion requirement" in *United States Shoe* "rather than require that exporter to request a refund from Customs" (Br. in Opp. 20-21). This Court did not "waive the exhaustion requirement" in *United States Shoe*. To the contrary, the court emphasized the critical importance of the exhaustion requirement, noting that a protest "is an essential prerequisite" that must be followed by the claimant to establish jurisdiction in customs cases. 523 U.S. at 365. It was precisely because of the Court's conclusion that there is no available protest route for "con-

troversies regarding the administration and enforcement of the [Harbor Maintenance Tax]" that the Court held that the "residual" jurisdiction of the Court of International Trade *is* available under Section 1581(i). 523 U.S. at 366.

4. Notwithstanding the contrary holding of this Court in *United States Shoe*, respondent argues that the denial of its refund request should be treated as if it were a protestable "decision" as to a charge or exaction under 19 U.S.C. 1514(a)(3). The only case cited by respondent for that theory (Br. in Opp. 25) is *Eurasia Import Co.* v. *United States*, 31 C.C.P.A. 202 (1944). But the conclusion that respondent purports to draw from that decision was specifically rejected by the same court in its subsequent decision in *Carlingswitch, Inc.* v. *United States*, 651 F.2d 768, 773 (C.C.P.A. 1981). In *Carlingswitch*, the court of appeals expressly held that "a refusal to refund money is not a § 1514 'charge or exaction'" which may be protested. *Ibid.* Protests under subsection 1514(a)(3) are to be made from the "actual assessments of specific sums of money" and not from any subsequent refusal to refund that money. *Id.* at 771, 773. Otherwise, a claimant would hold the key to the statute of limitations in his pocket, for he could manufacture "a new limitations period by making a new request for refund whenever [he] chooses." Pet. App. 33a. As the Court of International Trade emphasized in its decision below, that precise defect is a central feature—and not merely an accidental by-product—of respondent's flawed position in this case. *Ibid.*

Respondent did not protest a Customs decision to "assess" or "exact" money. Instead, respondent purportedly protested a Customs decision that refused to refund amounts that had been assessed and collected in

years long past.[*] Respondent's assertion that the refusal of the Customs Service to grant a request for refund is a protestable decision within the meaning of 19 U.S.C. 1514(a)(3) conflicts not only with the holding of this Court in *United States Shoe* but also with the longstanding precedent of the Federal Circuit itself in the *Carlingswitch* case. Respondent is thus simply wrong in asserting that the decision in this case is consistent with "fifty years of precedent" (Br. in Opp. 10). To the contrary, the decision in this case unsettles established rules for the adjudication of customs cases and, in doing so, departs radically from the recent, controlling decision of this Court on this very subject.

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For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

NOVEMBER 2000

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[*] Congress has been quite specific in delineating the situations in which it has determined to allow a protest of the Service's "refusal" to take action. See 19 U.S.C. 1514(a)(6)-(7) (authorizing protests of Customs' "refusal" to "pay a claim for drawback" or "refusal" to "reliquidate an entry").