No. ___________

In the
Supreme Court of the United States

HARRIS COUNTY, TEXAS

Petitioner,

v.

PRSI TRADING, LLC

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that an administrative agency's decisions made in a judicial capacity have issue preclusive effect. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 148 (2015). This Court has also held that deference to an administrative agency's interpretations of its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), respectively, applies only to interpretations made as part of "the agency's 'authoritative' or 'official position.'" *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2416 (2019).

This local property tax case involves the application of Customs and Border Patrol's interpretation of its own regulations in two Headquarters Letter Rulings regarding the status of a foreign trade subzone to determine whether certain property in that subzone—specifically, tens of millions of dollars' worth of crude oil and refined products at a refinery and tank farm—is exempt from state and local ad valorem taxation under 19 U.S.C. § 81o(e), a provision of the Foreign Trade Zones Act of 1934. The question presented is:

Whether the Texas Supreme Court erred in failing to follow the findings of CBP in its Headquarters Ruling Letters in holding that the foreign trade subzone in question was "activated."

PARTIES TO PROCEEDING AND RELATED CASES

Petitioner: Harris County, Texas

Respondent: PRSI Trading LLC

Related cases:

- *Harris County v. PRSI Trading, LLC and Harris County Appraisal District*, No. 2013-61450, 334th Judicial District Court, Harris County, Texas. Summary judgment entered April 20, 2016.
- *Harris County v. PRSI Trading, LLC and Harris County Appraisal District*, No. 4:13-cv-03437, U.S. District Court for the Southern District of Texas. Order remanding case to the 334th District Court entered September 29, 2014.
- *Harris County v. Harris County Appraisal District and PRSI Trading, LLC*, No. 01-16-00389-CV, Court of Appeals of Texas, First District, Houston. Opinion and judgment reversing the trial court's judgment

and rendering judgment for Petitioner issued June 22, 2017, reported at 579 S.W.3d 77. Order denying reconsideration *en banc* issued June 12, 2018 and reported, with dissenting opinions, at 554 S.W.3d 708.

- *PRSI Trading, LLC v. Harris County*, No. 18-0664, Supreme Court of Texas. Opinion and judgment reversing the court of appeals' judgment and rendering judgment for Respondent issued February 28, 2020 and reported at 599 S.W.3d 303. Order denying Petitioner's motion for rehearing issued May 29, 2020, unreported.

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Petitioner Harris County, Texas ("Harris County") respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Texas (App. A-1) is reported at 599 S.W.3d 303. The order of the Supreme Court of Texas denying Petitioner's motion for rehearing (App. A-88) is unreported. The opinion of the Court of Appeals of Texas, First District (App. A-18) is reported at 579 S.W.3d 77. The judgment of the 334th District Court (App. A-63) is unreported.

JURISDICTION

The Texas Supreme Court entered its opinion and judgment February 28, 3030. App. A-1. On May 29, 2020, the Texas Supreme Court denied a timely motion for rehearing. App. A-89. On March 19, 2020, this Court entered an Order extending the deadline to file any petition for certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a) because the validity of a statute of Texas is drawn in question on the ground of its being repugnant to the laws of the United States and because a right is claimed under the statutes of the United States.

As recited in the opinions of the Texas Supreme Court and the First Court of Appeals, the issue of whether the federal ad valorem tax exemption under

19 U.S.C. § 81o(e) applies was raised through Respondent's assertion of that exemption in its rendition to the Harris County Appraisal District and by Petitioner's challenge to that exemption before the appraisal district and in its petition for judicial review filed in the 334th District Court. App. A-24. The application of this exemption was the central issue of the entire course of litigation in this case. The 334th District Court found that the exemption applied, the Texas First Court of Appeals held that it did not apply, and the Texas Supreme Court held that it applied.

Additionally, Petitioner argued in its summary judgment pleadings in the 334th District Court and in its briefing in the state appellate courts that the CBP's headquarters ruling letters were entitled to issue preclusive effect under this Court's holding in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 147 (2015). A-33–34. The Texas First Court of Appeals held that CBP's ruling letters were entitled to issue preclusive effect, while the Texas Supreme Court gave greater weight to CBP's actions in granting temporary extensions after the letter ruling.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the statutory addendum to this petition.

INTRODUCTION

This is a local property tax case involving crude oil and refined products (the Inventory) at an oil refinery and tank farm located in a subzone that was established under the Foreign Trade Zones Act of 1984. Respondent, the owner of the Inventory, claimed that the Inventory is exempt from local property tax under 19 U.S.C. § 81o(e). However, CBP, which is responsible for supervising foreign trade zones and subzones, ruled in two Headquarters Ruling Letters (HRLs) that the subzone was not "activated" pursuant to CBP regulations during the tax years at issue. Under CBP and Foreign Trade Zone Board regulations, a zone or subzone must be "activated" for goods therein to be exempt from state and local ad valorem taxation under section 81o(e).

Despite CBP's determinations in the HRLs, the Texas Supreme Court held that the subzone was "activated" and the tax exemption applied because, despite CBP's express rulings, the court inferred from CBP's other conduct treating the subzone as if it was activated. Unlike the HRLs, however, CBP's acts on which the Texas Supreme Court relied were not judicial decisions entitled to issue preclusive effect, nor were they "authoritative" acts constituting the "official position" of CBP entitled to *Auer* deference. By disregarding the HRLs in favor of its own inferences drawn from CBP's non-judicial, non-authoritative acts, the Texas Supreme Court erred.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Foreign Trade Zones Act of 1934, 19 U.S.C. § 81a–81u, (the Act) authorizing the establishment of Foreign Trade Zones (FTZs), secure areas considered to be outside of the Customs territory of the United States for the purposes of payment of duty. The Act created the Foreign Trade Zone Board (FTZ Board), comprised of the Secretary of Commerce and the Secretary of the Treasury, and authorizes the FTZ Board to establish FTZs. 19 U.S.C. §§ 81a(b), 81b(a).

FTZs are under the supervision of the Bureau of Customs and Border Patrol (CBP), and are subject to "such regulations respecting identity and the safeguarding of the revenue as the Secretary of the Treasury may deem necessary." 19 U.S.C. § 81c(a). The FTRZ Board also has authority to "prescribe such rules and regulations not inconsistent with the provisions of this chapter or the rules and regulations of the Secretary of the Treasury made hereunder[.]" 19 U.S.C. § 81h.

An FTZ is created through a "grant of authority" by the FTZ Board to a "zone grantee," or simply "grantee," authorizing the grantee "to establish, operate and maintain a zone, subject to the limitations and conditions specified in [15 C.F.R. part 400] and 19 C.F.R. part 146." 15 C.F.R. § 400.2(i). The grantee is typically a port authority or other public corporation. The ultimate beneficiary of an FTZ is a "zone operator," or simply "operator," who "operates within a zone or subzone under the

terms of an agreement with the zone grantee (or third party on behalf of the grantee), with the concurrence of CBP." 15 C.F.R. § 400.2(w).

Under the FTZ Board's regulations, the FTZ Board may create a special-purpose "subzone" outside the confines of an FTZ. 15 C.F.R. § 400.3. Such a subzone is for the use of a specific operator for a limited purpose that cannot be accommodated within the general-purpose Foreign Trade Zone. 19 C.F.R. § 146.1(b).

In 1983, Congress amended the Act, providing that "[t]angible personal property imported from outside the United States and held in a zone" for certain purposes "shall be exempt from State and local ad valorem taxation." 19 U.S.C. § 81o(e).

The FTZ Board has clarified that property must be "admitted" into a zone in order to be entitled to ad valorem tax exemption: "Foreign merchandise (tangible personal property) *admitted* to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local ad valorem taxes. Articles admitted into zones for purposes not specified in the Act shall be subject to the tariff laws and regular entry procedures, *including the payment of applicable* duties, *taxes*, and fees." 15 C.F.R. § 400.1(c) (emphasis added).

"'Admit' means to bring merchandise into a zone with zone status." 19 C.F.R. § 146.1(b). Merchandise may only be admitted into a zone or subzone that has been "activated": "'Activation' means approval by the grantee and port director for operations and for the admission and handling of merchandise in zone

status." 19 C.F.R. § 146.1(b). Upon approval of an application for activation and acceptance of an executed bond, "the zone or zone site will be considered activated; and merchandise may be admitted into the zone." 19 C.F.R. § 146.6(e). "Only after the approval of activation will Users gain the benefits conferred under the Act." [1]

If a new entity wishes to take over as operator of an existing subzone, it must apply for and obtain the concurrence of the zone grantee and approval of a new activation. "A grantee of an activated zone shall make written application to the port director for approval of a new operator[.]" 19 C.F.R. § 146.7(e). "If the operator is different, it is an activation." 19 C.F.R. § 146.1(b). An application for zone activation "must be accompanied by . . . [t]he written concurrence of the grantee, when the operator applies for activation, in the requested zone activation." 19 C.F.R. § 146.6(b)(5). If an operator is a corporation and a "change results in a new corporate entity, a new application shall be made under the procedures in 19 C.F.R. § 146.6 and Section 4.12 FTZM." App. 5, FTZM § 4.13(b).

II. THIS CASE

Petitioner Harris County, Texas is a political subdivision of the State of Texas, empowered under Texas law to assess and collect ad valorem taxes on

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[1] U.S. Customs and Border Patrol, FOREIGN TRADE ZONES MANUAL, at 39, ¶ 4.1. Appendix 5. (FTZM).

real and tangible personal property within its borders. Under the Texas Constitution, all real and tangible personal property is subject to ad valorem taxation unless subject to an exemption. Tex. Const. art. 8, § 1(b). Texas law creates appraisal districts, such as the Harris County Appraisal District (HCAD), which are distinct from counties themselves and which are tasked with appraising property and preparing the tax roll, including determining the application of any exemptions. Taxing units, such as Harris County, annually assess taxes on all property included in the tax roll.

Foreign Trade Zone 84 was created by a grant of authority to the Port of Houston Authority as grantee, and is generally located along the Houston Shipping Channel within Harris County.

In 1995, Subzone 84N, which covers the refinery and tank farm at 111 Red Bluff Road and 1200 Red Bluff Road, Pasadena, Texas, was created in favor of its original operator, Crown Central Petroleum Corporation. As part of this process, Crown Central entered into an agreement with Harris County to secure Harris County's non-opposition to the creation of the subzone.

In 2004, the refinery and tank farm were sold to Pasadena Refining System, Inc. ("PRSI DE"), a Delaware corporation that was a subsidiary of Astra Holding USA, Inc., a Connecticut corporation that was itself a subsidiary of the Belgian conglomerate NPM/CNP. PRSI DE was approved by CBP as the new operator of Subzone 84N. This sale was made without Harris County's knowledge or consent, and

Harris County's non-opposition to CBP's approval of a new operator was never secured.

Between 2004 and 2006, PRSI DE was merged with its parent, Astra Holding US, Inc., which changed its name to Pasadena Refining System, Inc. (the aforementioned "PRSI CT"). Despite the fact that the two entities have the same name, PRSI CT is a separate and distinct entity from PRSI DE. Furthermore, half of the stock in PRSI CT was sold to Petrobras America, Inc. After this time, Petrobras purchased the other half of PRSI CT.[2] As with the 2004 sale, this change in ownership of the refinery and tank farm occurred without Harris County's knowledge or consent.

PRSI CT failed to apply for a grant of authority as the new operator of Subzone 84N or to CBP for a new activation of the subzone. Consequently, in a September 21, 2009 Headquarters Ruling Letter (HRL), CBP, the agency charged with administration of laws and regulations concerning the operation of foreign trade zones and subzones, held that the authorized operator of Subzone 84N, PRSI DE, ceased to exist on August 29, 2006, that PRSI CT is a new entity, and that PRSI CT was required to apply for and obtain a new activation of the subzone:

> A foreign trade zone or subzone ... has an activated status, or has had its

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[2] During the pendency of this case, and after the tax years at issue, PRSI CT was purchased by Chevron USA, Inc.

"activation" approved, if the zone grantee and the CBP port director approve the operation of the zone.... If the operator of a zone is about to be changed, then there must be an application for approval of activation of the zone When

a zone is operated by a corporation, and a change in the operator corporation "results in a new corporate entity, a new application for activation shall be made" pursuant to [19] C.F.R. § 146.6.

....

Pasadena Refining CT was a new legal entity, which differed from the operator at the time of the 2005 activation of Subzone 84-N. Either the zone operator or the grantee should have applied for activation prior to the termination of Pasadena Refining DE.

....

Pasadena Refining DE, the operator of Subzone 84-N, ceased to exist on August 29, 2006, and Pasadena Refining CT is a new entity for purposes of determining whether it is a new zone operator. Therefore, in Pasadena Refining CT's application for approval of what must be activation, Pasadena Refining CT must provide a letter of concurrence from the [Port of]

> Houston Authority, the zone grantee, before CBP will approve the activation.

App. A-65–73.

On May 5, 2010, PRSI CT filed a Request for Reconsideration with CBP, asking it to reconsider its letter ruling. On December 21, 2012, PRSI CT filed a memorandum with CBP briefing its arguments for reconsideration of the letter ruling. On April 12, 2013, CBP issued a second HRL denying PRSI CT's Request for Reconsideration:

> Operation of an FTZ is a privilege not a right. Moreover, CBP does not permit the sale or transfer of the FTZ operator status between entities. The CBP Regulations and the FTZM require that new FTZ operators be approved prior to operating a zone.... As explained above, since Pasadena DE ceased to exist, CBP's approval to operate the FTZ also ceased. Pasadena CT therefore, must be a new operator. This new operator must apply for approval to operate the FTZ.

App. A-75–87.

PRSI CT has never obtained the authority to operate Subzone 84N from CBP, the Foreign Trade Zones Board, or the Port of Houston Authority, nor did it ever obtain approval for a new activation of Subzone 84N. Indeed, on August 23, 2013, Subzone 84N was formally deactivated by CBP.

Before Subzone 84N was formally deactivated, the port director issued a series of letters granting PRSI CT temporary authorization to continue operating the subzone. None of these letters referenced whether the subzone was activated, referenced state and local ad valorem taxes, or purported to alter or suspend the effect of the 2009 and 2013 HRLs.

Despite the fact that there has been no approved operator of Subzone 84N, PRSI Trading claimed its renditions to HCAD an FTZ exemption from ad valorem taxation of its crude oil and refined products (the Inventory) within Subzone 84N, including taxes assessed by Harris County. HCAD erroneously granted the FTZ exemption each year between 2006 and 2013, and therefore the Inventory has improperly escaped taxation.

On May 30, 2013, Harris County filed a petition under Texas law with HCAD's Appraisal Review Board (the ARB) to challenge the exemption. The ARB denied the challenge on September 16, 2013. Harris County then timely filed a petition for judicial review under Texas law with the 334th District Court.

The case was removed by PRSI Trading to the federal district court and then remanded by the district court back to the 334th District Court. Each party then filed a motion for summary judgment. The 334th District Court granted PRSI Trading's motion for summary judgment and denied Harris County's.

Harris County appealed to the Court of Appeals of Texas for the First District (the First Court of Appeals). The First Court of Appeals reversed the trial court's judgment and rendered judgment for Harris County, holding that the FTZ Exemption did not apply because, as determined by CBP, Subzone 84N was not "activated" during the relevant tax years. PRSI Trading filed a motion for reconsideration *en banc*, which was denied.

PRSI Trading then petitioned for review to the Texas Supreme Court. The Texas Supreme Court granted the petition and, after hearing, reversed the judgment of the First Court of Appeals, holding that the FTZ Exemption applied. The Texas Supreme Court noted: "The parties' dispute can be distilled down to one question: Was Subzone 84-N activated during the tax years at issue? If it was, all agree that the ad valorem tax exemption applies to Pasadena's inventory." A-8, 599 S.W.3d at 307. Contrary to CBP's HRLs, the Texas Supreme Court held that Subzone 84-N was activated because CBP otherwise behaved as if the subzone was activated, including by issuing the temporary authorization letters.

REASONS FOR GRANTING THE WRIT

It is undisputed, for reasons explained below and as the Texas Supreme Court correctly recognized, that a subzone must be "activated" pursuant to CBP regulations before goods in the subzone can receive the section 81o(e) tax exemption. However, the Texas Supreme Court erred in failing to follow CBP's

determination in its HRLs that the subzone was not activated. The petition should be granted.

I. CBP AND FTZ BOARD REGULATIONS MAKE CLEAR THAT A ZONE MUST BE ACTIVATED BEFORE GOODS CAN RECEIVE THE § 81O(E) TAX EXEMPTION.

The issue in this case is whether the federal tax exemption for property within a foreign trade zone, the "FTZ Exemption," applies to the Inventory during the tax years at issue. With the FTZ Exemption, Congress has provided that "[t]angible personal property" which is "held in a zone" for certain enumerated purposes "shall be exempt from State and local *ad valorem* taxation." 19 U.S.C. § 81o(e). Congress has not defined the term "held" or the phrase "held in a zone" in the Foreign Trade Zones Act.

However, Congress has delegated to the Foreign Trade Zones Board (the "Board", consisting of the Secretaries of Commerce and the Treasury) and to the Secretary of the Treasury rulemaking authority governing the use and operation of foreign trade zones.[3] These regulations establish the procedures

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[3] The taking of articles into a foreign trade zone is "subject to such regulations respecting identity and the safeguarding of the revenue as the Secretary of the Treasury may deem necessary." 19 U.S.C. § 81c(a). "The Board shall prescribe such rules and regulations not inconsistent with the provisions of this chapter or the rules and regulations of the Secretary of the Treasury made hereunder and as may be necessary to carry

by which property may enjoy the benefits of zone status, including exemption from state and local ad valorem taxation.

Where Congress has entrusted the administration of a statutory scheme to an agency, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Here, the Foreign Trade Zones Board has clarified that property must be "admitted" into a zone in order to be entitled to *ad valorem* tax exemption: "Foreign merchandise (tangible personal property) *admitted* to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local ad valorem taxes. Articles admitted into zones for purposes not

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out this chapter." 19 U.S.C. § 81h. Merchandise taken into the zone "may be stored, manipulated, or manufactured *under the supervision and regulations prescribed by the Secretary of the Treasury*"—here represented by CBP. 19 U.S.C. § 81c(a).

specified in the Act shall be subject to the tariff laws and regular entry procedures, *including the payment of applicable* duties, *taxes*, and fees." 15 C.F.R. § 400.1(c) (emphasis added).

"'Admit' means to bring merchandise into a zone with zone status." 19 C.F.R. § 146.1(b). Merchandise may only be admitted into a zone or subzone that has been "activated": "'Activation' means approval by the grantee and port director for operations and for the admission and handling of merchandise in zone status." *Id.* Upon approval of an application for activation and acceptance of an executed bond, "the zone or zone site will be considered activated; and merchandise may be admitted into the zone." 19 C.F.R. § 146.6(e). "Only after the approval of activation will Users gain the benefits conferred under the Act." U.S. Customs and Border Patrol, FOREIGN TRADE ZONES MANUAL, at 39, ¶ 4.1. (hereafter, "FTZM").

If a new entity wishes to take over as operator of an existing subzone, it must apply for and obtain the concurrence of the zone grantee and approval of a new activation. "A grantee of an activated zone shall make written application to the port director for approval of a new operator[.]" 19 C.F.R. § 146.7(e). "If the operator is different, it is an activation." 19 C.F.R. § 146.1(b). An application for zone activation "must be accompanied by . . . [t]he written concurrence of the grantee, when the operator applies for activation, in the requested zone activation." 19 C.F.R. § 146.6(b)(5). If an operator is a corporation and a "change results in a new

corporate entity, a new application shall be made under the procedures in 19 C.F.R. § 146.6 and Section 4.12 FTZM." FTZM § 4.13(b).

Under the regulations of the Foreign Trade Zones Board, only merchandise "admitted" to a zone is entitled to exemption from *ad valorem* taxation." 15 C.F.R. § 400.1(c). Merchandise may only be "admitted" to a zone "[u]pon the port director's approval of the application" to activate the zone. 19 C.F.R. § 146.6(e).

II. UNDER PRINCIPLES OF ISSUE PRECLUSION, THE TEXAS SUPREME COURT SHOULD HAVE FOLLOWED CBP'S FINDINGS AND HELD THAT THE SUBZONE WAS NOT ACTIVATED.

As the Texas Supreme Court noted, "The parties' dispute can be distilled down to one question: Was Subzone 84-N activated during the tax years at issue? If it was, all agree that the ad valorem tax exemption applies to Pasadena's inventory." A-8, 599 S.W.3d at 307. The entire proceeding in state court was a re-litigation of this issue was already answered by CBP in its 2009 and 2013 Headquarters Ruling Letters (HRLs):

> A foreign trade zone or subzone ... has an activated status, or has had its "activation" approved, if the zone grantee and the CBP port director approve the operation of the zone.... If the operator of a zone is about to be changed, then there must be an

> application for approval of activation of the zone When a zone is operated by a corporation, and a change in the operator corporation "results in a new corporate entity, a new application for activation shall be made" pursuant to [19] C.F.R. § 146.6.
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> ....
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> Pasadena Refining CT was a new legal entity, which differed from the operator at the time of the 2005 activation of Subzone 84-N. Either the zone operator or the grantee should have applied for activation prior to the termination of Pasadena Refining DE.
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> ....
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> Pasadena Refining DE, the operator of Subzone 84-N, ceased to exist on August 29, 2006, and Pasadena Refining CT is a new entity for purposes of determining whether it is a new zone operator. Therefore, in Pasadena Refining CT's application for approval of what must be an activation, Pasadena Refining CT must provide a letter of concurrence from the [Port of] Houston Authority, the zone grantee, before CBP will approve the activation.

2009 HRL, App. A-65–73.

> Operation of an FTZ is a privilege not a right. Moreover, CBP does not permit

> the sale or transfer of the FTZ operator status between entities. The CBP Regulations and the FTZM require that new FTZ operators be approved prior to operating a zone.... As explained above, since Pasadena DE ceased to exist, CBP's approval to operate the FTZ also ceased. Pasadena CT therefore, must be a new operator. This new operator must apply for approval to operate the FTZ.

2013 HRL, App. A-75–87.

In these HRLs, CBP is clear that Subzone 84-N ceased to be "activated" when its operator, PRSI DE, ceased to exist, and that PRSI CT, as a new operator, was required to apply for "what must be an activation." A-73. PRSI CT, Respondent's sister company, was a party to the proceeding that resulted in the HRLs, and thus it is bound by the result.

"This Court has long recognized that 'the determination of a question directly involved in one action is conclusive as to that question in a second suit.'" *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 147 (2015). "Both this court's cases and the Restatement make clear that issue preclusion is not limited to those situations in which the same issue is before two *courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies." *Id.* at 148. "This reflects the Court's longstanding view that '"[w]hen an administrative agency is acting in a

judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.""" *Id.*

In *B&B Hardware*, B&B filed an opposition with the Patent and Trademark Office (the PTO) to Hargis's registration of a trademark. *B&B Hardware*, at 145. After conducting an opposition proceeding, the PTO's Trademark and Trial Appeal Board (the TTAB) issued a ruling siding with B&B and holding that Hargis's trademark could not be registered because it was likely to be confused with B&B's own trademark. *Id.* at 146. "Despite the right to do so, Hargis did not seek judicial review in either the Federal Circuit or District Court." *Id.*

While the opposition proceeding was ongoing, B&B sued Hargis in federal district court for infringement, a cause of action of which "likelihood of confusion" is an element. *Id.* The TTAB's ruling was issued prior to trial in the infringement suit, and B&B argued that the ruling precluded Hargis from contesting the issue of likelihood of confusion. *Id.* at 6-7. The district court disagreed with B&B, and the jury found for Hargis. *Id.* at 7.

Reversing the trial court's ruling, this Court held that "a court should give preclusive effect to TTAB decisions if the ordinary elements of issue preclusion are met." *Id.* at 2. "[B]ecause the principle of issue preclusion was so well established at common law, in those situations in which Congress has authorized agencies to resolve disputes, courts may take it as

given that Congress has legislated with the expectation that the principle of issue preclusion will apply except when a statutory purpose to the contrary is evident." *Id.* at 148 (internal quotes omitted). "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *Id.* (quoting *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 797-98 (1986)).

This Court explained that it was not evident that Congress intended to forbid issue preclusion from applying to TTAB decisions simply because their decisions were subject to *de novo* judicial review. *B&B Hardware*, at 152. "Ordinary preclusion law teaches that if a party to a court proceeding does not challenge an adverse decision, that decision can have preclusive effect in other cases, even if it would have been reviewed *de novo*." *Id.* Where a party believes that an agency erred in its application of the law, "an aggrieved party should seek judicial review," but the fact that the agency may have erred "does not prevent preclusion." *Id.* at 157.

Here, as in *B&B Hardware*, PRSI CT availed itself of the opportunity to fully and fairly litigate the issue of whether it was an authorized operator of Subzone 84N. It was provided with notice of the first letter ruling and submitted a Request for Reconsideration and a memorandum briefing CBP on its legal arguments. CBP considered PRSI CT's arguments and addressed them in detail in its

second letter ruling denying PRSI CT's Request for Reconsideration.

Also, as in *B&B Hardware*, PRSI CT did not seek judicial review of CBP's ruling, despite having the right to seek such review in the Court of International Trade. *See Conoco, Inc. v. U.S. Foreign-Trade Zones Board*, 18 F.3d 1581 (Fed. Cir. 1994) (holding that the CIT has jurisdiction to conduct judicial review of agency rulings regarding the grant of subzones). If PRSI CT or PRSI Trading wished to dispute CBP's ruling, their remedy was to seek judicial review in the Court of International Trade, and not to relitigate the issue in this proceeding.

Because PRSI Trading is collaterally estopped from relitigating CBP's unchallenged HRLs, the facts and conclusions contained in the ruling are conclusively established pursuant to the doctrine of issue preclusion. The Texas courts should, accordingly, have taken it as conclusively established that, during the relevant tax years, there has been no authorized operator of Subzone 84N and Subzone 84N has not been activated.

CBP was acting in a judicial capacity when issuing the HRLs, which are published by CBP, and can be found on CBP's Customs Rulings Online Search System.[4] Contrary to an assertion made by

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[4] CBP's September 21, 2009 ruling letter, HQ H027423 is available on CBP's "CROSS" system at https://rulings.cbp.gov/ruling/H027423. CBP's April 12, 2013

Respondent in the Texas Supreme Court, ruling letters are not "advice":

> A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.

19 C.F.R. § 177.9(a).

The Texas courts in this case, including the Texas Supreme Court, were bound by CBP's interpretation of section 81o(e) and its own regulations, and by CBP's HRLs ruling that Subzone 84N was not "activated." The Texas Supreme Court erred in holding that Subzone 84N was activated.

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ruling letter, HQ H105336, is available on CBP's "CROSS" system at https://rulings.cbp.gov/ruling/H105336.

III. THE TEXAS SUPREME COURT IMPROPERLY FOCUSED ON INFERENCES DRAWN FROM THE CONDUCT OF CBP RATHER THAN ITS EXPLICIT HOLDINGS IN THE HRLS.

In its opinion, the Texas Supreme Court failed to acknowledge the issue-preclusive effect of the HRLs, but instead held that CBP "treated Subzone 84-N as activated" through other, non-judicial actions. App. A-12. The Texas Supreme Court focused on CBP's issuance of temporary authorization letters to PRSI CT and the fact that CBP took no action to stop PRSI CT from operating. However, none of these acts were taken by CBP acting in a judicial capacity, as it was when it issued the HRLs.

Issue preclusion has only been held to apply to an agency acting in a judicial capacity. *B&B Hardware,* 575 U.S. at 163. Likewise, this Court has held that *Auer* deference does not apply to interpretations inferred from acts such as those relied on by the Texas Supreme Court, but only to a "regulatory interpretation actually made by the agency." *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2416 (2019). "In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." *Id.* The "requirement of 'authoritative' action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisors." *Id.* "The interpretation must at the least emanate from those actors, using those vehicles, understood to

make authoritative policy in the relevant context." *Id.*

An HRL "represents the official position of" CBP. 19 C.F.R. § 177.9(a). There is no regulation or other authority providing that a letter granting temporary authority to operate a subzone or CBP's failure to eject an unauthorized operator from a subzone is authoritative or constitutes the official position of CBP. Only CBP's interpretation of its regulations contained in the HRLs, not interpretations inferred from other acts, are entitled to deference. *Kisor*, at 2416.

This case presents an opportunity for this Court to clarify the scope of administrative issue preclusion under *B&B Hardware* and of *Auer* deference. Further, this case presents an opportunity for this Court to clarify whether and when a court may disregard an agency's judicial decisions or authoritative interpretations of its own regulations in favor of conflicting inferences drawn from acts of the agency's employees.

The petition for writ of certiorari should be granted so that this Court may resolve these questions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 26, 2020

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SUPREME COURT OF TEXAS

NO. 18-0664

PRSI TRADING, LLC, Petitioner,

v.

HARRIS COUNTY, Respondent.

Petition for Review from the Court of Appeals
for the First District of Texas,
No. 01-16-00389-CV

Decided: February 28, 2020

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599 S.W.3d 303

CHIEF JUSTICE HECHT delivered the opinion of the Court. JUSTICE BOYD and JUSTICE BLAND did not participate in the decision.

The federal Foreign-Trade Zones Act of 1934[1] provides for the designation of duty-free areas of operation in or near United States ports of entry. The Act exempts goods imported from outside the

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[1] 19 U.S.C. §§ 81a-81u.

United States and held within a zone for certain purposes from state and local ad valorem taxation.[2] The court of appeals held that the exemption did not apply to petitioner's imported crude oil and refinery products because the zone involved was not activated at the time.[3] We disagree and therefore reverse the judgment of the court of appeals and render judgment for petitioner.

I

Foreign-trade zones (FTZs) are located in the United States, but goods imported into the zones are not subject to tariffs or duties until they leave.[4] Goods in FTZs may be processed and incorporated into finished products bearing lower tariffs than the original goods. Postponing the imposition of tariffs often results in a lower finished-good cost, thus encouraging manufacturing in the United States instead of abroad.[5]

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[2] *Id.* § 81o(e).

[3] 579 S.W.3d 77, 84-85 (Tex. App.—Houston [1st Dist.] 2017).

[4] *See* 15 C.F.R. § 400.1(c); *see also*U.S. CUSTOMS AND BORDER PROT., DEP'T OF HOMELAND SEC., PUB. NO. 0000-0559A, FOREIGN-TRADE ZONES MANUAL § 1.1 (2011) [hereinafter FTZM].

[5] *See* Scott H. Segal & Stephen J. Orava, *Playing the Zone and Controlling the Board: The Emerging Jurisdictional Consensus and the Court of International Trade*, 44 AM. UNIV. L. REV. 2393, 2402-2404 (1995); *About Foreign-Trade Zones*, U.S. CUSTOMS AND BORDER PROTECTION,

The Act authorizes a Board to create FTZs.[6] Customs and Border Protection supervises the operation of the FTZs the Board creates.[7] The Board may also create subzones—limited-purpose zones established outside the confines of existing FTZs that enjoy the same status and benefits as general-purpose zones.[8]

Putting an FTZ into operation is a two-stage process. The Board first approves a *grantee* to establish, operate, and maintain the zone.[9] Customs then must vet and approve an *operator* and *activate* the zone to allow goods to be admitted with *zone status*.[10] Importantly, zone benefits, such as the ad valorem tax exemption, do not accrue until Customs

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https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about (last visited Feb. 18, 2020).

[6] 19 U.S.C. §§ 81a(b), 81b(a).

[7] FTZM § 1.1.

[8] 15 C.F.R. § 400.3(a)(2). Subzones are usually private plant sites authorized by the Board for operations that cannot be accommodated within an existing general-purpose FTZ. *About Foreign-Trade Zones*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/ about (last visited Feb. 18, 2020).

[9] FTZM § 4.1.

[10] *Id.*; *see also* 19 C.F.R. § 146.6 (setting forth the procedures for activation).

activates the zone.[11] Under the regulations, activation requires approval of the zone's grantee.[12] The terms operator and activation go hand in hand in the FTZ regulations; a party only operates an activated zone and an activated zone must have an operator.[13]

In 1995, the Board approved the Port of Houston Authority as grantee of Subzone 84-N, which consists of a refinery and connected facilities in Pasadena, Texas that are used to store imported crude oil and refined petroleum products. Customs activated Subzone 84-N with the refinery's original owner, Crown Central Petroleum Corporation, as operator. In 2004, Crown sold the refinery to Pasadena Refining System, Inc., a Delaware corporation, which we will call *Pasadena-DE*. The Port of Houston agreed for Pasadena-DE to replace

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[11] FTZM § 4.1 ("Only after the approval of activation will Users gain the benefits conferred under the FTZ Act.").

[12] 19 C.F.R. § 146.1(b) ("'Activation' means approval by the grantee and port director for operations and for the admission and handling of merchandise in zone status.").

[13] *See* FTZM § 4.6 ("An FTZ may commence operations after approval by the Port Director of an application to activate [pursuant to 19 C.F.R. § 146.6]."); *id.* § 4.7(a) ("An Operator . . . shall make written application to the local Port Director to obtain approval for activation of an FTZ or FTZ site.").

Crown as operator of Subzone 84-N, and Customs approved the change in February 2005.[14]

Some 18 months later, in August 2006, Pasadena-DE merged into its parent, which in turn simultaneously merged into its parent, a Connecticut corporation, which then changed its name to Pasadena Refining System, Inc., the same as Pasadena-DE's. We will refer to the new entity as *Pasadena*. Pasadena applied to Customs for approval to become the new operator of Subzone 84-N,[15] but by that time, the Port of Houston had changed its policy to withhold concurrence unless Harris County did not object to the proposed operator's application. Harris County would not provide a letter of nonobjection to the Port unless Pasadena first agreed to waive its right to the FTZ ad valorem tax exemption. Pasadena refused and instead changed positions, asserting in a statement to Customs that it was not a new operator after all and therefore was not required to follow the procedures in the FTZ regulations for activation of a zone, which require the Port's agreement.[16]

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[14] 19 C.F.R. § 146.6(b)(5) (requiring written concurrence of the grantee when an operator applies for activation).

[15] Pasadena's FTZ administrator, Jon Mattson, testified by affidavit that Pasadena applied to Customs for reapproval out of an "abundance of caution" and because it believed approval would be "automatic" given its close relation to Pasadena-DE.

[16] 19 C.F.R. § 146.6.

Pasadena continued operations in Subzone 84-N, just as Pasadena-DE had.[17] The Appraisal District continued the operation's tax exemption. On September 21, 2009, Customs issued a letter ruling that Pasadena-DE had ceased to exist in August 2006 as a result of the mergers, that Pasadena was a new entity that had to apply for approval and activation, and that the Port's concurrence was required. Pasadena sought administrative review of the letter ruling and continued to press its case with Customs that it should not be considered a new operator because it had succeeded to all of Pasadena-DE's rights and privileges as a matter of state law.[18] Over five years, from April 2008 to April 2013, Customs issued 53 monthly letters giving Pasadena temporary authorization to **[**5]** operate and move goods through Subzone 84-N with zone status. The Appraisal District continued the tax exemption unchanged.

Finally, in April 2013, Customs issued a second letter ruling reaffirming that Pasadena was a new

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[17] A sister entity, petitioner PRSI Trading, LLC, owned the crude oil imported into the zone and the products refined from it. Our references to Pasadena include PRSI Trading unless the context indicates otherwise.

[18] Pasadena filed a request for reconsideration, arguing that it should not be considered a new operator because (1) Pasadena-DE "continues to exist as part of" Pasadena; (2) Pasadena-DE's rights and privileges vested in Pasadena as a result of the mergers; and (3) Pasadena was operating identically to Pasadena-DE in all material respects.

corporate entity and that it was therefore required to apply for approval to operate Subzone 84-N.[19] In response, the Port of Houston, which still refused to concur in the application, requested for the first time that Customs deactivate the zone. Customs began the process, which was completed in August 2013. Pasadena removed its inventory, and the Appraisal District ceased to recognize the tax exemption.

Harris County petitioned the Harris County Appraisal Review Board for a determination that Pasadena's operations in Subzone 84-N had never been tax-exempt because Pasadena had never qualified as the operator after the merger and that the County was owed taxes from 2011 through 2013.[20] The Appraisal Review Board denied relief, and Harris County brought this action for judicial review.[21] The trial court granted Pasadena's and the

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[19] *See* FTZM § 4.13(a) ("If the [operator] is a corporation and the change results in a new corporate entity, a new application for activation shall be made under the procedures in 19 CFR 146.6".). The 2009 and 2013 letter rulings are in Appendix D to Petitioner's Brief on the Merits.

[20] Harris County sought relief under § 25.21 of the Texas Tax Code, which allows an appraisal district to add personal property omitted from the appraisal roll for the two years preceding the challenge.

[21] TEX. TAX CODE § 42.031(a) ("A taxing unit is entitled to appeal an order of the appraisal review board determining a challenge by the taxing unit.").

Appraisal District's summary judgment motions and denied Harris County's.

The court of appeals reversed and rendered judgment in favor of Harris County.[22] The court concluded that "[w]ithout activation of Subzone 84-N pursuant to approval of a new operator, [Pasadena's] inventory could not have been properly admitted into the subzone, and, thus, was not entitled to exemption from ad valorem taxation."[23] We granted Pasadena's petition for review.

II

The parties' dispute can be distilled down to one question: Was Subzone 84-N activated during the tax years at issue? If it was, all agree that the ad valorem tax exemption applies to Pasadena's inventory.

A

Under the Act, "[t]angible personal property" that is "held in a zone" for certain enumerated purposes "shall be exempt from State and local ad valorem taxation."[24] Though the Act does not define

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[22] 579 S.W.3d 77, 79 (Tex. App.—Houston [1st Dist.] 2017).

[23] *Id.* at 85.

[24] 19 U.S.C. § 81o(e); *see also* TEX. TAX CODE § 11.12 ("Property exempt from ad valorem taxation by federal law is exempt from taxation.").

"held in a zone", it gives the Board and Customs authority to make rules governing the use and operation of FTZs.[25] These regulations, set out in the Code of Federal Regulations and summarized in the FTZ Manual, comprise the scheme by which FTZs are governed.[26]

The regulations are clear. Imported goods must be admitted into a zone to be entitled to the tax exemption.[27] Goods may only be admitted into a zone that has been activated.[28] Activation, in turn, requires approval by the grantee.[29] Once Customs approves an operator's application for activation and

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[25] 19 U.S.C. § 81h.

[26] "The Foreign-Trade Zones Act is administered through two sets of regulations, the FTZ Regulations (15 CFR Part 400) and [Customs] Regulations (19 CFR Part 146)." *About Foreign-Trade Zones*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about (last visited Feb. 18, 2020). The FTZ Manual paraphrases the regulations "for the sake of simplicity and easier reading." FTZM at 2. In that spirit, our references to *FTZ regulations* include those in 15 C.F.R., 19 C.F.R., and the Manual.

[27] 15 C.F.R. § 400.1(c); *see also* 19 C.F.R. § 146.1(b) ("'Admit' means to bring merchandise into a zone with zone status.").

[28] 19 C.F.R. § 146.6(e) ("Upon the port director's approval of the application and acceptance of the executed bond, the zone or zone site will be considered activated; and merchandise may be admitted to the zone.").

[29] *Id.* § 146.1(b).

accepts an executed bond, the zone is considered activated, goods can be admitted, and the benefits conferred under the Act begin to flow.[30] If another party later seeks to take over as the operator of an existing zone, it must apply for approval of a new activation.[31] An operator that undergoes a change that results in a new corporate entity must also apply for approval of a new activation.[32]

The regulations explain the process for deactivating an FTZ. *Deactivation* is defined as the "voluntary discontinuation of the activation of an entire zone or subzone by the grantee or operator."[33] The grantee or operator must apply in writing to deactivate the zone, which Customs will not do unless all merchandise has been removed from the zone at the risk and expense of the operator.[34] The operator must submit a blueprint of the exact site to

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[30] *Id.* § 146.6(e); FTZM § 4.1.

[31] 19 C.F.R. § 146.1(b) ("If the operator is different, it is an activation.").

[32] FTZM § 4.13(a) ("If the zone is a corporation and the change in ownership does not result in a new corporate entity with a different corporate charter, the change will be treated as a name change as described in Section 4.13(b) . . . . If the firm is a corporation and the change results in a new corporate entity, a new application for activation shall be made under the procedures in 19 CFR 146.6 and Section 4.12 FTZM.").

[33] 19 C.F.R. § 146.1(b).

[34] *Id.* § 146.7(b).

be deactivated, and Customs may require an accounting of all merchandise in the zone as a precondition to approving the deactivation.[35] Finally, deactivation stands in contrast to the regulations' concept of *suspension*—an action that Customs may impose on an operator for failing to follow its rules or orders.[36] Deactivation represents a voluntary—and suspension an involuntary—discontinuation of a zone's activated status.

B

Harris County reasons that Customs' letter rulings establish that Pasadena-DE ceased to exist as a result of the mergers in August 2006; that Subzone 84-N did not have an authorized operator as of that time; that without an operator, no goods were properly admitted into the subzone; and that Pasadena was therefore not tax-exempt. Pasadena counters that Customs' letters indicate only that new operator approval was required, not that Subzone 84-N was deactivated.

Though Customs' 2009 letter ruling required operator approval, its letters for several years

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[35] *Id.*

[36] *Id.* § 146.82(a) ("The port director may suspend for cause the activated status of a zone or zone site . . . ."); *see also* FTZM § 13.8(a)(2) (Customs may suspend the activation of a zone if the operator "neglects or refuses to obey any . . . order, rule, or regulation relating to the operation or administration of a zone").

afterward treated Subzone 84-N as activated, deferring a final decision on deactivation through an administrative process that did not conclude until April 2013. In the interim, Customs repeatedly issued Pasadena monthly extensions to operate Subzone 84-N, allowed Pasadena's inventory to enter without paying duties, and supervised Pasadena's activities.[37] None of these activities are consistent with deactivating Subzone 84-N. Customs both determined that Pasadena was a new operator required to apply for approval and allowed Pasadena to operate Subzone 84-N for the review period leading up to that determination.

Harris County's focus on the letter rulings ignores the bigger picture. After Pasadena-DE became Pasadena, it both sought approval and, alternatively, argued that none was necessary.[38] In 2009 and again in 2013, Customs advised Pasadena that new approval was required, but Customs did not deny Pasadena's application to continue its operation, took no action to stop Pasadena from operating the refinery, continued to treat those operations as allowed by federal law, and did not

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[37] Pasadena was audited twice, in March 2010 and July 2013, for compliance with the federal rules and regulations governing Subzone 84-N.

[38] *See* FTZM § 4.13(a) (distinguishing an operator's mere name change from a change resulting in a new corporate entity requiring the operator to submit a new application for activation).

deactivate Subzone 84-N until August 2013. Until then, Pasadena continued to operate the refinery as it always had. Pasadena's inventory enjoyed the benefits of zone status that entire time. Under the FTZ regulations, those benefits could not have continued unless 84-N was activated.[39]

Harris County argues that if Subzone 84-N remained activated, Customs would not have required Pasadena to apply for approval of a new activation. But if Subzone 84-N was deactivated by the 2006 mergers, Customs had no need to deactivate Subzone 84-N in August 2013. Harris County points to the word voluntary in the definition of deactivation[40] to suggest that the regulations, by implication, contemplate the involuntary discontinuance of a zone's activated status, which it further contends happened here. But Customs did not deactivate Subzone 84-N—involuntarily or otherwise—because it treated 84-N as uninterruptedly activated until August 2013. Before merchandise may be admitted into a zone, or manufactured or processed once in a zone, certain

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[39] *See* 15 C.F.R. § 400.1(c) ("To the extent zones are 'activated' . . . [they] are treated for purposes of the tariff laws and customs entry procedures as being outside the customs territory of the United States."); FTZM § 4.1 (Customs must approve activation before merchandise may be admitted with zone status and enjoy benefits conferred under the Act).

[40] 19 C.F.R. § 146.1(b) ("'Deactivation' means *voluntary* discontinuation of the activation of an entire zone or subzone by the grantee or operator." (emphasis added)).

request forms must be submitted to and approved by Customs.[41] Customs approved all of Pasadena's requests to admit crude oil with zone status and all of Pasadena's requests to process the admitted crude oil. In light of this evidence, we conclude that Customs never implicitly deactivated 84-N, as Harris County contends.

Harris County's theory of implied involuntary deactivation also overlooks the concept of suspension in the FTZ regulations—an express mechanism by which Customs can involuntarily discontinue the activation of a zone. Customs may suspend the activated status of a zone if the operator fails to comply with any "order, rule, or regulation relating to the operation or administration of a zone".[42] Harris County argues that Pasadena failed to comply with the FTZ regulations, but Customs indisputably never suspended operations in Subzone 84-N. We decline to read into the regulations a third, unwritten method for discontinuing the activated status of FTZs.

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[41] *Id.* § 146.32(a)(1) ("Merchandise may be admitted into a zone only upon application on a uniquely and sequentially numbered [Customs] Form 214 . . . ."); *id.* § 146.52(a) ("Prior to any action, the operator shall file with the port director an application . . . on Customs Form 216 for permission to manipulate, manufacture, exhibit, or destroy merchandise in a zone.").

[42] FTZM § 13.8(a)(2).

The formal procedures of deactivation and suspension serve the vital purpose of ensuring that Customs maintains operational control and supervision of goods entering the United States.[43] If deactivation could occur implicitly or informally, Customs could not keep clear records of which areas are within the customs territory of the United States and which are exempt from duty payments.[44] Because the Port did not ask that 84-N be deactivated until August 2013, and Customs never suspended it, 84-N remained activated during the challenged tax years.

Section 4.12(a) of the FTZ Manual further supports this conclusion by directing that an existing operator is to remain responsible for an activated zone until there is a new operator approved or the zone is suspended or deactivated:

Interim Responsibility of Existing Operator — The existing Operator remains responsible for merchandise in zone status and for compliance with the laws and regulations, under its Operator's bond until the new Operator is approved and a new bond

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[43] These formal procedures also protect operators. For example, if Customs had not granted Pasadena temporary authority to operate 84-N and then decided that it was not a new operator, Pasadena would have had no way to recover the tax benefits it necessarily would have lost.

[44] An emphasis on recordkeeping is pervasive throughout the FTZ regulations. *See, e.g.*, FTZM §§ 7.1-7.13 (Operator Recordkeeping and Reporting Responsibilities).

is executed. The existing Operator is relieved of responsibility in the interim only if the zone is deactivated or activated status is suspended, and all merchandise in zone status . . . has been removed from the zone or entered for consumption.

This section evinces a policy of stable transition if there is ever a proposed change in operators. By ensuring that a party is responsible for the zone at all times, Customs is better able to control and supervise merchandise entering and leaving the customs territory of the United States, which we have explained is critical. Section 4.12(a) must apply to any successor of an existing operator; otherwise, there would be no responsible party and the risks associated with implicit deactivation are implicated. A successor operator's right to operate a zone on a permanent basis is not a matter of contract; Customs must approve it. But the successor remains provisionally responsible until Customs deactivates or suspends the zone or approves a new application.

Pasadena, as acting operator of Subzone 84-N, remained responsible for the zone until Customs reached a final decision on whether approval of a new operator was required. Once Customs confirmed that Pasadena was a new operator, and the Port declined to concur with its application, the application was not approved, and Subzone 84-N was formally deactivated. Pasadena's responsibilities terminated only after deactivation was approved by Customs and all inventory was removed at Pasadena's expense. The stable

transition envisioned by § 4.12(a) was implemented in this case.

Pasadena's tax-exempt status did not terminate until Subzone 84-N was deactivated in August 2013. We reverse the court of appeals' judgment and render judgment for petitioner.

/s/ Nathan L. Hecht

Nathan L. Hecht

Chief Justice

Opinion delivered: February 28, 2020

COURT OF APPEALS OF TEXAS
FIRST DISTRICT, HOUSTON

NO. 01-16-00389-CV

HARRIS COUNTY, Appellant,

v.

HARRIS COUNTY APPRAISAL DISTRICT and PRSI TRADING LLC, Appellees.

On appeal from the 334th District Court,
Harris County, Texas.
No. 2013-61450

Issued: June 22, 2017

579 S.W.3d 77

Panel consists of Justices KEYES, HIGLEY, and LLOYD. Justice KEYES, dissenting.

Opinion by Justice LLOYD.

OPINION

This is an appeal of the trial court's judgment on a petition for judicial review of an order of Harris County Appraisal District's ("HCAD") Appraisal Review Board denying Harris County's challenge to the granting of a property tax exemption on certain

inventory owned by PRSI Trading, LLC ("PRSI").[1] Harris County contends that the trial court erred in denying its motion for summary judgment and granting PRSI's and HCAD's cross-motions for summary judgment because PRSI's inventory is not exempt from ad valorem taxation under applicable federal law. We reverse and render.

Background

A. Foreign Trade Zones

Foreign trade zones ("FTZs") are areas under the supervision of United States Customs and Border Protection ("CBP") that are considered outside the customs territory of the United States for purposes of payment of customs duties. *See* 75th Annual Report of Foreign Trade Zones Board to the Congress of the United States. Authority for establishing these areas is granted to the Foreign Trade Zones Board ("FTZ Board") pursuant to the Foreign Trade Zones Act of 1934 ("the Act") and the FTZ Board's regulations. *See* 19 U.S.C. § 81a-u (2012); 15 C.F.R. § 400.3 (2017). The FTZ Board also has the authority to approve "subzones," which are special purpose zones established as part of a zone project for a limited purpose that cannot be accommodated within an existing zone, and that enjoy the same status as goods held in an FTZ. *See*

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[1] *See* TEX. TAX CODE ANN. § 42.031 (West 2015).

15 C.F.R. § 400.3(a)(2) (2017), 19 C.F.R. § 146.1(b) (2016).

Putting a zone into operation is a two-stage process. *See* FOREIGN TRADE ZONES MANUAL, at ¶ 4.1 (2011). First, the FTZ Board must approve a grant to establish, operate, and maintain the zone. *Id.* Second, CBP must approve activation to allow merchandise to be admitted to the zone in zone status. *Id.* In order for the zone to be activated, the operator of the zone must obtain approval of the grantee, in this case, the Port of Houston and the port director. 19 C.F.R. § 146.6(e) (2016).

Under a 1983 amendment to the Act, goods held in an FTZ for export out of the United States are exempt from state and local ad valorem taxation. *See* 19 U.S.C. § 81o(e) (2012). This exemption is commonly referred to as an "FTZ exemption." Under Texas Tax Code section 11.12, "[p]roperty exempt from ad valorem taxation by federal law is exempt from taxation." TEX. TAX CODE ANN. § 11.12 (West 2015).

B. Factual and Procedural History

In 1995, the FTZ Board created Subzone 84-N in favor of its original operator, Crown Central Petroleum Corporation ("Crown"). Subzone 84-N covers the refinery located at 111 Red Bluff Road and 1200 Red Bluff Road, in Pasadena, Texas. Crown entered into an agreement with Harris County, insuring that the county would not oppose the subzone.

In 2004, the refinery was sold to Pasadena Refining System, Inc., a Delaware corporation ("PRSI(DE)"). At the time it purchased the refinery, PRSI(DE) was a wholly owned subsidiary of Astra Refining System, Inc. which was a wholly owned subsidiary of Astra Holding USA. Astra Holding USA, Inc., in turn, was a wholly owned subsidiary of Astra Oil Trading NV.

On January 21, 2005, PRSI(DE) entered into an agreement with the Port of Houston, the grantee of Subzone 84-N, authorizing PRSI(DE) to operate Subzone 84-N for the manufacturing, blending, and storage of petrochemicals and other related products at the refinery. On February 4, 2005, PRSI(DE) requested that CBP approve it as a new operator of Subzone 84-N, subject to the concurrence of the Port of Houston. The Port of Houston concurred with PRSI(DE)'s request and, on February 20, 2005, CBP approved PRSI(DE) as the new operator of Subzone 84-N. Harris County did not know of nor approve of this new operator designation.

In August 2006, PRSI(DE) was merged into its parent, Astra Refining System, Inc. which was simultaneously merged into its parent, Astra Holding USA, Inc. Astra Holding USA, Inc. subsequently changed its name to Pasadena Refining System, Inc., a Connecticut corporation ("PRSI(CT)").

In late August 2006, PRSI(CT) submitted an application to CBP asking that it approve PRSI(CT) as a new operator of the FTZ. In a letter dated February 15, 2008, CBP advised PRSI(CT) that it

needed to obtain a letter of concurrence from the Port of Houston for approval to be granted. CBP did not approve PRSI(CT)'s application.

On April 7, 2008, PRSI(CT) filed a statement with CBP changing its position and asserting that it was not a new operator of Subzone 84-N and that it did not require an activation pursuant to 19 C.F.R. § 146.6.[2] On April 29, 2008, the Port of Houston advised CBP that if it required a letter of concurrence from the Port of Houston, then the Port of Houston would first need a "letter of non-objection" from Harris County, and it had not yet received such a letter.[3] Despite this uncertainty over the zone, PRSI requested, and CBP granted, PRSI month-to-month extensions of time to operate Subzone 84-N between April 18, 2008 and March 27, 2013.

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[2] PRSI(CT) argued that it should not be considered a new operator as a result of its merger and creation from PRSI(DE) because the assets, liabilities, and the officers were the same, and the ultimate parent remained the same. It further argued that Astra Oil Trading NV's sale of half of its shares in PRSI(CT) to Petrobas America Inc. did not result in assets being transferred, and that the sale of stock did not necessitate an application for activation.

[3] Effective July 1, 2006, the Port of Houston implemented a new policy under which it would not concur in CBP's approval of a new operator unless it received a letter of non-objection from Harris County. Such a letter has not been forthcoming for this FTZ.

However, on September 21, 2009, CBP issued a letter ruling in which it held that

Pasadena Refining DE, the operator of Subzone 84-N, ceased to exist on August 29, 2006, and Pasadena Refining CT is a new entity for purposes of determining whether it is a new zone operator. Therefore, in Pasadena Refining CT's application for approval of what must be an activation, Pasadena Refining CT must provide a letter of concurrence from the [Port of] Houston Authority, the zone grantee, before CBP will approve the activation.

On May 5, 2010, PRSI(CT) requested that CBP reconsider its determination. As it had done in its original request for approval, PRSI(CT) argued in its request for reconsideration that, as a result of the merger, it had succeeded, as a matter of state law, to the operator status of PRSI(DE) and could not be a new operator.

On April 12, 2013, CBP issued a second letter ruling, reaffirming its holding:

The CBP Regulations and the [Foreign Trade Zone Manual] require that new FTZ operators be approved prior to operating a zone. . . . [S]ince Pasadena DE ceased to exist, CBP's approval to operate the FTZ also ceased. Pasadena CT[,] therefore, must be a new operator. This new operator must apply for approval to operate the FTZ.

On May 6, 2013, the Port of Houston notified CBP that it continued to decline to approve of PRSI(CT) as a new subzone operator, and it

requested deactivation of Subzone 84-N. On August 23, 2013, CBP formally deactivated Subzone 84-N.

In its renditions to HCAD, PRSI claimed exemption from ad valorem taxation of the inventory within Subzone 84-N, including taxes assessed by Harris County. HCAD has continued to grant the FTZ exemptions to PRSI each year since 2006.

On May 30, 2013, Harris County filed a petition with the Harris County Appraisal Review Board ("ARB") challenging HCAD's grant of FTZ exemptions to PRSI and seeking back-appraisal for HCAD accounts numbered 1041489, 1044919, 2010581, and 2010582, for tax years 2006 to 2013. On September 16, 2013, the ARB denied Harris County's challenge.

On October 11, 2013, Harris County filed its original petition for review seeking judicial review of the ARB's order pursuant to Tax Code section 42.031. PRSI and HCAD answered on November 8 and 15, 2013, respectively. The case was removed to federal court on November 20, 2013, and then remanded on June 12, 2015. The parties filed cross-motions for summary judgment.

On April 20, 2016, the trial court granted PRSI's and HCAD's motions for summary judgment and denied Harris County's motion for summary judgment. Harris County timely filed its notice of appeal.

Discussion

On appeal, Harris County contends that the trial court erred in denying its motion for summary judgment and granting PRSI's and HCAD's cross-motions for summary judgment. Harris County argues that there has been no authorized operator of Subzone 84-N since 2006 and that, without an authorized operator, no goods could have been properly admitted into the subzone pursuant to applicable federal regulations. Thus, it argues, PRSI is not entitled to the FTZ exemption.

PRSI and HCAD contend that the trial court properly granted summary judgment in their favor and denied Harris County's motion. PRSI argues that the FTZ exemption was available to its inventory during the relevant tax years based on the continued active status of 84-N, CBP's approval of PRSI(CT) to operate 84-N on a month-to-month basis, and CBP's allowing the inventory to be admitted to Subzone 84-N. HCAD asserts that it correctly applied Texas law in exempting from ad valorem taxation PRSI's property based on its exemption from federal taxation.

A. Standard of Review

Summary judgment is a question of law. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). Thus, we review a trial court's grant of summary judgment de novo. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013). In a traditional motion for summary judgment, the movant must establish that no genuine issue of material fact exists and the movant is thus entitled

to judgment as a matter of law. TEX. R. CIV. P. 166a(c). When, as here, both parties move for summary judgment and one motion is granted and one denied, we must determine all questions presented and render the judgment that the trial court should have rendered. *See Argonaut Ins. Co v. Baker*, 87 S.W.3d 526, 529 (Tex. 2002).

Exemptions from taxation are not favored by the law. "Statutory exemptions from taxation are subject to strict construction since they are the antithesis of equality and uniformity and because they place a greater burden on other taxpaying businesses and individuals." *Bullock v. Nat'l Bancshares Corp.*, 584 S.W.2d 268, 271-72 (Tex. 1979). "An exemption cannot be raised by implication, but must affirmatively appear, and all doubts are resolved in favor of [the] taxing authority and against the claimant." *Id.* at 272. "Simply stated, the burden of proof is on the claimant to clearly show that it comes within the statutory exemption." *Id.*

B. FTZ Exemption

The FTZ exemption provides that "[t]angible personal property" which is "held in a zone" for certain enumerated purposes "shall be exempt from State and local ad valorem taxation." 19 U.S.C. § 81o(e). The FTZ Board, which has rulemaking authority governing the use and operation of FTZs, has made clear that property must be "admitted" into a zone to be entitled to ad valorem tax exemption: "Foreign merchandise (tangible personal

property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local ad valorem taxes . . . . Articles admitted into zones for purposes not specified in the Act shall be subject to the tariff laws and regular entry procedures, including the payment of applicable duties, taxes, and fees." 15 C.F.R. § 400.1(c) (2017).

"Admit" means to bring merchandise into a zone with zone status. 19 C.F.R. § 146.1(b). Merchandise may only be admitted into a zone or subzone that has been "activated." *Id.* "Activation" means approval by the grantee[4] and port director[5] for operations[6] and for the admission and handling of merchandize in zone status. *See id.* at (a). "Upon the port director's approval of the application and acceptance of the executed bond, the zone or zone site will be considered activated; and merchandise may be admitted into the zone." *Id.* § 146.6(e). Only after the approval of activation will Users gain the benefits

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[4] A "grantee" is a public or private corporation to which the privilege of establishing, operating, or maintaining a zone project has been given. *See* FOREIGN TRADE ZONES MANUAL, at ¶ 2.3(a).

[5] The "port director" is the local representative of the FTZ Board. *Id.* at 2.2(e)(2).

[6] An "operator" is a corporation, partnership, or person that operates a FTZ or FTZ subzone under the terms of an agreement with the grantee. *Id.* at 2.3(b).

conferred under the FTZ Act. *See* FOREIGN TRADE ZONES MANUAL, at ¶ 4.1.

In the event that a new entity wishes to take over as operator of an existing subzone, it must apply for and obtain the concurrence of the zone grantee and approval of a new activation. "A grantee of an activated zone site shall make written application to the port director for approval of a new operator." 19 C.F.R. § 146.7(e) (2016). Section 146.1(b) provides that "[i]f the operator is different, [the action] is an activation." 19 C.F.R. § 146.1(b). If an operator is a corporation and a "change results in a new corporate entity, a new application for activation shall be made under the procedures in 19 C.F.R. § 146.6 and section 4.12 FTZM." FOREIGN TRADE ZONES MANUAL, at ¶ 4.13(a).

C. Was Subzone 84-N Activated During the Tax Years in Question?

Harris County contends that PRSI(CT) never complied with the federal regulations governing FTZs and therefore never obtained the authority to operate Subzone 84-N because it did not obtain approval as a new operator, which was necessary to activate the subzone. It argues that, without "activation," none of PRSI(CT)'s inventory in question could have properly been admitted and subject to the FTZ exemption.

PRSI(CT) contends that Harris County conflates the process for approving a new operator with the process for activating an FTZ. It argues that although it is true that an operator must be

approved before activation occurs, a change in operator does not result in a loss of activation. PRSI(CT) further asserts that the FTZ exemption was available to its inventory during the tax years in question based on the continued active status of 84-N, and CBP's grant to PRSI of month-to-month extensions of time to operate Subzone 84-N between April 18, 2008 to March 27, 2013.

However, the resolution of this issue is governed by federal regulations and the rulings of the relevant federal authority. In its September 21, 2009 letter, CBP stated:

> A foreign trade zone or subzone . . . has an activated status, or has had its "activation approved, if the zone grantee and the CBP port director approve the operation of the zone . . . . If the operator of a zone is about to be changed, then there must be an application for approval of activation of the zone. . . . When a zone is operated by a corporation, and a change in the operator corporation "results in a new corporate entity, a new application for activation shall be made" pursuant to C.F.R. § 146.6.
>
> . . . .
>
> Pasadena Refining CT was a new legal entity, which differed from the operator at the time of the 2005 activation of Subzone 84-N. Either the zone operator or the grantee should have applied for

> activation prior to the termination of Pasadena Refining DE.
>
> . . . .
>
> Pasadena Refining CT is a new entity for purposes of determining whether it is a new zone operator. Therefore, in Pasadena Refining CT's application for approval of what must be activation, Pasadena Refining CT must provide a letter of concurrence from the [Port of] Houston Authority, the zone grantee, before CBP will approve the activation.

In its April 12, 2013 letter ruling, CBP reiterated its position and addressed PRSI(CT)'s position that PRSI(DE)'s right to operate the FTZ vested in PRSI(CT), the surviving corporation:

> Operation of an FTZ is a privilege not a right. Moreover, CBP does not permit the sale or transfer of the FTZ operator status between entities. The CBP Regulations and the FTZM require that new FTZ operators be approved *prior to operating a zone*. . . . As explained above, since Pasadena DE ceased to exist, CBP's approval to operate the FTZ also ceased. Pasadena CT therefore, must be a new operator. This new operator must apply for approval to operate the FTZ. (Emphasis added).

In light of CBP's holdings in its letter rulings, we find PRSI's interpretation of the applicable regulations untenable. PRSI(CT) was aware that CBP—the federal agency charged with administration of laws and regulations concerning the operation of FTZs and subzones—held that PRSI(CT) was a new operator and, as such, was required to submit a new application for activation pursuant to 19 C.F.R. § 146.6. There is nothing in the record showing that PRSI(CT) ever obtained approval to operate Subzone 84-N.

PRSI(CT) argues that it was still activated during the relevant tax years because CBP did not deactivate it until August 23, 2013.[7] However, if Subzone 84-N was still activated, as PRSI(CT) contends, then CBP would not have required PRSI(CT) to apply for approval of a new activation.

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[7] The dissent interprets the FTZ Manual to the effect that a free trade zone continues to exist until it is "deactivated." However, the activation of an FTZ is neither a grant of eternal life nor a sentence of perpetual involuntary servitude. The relevant federal regulation which authoritatively addresses "deactivation" is 19 C.F.R. § 146.7. That section is entitled "Zone Changes" and provides a mechanism for an operator to make "alterations of an activated area." 19 C.F.R. § 146.7(a). Alteration of "an activated" area includes the ability of the operator to cease business in, or deactivate, the zone. *See id.* (b). There are requirements for deactivation, such as removing merchandise from the area, and the deactivation must be finally approved by the port director. *See id.* This section address the steps that the operator must take to walk away from an active zone. It does not change the requirements for the creation, and continued existence, of an active zone.

Moreover, we note that PRSI(CT)'s position contradicts other evidence in the record. As an exhibit to its response to PRSI's and HCAD's cross-motions for summary judgment and its reply to their responses to Harris County's motion for summary judgment, Harris County attached the affidavit of Shane M. Williams, the FTZ administrator for the Port of Houston. In paragraph nine of his affidavit, Williams states, "On February 8, 2010, the Port Authority acknowledged to CBP the deactivation of subzone 84-N, in the absence of an authorized subzone operator, and confirmed that it continued to decline to concur with Pasadena Refining CT's activation request."

PRSI also argues that CBP's temporary authorization of PRSI(CT)'s operation on a month-to-month basis is evidence that the subzone was "activated" during the applicable tax years.[8] These letters from CBP to PRSI(CT) granting an extension to operate, or a continuation to operate, Subzone 84-N are not evidence that the subzone was "activated," nor do they purport to "activate" the subzone during this period as required by federal regulations. CBP consistently declined to "activate" the subzone

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[8] Next to the portion of its summary judgment order granting PRSI's and HCAD's motions, the trial court made the following handwritten notation "See, e.g., Mattson affidavit at ¶15 and Exhibits 7 and 8 attached thereto." This evidence refers to CBP's letters granting PRSI an extension of time to operate Subzone 84-N.

absent written consent of the grantee, i.e., the Port of Houston. *See* 19 C.F.R. § 146.6(b)(5).

Without activation of Subzone 84-N pursuant to approval of a new operator, PRSI's inventory could not have been properly admitted into the subzone, and, thus, was not entitled to exemption from ad valorem taxation. *See* 15 C.F.R. § 400.1(c); 19 C.F.R. §§ 146.1(b), 146.6(e); *see also* FOREIGN TRADE ZONES MANUAL, at ¶ 4.1 ("Only after the approval of activation will Users gain the benefits conferred under the [Foreign Trade Zones] Act.")

D. Are CBP's Letter Rulings Entitled to Preclusive Effect Under the Doctrine of Collateral Estoppel?

Harris County also contends that CBP's letter rulings are entitled to preclusive effect under the doctrine of collateral estoppel. PRSI argues that CBP's decision requiring activation of the FTZ does not resolve the issue before us because Harris County has not satisfied all of the requirements of collateral estoppel.

Collateral estoppel, or issue preclusion, "prevents relitigation of particular issues already resolved in a prior suit." *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). It is designed to promote judicial efficiency, protect parties from multiple lawsuits, and prevent inconsistent judgments by precluding the relitigation of issues. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).

To establish collateral estoppel, a party must show that "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Id.* Collateral estoppel applies to administrative agency orders "when the agency is 'acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" *Turnage v. JPI Multifamily, Inc.*, 64 S.W.3d 614, 620 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (quoting *Muckelroy v. Richardson Indep. Sch. Dist.*, 884 S.W.2d 825, 830 (Tex. App.—Dallas 1994, writ denied)); *see also B&B Hardware, Inc. v. Hargis Indus., Inc.*, __ U.S. __, __, 135 S. Ct. 1293, 1303, 191 L.Ed.2d 222 (2015) ("[W]here a single issue is before a court and an administrative agency, preclusion [] often applies."). Further, "collateral estoppel requires that the issue decided in the first action be identical to the issue in the pending action." *Union Pac. R. Co. v. Ameriton Properties Inc.*, 448 S.W.3d 671, 682 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (citing *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347, 350 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

PRSI first argues that CBP's letter rulings addressed only whether PRSI(CT) was a new operator and not whether PRSI(CT) was entitled to an FTZ exemption. Thus, it claims, the issue decided by CBP is not identical to the issue in this case. However, CBP's September 21, 2009 letter ruling,

and its August 12, 2013 letter ruling affirming its holding, resolved the issue of whether PRSI(CT) was a new operator and whether a new activation was required. In the case before us, the issue is whether Subzone 84-N had an authorized operator during the relevant tax years and whether the subzone was activated, thereby authorizing an FTZ tax exemption. PRSI's failure to obtain an FTZ exemption flows from application of federal regulations by the relevant federal authority as memorialized in the CBP letter rulings. *See* 15 C.F.R. § 400.1(c); 19 C.F.R. §§ 146.1(b), 146.6(e). The issue ruled on by CBP is identical to the issue before us.

PRSI next argues that CBP's decision was not the product of a judicial proceeding because there was no judge, witnesses or other sworn evidence, right of discovery, or hearing. However, we are unaware of any authority—nor does PRSI direct us to any—holding that an administrative agency's proceedings must take a particular form in order for the agency to be acting in a judicial capacity. *See Alten v. Ellin & Tucker, Chartered*, 854 F. Supp. 283, 291 (D. Del. 1994) ("[W]hether an administrative agency was 'acting in a judicial capacity' is not solely determined by whether the administrative agency used such judicial procedures as 'the ability to call, examine, cross-examine, and subpoena witnesses.") (citing *A. Duda & Sons Coop. Assoc. v. United States*, 495 F.2d 193, *withdrawn*, 504 F.2d 970 (5th Cir. 1974)). Here, CBP issued two letter rulings, widely separated in time, which consistently set forth the relevant facts,

applicable law, the issue before it, its legal analysis, and its holding. PRSI also had the opportunity to seek judicial review of CBP's rulings in the Court of International Trade but did not do so. *See Conoco, Inc. v. U.S. Foreign-Trade Zones Board*, 18 F.3d 1581, 1590 (Fed. Cir. 1994); *B&B Hardware*, 135 S. Ct. at 1310, (noting Congress's provision of judicial review of Patent and Trademark Office registration rulings in deciding that "registration decisions can be weighty enough to ground issue preclusion"). We conclude that CBP acted in a judicial capacity in issuing its letter rulings.

PRSI also contends that CBP never addressed the FTZ tax exemption issue and, therefore, it was not essential to CBP's decision. *See Trapnell*, 890 S.W.2d at 801 (noting that, to establish collateral estoppel, party must establish that facts sought to be litigated in second action were essential to judgment in first action). However, as discussed above, the issue presented in this case is not the FTZ tax exemption; rather, it is whether Subzone 84-N was activated during the relevant tax years thereby authorizing a tax exemption. The facts underlying this issue are precisely the facts that CBP considered in its opinions and that were essential to its letter rulings.

Finally, PRSI contends that collateral estoppel is inapplicable in this case because Harris County was not a party to CBP's proceedings. Strict mutuality of parties is not required for collateral estoppel. *See Sysco Food*, 890 S.W.2d at 801. Instead, it is only necessary that the party against whom the doctrine

is asserted (i.e., PRSI) was a party or in privity with a party in the first action. *Id.*

We conclude that the summary judgment evidence demonstrates, as a matter of law, that the FTZ tax exemption does not apply to PRSI's inventory during the applicable tax years. *See Bullock*, 584 S.W.2d at 272 ("An exemption cannot be raised by implication, but must affirmatively appear, and all doubts are resolved in favor of [the] taxing authority and against the claimant.") Therefore, PRSI and HCAD were not entitled to summary judgment. Because we also conclude that the FTZ exemption does not apply to PRSI's inventory, Harris County was entitled to summary judgment. Accordingly, we sustain Harris County's issue.

Conclusion

We reverse the trial court's April 20, 2016 order granting summary judgment to PRSI and HCAD and denying Harris County's motion for summary judgment, and we render judgment in favor of Harris County.

/s/ Russell Lloyd

Russell Lloyd

Justice

DISSENTING OPINION

This is an important tax case of first impression regarding the ability of a local county taxing

authority to levy ad valorem taxes on inventory in a federally authorized Foreign Trade Zone ("FTZ"). The majority ignores the governing law set out in the Code of Federal Regulations ("CFR") and the Foreign-Trade Zone Manual ("FTZ Manual"),[1] the contract governing the operation of the FTZ, and all of the evidence indicating that the correct regulations were followed and the correct taxes were assessed at the relevant times. Instead, *the majority reverses the judgment of the district court and the order of appellee Harris County Appraisal District's ("HCAD's") own county taxing authority, holding that the inventory in the relevant zone*—Port of Houston Subzone 84-N—was admitted to an active zone and thus was *exempt from the assessment of county ad valorem taxes for the relevant tax years* (2011-2013).

The federal Foreign Trade Zones Act, as embodied in the federal CFRs and the federal FTZ Manual, sets out the scheme by which FTZs are governed. Essentially, the Foreign-Trade Zones Board ("FTZ Board") has authority to designate FTZs and subzones, which are special-purpose zones established within existing zones. The zones are supervised by Customs and Border Protection ("CBP"). The FTZ Board first approves a grant to a

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[1] As stated in its foreword, "The purpose of the [FTZ Manual] is to place in one document, the various laws, regulations, policies and procedures that Customs and Border Protection personnel, grantees, operators and users need to know in the daily operation of Foreign Trade Zones." FTZ Manual at 2.

grantee to establish, operate, and maintain a zone, and CBP then approves the activation of the zone to allow merchandise to be admitted to the zone. At that point, an operator—defined as a corporation, partnership, or person that operates a zone or subzone under the terms of an agreement with the zone grantee—or the grantee may operate the zone by, among other acts or responsibilities, admitting, transferring, and removing merchandise from the zone. *See* 19 C.F.R. § 146.1(b); *id.* § 146.4.

Relevant here, *the Foreign-Trade Zones Act provides that goods held in an active FTZ for export out of the United States are exempt from state and local ad valorem taxation. See* 19 U.S.C. § 81o(e); *see also* TEX. TAX CODE ANN. § 11.12 (West 2016) (providing that property exempt from ad valorem taxation by federal law is exempt from taxation).

In the present case, appellee PRSI Trading, LLC, acting through predecessor entities, served as the operator of a subzone, Subzone 84-N. On January 21, 2005, PRSI Trading's predecessor, Pasadena Refining System, Inc. DE ("PRSI(DE)") entered into an agreement with the Port of Houston Authority (the grantee of Zone No. 84), to serve as the operator of the already-activated Subzone 84-N ("the 2005 Grantee/Subzone-Operator Agreement"). HCAD recognized PRSI's entitlement to the exemption from ad valorem taxation.

Following a series of mergers, another PRSI entity, Pasadena Refining System, Inc. CT ("PRSI(CT)") applied to become the operator of Subzone 84-N in place of PRSI(DE). A dispute arose

among the various parties involved—including CBP, the Port of Houston Authority, and PRSI(CT)—regarding PRSI(CT)'s status as operator of the subzone. While that dispute was being resolved through various administrative processes, Subzone 84-N remained active and PRSI(CT) continued to operate it pursuant to the 2005 Grantee/Subzone-Operator Agreement and temporary authorizations granted by CBP to PRSI(CT) to continue acting as operator while the dispute was pending. Consequently, HCAD continued to recognize that imported crude oil owned by PRSI(CT), held in the activated and operational FTZ, qualified for the FTZ tax exemption.

The dispute over PRSI(CT)'s status as operator was ultimately resolved in April 2013, when CBP made its final determination that PRSI(CT) must resubmit an application if it wished to serve as the operator of Subzone 84-N. Following this determination, the Port of Houston declined to approve PRSI(CT) as subzone operator, and it requested deactivation of Subzone 84-N. On August 23, 2013, CBP formally deactivated Subzone 84-N.

Appellant Harris County then challenged HCAD's recognition of PRSI(CT)'s ad valorem tax exemption for the tax years 2011, 2012, and 2013. HCAD's Appraisal Review Board denied Harris County's challenge, and Harris County sought review of the Board's decision in the trial court.[2] The

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[2] *See* TEX. TAX CODE ANN. § 42.031 (West 2014).

trial court likewise denied Harris County's challenge, upholding the exemption granted to PRSI(CT) for each of these years under authority of the CFRs, the FTZ Manual, and the 2005 Grantee/Subzone-Operator Agreement and recognized by HCAD.

The majority in this case on appeal, however, misapplies and misconstrues the CFRs and the FTZ Manual and ignores the operative 2005 Grantee/Subzone-Operator Agreement between the Port of Houston Authority and PRSI and the determinations of CBP granting PRSI(CT) temporary authorizations to continue as operator of the subzone throughout the pendency of the dispute. The majority now decides to grant Harris County's challenge to HCAD's failure to collect ad valorem taxes on the inventory in Subzone 84-N from the years in which PRSI(CT) operated the subzone pursuant to temporary authorization from CBP and the 2005 Grantee/Subzone-Operator Agreement with the Port of Houston Authority while its status as operator was in dispute.

I respectfully dissent. I believe the majority misunderstands the law has it exactly backwards. It does not properly account for the fact that, during the entirety of the relevant time, PRSI(CT) was seeking approval of a change of operator, its application was under review by CBP, and the application had not been either granted or finally denied by ruling of CBP. HCAD never challenged the exemption from ad valorem taxation of the inventory admitted to Subzone 84-N granted by CBP for any of

the years at issue in this litigation (2011-2013), and, when Harris County subsequently challenged the exemptions for those years, HCAD's Appraisal Review Board agreed with HCAD—the county taxing authority—and with its co-defendant, PRSI Trading, LLC—not with Harris County. The trial court also upheld the Appraisal Review Board's ruling when Harris County brought this suit for judicial review of that administrative ruling. Harris County now appeals the trial court's ruling, contending that the trial court erred in denying its motion for summary judgment and granting PRSI's and HCAD's cross-motions for summary judgment because PRSI's inventory was not exempt from ad valorem taxation by Harris County for the years 2011-2013 under applicable federal law.

I strongly disagree with the majority's holding reversing and rendering judgment in favor of Harris County. I believe that the majority's opinion establishes legally incorrect and unsustainable precedent in this Court construing federal law—the FTZ Act—as permitting the taxation by a county of merchandise in a FTZ during the period in which a change of operator is pending and when successive extensions have been granted by CBP to the operator to continue to operate the Subzone in the interim. I would affirm the order of the trial court granting PRSI's and HCAD's motion for summary judgment and upholding the exemption.

Background

Subzone 84-N was created and activated in 1995. It covers a refinery located in Pasadena, Texas that was owned in 1995 by the original operator of Subzone 84-N, Crown Central Petroleum Corporation. Crown sold the refinery to PRSI(DE) in 2004. At the time it purchased the refinery, PRSI(DE) was a wholly-owned subsidiary of Astra Refining System, Inc., which was a wholly-owned subsidiary of Astra Holding USA. Astra Holding USA, Inc., in turn, was a wholly-owned subsidiary of Astra Oil Trading NV.

On January 21, 2005, PRSI(DE) entered into the 2005 Grantee/Subzone-Operator Agreement to operate Subzone 84-N for the manufacturing, blending, and storage of petrochemicals and other related products at the refinery. The Grantee/Subzone-Operator Agreement imposed a number of duties on PRSI(DE) as subzone operator and, subsequently, on PRSI(CT) as the temporary authorized interim subzone operator. PRSI(DE) agreed, inter alia, to use the activated subzone only "for the manufacture, blending, and storage of petrochemicals and other related products"; to pay the Port of Houston Authority, as grantee, an annual nonrefundable fee under terms prescribed by the FTZ Board; "to comply with all U.S. Customs rules and regulations governing foreign trade zones as well as all applicable Port of Houston Authority tariffs"; to "maintain accurate inventory record and adequate security for zone merchandise in accordance with all U.S. Customs rules and regulations"; and to "submit to the grantee written

monthly activity reports" and all information required for the Port of Houston's annual report to the FTZ Board.

Importantly, the 2005 Grantee/Subzone-Operator Agreement provided:

> This agreement shall remain in effect until one of the following occurs: (1) an alternate agreement becomes effective, (2) the subzone operator relinquishes control of the zone authorized property, (3) the Port of Houston Authority is replaced as grantee of U.S. FTZ No. 84, (4) zone status of the subzone operator is terminated by the Foreign Trade Zone Board.

It also provided:

> The subzone operator will be responsible for all activity occurring within the zone area authorized on its behalf by the Foreign Trade Zones Board as it is described in its subzone application. *[PRSI(DE)] shall continue as subzone operator until its authorized zone status is terminated by the Foreign Trade Zones Board or for any reason it is no longer in control of the authorized area.*

(Emphasis added).

On February 4, 2005, PRSI(DE) requested that CBP approve it as a new operator of Subzone 84-N, subject to the concurrence of the grantee, the Port of

Houston Authority. The Port of Houston Authority concurred with PRSI(DE)'s request and, on February 20, 2005, CBP activated Subzone 84-N with PRSI(DE) as the new operator.

In 2006, a series of mergers occurred giving rise to the facts underlying this dispute. On August 29, 2006, documents were filed with the Delaware Secretary of State indicating that PRSI(DE) was that day merged into Astra Refining System, Inc., which, in turn, was merged with and into Astra Holding, USA, Inc., a Connecticut corporation, and that Astra Holding USA, Inc.'s name was changed to PRSI(CT).

On September 1, 2006, PRSI(CT) submitted an application to CBP asking that it approve the "change in FTZ operator" for Subzone 84-N from PRSI(DE) to PRSI(CT).

In a letter dated February 15, 2008, CBP advised PRSI(CT) that, pursuant to 19 C.F.R. § 146.6, PRSI(CT) needed to obtain a letter of concurrence from the Port of Houston for approval to be granted. The Port of Houston refused to grant the concurrence and CBP, therefore, did not approve the application.

On April 7, 2008, PRSI(CT) filed a statement with the CBP changing its position and asserting that it was not a new operator of Subzone 84-N and that it did not require an activation. This statement presented the issue: "Whether changes to the corporate structure of the operator of Subzone 84-N require the operator to apply for zone activation and obtain a letter of concurrence from the

Houston Authority, pursuant to 19 C.F.R. § 146.6(b)(5)."

On September 21, 2009, CBP issued a letter ruling in which it held:

> [PRSI(DE)], the operator of Subzone 84-N, ceased to exist on August 29, 2006, and [PRSI(CT)] is a new entity for purposes of determining whether it is a new Zone operator. Therefore, in [PRSI(CT)'s] application for approval of what must be an activation, [PRSI(CT)] must provide a letter of concurrence from [the Port of] Houston Authority, the zone grantee, before CBP will approve the activation.

See 19 C.F.R. § 146.7(e) ("A grantee of an activated zone site shall make written application to the port director for approval of a new operator[.]"); 19 C.F.R. § 146.1(b) (defining "reactivation" as "a resumption of the activated status of an entire area that was previously deactivated without any change in the operator" and providing that "[i]f the operator is different, [the action] is an activation"); FTZ MANUAL, section 4.13(a) (providing that if corporate operator undergoes "change result[ing] in a new corporate entity, a new application for activation shall be made under the procedures in 19 C.F.R. § 146.6 and section 4.12 [FTZ Manual].").

The dispute over the status of PRSI(CT) continued, and PRSI(CT) pursued administrative review of CBP's September 21, 2009 ruling. Throughout the period of time during which the

uncertainty over the status of PRSI(CT) as operator existed—between April 18, 2008, and March 27, 2013—PRSI(CT) requested, and CBP granted to PRSI(CT), month-to-month extensions of time to operate Subzone 84-N. PRSI(CT) continued to operate the subzone, which remained active, pursuant to the 2005 Grantee/Subzone-Operator Agreement. Neither PRSI(CT) nor the Port of Houston Authority requested formal deactivation of the subzone, and none of the actions necessary to deactivate a subzone occurred during the time PRSI(CT)'s administrative review of CBP's ruling remained pending. In each of its renditions to HCAD during this time, PRSI(CT) claimed exemption from ad valorem taxation of the inventory within Subzone 84-N, including taxes assessed by Harris County. And HCAD continued to grant the FTZ exemptions to PRSI(CT) each year.

On April 12, 2013, PRSI(CT)'s administrative review process ended when CBP issued a final ruling, reaffirming its holding:

The CBP Regulations and the [FTZ Manual] require that new FTZ operators be approved prior to operating a zone. . . . [S]ince [PRSI(DE)] ceased to exist, CBP's approval to operate the FTZ also ceased. [PRSI(CT),] therefore, must be a new operator. This new operator must apply for approval to operate the FTZ.

On May 6, 2013, the Port of Houston Authority notified CBP that it declined to approve of PRSI(CT) as the new subzone operator, and it requested deactivation of Subzone 84-N. On August 23, 2013,

CBP formally deactivated Subzone 84-N. Its inventory was removed, and HCAD accordingly ceased to recognize the FTZ exemptions.

Harris County, however, took a different position from CBP, the Port of Houston, and HCAD. On May 30, 2013—before Subzone 84-N had been formally deactivated—Harris County filed a petition with the HCAD's Appraisal Review Board challenging HCAD's grant of FTZ exemptions to PRSI and seeking back-appraisal for HCAD accounts numbered 1041489, 1044919, 2010581, and 2010582, for tax years 2011 to 2013. On September 16, 2013, HCAD's Appraisal Review Board denied Harris County's challenge. Harris County then sought judicial review from HCAD's Appraisal Review Board's order. The district court affirmed the order. The majority reverses that decision and renders judgment in Harris County's favor. I would affirm the judgment of the trial court.

Discussion

Harris County argues that there has been no authorized operator of Subzone 84-N since 2006 and that, without an authorized operator, no goods could have been properly admitted into the subzone pursuant to applicable federal regulations. Thus, it argues, PRSI was not entitled to the FTZ exemption and HCAD's Appraisal Review Board and the trial court improperly granted summary judgment in favor of PRSI(CT) and HCAD. The majority agrees; I do not. The terms of the federal Foreign Trade Zones Act, its attendant regulations contained in the

CFRs and the FTZ Manual, the operative 2005 Grantee/Subzone-Operator Agreement between the Port of Houston Authority and PRSI, the ongoing extensions granted by the federal agency in control of the FTZ, the CBP, and the conduct of the parties all undermine Harris County's argument and the majority's conclusions.

A. Exemption of Merchandise in an FTZ from Ad Valorem Taxation

The FTZ exemption rule provides that "[t]angible personal property" which is "held in a zone" for certain enumerated purposes "shall be exempt from State and local ad valorem taxation." 19 U.S.C. § 81o(e). Likewise, under CFR section 400.1(c), governing the use and operation of FTZs, "Foreign merchandise (tangible personal property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local *ad valorem* taxes . . . . Articles admitted into zones for purposes not specified in the Act shall be subject to the tariff laws and regular entry procedures, including the payment of applicable duties, taxes, and fees." 15 C.F.R. § 400.1(c).

"'Admit' means to bring merchandise into a zone with zone status." 19 C.F.R. § 146.1(b) (providing that "zone status" means "the status of the merchandise admitted to a zone, i.e., nonprivileged foreign, privileged foreign, zone restricted, or domestic"). Merchandise may only be admitted into a zone or subzone that has been "activated." *Id.* In

turn, "'[a]ctivation' means approval by the grantee[3] and port director[4] for operations[5] and for the admission and handling of merchandise in zone status." *Id.* The CFRs further provide, "Upon the Port Director's approval of an application for activation and acceptance of an executed bond, the zone or zone site will be considered activated; and merchandise may be admitted to the zone." *See id.* § 146.6(e). Only after the approval of activation do users of the zone or zone site gain the benefits conferred under the FTZ Act. *See* FTZ MANUAL, section 4.1.

Here, it is undisputed that Subzone 84-N was activated on February 20, 2005, with PRSI(DE) as the operator. It is also undisputed that, on August 29, 2006, PRSI(DE) merged with Astra Refining System, Inc., which, in turn, merged with Astra Holding, USA, and that Astra Holding, USA's name was changed to PRSI(CT). On September 1, 2006, PRSI(CT) filed a request with CBP for approval of

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[3] A "grantee" is a public or private corporation to which the privilege of establishing, operating, or maintaining a zone project has been given. *See* FTZ MANUAL, section 2.3(a). Here, the grantee is the Port of Houston Authority

[4] The "Port Director" is the director of the port of entry in which an FTZ is located. Here, the FTZ Administrator is the Port of Houston Authority. 19 C.F.R. § 146.1(b).

[5] An "operator" is a corporation, partnership, or person that operates a FTZ or FTZ subzone under the terms of an agreement with the grantee. 19 C.F.R. § 146.1(b).

the "change in FTZ operator" for Subzone 84-N from PRSI(DE) to PRSI(CT). PRSI(CT) later changed its mind, and, on April 7, 2008, it filed a statement explaining that it was not a new operator and did not require an activation. By an opinion letter issued September 21, 2009, the CBP opined that "the operator at the time of the 2005 activation of Subzone 84-N, [PRSI(DE)], ceased to exist on August 29, 2006," and it ruled that PRSI(CT) must obtain the concurrence of the zone grantee (the Port of Houston) and CBP approval of a new activation.

All of this is undisputed. What *is* disputed is whether Subzone 84-N was *deactivated* on August 29, 2006, when PRSI(DE) ceased to exist. The question is whether Subzone 84-N, which had been activated on February 20, 2005, with PRSI(DE) as operator, was left without an approved operator and thus was operated by PRSI(CT) without authorization. This alleged unauthorized operation would subject all of the inventory in Subzone 84-N to local ad valorem taxation by HCAD from August 2006 until 2013, when CBP made its final ruling and Subzone 84-N was formally deactivated.

The majority holds that the operation of Subzone 84-N from August 29, 2006, to April 13, 2013, was unauthorized and illegal and therefore the inventory in the subzone during that period was subject to ad valorem taxation by HCAD. I find the majority's construction of the law and the governing documents to be directly contrary to the plain language of the law and the evidence.

B. Was Subzone 84-N Activated During the Tax Years in Question?

At this point in the litigation, no party disputes the determination of CBP that when a change in operator occurs the grantee or purported new operator of the zone or subzone must file a new application for activation. In its September 21, 2009 letter, CBP stated:

> A foreign trade zone or subzone . . . has an activated status, or has had its "activation" approved, if the zone grantee and the CBP port director approve the operation of the zone . . . . If the operator of a zone is about to be changed, then there must be an application for approval of activation of the zone. . . . *When a zone is operated by a corporation, and a change in the operator corporation "results in a new corporate entity, a new application for activation shall be made*" pursuant to C.F.R. § 146.6.

(Emphasis added). CBP further opined that PRSI(CT) was "a new entity for purposes of determining whether it is a new zone operator," that it must, therefore, apply for approval of activation as the new operator, and that PRSI(CT) "must provide a letter of concurrence from the [Port of] Houston Authority, the zone grantee, before CBP will approve the activation"—approval that never came.

The majority takes this initial opinion by CBP to be the end of the story and immediately concludes that Subzone 84-N was *deactivated* and that subsequent operation of the subzone was without authorization and illegal, and, therefore, ad valorem taxes were payable on the inventory stored in the subzone. All of this reasoning is contradicted by the governing law and documents and is incorrect.

Nothing in CBP's September 21, 2009 letter purports to deactivate Subzone 84-N. Instead, following the issuance of this letter, PRSI(CT) pursued administrative review of the September 21, 2009 determination up until April 2013. During that time, it is undisputed that CBP repeatedly granted PRSI(CT) temporary authorizations to serve as the operator of Subzone 84-N in accordance with the express provisions of the CFR, the FTZ Manual, and the 2005 Grantee/Subzone-Operator Agreement between the Port of Houston Authority and PRSI(DE). Although it could have sought formal deactivation at any time,[6] the grantee, the Port of Houston Authority, continued to recognize PRSI(CT) as the subzone's operator, and it continued to abide by the terms of the 2005 Grantee/Subzone-Operator Agreement up until April 2013, when CBP issued its final ruling confirming that PRSI(CT) was a new operator and

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[6] *See* 19 C.F.R. § 146.1(b) ("'Deactivation' means voluntary discontinuation of the activation of an entire zone or subzone by the grantee or operator.").

was required to apply for approval to operate Subzone 84-N.

During all of that time, Subzone 84-N was *never deactivated* in accordance with controlling regulations. On the contrary, the relevant provisions of the FTZ Manual—which serves to collect in a single document all of the laws, regulations, and policies relevant to the daily operations of FTZs—contemplate the continued activation and operation of a zone or subzone when there is a change in operator and approval of the new operator's application to operate the zone is pending. And that is exactly what happened here.

With respect to a "New Zone Operator," the FTZ Manual provides:

> It is permissible to change Operators. In the existing zone operation, the Grantee sponsor should be careful not to terminate contractual relationships until the Port Director has approved a new Operator, background investigations have been completed, and an Operator's bond has been accepted and is in force for an agreed amount. A contract between the Grantee and Operator should govern the relationship between the parties. A Grantee of an activated zone site shall make written application to the Port Director for approval of a new Operator, submitting with the application a certification by the new

> Operator that the inventory control and recordkeeping system meets the requirements of 19 CFR 146 Subpart B and a copy of the procedures manual if different from the previous Operator's manual. . . . The bond specified in 19 CFR 146.6(d) shall be submitted by the Operator before the operating agreement may become effective in respect to merchandise in zone status. The Port Director shall promptly notify the Grantee, in writing, of the approval or disapproval of the application (19 CFR 146.7(e), (f))[.]

FTZ MANUAL, section 4.12.

The FTZ Manual also provides for the "Interim Responsibility of Existing Operator" pending approval of a new Operator and for execution of a new bond when a change of Operators is sought:

> The existing Operator remains responsible for merchandise in zone status and for compliance with the laws and regulations, under its Operator's bond until the new Operator is approved and a new bond is executed. The existing Operator is relieved of responsibility in the interim only if the zone is deactivated or activated status is suspended, and all merchandise in zone status (except domestic status merchandise for which no permit is

> required) has been removed from the zone or entered for consumption.

Id. at § 4.12(a).

Under these regulations, PRSI(CT) as the acting operator remained responsible for merchandise in Subzone 84-N until a new operator could be approved, and the grantee, the Port of Houston Authority——following the dictates in section 4.12—was "careful not to terminate contractual relationships until the Port Director . . . approved a new Operator." Thus, the 2005 Grantee/Subzone-Operator Agreement continued to govern the relationship between the parties until the issue of whether approval of a new operator was required was finally resolved in the affirmative and a new operator of Subzone 84-N was approved. No deactivation or suspension of activation was initiated and no removal of all merchandise in zone status occurred to relieve PRSI(CT) of its responsibilities as operator until August 2013.

The CFRs define "deactivation" as the "voluntary discontinuation of the activation of an entire zone or subzone by the grantee or operator." 19 C.F.R. § 146.1(b). And the CFRs set out the process by which a zone or subzone may be deactivated. Title 19, section 146.7 of the CFRs requires the "grantee [the Port of Houston] or an operator [PRSI(CT)] with the concurrence of [the] grantee, shall make written application to the port director for deactivation of zone site." *See id.* § 146.7(b). When deactivation is formally sought, the CFR provides, "The port director shall not approve the application unless all

merchandise in the site in zone status (other than domestic status) has been removed at the risk and expense of the operator." *Id.* The zone then "may be reactivated using the above procedure if a sufficient bond is on file under § 146.6(d)." *Id.*

Contrary to the majority's assumption that deactivation of Subzone 84-N occurred in 2006, *none* of the steps required for deactivation of Subzone 84-N were undertaken in this case prior to April 12, 2013. For this to have happened, under 19 CFR, section 146.7, PRSI(CT) would have had to initiate the process of deactivation and it would have had to remove the merchandise "in zone status"—i.e., PRSI(CT)'s stored crude oil benefitting from the exemption from ad valorem taxes for merchandise held in an FTZ—at its own expense. That would have terminated its responsibility to continue to operate the subzone under the 2005 Grantee/Subzone-Operator Agreement with the Port of Houston Authority. But it would also have left nothing for HCAD to tax as unlawfully held in Subzone 84-N, as no inventory subject to ad valorem taxation would have remained in the subzone.

Not only did deactivation not happen, but the record conclusively manifests what *did* happen—namely, PRSI(CT)'s authorized, continued operation of Subzone 84-N pursuant to letters of temporary authorization from CBP for the entire time between the date on which CBP ruled that PRSI(DE) ceased to exist (August 29, 2006) until the steps required by 19 CFR 146.7 were completed in 2013. In the interim, PRSI(CT) continued to operate Subzone 84-

N in full compliance with federal law and regulations, the FTZ Manual, the 2005 Grantee/Subzone-Operator Agreement for Subzone 84-N, and extensions granted by CBP, the agency in control of the FTZ.

Thus, all of the requirements set out in the CFRs and the FTZ Manual were complied with, not only in accordance with the referenced federal regulations and the FTZ Manual, but also in accordance with the "contract between the Grantee and Operator," the 2005 Grantee/Subzone-Operator Agreement, which section 4.12 of the FTZ Manual instructs "should govern the relationship between the parties" when a change of operator is sought "until the Port Director has approved a new Operator, background investigations have been completed, and an Operator's bond has been accepted and is in force for an agreed amount." FTZ MANUAL, section § 4.12.

The Grantee/Subzone-Operator Agreement entered into on January 21, 2005, between the Port of Houston Authority as the "grantee" and PRSI(DE) as the "subzone operator" was clear on PRSI(DE)'s obligations. First, it provided, in relevant part, that PRSI(DE) was "responsible for all activity occurring with the zone area" and that it "shall continue as subzone operator until its authorized zone status is terminated by the FTZ Board or for any reason it is no longer in control of the authorized area." Second, it provided that the agreement was to remain in effect until, among other events, "an alternate agreement become effective," PRSI(DE) "relinquish[ed] control of the zone authorized

property," or the "zone status of the subzone operator is terminated by the" FTZ Board.

The final determination as to the post-merger status of PRSI(CT) did not occur until April 12, 2013. Up until that time, the Port of Houston Authority continued to abide by the terms of the 2005 Grantee/Subzone-Operator Agreement and CBP granted PRSI(CT) temporary authorizations to operate Subzone 84-N. On May 6, 2013, the Port Authority notified CBP that it declined to seek approval of PRSI(CT) as a new operator of Subzone 84-N, and on May 8, 2013, CBP notified PRSI(CT). On August 23, 2013, CBP formally deactivated Subzone 84-N pursuant to 19 CFR 146.7. The record reflects that all provisions of the 2005 Grantee/Subzone-Operator Agreement were complied with and that the Agreement was not terminated until the subzone was deactivated.

The affidavit of Jon Mattson, the FTZ Administrator for PRSI(CT), is instructive. It attests, inter alia:

14. Between September 2006 and April 12, 2013, PRSI(CT)'s status as a new operator was the subject of administrative review at [CBP]. The issue being considered by [CBP] was whether PRSI(CT) was in fact a new operator that required [CBP's] approval. That issue was not administratively resolved until April 12, 2013.

15. During this administrative review period, which is also the period at issue in the lawsuit, [CBP] recognized, on a temporary basis, PRSI(CT) as the operator of 84-N, treated that subzone as

activated, and approved the admission of foreign sourced crude oil into 84-N, meaning that crude oil was not subject to federal duties, tariffs or taxes until it or products produced from that crude oil left the zone.

16. Attached as Exhibit 7 are true and correct copies of letters I received from [CBP] from April 18, 2000 until March 27, 2013, in which [CBP] granted PRSI(CT) approval to operate 84-N on a temporary basis.

17. Attached as Exhibit 8 are true and correct copies of forms (214 and 216) filed with [CBP] that authorized foreign sourced crude oil to be admitted to 84-N between January 1, 2006 and August 23, 2103[.]

The actions described in Mattson's affidavit and set out in its attached exhibits were in strict compliance with the provisions of the 2005 Grantor/Subzone Operator Agreement set forth above. These actions were also in strict compliance with the provisions for changing a zone operator set out in the federal laws and regulations and summarized in the FTZ Manual at Section 4.12 (New Zone Operator) and Section 4.12(a) (Interim Responsibility of Existing Operator)—provisions likewise set forth above.

Because all federal regulations and all applicable instruments were complied with at all times during the administrative review period from September 2006 through April 12, 2013—the period for which Harris County claims HCAD erroneously recognized PRSI(CT)'s exemption from ad valorem taxes on the

merchandise in Subzone 84-N—the subzone remained activated and was operated by PRSI(CT) with appropriate authorization during that entire time. Accordingly, the "[t]angible personal property" that was "held in a zone"—subzone 84-N—for the enumerated purpose was properly "exempt from State and local ad valorem taxation." *See* 19 U.S.C. § 81o(e); TEX. TAX CODE ANN. § 11.12. I would hold, therefore, that HCAD's recognition of PRSI(CT)'s exemption was proper, and I would affirm the determinations of both HCAD's Appraisal Review Board and the trial court. The majority does not.

The majority, however, places great weight on the affidavit of Shane M. Williams, the FTZ Administrator for the Port of Houston. In paragraph nine of his affidavit, Williams states, "On February 8, 2010, the Port Authority acknowledged to CBP the deactivation of subzone 84-N, in the absence of an authorized subzone operator, and confirmed that it continued to decline to concur with [PRSI(CT)'s] activation request." What the majority fails to note is that Williams's statement is simply acknowledging the *initial* ruling of CBP during negotiations over the future of Subzone 84-N that continued from 2006 until CBP entered its *final* ruling, on April 12, 2013, that PRSI(CT) must apply as a new operator. Thus, Williams's affidavit does not nullify any of the facts set out above, the evidence supporting them, or the construction of the applicable documents and regulations advanced herein. Thus it does not undermine the conclusion that Harris County's appeal seeking judicial review

of HCAD's Appraisal Review Board's adverse ruling is without merit.

I can find no legal justification for the majority's holding in this important tax case of first impression, which undermines a recognized exemption from payment of ad valorem taxes granted to an authorized operator of an active FTZ as determined by CBP during the pendency of an administrative review proceeding. I would hold that CBP has the authority under the relevant CFRs to grant authorization for the interim operation of an activated FTZ or Subzone during the period in which an adverse ruling on the activation of a new operator is under review prior to CBP's final ruling. I would further hold that that authority was properly exercised in this case to permit the interim operation of Subzone 84-N between August 29, 2006, and the formal deactivation of the subzone in August 2013, and that all requirements of the CFRs, the FTZ Manual, and the 2005 Grantee/Zone-Operator Agreement were complied with. Therefore, PRSI(CT) was properly exempted from ad valorem taxes on the merchandize held in Subzone 84-N during that period.

Conclusion

I would overrule Harris County's issue, and I would affirm the trial court's order granting summary judgment to PRSI and HCAD and denying Harris County's motion for summary judgment.

/s/ Evelyn V. Keyes

Evelyn V. Keyes
Justice

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

NO. 2013-61450

HARRIS COUNTY, Plaintiff,

v.

HARRIS COUNTY APPRAISAL DISTRICT AND PRSI TRADING, LLC, Defendants.

Entered: April 20, 2016

ORDER

Pending before the Court are cross motions for summary judgment of Plaintiff Harris County and Defendants PRSI Trading, LLC and Harris County Appraisal District (HCAD). The Court, having considered the motions, responses, and any timely filed replies, and objections, and having considered all of the competent summary judgment evidence, hereby orders as follows:

1. The Motion for Summary Judgment filed by Plaintiff Harris County is DENIED.

2. The Cross-Motions for Summary Judgment filed by Defendants HCAD and PRSI Trading, LLC are GRANTED, and all claims by Plaintiff against

HCAD and PRSI Trading, LLC are DISMISSED WITH PREJUDICE. See, e.g., Mattson affidavit at ¶15 and Exhibits 7 and 8 attached thereto.

SIGNED this 20th day of April, 2016.

/s/ Grant Dorfman
JUDGE PRESIDING

U.S. CUSTOMS AND BORDER PROTECTION

HQ H027423

HEADQUARTERS RULING LETTER

HQ H027423

September 21, 2009

FOR-3-03

OT:RR:CTF:ER H027423 ECD

Terry Estell
Service Port Director
U.S. Customs and Border Protection
2350 N. Sam Houston Pkwy E., Suite 1000
Houston, Texas 77032

RE: Foreign trade zone and subzone activation, grantee letter of concurrence, new corporate entity, 19 C.F.R. § 146.6 and 146.7

Dear Dir. Estell:

This letter is in response to your request for our opinion on whether Pasadena Refining System, Inc. ("Pasadena Refining CT"), a Connecticut corporation, as a result of two mergers and sale of its shares of stock, as well as the recent collapse of its joint venture, should be required to obtain a letter of

concurrence form the Port of Houston Authority (the "Port Authority"), pursuant to 19 C.F.R. § 146.6(b)(5). Pasadena Refining is required to obtain a letter of concurrence, for the reasons explained in this letter.

FACTS:

Foreign Trade Subzone 84-N ("Subzone 84-N") is a refinery foreign trade subzone in Harris County, Texas, and was first activated on December 11, 1995, with Crown Central Petroleum Corporation ("Crown") as the operator of Subzone 84-N. The Port of Houston Authority ("Houston Authority"), an autonomous governmental entity authorized by the Texas legislature, received the foreign trade zone grant that includes Subzone 84-N. On July 2, 2004, Astra Oil Company, Inc. acquired Crown's petroleum products; however, Crown retained ownership of the refinery, and remained the operator of Subzone 84-N. There was no new activation.

Crown subsequently sold its refinery to Pasadena Refining System, Inc., which was a Delaware corporation ("Pasadena Refining DE") owned by Astra Oil Company, Inc. Pasadena Refining DE was incorporated in 2004. Subzone 84-N was activated on February 20, 2005, with Pasadena Refining DE as the operator.

On August 29, 2006, documents were filed with the Secretary of State for the state of Delaware at 11:15 a.m., and those documents indicated that Pasadena Refining DE was merged with and into Astra Refining System, Inc., a Delaware

corporation. On the same day, documents were filed with the Secretary of State for the state of Delaware at 11:46 a.m. Astra Refining System, Inc. was merged with and into Astra Holding, USA, Inc., a Connecticut corporation that was first registered in 1998. Later that day, at 1:35 p.m., the corporation's name, Astra Holding USA, Inc., was changed to Pasadena Refining System, Inc. ("Pasadena Refining CT"), and an amendment indicating the name change was filed with the Secretary of State of Connecticut. Also on August 29, 2006, Pasadena Refining System CT filed, with the Bond Desk at CBP, Customs Form 5106 indicating its new Internal Revenue Service ("IRS") Identification Number, a request to file a new continuous bond, and a request to terminate its old continuous bond.

Pasadena Refining CT was created as a joint venture between Astra Oil Trading NV and Petrobras America Inc. Astra Oil Trading NV and Petrobras America Inc. each owned fifty percent of Pasadena Refining CT. On September 1, 2006, Pasadena Refining CT filed a request with the Port of Houston that the port approve the "change in FTZ operator" for Subzone 84-N from Pasadena Refining DE to Pasadena Refining CT. Pasadena Refining CT did not include a letter of concurrence from the Houston Authority. A new continuous bond for Pasadena Refining CT was executed on September 5, 2006, with an effective date of September 20, 2006. CBP did not approve the application.

On April 7, 2008, Pasadena Refining CT filed a statement explaining that it was not a new operator

of Subzone 84-N and it does not require an activation, pursuant to 19 C.F.R. § 146.6. Pasadena Refining CT argues that Pasadena Refining CT should not be considered a new operator, because, as a result of its merger and creation from Pasadena Refining DE:

The assets were the same, the liabilities were the same, the officers were the same, and the ultimate parent remained the same. For example, the current and reorganized Pasadena Refining System, Inc. is still legally obligated under its agreement with the Port of Houston Authority. Likewise, the current and reorganized Pasadena Refining System, Inc. is still responsible to the surety under the bond required by U.S. Customs and Border Protection regulations.

Pasadena Refining CT argued that after Astra Oil Trading NV sold half its shares in Pasadena Refining CT to Petrobras America Inc., no assets were transferred; the sale meant that Pasadena Refining CT had two owners instead of one. Pasadena Refining CT argued that the sale of stock did not necessitate an application for activation.

On April 29, 2008, the zone grantee of Subzone 84-N, the Houston Authority, provided a letter on the activated status of Subzone 84-N, and stated that if CBP required a letter of concurrence from the Houston Authority, the Houston Authority would first need a "letter of non-objection" from Harris County, and it had not yet received such a letter. If CBP determined that "no significant changes have occurred to the operator of Subzone 84-N" and no

action was required from the Houston Authority, then the Houston Authority would accept the decision and would not contest the activated status of Subzone 84-N.

Around this time, disputes arose between Astra Oil Trading NV and Petrobras America Inc. that led to international arbitration, as well as litigation filed in Federal courts. During the arbitration, Astra Oil Trading NV asked the international arbitration panel to validate certain put-option rights, which would force a sale of Pasadena Refining CT to Petrobras America Inc. Although Petrobras America Inc. has indicated that it is analyzing the arbitrators' decisions, one U.S. court has stated that Petrobras America Inc. is the "de facto owner of Pasadena Refining System, Inc." See Astra Oil Trading NV v. PRSI Trading Company LP, Court No. 08-CV-10467, 2008 U.S. Dist. LEXIS 106194 (S.D.N.Y. December 23, 2008).

CBP notified Pasadena Refining CT that it was required to obtain a letter of concurrence from the Houston Authority as part of its application for approval of activation of Subzone 84-N, but CBP has extended the time for Pasadena Refining CT to file the letter, pending advice from CBP Headquarters.

ISSUE:

Whether changes to the corporate structure of the operator of Subzone 84-N require the operator to apply for zone activation and obtain a letter of concurrence from the Houston Authority, pursuant to 19 C.F.R. § 146.6(b)(5).

LAW AND ANALYSIS

If the operator of Subzone 84-N is a new operator, then an application for approval of activation of the foreign trade subzone should have been filed. A foreign trade zone or subzone (collectively "zone") has an activated status, or has had its "activation" approved, if the zone grantee and the CBP port director approve the operation of the zone, and the admission and handling of merchandise in zone status. See 19 C.F.R. § 146.1(a). If the operator of a zone is about to be changed, then there must be an application for approval of activation of the zone. See id., and § 146.7(e). If a zone operator applies to obtain approval of activation of a zone, then a written letter of concurrence from the zone grantee must accompany the application. See 19 C.F.R. § 146.6(b)(5). When a zone is operated by a corporation, and a change in the operator corporation "results in a new corporate entity, a new application for activation shall be made" pursuant to 19 C.F.R. § 146.6. See Foreign-Trade Zones Manual, Cust. Dir. No. 3210-030, at 40, para. 4.13(a) (August 6, 1991). Therefore, the question is whether Pasadena Refining CT is a new operator.

In this case, the operator at the time of the 2005 activation of Subzone 84-N, Pasadena Refining DE, ceased to exist on August 29, 2006. Legacy Customs has ruled that a corporation absorbed in a merger "ceases to exist and its existence is not, in any way or form, continued in the surviving or resultant corporation which constitutes a different legal being altogether." See HQ 222064 (April 10, 1990). The

operator had been a Delaware Corporation, Pasadena Refining DE, which was wholly owned by Astra Oil Company Inc. According to the "Agreement and Plan of Merger of Pasadena Refining System, Inc., a Delaware Corporation and Astra Refining System, Inc., a Delaware Corporation," Astra Refining System, Inc. was the "Surviving Corporation," and Pasadena Refining DE was the "Merged Corporation," and the "Surviving Corporation shall continue its corporate existence under the laws of the State of Delaware and the separate existence and corporate organization of the Merged Corporation shall be terminated and cease."

Subsequently, Astra Refining System, Inc. was merged with and into Astra Holding, USA, Inc., a Connecticut corporation that was first registered in 1998. According to the "Agreement and Plan of Merger of Astra Refining System Inc., a Delaware Corporation and Astra Holding USA, Inc., a Connecticut Corporation," Astra Holding USA, Inc. was the "Surviving Corporation" and Astra Refining System, Inc. was the "Merged Corporation," and thus Astra Refining System, Inc. was terminated and ceased to exist.

Astra Holding USA, Inc., the Surviving Corporation, subsequently changed its name to Pasadena Refining System, Inc., by a Certificate of Amendment filed with the Office of the Secretary of the State of Connecticut. The amendment listed the name change as the only amendment, thus the new Pasadena Refining CT is Astra Holding USA, Inc.

Before the sale of shares to create the joint venture between Astra Oil Trading NV and Petrobras America Inc., and before Astra Oil Trading NV exercised its put-option, Pasadena Refining CT was a new legal entity, which differed from the operator at the time of the 2005 activation of Subzone 84-N. Either the zone operator or the grantee should have applied for activation prior to the termination of Pasadena Refining DE.

Pasadena Refining CT argues that it is not required to obtain a letter of concurrence from the grantee, because the "grantee is requesting approval" of the new zone operator. In general, a zone grantee filing a request for approval of a new operator is requesting approval of an activation: the zone grantee is not required to furnish a letter of concurrence from itself. See 19 C.F.R. § 146.6(b)(5) and 146.7(e); see also 19 C.F.R. § 146.1 ("If the operator is different, it is an activation."). Pasadena Refining CT does not dispute that Pasadena Refining DE was the operator, and the Houston Authority is the grantee of Subzone 84-N. There is nothing to indicate that Pasadena Refining CT is the same entity as the Houston Authority. The Houston Authority did not file an application for approval of the change in operator of Subzone 84-N, nor does the Houston Authority's April 29, 2008, letter indicate that it was applying for approval of the change in operator of Subzone 84-N. The letter from the Houston Authority indicates only that if Pasadena Refining CT was a new operator, then the Houston Authority would have to obtain a non-objection

letter from Harris County, before the Houston Authority could provide a letter of concurrence. Because the grantee of Subzone 84-N is not applying for approval of the new operator, the applicant is required to provide a letter of concurrence from the zone grantee, pursuant to 19 C.F.R. § 146.6(b)(5).

HOLDING:

Pasadena Refining DE, the operator of Subzone 84-N, ceased to exist on August 29, 2006, and Pasadena Refining CT is a new entity for purposes of determining whether it is a new zone operator. Therefore, in Pasadena Refining CT's application for approval of what must be an activation, Pasadena Refining CT must provide a letter of concurrence from the Houston Authority, the zone grantee, before CBP will approve the activation.

You are to mail this decision to the Houston Authority and to Pasadena Refining CT no later than 60 days from the date of this letter. On that date, the Office of International Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

/s/ Myles B. Harmon
Myles B. Harmon, Director
Commercial and Trade Facilitation Division

U.S. CUSTOMS AND BORDER PROTECTION

HQ H105336

HEADQUARTERS RULING LETTER

HQ H105336

April 12, 2013

OT:RR:CTF: ER H105336 RDC

James B. Harris, Esq.
Thompson & Knight, LLP
One Arts Plaza
1722 Routh Street
Suite 1500
Dallas, Texas 75201-2533

Re: Pasadena Refining System, Inc.; Foreign Trade Subzone 84-N; Request for Reconsideration of HRL H027423 (September 21, 2009).

Dear Mr. Harris:

This is in response to your May 5, 2010, request on behalf of your client, Pasadena Refining System, Inc. organized in Connecticut, (Pasadena CT), that CBP reconsider its determination in Headquarters

Ruling Letter (HRL) H027423, issued September 21, 2009. In HRL H027423 we held that Pasadena CT was a new operator of the foreign trade zone, (FTZ), because the approved operator, Pasadena Refining System, Inc. organized in Delaware, (Pasadena DE), ceased to exist after the mergers described below. We have reconsidered the matter based on your Request for Reconsideration dated May 5, 2010, and your Memorandum dated December 21, 2012.

FACTS:

Pasadena DE was the approved operator of the relevant FTZ and a wholly owned subsidiary of Astra Refining System, Inc. (Astra). In 2006, Pasadena DE was merged into its parent, Astra. At the same time, Astra was merged into its parent, Astra Holdings, Inc. (Astra Holdings). Astra Holdings was a subsidiary of Astra Oil Trading NV. Astra Holdings then changed its name to Pasadena Refining System, Inc., (Pasadena CT), a Connecticut corporation. In sum, Pasadena DE, and Astra were merged into Astra Holdings, then Astra Holdings changed its name. Three days after this merger 50 percent of the stock of Pasadena CT was sold to Petrobras America Inc. (Petrobras). After the merger Pasadena CT obtained a new FTZ bond in its name and applied to the grantee of the zone to be approved as a new operator. You say this was not because Pasadena CT believed such action necessary, but "out of an abundance of caution." Request for Reconsideration, May 5, 2010, page 3. Finally, Pasadena CT obtained a new tax identification number.

LAW AND ANALYSIS:

You now argue that under Delaware and Connecticut law a subsidiary that is merged into its parent "continues on as part of the parent corporation" and that Pasadena DE continues to exist as part of Pasadena CT so that Pasadena CT is not a new operator. Request for Reconsideration, May 5, 2010. You claim that CBP is confusing the "concept that the separate existence of the merged corporation terminated and ceases as a result of a merger with the concept that an entity itself terminates and ceases as a result of a dissolution." Memorandum, December 12, 2012, page 2. You also advise that Pasadena DE's pre-merger balance sheet and Pasadena CT's post-merger balance sheet were identical, and that "as a result of the mergers, all of the rights, privileges, powers and franchises [belonging to Pasadena DE and Astra] . . . were as a matter of Delaware law vested in Pasadena CT." Request for Reconsideration, May 5, 2010, page 6. You contend that Pasadena DE continues to exist as part of Pasadena CT so that Pasadena CT is not a new operator.

We disagree that Pasadena DE continues its existence and that Pasadena CT is not a new operator. In fact, the Agreement and Plan of Merger of Astra Refining System, Inc. and Astra Holding USA, Inc., dated August 29, 2006, states that Pasadena DE will cease to exist and Astra will survive the merger. Page 1 of the Agreement and Plan states that "the Merged Corporation shall be merged with and into the Surviving Corporation, . .

. the separate existence of the Merged Corporation shall cease and the Surviving Corporation shall survive the merger and continue to exist . . . ." See also, para. 1.3 (". . . the separate existence and corporate organization of the Merged Corporation shall be terminated and cease.") In this case, Astra was named the surviving entity and therefore the merger documents demonstrate that Pasadena DE ceased to exist.

Legacy Customs previously held that "it is settled law that the corporation absorbed in a merger, or consolidation ceases to exist and its existence is not, in any way or form, continued in the surviving or resultant corporation which constitutes a different legal being altogether." See H222064 (Apr. 10, 1990) and C.S.D. 89-12 (December 15, 1988). You argue that absent federal law, which takes precedence over state law, CBP should follow "the law of the state that governed the merger . . . ." Request for Modification and Revocation, May 5, 2010 at 6. However, the matter at issue, operation of an FTZ, is a federal issue because an FTZ and the authority to operate it are creatures of federal law, i.e., 19 U.S.C. § 81c. Specifically, we are determining whether the FTZ operator status can continue after the operator is merged and ceases to exist. Consequently, federal law and regulations control.

Moreover, state law is consistent with CBP's position, that the merged corporation ceases to exist as a separate entity. Under both Delaware and Connecticut law, by statute, the merged

corporations cease to exist (unless identified as the surviving corporation - which here was Astra). Section 259 of the Delaware Code provides:

> When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, ..."

8 Del. C. § 259(a) (2012). The Connecticut statute has similar language and provides:

> (a) When a merger becomes effective:
>
> (1) The corporation or other entity that is designated in the certificate of merger as the survivor continues or

> comes into existence, as the case may be;
>
> (2) The separate existence of every corporation or other entity that is merged into the survivor ceases;

Conn. Gen. Stat. § 33-820 (2012). Therefore, Pasadena DE ceased to exist when it was merged into its parent and hence, the approved FTZ operator, Pasadena DE, no longer exists. Accordingly, Pasadena CT must be a new operator.

Further, Delaware courts have held that the subsumed corporation in a merger ceases to exist under Delaware law. In Beals v. Washington International, Inc., (386 A.2d 1156 (Del. Ch. 1978)) the Delaware court interpreted its statute to provide "a constituent corporation ceases to exist upon merger . . . . " Id. at 1161. In Beals, Company B was merged into Company A. The plaintiffs, former stockholders of Company A, named Company B as a defendant. The defendants' motion to quash the service of process on Company B was granted because the court determined that Company B "no longer exists and the action cannot be maintained against it." Id. at 1161. As rationale for its decision, the Beals Court stated:

> In resolving questions centering on corporate existence or dissolution, it should be kept in mind that corporations exist only by legislative act. International Pulp Equipment v.

> St. Regis Kraft, D.C. Del., 54 F. Supp. 745 (1944). Since by statute, corporate existence is terminated on the date of merger, U.S. v. Borden, N.D. Ill., 28 F. Supp. 177 (1939), a corporation ceases to exist on merger for all purposes, including service of process, unless the legislature provides otherwise. Sevits v. McKiernan-Terry, S.D.N.Y., 264 F. Supp. 810 (1966).

Id. Based on Beals, Pasadena DE, regardless of whatever rights, privileges, powers and franchises passed to Pasadena CT as a result of the merger, after the merger Pasadena DE ceased to exist as a corporate entity. Accordingly, since the approved operator of the FTZ no longer exists, any entity said to be operating the zone must be a new operator.

Despite the plain text of the Delaware and Connecticut law, you assert that:

> Section 259(a) of the DGCL [Delaware General Corporate Law] provides that in a merger, the subsidiary corporation combines with, and continues its existence in, the parent corporation. Therefore, the combined entity possesses all the rights, privileges, powers and franchises, and is subject to all restrictions, disabilities and duties of the subsidiary corporation. Accordingly, under Delaware law, combining a subsidiary with a parent results in a continuation of the

> subsidiary corporation through the parent corporation. This result is a major distinction between a merger and a dissolution. In a dissolution, the subsidiary corporation disappears and terminates, and its creditors are paid and the remaining assets are distributed to the parent corporation. By contrast, in a merger, the subsidiary corporation continues on in the parent corporation, without losing its life.

Request for Reconsideration, May 5, 2010, page 6. However, as explained above, only the surviving corporation continues, not the corporations that are merged into it. Thus, your position is inconsistent with both the text of the Delaware and Connecticut statutes as well as a ruling by a Delaware court.

Moreover, the two cases you rely upon in your Memorandum dated December 21, 2012, Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (1952) and Argenbright v. Phoenix Fin. Co., 187 A. 124, 126 (Del. Ch. 1936), do not contradict the conclusion that Pasadena DE ceased to exist after the merger. In Sterling v. Mayflower Hotel Corp., the court affirmed the denial of plaintiffs' request for injunctive relief and found no unfairness or fraud regarding a planned merger. In Argenbright v. Phoenix Finance Co., the court sustained the corporations' demur on the minority shareholders' action to rescind the sale and distribution of corporate assets. The court denied the demur on the minority shareholders' claim for breach of trust

based upon conversion of the proceeds from the distribution. Neither of these cases refute the conclusion that a corporation merged into another ceases to exist and are inapposite. Accordingly, you provide no legal basis to alter the determination in HRL H027423, that Pasadena DE ceased to exist after it was merged into Astra.

You also contend that HRL H027423 did not address two key points, i.e., whether there "was a change in ownership, and did that change in ownership result in a new corporate entity as operator." We believe this assertion is a reference to the CBP Foreign Trade Zone Manual, Publication number 0000-0559A (2011) (FTZM). The FTZM at 4.13 states:

> Change in Ownership of Operator - If ownership of the operator firm changes hands through sale or other transfer, the procedure to be followed depends on whether the firm is individually owned, a partnership, or a corporation.
>
> . . . . If the firm is a corporation and the change in ownership does not result in a new corporate entity with a different corporate charter, the change will be treated as a name change as described in Section 4.13(b), below, FTZM. If the firm is a corporation and the change results in a new corporate entity, a new application for activation shall be made

under the procedures in 19 CFR 146.6
and Section 4.12 FTZM.

FTZM 4.13(a). You contend that the "reorganization of the subsidies of Astra Oil Trading NV made no change in the ultimate ownership of the Operator [Pasadena DE/Pasadena Ct]." Request for Reconsideration, May 5, 2010. You state that since Astra Oil Trading NV was the ultimate owner of Pasadena DE and the resulting corporation, Pasadena CT, remained a wholly owned subsidiary of Astra Oil Trading NV, the ownership of Pasadena DE did not change. You also argue that there was no change in ownership that resulted from the sale of half of the stock of Pasadena CT to Petrobras. However, that section of the FTZM only addresses when the entity continues to exist but the ownership changed. After finding, as explained above, that the approved operator, Pasadena DE, ceased to exist as a matter of law after the merger, there is no reason to consider whether there "was there a change in ownership." The fact that the approved zone operator no longer existed after the merger obviates the need to consider whether there was a change in ownership of the operator.

Moreover, even if we were to consider the contention that the merger did not result in a change in ownership, three days after the merger, half of Pasadena CT was sold to Petrobras, creating a change in ownership of the corporation you say should be deemed the FTZ operator. The United States District Court for the Southern District of Texas and the First District Court of Appeals of

Texas both describe Pasadena CT as being a joint venture owned by Astra Oil Trading NV and Petrobras. The First District Court of Appeals of Texas, recently described the ownership of Pasadena CT in this way:

> In September 2006, a joint venture was started between Pasadena Refining System, Inc. ("PRSI"), [Pasadena Ct] . . . . and PRSI Trading Company LP ("the Trading Company"), an associated partnership, which supplied the refinery with feed stocks and crude oil. Petrobras America Inc. ("Petrobras America") and appellee, Astra Oil Trading NV ("Astra Oil") each owned one-half of the shares in PRSI. A Shareholders Agreement governed PRSI's operations.

Petrobras Am., Inc. v. Astra Oil Trading NV, 2012 Tex. App. LEXIS 2458 (Tex. App. Houston 1st Dist. Mar. 29, 2012) (emphasis added). The United States District Court for the Southern District of Texas, Houston Division, said that Astra Oil and Petrobras were "co-owners" of a joint venture, Pasadena CT:

> Petitioners Astra Oil Trading NV . . . ("Petitioners") seek in this action judicial confirmation of an arbitral award rendered in their favor against Respondents . ("Respondents"). Petitioners [Astra Oil Trading NV, et. al.] and Respondents [Petrobras

> America, Inc., et. al.] were 50% co-owners of a joint venture consisting of two companies. The first company--Pasadena Refining System, Inc. ("PRSI")--owns a refinery in Pasadena, Texas. PRSI was governed by a Shareholders Agreement between [Astra Oil Trading NV] and [Petrobras America, Inc., et. al.] . . . .

Astra Oil Trading NV v. Petrobras Am. Inc., 718 F. Supp. 2d 805 (S.D. Tex. 2010). Therefore, Astra Oil Trading NV's ownership of Pasadena DE, Astra and Pasadena CT changed after the merger.

There is also evidence that Pasadena CT acted as if Pasadena DE no longer existed. After the merger Pasadena CT obtained a new FTZ bond in its name, applied to the grantee of the zone to be approved as a new operator, and obtained a new tax identification number. Request for Reconsideration, May 5, 2010. While you say that this was not because Pasadena CT believed such action necessary, but "out of an abundance of caution," (Request for Reconsideration, May 5, 2010, page 3), however, these actions demonstrate that the management of Pasadena CT thought the changes to the corporate entity that operated the FTZ were significant enough to notify CBP and the surety.

Finally, you argue that Pasadena DE's status as operator of the FTZ vested in the surviving corporation where it is preserved and continued." You contend that there is no federal law to trump the state law that vests all the rights, privileges and

powers of the merged corporation in the surviving corporation. You say that means that Pasadena DE's right to operate the FTZ vested in Pasadena CT, the surviving corporation. However, operation of an FTZ is a privilege not a right. Moreover, CBP does not permit the sale or transfer of the FTZ operator status between entities. The CBP Regulations and the FTZM require that new FTZ operators be approved prior to operating a zone. See FTZM 4.13(a) and 19 C.F.R. § 146.7(e). As explained above, since Pasadena DE ceased to exist, CBP's approval to operate the FTZ also ceased. Pasadena CT therefore, must be a new operator. This new operator must apply for approval to operate the FTZ.

HOLDING:

Based on the above, we find that there is no legal basis to alter the determination in HRL H027423, that Pasadena Refining System Inc. (Pasadena DE) ceased to exist after the merger and the resulting entity, Pasadena CT is a new entity and hence, is a new zone operator.

Sincerely

/s/ *Sandra L. Bell*
Sandra L. Bell
Executive Director
Regulations and Rulings
Office of International Trade

THE SUPREME COURT OF TEXAS

Orders Pronounced May 29, 2020

ORDERS ON CAUSES

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED

[…]

18-0664 PRSI TRADING, LLC v. HARRIS COUNTY, TEXAS; from Harris County; 1st Court of Appeals District (01-16-00389-CV, 579 S.W.3d 77, 06-22-17)

(Justice Boyd and Justice Bland not participating)

[…]

19 U.S.C. § 81a(b)

(b) The term "Board" means the Board which is established to carry out the provisions of this chapter. The Board shall consist of the Secretary of Commerce, who shall be chairman and executive officer of the Board, and the Secretary of the Treasury;

19 U.S.C. § 81b(a)

(a) Board authorization to grant zones

The Board is authorized, subject to the conditions and restrictions of this chapter and of the rules and regulations made thereunder, upon application as hereinafter provided, to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States.

19 U.S.C. § 81c(a)

(a) Handling of merchandise in zone; shipment of foreign merchandise into customs territory; appraisal; reshipment to zone

Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into customs territory of

the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting imported merchandise: Provided, That whenever the privilege shall be requested and there has been no manipulation or manufacture effecting a change in tariff classification, the appropriate customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be stored, manipulated, or manufactured under the supervision and regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not may, under regulations prescribed by the Secretary of the Treasury, be exported or destroyed, or may be sent into customs territory upon the payment of such liquidated duties and determined taxes thereon. If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on the quantity of such foreign merchandise used in the manipulation or manufacture of the entered article. Allowance shall be made for recoverable and irrecoverable waste; and if recoverable waste is sent into customs territory, it shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry. Where two or more products result from the manipulation or manufacture of merchandise in a

zone the liquidated duties and determined taxes shall be distributed to the several products in accordance with their relative value at the time of separation with due allowance for waste as provided for above: Provided further, That subject to such regulations respecting identity and the safeguarding of the revenue as the Secretary of the Treasury may deem necessary, articles, the growth, product, or manufacture of the United States, on which all internal-revenue taxes have been paid, if subject thereto, and articles previously imported on which duty and/or tax has been paid, or which have been admitted free of duty and tax, may be taken into a zone from the customs territory of the United States, placed under the supervision of the appropriate customs officer, and whether or not they have been combined with or made part, while in such zone, of other articles, may be brought back thereto free of quotas, duty, or tax: Provided further, That if in the opinion of the Secretary of the Treasury their identity has been lost, such articles not entitled to free entry by reason of noncompliance with the requirements made hereunder by the Secretary of the Treasury shall be treated when they reenter customs territory of the United States as foreign merchandise under the provisions of the tariff and internal-revenue laws in force at that time: Provided further, That under the rules and regulations of the controlling Federal agencies, articles which have been taken into a zone from customs territory for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented

malt liquors), or storage shall be considered to be exported for the purpose of—

(1) the draw-back, warehousing, and bonding, or any other provisions of the Tariff Act of 1930, as amended, and the regulations thereunder; and

(2) the statutes and bonds exacted for the payment of draw-back, refund, or exemption from liability for internal-revenue taxes and for the purposes of the internal-revenue laws generally and the regulations thereunder.

Such a transfer may also be considered an exportation for the purposes of other Federal laws insofar as Federal agencies charged with the enforcement of those laws deem it advisable. Such articles may not be returned to customs territory for domestic consumption except where the Foreign-Trade Zones Board deems such return to be in the public interest, in which event the articles shall be subject to the provisions of paragraph 1615(f) of section 1201 of this title: Provided further, That no operation involving any foreign or domestic merchandise brought into a zone which operation would be subject to any provision or provisions of section 1807, chapter 15, chapter 16, chapter 17, chapter 21, chapter 23, chapter 24, chapter 25, chapter 26, or chapter 32 of the Internal Revenue Code if performed in customs territory, or involving the manufacture of any article provided for in paragraphs 367 or 368 of section 1001 of this title, shall be permitted in a zone except those operations (other than rectification of distilled spirits and wines, or the manufacture or production of alcoholic

products unfit for beverage purposes) which were permissible under this chapter prior to July 1, 1949: Provided further, That articles produced or manufactured in a zone and exported therefrom shall on subsequent importation into the customs territory of the United States be subject to the import laws applicable to like articles manufactured in a foreign country, except that articles produced or manufactured in a zone exclusively with the use of domestic merchandise, the identity of which has been maintained in accordance with the second proviso of this section may, on such importation, be entered as American goods returned: Provided, further, That no merchandise that consists of goods subject to USMCA drawback, as defined in section 4534(a) of this title, that is manufactured or otherwise changed in condition shall be exported to a USMCA country, as defined in section 4502 of this title, without an assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of its exportation (or if the privilege in the first proviso to this subsection was requested, an assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of its admission into the zone) and the payment of the assessed duty before the 61st day after the date of exportation of the article, except that upon the presentation, before such 61st day, of satisfactory evidence of the amount of any customs duties paid or owed to the USMCA country on the article, the customs duty may be waived or reduced (subject to section 508(b)(2)(B) of the Tariff Act of 1930 [19 U.S.C. 1508(b)(2)(B)]) in an amount that

does not exceed the lesser of (1) the total amount of customs duties paid or owed on the merchandise on importation into the United States, or (2) the total amount of customs duties paid on the article to the USMCA country: Provided, further, That, if Canada ceases to be a USMCA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates, with the exception of drawback eligible goods under section 204(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988, no article manufactured or otherwise changed in condition (except a change by cleaning, testing or repacking) shall be exported to Canada during the period such Agreement is in operation without the payment of a duty that shall be payable on the article in its condition and quantity, and at its weight, at the time of its exportation to Canada unless the privilege in the first proviso to this subsection was requested: Provided further, That no merchandise that consists of goods subject to Chile FTA drawback, as defined in section 203(a) of the United States-Chile Free Trade Agreement Implementation Act, that is manufactured or otherwise changed in condition shall be exported to Chile without an assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of its exportation (or if the privilege in the first proviso to this subsection was requested, an assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of its admission into the zone) and the payment of the assessed duty before the 61st day after the date of

exportation of the article, except that the customs duty may be waived or reduced by (1) 100 percent during the 8-year period beginning on January 1, 2004; (2) 75 percent during the 1-year period beginning on January 1, 2012; (3) 50 percent during the 1-year period beginning on January 1, 2013; and (4) 25 percent during the 1-year period beginning on January 1, 2014.

19 U.S.C. § 81h

The Board shall prescribe such rules and regulations not inconsistent with the provisions of this chapter or the rules and regulations of the Secretary of the Treasury made hereunder and as may be necessary to carry out this chapter.

19 U.S.C. § 81o(e)

(e) Exemption from State and Local Ad Valorem Taxation of Tangible Personal Property

Tangible personal property imported from outside the United States and held in a zone for the purpose of storage, sale, exhibition, repackaging, assembly, distribution, sorting, grading, cleaning, mixing, display, manufacturing, or processing, and tangible personal property produced in the United States and held in a zone for exportation, either in its original form or as altered by any of the above processes, shall be exempt from State and local ad valorem taxation.

15 C.F.R. § 400.1(c)

(c) To the extent "activated" under Customs procedures in 19 CFR part 146, and only for the

purposes specified in the Act (19 U.S.C. 81c), zones are treated for purposes of the tariff laws and Customs entry procedures as being outside the Customs territory of the United States. Under zone procedures, foreign and domestic merchandise may be admitted into zones for operations such as storage, exhibition, assembly, manufacture and processing, without being subject to formal Customs entry procedures and payment of duties, unless and until the foreign merchandise enters Customs territory for domestic consumption. At that time, the importer ordinarily has a choice of paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone, or if used in manufacturing or processing, to the emerging product. Quota restrictions do not normally apply to foreign goods in zones. The Board can deny or limit the use of zone procedures in specific cases on public interest grounds. Merchandise moved into zones for export (zone-restricted status) may be considered exported for purposes such as federal excise tax rebates and Customs drawback. Foreign merchandise (tangible personal property) admitted to a zone and domestic merchandise held in a zone for exportation are exempt from certain state and local ad valorem taxes (19 U.S.C. 81o(e)). Articles admitted into zones for purposes not specified in the Act shall be subject to the tariff laws and regular entry procedures, including the payment of applicable duties, taxes, and fees.

15 C.F.R. § 400.42(a)

Requirements for commencement of operations in a zone project.

(a) *In general.* The following actions are required before operations in a zone may commence:

(1) Approval by the Port Director of an application for activation is required as provided in 19 CFR part 146; and

(2) The Executive Secretary will review proposed manufacturing or processing, pursuant to § 400.32, and a zone schedule as provided in this section.

19 C.F.R. § 146.1

(a) The following words, defined in section 1 of the Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81a), are given the same meaning when used in this part, unless otherwise stated: "Board", "Grantee", and "Zones".

(b) The following are general definitions for the purpose of this part:Act. "Act" means the Foreign-Trade Zones Act of June 18, 1934, as amended (48 Stat. 998-1003; 19 U.S.C. 81a-u).

Activation. "Activation" means approval by the grantee and port director for operations and for the admission and handling of merchandise in zone status.

Admit. "Admit" means to bring merchandise into a zone with zone status.

Alteration. "Alteration" means a change in the boundaries of an activated zone or subzone;

activation of a separate site of an already-activated zone or subzone with the same operator at the same port; or the relocation of an already-activated site with the same operator.

Conditionally admissible merchandise. "Conditionally admissible merchandise" is merchandise which may be imported into the U.S. under certain conditions. Merchandise which is subject to permits or licenses, or which may be reconditioned to bring it into compliance with the laws administered by various Federal agencies, is an example of conditionally admissible merchandise.

Constructive transfer. "Constructive transfer" is a legal fiction which permits acceptance of a Customs entry for merchandise in a zone before its physical transfer to the Customs territory.

Customs territory. "Customs territory" is the territory of the U.S. in which the general tariff laws of the U.S. apply. "Customs territory of the United States" includes only the States, the District of Columbia, and Puerto Rico. (General Note 2, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202)).

Deactivation. "Deactivation" means voluntary discontinuation of the activation of an entire zone or subzone by the grantee or operator. Discontinuance of the activated status of only a part of a zone site is an alteration.

Default. "Default" means an action or omission that will result in a claim for duties, taxes, charges, or

liquidated damages under the Foreign Trade Zone Operator Bond.

Domestic merchandise. “Domestic merchandise” is merchandise which has been (i) produced in the U.S. and not exported therefrom, or (ii) previously imported into Customs territory and properly released from Customs custody.

Foreign merchandise. “Foreign merchandise” is imported merchandise which has not been properly released from Customs custody in Customs territory.

Fungible merchandise. “Fungible merchandise” means merchandise which for commercial purposes is identical and interchangeable in all situations.

Merchandise. “Merchandise” includes goods, wares and chattels of every description, except prohibited merchandise. Building materials, production equipment, and supplies for use in operation of a zone are not “merchandise” for the purpose of this part.

Operator. “Operator” is a corporation, partnership, or person that operates a zone or subzone under the terms of an agreement with the zone grantee. Where used in this part, the term “operator” also applies to a “grantee” that operates its own zone.

Port Director. For those foreign trade zones located within the geographical limits of a port of entry, the term “port director” means the director of that port of entry. For those foreign trade zones located outside the geographical limits of a port of entry, the term “port director” means the director of the port of

entry geographically nearest to where the foreign trade zone is located.

Prohibited merchandise. “Prohibited merchandise” is merchandise the importation of which is prohibited by law on grounds of public policy or morals, or any merchandise which is excluded from a zone by order of the Board. Books urging treason or insurrection against the U.S., obscene pictures, and lottery tickets are examples of prohibited merchandise.

Reactivation. “Reactivation” means a resumption of the activated status of an entire area that was previously deactivated without any change in the operator or the area boundaries. If the boundaries are different, the action is an alteration. If the operator is different, it is an activation.

Subzone. “Subzone” is a special-purpose zone established as part of a zone project for a limited purpose, that cannot be accommodated within an existing zone. The term “zone” also applies to a subzone, unless specified otherwise.

Transfer. “Transfer” means to take merchandise with zone status from a zone for consumption, transportation, exportation, warehousing, cartage or lighterage, vessel supplies and equipment, admission to another zone, and like purposes.

Unique identifier. “Unique identifier” means the numbers, letters, or combination of numbers and letters that identify merchandise admitted to a zone with zone status.

User. “User” means a person or firm using a zone or subzone for storage, handling, or processing of merchandise.

Zone lot. “Zone lot” means a collection of merchandise maintained under an inventory control method based on specific identification of merchandise admitted to a zone by lot.

Zone site. “Zone site” means the physical location of a zone or subzone.

Zone status. “Zone status” means the status of merchandise admitted to a zone, i.e., nonprivileged foreign, privileged foreign, zone restricted, or domestic.

19 C.F.R. § 146.6

(a) Application. A zone operator, or where there is no operator, a grantee, shall make written application to the port director to obtain approval of activation of a zone or zone site. The area to be activated may be all or any portion of the zone approved by the Board. The application must include a description of all the zone sites covered by the application, any operation to be conducted therein, and a statement of the general character of the merchandise to be admitted. The port director may also require the operator or grantee to submit fingerprints on form FD 258 or electronically at the time of filing the application. If the operator is an individual, that individual's fingerprints may be required. If the operator or grantee is a business entity, fingerprints of all officers and managing officials may be required.

(b) Supporting documents. The application must be accompanied by the following:

(1) [Reserved]

(2) A blueprint of the area approved by the Board to be activated showing area measurements, including all openings and buildings; and all outlets, inlets, and pipelines to any tank for the storage of liquid or similar product, that portion of the blueprint certified to be correct by the operator of the tank;

(3) A gauge table, when appropriate, showing the capacity, in the appropriate unit, of any tank, certified to be correct by the operator of the tank;

(4) A procedures manual describing the inventory control and recordkeeping system that will be used in the zone, certified by the operator or grantee to meet the requirements of subpart B; and

(5) The written concurrence of the grantee, when the operator applies for activation, in the requested zone activation.

(c) Inquiry by port director. As a condition of approval of the application, the port director may order an inquiry by a Customs officer into:

(1) The qualifications, character, and experience of an operator and/or grantee and their principal officers; and

(2) The security, suitability, and fitness of the facility to receive merchandise in a zone status.

(d) Decision of the port director. The port director shall promptly notify the applicant in writing of his decision to approve or deny the application to activate the zone. If the application is denied, the notification will state the grounds for denial which need not be limited to those listed in § 146.82. The decision of the port director will be the final Customs administrative determination in the matter. On approval of the application, a Foreign Trade Zone Operator's Bond shall be executed on Customs Form 301, containing the bond conditions of § 113.73 of this chapter.

(e) Activation. Upon the port director's approval of the application and acceptance of the executed bond, the zone or zone site will be considered activated; and merchandise may be admitted to the zone. Execution of the bond by an operator does not lessen the liability of the grantee to comply with the Act and implementing regulations.

19 C.F.R. § 146.7(e)

(e) New operator. A grantee of an activated zone site shall make written application to the port director for approval of a new operator, submitting with the application a certification by the new operator that the inventory control and recordkeeping system meets the requirements of subpart B, and a copy of the system procedures manual if different from the previous operator's manual. The port director may order an inquiry into the qualifications, character, and experience of the operator and its principal officers.

19 C.F.R. § 177.9(a)

(a) Effect of ruling letters generally. A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances. Generally, a ruling letter is effective on the date it is issued and may be applied to all entries which are unliquidated, or other transactions with respect to which the Customs Service has not taken final action on that date. See, however, § 177.10(e) (changes of practice published in the Federal Register) and § 177.12 (rulings which modify or revoke previous rulings, decisions, or treatments).