

CASENOTES

Six-Month Deadline Set for Customs and Border Protection to Implement Final Antidumping or Countervailing Duty Decisions

International Trading Co. v. United States, 412 F.3d 1303 (Fed. Cir. 2005)

In *International Trading*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) found that where the U.S. Bureau of Customs and Border Protection (CBP) does not liquidate merchandise entries within six months after the U.S. Department of Commerce (Commerce) publishes the final antidumping or countervailing duty (ADD/CVD) rate, such entries are deemed liquidated by operation of law at the estimated ADD/CVD rates declared at entry. Because Commerce's final ADD/CVD calculation may be considerably different from the initial, estimated rates, deemed liquidation can create a windfall for either the importer or the U.S. government. Accordingly, Commerce, CBP, and importers may need to change significantly their procedures for administering ADD/CVD entries.

Importers of merchandise subject to an ADD or CVD order pay estimated cash deposits at the time of entry. CBP's standard 10-month entry liquidation process is suspended until Commerce determines the final ADD/CVD liability in an administrative review covering a 12-month period. In light of the time it takes for Commerce to conduct this annual review, CBP may not receive liquidation instructions from Commerce until approximately two-and-a-half years after entry, and then only if there is no appeal of Commerce's decision. At liquidation, CBP collects any additional ADD/CVDs owed or refunds any overpayment.

International Trading Co. paid an

ADD cash deposit of 2.72% on a March 1994 entry, and liquidation of the entry was automatically suspended. Commerce published final results in the *Federal Register* on October 30, 1996, announcing a 27.31% final assessment rate. On July 1, 1997, Commerce instructed CBP to liquidate the entry. CBP liquidated the entry on September 26, 1997, and issued a bill for the difference between the cash deposit rate and the final assessment rate. International Trading protested the bill, arguing that the entry was deemed liquidated by operation of law, at the cash deposit rate, because CBP failed to liquidate within six months of the *Federal Register* notice. CBP denied the protest. International Trading successfully appealed to the U.S. Court of International Trade, and the U.S. government appealed to the Federal Circuit.

Pursuant to 19 U.S.C. § 1504(d), any entry not liquidated within six months of CBP "receiving notice" that suspension of liquidation has been lifted is deemed liquidated by operation of law at the rate of duty asserted at the time of entry. In 2002, the Federal Circuit considered a similar claim by International Trading Co., involving the version of section 1504(d) in effect prior to the Uruguay Round Agreement Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (1994). *Int'l Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir. 2002). In the 2002 case, the Federal Circuit found that publication of Commerce's final results in the *Federal Register* constitutes "notice" under 19 U.S.C. § 1504(d).

The issue in the 2005 *International Trading* case was whether the amendments made by the URAA exempted entries of goods subject to ADD/CVD administrative review from deemed liquidation. The URAA added the

clause "[e]xcept as provided in section 1675(a)(3) of this title" to section 1504(d) and also added a new section (a)(3)(B) to 19 U.S.C.A. § 1675. Under section 1675(a)(3)(B), CBP is required to liquidate ADD/CVD entries "promptly and, to the greatest extent possible, within 90 days after the instructions to CBP are issued." If CBP fails to liquidate within 90 days, the importer may request an explanation of the delay. The government contended that the "[e]xcept as" language made ADD/CVD entries subject *only* to the new section 1675(a)(3)(B), thereby exempting such entries from deemed liquidation.

The Federal Circuit rejected the government's argument. First, the Federal Circuit found that section 1504(d) covered all entries because the plain language states that "any entry" not liquidated within six months is deemed liquidated. Moreover, section 1675(a)(3)(B) merely added the requirement that the CBP liquidate promptly and allowed importers to request an explanation for any delays. Second, the court found that the legislative history demonstrated that the URAA's "[e]xcept as" amendment to section 1504(d) was described as a nonsubstantive "conforming amendment." Thus, because Congress imposed the deadline in section 1504(d) to prevent indefinite delay in liquidation, it was unlikely that Congress had exempted some entries from that deadline without mentioning such a substantive change in the legislative history.

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CASENOTES

The Federal Circuit also rejected the government's argument that the Federal Register Act, 44 U.S.C. §§ 1501–11, provides that such publication gives notice only to a "person," which does not include federal agencies such as the CBP. The government argued that the CBP receives notice of the lifting of the suspension of liquidation only from Commerce's instructions. The Federal Circuit affirmed its 2002 reasoning that publication in the *Federal Register* was a familiar way of providing notice in ADD/CVD proceedings and that the date of publication, unlike the date of instructions to CBP, provided

an unambiguous, public starting point for Congress's six-month deadline.

This new interpretation likely will mean significant changes in the practical application of the ADD/CVD laws. CBP has always delayed action on ADD/CVD entries until receiving instructions from Commerce, regardless of any *Federal Register* notice. Now, CBP may have to implement procedures to accelerate its liquidation process. Moreover, where the cash deposit rate is higher than the final assessment rate, importers will have strong incentive to contact CBP in advance to ensure timely liquida-

tion and refund. Similarly, where the cash deposit rate is lower than the final assessment rate, importers will have a strong incentive to review any bills received to determine if they were issued by CBP in a timely fashion or if they may be contested.

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