

Global Trade Report

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February, 2010

Court Decisions Dominate Busy Month in Trade Law, Policy

Penalties Against Corporate Owners Not Automatic, CIT Says

A complaint seeking Customs penalties against an importer must contain specific allegations against the company's owner if it wishes to hold the owner liable for the penalties, a recent U.S. Court of International Trade decision holds.

In [*United States v. Tip Top Pants, Inc.*, Slip Op 10-5](#) (January 13, 2010), Customs and Border Protection (CBP) sued an importer to recover civil penalties and withheld duties for allegedly false statements in connection with an import entry of wearing apparel. The complaint named the president/owner of the importing company as a defendant, and indicated his corporate capacity. However, the Court, per Judge Timothy Stanceu, granted a motion to dismiss the individual owner as a defendant in the case, stating that the Complaint did not contain any specific allegations that the president/owner had violated the law.

The court noted that "the complaint does not allege that [the owner] did, or failed to do, anything whatsoever. The complaint sets forth no facts upon which liability allegedly incurred by Tip Top, based on negligence in importing the merchandise, could be imputed to [the president]. Thus, not only does plaintiff's complaint fail to

plead facts, which, if true, would entitle plaintiff to recover from [the owner] a penalty under Section 592, but it can also be fairly described as failing to state *any* claim against [him]."

Although the government had moved for summary judgment against the importer, the court indicated that "[n]othing in plaintiff's motion for summary judgment establishes or alleges facts implicating [the owner in any violation of Section 592 that may have occurred]."

The decision sends a warning to the Government that it cannot simply assume that the owners of closely held corporations can be named as defendants in Section 592 cases, or held liable for penalties or withheld duties. The Complaint must either allege some actual violation by the owner, or state facts sufficient to allow the court to "pierce the corporate veil" and hold the individual owner liable.

Customs Equal Protection Litigation Dealt a Setback

Lawsuits challenging tariff provisions which discriminate on the basis of gender or age were dealt a setback by the United States Court of Appeals for the Federal Circuit (CAFC) in a recent decision.

In [*Totes-Isotoner Corp. v. United States*, No. 2009-1113](#) (February 5, 2010), the Federal

Circuit ruled that a mere showing that discriminatory tariff provisions “disproportionately impact” users of merchandise based on gender or age is not sufficient to make out a prima facie case of an equal protection violation. While such a showing might be sufficient in the ordinary case, the CAFC held, a different, and more stringent test is required in cases involving the tariff laws.



In so ruling, the CAFC noted that tariff laws may be influenced by a variety of other considerations, including international agreements [such as that creating the Harmonized System tariff nomenclature] and multilateral trade negotiations. Under these circumstances, the court held, the fact that a tariff provision may disproportionately impact persons of a given sex, is not by itself sufficient to create a presumption that the discrimination is intentional or invidious.

The CAFC ruled that the tariff provisions in question did not “facially” discriminate. However, this determination is hard to square with the court’s ruling that “disparate impact” had been shown based solely on the pleadings in the lawsuit.

A further appeal to the United States Supreme Court is likely.

ISF Filings Become Mandatory; Trade Struggles to Comply

Submission of Importer Security Filings (ISF) became mandatory January 26, 2010, and the trade community is struggling to comply.

CBP officials have announced a graduated, escalated approach to enforcement of the ISF requirements, which obligate shippers to submit substantial data about containerized import cargoes before the cargoes are laden on vessels for export to the United States.

The agency has announced that filings made during the one-year “phase-in” period will not be used for enforcement purposes. However, latenesses, inaccuracies and omissions in filings starting January 26, 2010 can be used as the basis for liquidated damages, penalties and other Customs enforcement actions.

For the first quarter of 2010, importers who fail to file will be issued warning letters and instructed that continued failures to file will result in liquidated damages and delays in loading of cargoes. It will also work with importers who have problems filing timely and accurate ISFs. However, Customs will use its full enforcement tools against entities engaged in smuggling or other violations of law unrelated to ISF.

In the second quarter of the year, Customs will issue “no load” instructions in respect of high risk cargoes for which no ISF is filed, and will also consider issuing liquidated damages claims.

In the 3rd and 4th quarters of the year, CBP enforcement of ISF requirements will move into higher gear, including more rigorous issuance of liquidated damages claims, and non-intrusive inspections of certain cargoes. Delays in Customs releases of sensitive cargoes could also result.

Initially, liquidated damages claims for ISF violations will be originated by ports of entry, but forwarded to Customs Headquarters for processing.

Divided Federal Circuit Upholds Denial of Exporter's HMT Refund

An exporter who was unable to provide documents substantiating Harbor Maintenance Tax (HMT) payments for exports made before mid-1990 could be denied refunds – notwithstanding that Customs' records corroborated the claim – a divided Court of Appeals for the Federal Circuit recently held.

In [*Chrysler Corporation v. United States, No. 09-1267*](#) (January 19, 2010), an exporter had received refunds of the unconstitutional export HMT for periods from mid-1990, until the time the tax was struck down by the U.S. Supreme Court in 1998. However, Customs denied Chrysler refunds of tax paid for the period 1987 through mid-1990, holding that the agency's electronic data base contained errors and was not reliable, and noting that Chrysler had not provided documentation of its payments for that period, as Customs' refund regulations required.

Giving preclusive effect to Customs' export HMT refund regulation, the Federal Circuit upheld the decision of the U.S. Court of International Trade (CIT) to deny Chrysler its additional refunds. A two-judge majority held that a claimant's failure to provide documentary evidence of the older payments was sufficient to preclude any recovery, notwithstanding that the export HMT had been struck down as unconstitutional.

Judge Pauline Newman dissented, noting that "the tax refund claimed by Chrysler is the amount Customs' tax records shows was paid by

Chrysler as export tax. This is not a case of a taxpayer claiming a refund that it cannot substantiate". Judge Newman suggested that although the export HMT database might have contained some errors generally, there is no indication that the Customs database contained any errors with respect to Chrysler.

The [*Chrysler*](#) decision is a blow to exporters who did not retain their original tax records from the initial years of the HMT statute, and suggests that the government – which failed to keep its own records – will be able to hold on to millions of dollars' worth of unconstitutionally-exacted taxes.

CIT Confirms Strict One-Year Limit for Post-Entry NAFTA Claims

The United States Court of International Trade has affirmed, once again, that companies seeking NAFTA status for imported goods must physically file *NAFTA Certificates of Origin* within one year of the date of entry. Although importers typically have 180 days after the date of liquidation to protest Customs' determination of the "rate of duty" applied to an entry, this right is of no avail when the rate of duty sought is a NAFTA preferential duty, the CIT confirmed.

In [*Ford Motor Company v. United States, Slip Op 10-4*](#) (January 12, 2010), the importer did not claim NAFTA at the time of entry, but submitted a 19 C.F.R. §1520(d) claim electronically about 10 months after entry. The electronic claim did not include the *NAFTA Certificates of Origin*, which Ford subsequently submitted to Customs, albeit more than a year after the date of importation. Customs at Detroit denied Ford's claim on the ground that Ford failed to submit its NAFTA Certificates within

one year of entry. The importer protested the liquidation of the entry as dutiable.

The CIT dismissed the importer's case, asserting that it lacked subject matter jurisdiction because Ford had not filed a valid post-entry NAFTA claim within the time provided by law. In this regard, the court held that an electronic post-entry NAFTA claim which does not include certificates, is not a valid claim unless the certificates are physically submitted to Customs within one year of the date of entry.

The CIT also held that Ford's claims were barred by decisions reached in two Federal Circuit decisions, [*Corpro Cos. v. United States*](#), 433 F. 3d 1360 (Fed. Cir. 1360) (Fed. Cir. 2006) and [*Xerox Corp. v. United States*](#), 423 F. 3d 1356, 1363 (Fed. Cir. 2005). In each case, the Federal Circuit had ruled that, despite filing an otherwise timely protest, an importer seeking post-importation NAFTA treatment is barred if it does not complete the filing of a Section 1520(d) reliquidation petition or entry amendment, complete with NAFTA Certificates of origin, within one year of the date of entry.

As commentators have noted, the courts' formulation could leave importers with no remedy, since Section 1520(d) is a post-liquidation remedy. Because most entries liquidate just a few weeks before their one year anniversary (and some may be extended for more than one year), the window for filing a timely Section 1520(d) claim is narrow and, in some cases, may be non-existent.

Plaintiffs Can Drop Out of Dumping Appeal, CIT Rules

Exporters who brought a lawsuit challenging a Commerce Department antidumping determination can, under certain circumstances, seek voluntary dismissal of their case and avoid possible adverse results,

according to a recent U.S. Court of International Trade decision.

In [*Zhengzhou Harmoni Spice Co. v. United States*](#), Slip Op 10-8 (January 26, 2010), seven exporters of garlic from China brought a lawsuit challenging the final results of the Commerce Department's tenth annual review of that order, and seeking to have the antidumping margins lowered. Four of the seven companies moved for summary judgment, seeking review of the determination.

Domestic garlic producers had brought their own suit, seeking to impose a higher rate of duty, but subsequently dropped that challenge. The CIT issued a decision largely favorable to the exporters, and remanded the case for the Commerce Department with instructions to recalculate the margin. Thereafter, four of the plaintiffs - three who had not filed a summary judgment motion and one of the companies which had - moved to voluntarily dismiss the lawsuit as to themselves.

While the government agreed to the dismissal, the domestic petitioners tried to block it. They argued that the companies seeking to dismiss the lawsuit had acted out of concern that the Commerce Department might revalue an essential input (garlic clove) in such a way that would result in higher dumping margins. They claimed that allowing the four companies to dismiss the lawsuit would prejudice the domestic producers.

The CIT allowed the exporters to dismiss the action. It noted that because the domestic producers had dropped their case, they had no stake in seeking higher dumping duties. As three of the exporters had not even sought summary judgment reviewing the Commerce Department's determination, that holding was final as to them. As for the fourth company which had joined in the summary judgment motion, the court held that allowing dismissal would not prejudice the domestic producers,

since those producers had abandoned their own challenge.

ITC Investigates Removal of Certain Sleeping Bags from GSP

The U.S. International Trade Commission (ITC) has initiated an investigation into the economic impact of removing certain sleeping bags from eligibility for duty-free treatment under the Generalized System of Preferences (GSP).

The investigation, *Advice Concerning Possible Modifications to the U.S. Generalized System of Preferences, 2010 Special Review, Certain Sleeping Bags* (Investigation No. 332-513), was requested by the U.S. Trade Representative, following receipt of a request from a domestic producer of sleeping bags.

The sleeping bags in question are filled with materials other than down, and are classified under Harmonized Tariff Schedule subheading 9404.30.80 (sleeping bags, not containing 20% or more by weight of feathers and/or down). While the petition would strip GSP treatment for this item from all beneficiary countries, the principal focus of the petition has been an increase of sleeping bags from Bangladesh.



The USTR has accepted a petition from Exxel Outdoors, Inc., an Alabama-based manufacturer of outdoor and recreational products (including the subject sleeping bags), to remove these sleeping bags from the GSP. Exxel claims that sleeping bags are an import-sensitive product

for which GSP eligibility should be removed generally, the immediate cause of the need for removal is the "sudden and significant" impact of duty-free sleeping bags from Bangladesh.

Technical Error Derails Penalty Case Against Customs Broker

Customs and Border Protection's failure to consider all required factors before bringing a 19 U.S.C. §1641 penalty case against a Customhouse broker doomed the government's case, the U.S. Court of International Trade recently held.

The government's long-running case against UPS Customhouse Brokers, Inc., crashed to an end after Judge Gregory Carman of the CIT held that he would not remand the case to the agency in order to give it an opportunity to reconsider the mandatory penalty factors specified in the Customs Regulations. Because the government's penalty suit was based on a flawed administrative process, the court held, it had to be dismissed.

In [*United States v. UPS Customhouse Brokerage, Inc.*, Slip Op. 10-11](#), (January 28, 2010), the government assessed penalties against a Customs broker for repeatedly misclassifying certain data processing equipment. The CIT initially upheld the penalties, but the Court of Appeals for the Federal Circuit held that the government had erred by refusing to consider each of the 10 factors set out in the Customs Regulations defining "responsible supervision and control" before imposing its penalty. While the list is not exclusive, and the government is free to weigh each factor as it sees fit, it must consider all factors, and indicate that it has done so, the CAFC held, remanding the case back to the CIT.

Back at the CIT, the key question was whether the case should be remanded to Customs, so that they agency could provide an

explanation of its consideration of the required factors. Trial testimony indicated clearly that the government had not considered some of the factors before imposing a penalty, and there was no need for further evidentiary proceedings.

Noting that the government had the burden of proof in a broker penalty case, the court refused the request for a remand, indicating “This burden of proof would become meaningless if, after Plaintiff failed to prove entitlement to recovery at trial, the Court exercised its discretionary remand power so that Plaintiff could create the facts prerequisite to recovery, add those facts to the trial record, and receive a judgment in its favor. Certainly no other plaintiff would be allowed such an extraordinary remedy for a failure of proof at trial. Furthermore, the parties have not identified, and the Court has not located, any case brought pursuant to 28 U.S.C. § 1582 which has been remanded to the agency. Therefore, after due consideration, the Court concludes that discretionary remand to Customs pursuant to 28 U.S.C. § 2643 would be inappropriate in this case. Remand being neither mandatory nor appropriate, the Court denies the request to remand this case to Customs.”

The UPS decision will likely erode the basis of a number of pending broker penalty suits in the CIT, and will require the government to charge broker penalties with far more formality and particularity in the future.

BIS Issues Updated Forwarder Compliance Guidance

The Bureau of Industry and Security (BIS) of the U.S. Commerce Department has updated its export compliance guidance for freight forwarders. This publication serves as a timely reminder that forwarders are responsible for the representations they make on behalf of their clients in export control documents, including Automated Export System (AES) filings and export license applications. The guidance pays particular

attention to the forwarder’s role in “routed” export transactions, in which the foreign principal party in interest (typically the buyer of merchandise) designates an agent in the U.S. to facilitate the export.

BIS recommends that forwarders establish their own export compliance programs to screen parties to transactions in which they are engaged as well as identify potential “red flags” that raise questions about whether a transaction can proceed. The document notes that “BIS has not hesitated to hold forwarders liable for participating in illegal transactions”, citing the DHL’s 2009 settlement of charges involving shipments to prohibited destinations and failure to maintain records as an example. DHL settled the charges against it with a payment of \$9,444,744.

The BIS guidance is available online at <http://www.bis.doc.gov/complianceand enforcement/freightforwarderguidance.htm>.

New State Department Guidelines for Firearms and Ammunition

The U.S. State Department has issued newly revised Guidelines for the Permanent Export, Temporary Export, and Temporary Import of Firearms and Ammunition. Certain firearms and ammunition are identified in categories I and III of the United States Munitions List, and the State Department has jurisdiction over exports and temporary imports of such items. Permanent imports of firearms and ammunition are within the regulatory authority of the U.S. Justice Department.



The Guidelines identify the procedures that importers and exporters must follow to obtain authorization for proposed transactions. They give detailed instructions on the steps and requirements to obtain an import or export license. They also set forth a detailed checklist for importers and exporters to use as in preparing license applications.

ITC Invites Proposals for Changes to the International Tariff Nomenclature

The U.S. International Trade Commission (ITC) has solicited comments concerning possible modifications to the Harmonized Commodity Description and Coding System (HCDCS), the international tariff system nomenclature that underlies the Harmonized Tariff Schedule of the United States (HTSUS). The ITC is conducting this project in conjunction with the World Customs Organization's review of the HCDCS.

The purpose of the review is to identify tariff provisions that should be deleted, added, or altered in the international nomenclature. Reasons provided for modifications include eliminating tariff items with low trade volume, coverage of new products, and removal of difficult to administer items. The requested proposals are limited to changes at the international level; country-specific "eight digit" provisions and duty rate changes are not under consideration. Proposals will be subject to interagency review and, if deemed appropriate, will be forwarded to the World Customs Organization for consideration.

Because the HCDCS forms the basis for the tariff nomenclatures in most countries, any proposed revisions would affect both exporters and importers of products, even though tariff rates are not supposed to be affected. Changes could also have an impact on international agreements

(such as the Information Technology Agreement) that provide tariff reduction benefits to products on the basis of their tariff classification. Thus, parties engaged in international trade should monitor the process carefully, both to identify tariff provisions that warrant changes and to detect proposals that could have a detrimental impact.

Comments are due by November 1, 2010.

U.S., Canada Near Settlement in Procurement Dispute

The United States and Canada have indicated that they will shortly sign an agreement to end a long-simmering bilateral dispute concerning government procurement by sub-central government agencies.

The agreement follows Canadian complaints that products of Canada are being denied access to state and municipal contracts which are funded, in whole or in part, pursuant to the American Recovery and Reinvestment Act, commonly known as the "Stimulus Bill", which contains a controversial "Buy American" provision.

Under the pact, the United States will make available to Canadian products and contractors access to a wide range of procurements by State and municipal authorities, including those funded by ARRA, until October 2011 (the date on which ARRA funding stops). For its part, Canada will make Provincial and municipal procurements available to American goods and contractors.



U.S. Trade Representative Ron Kirk and Canada's Minister of International Trade are expected to sign a formal agreement on February 16, 2010.

Miscellaneous Tariff Bill Still Languishes in Congress

More than a month after most tariff suspensions and temporary reductions lapsed, a Miscellaneous Tariff Bill (MTB) to extend these provisions, and add others, remains unresolved in Congress.

The House Ways and Means Committee has published an "omnibus" bill which mainly incorporates duty suspension measures introduced into the House in 2008. A major problem with the composition of this bill is that very few acts were introduced that year to extend tariff suspensions scheduled to expire in 2009, so the House bill fails to resuscitate many of the expired provisions.

The Senate is preparing a package of MTB measures, but its package will look much different than the House measure. Reconciling them to produce a single cohesive package will be a major task.

The Senate is expected to turn its attention back to tariff suspension legislation later this month. The present legislative intent appears to be to work toward enacting two MTB legislations this year – a quick bill to extend expiring duty suspensions and enact a handful of new measures on which there is House-Senate concurrence, and a second MTB, focused primarily on new suspension measures, later in the year.

FDA Outlines Supply Chain-Based Food Safety Scheme

The U.S. Food and Drug Administration (FDA) recently outlined a three-step supply chain-based approach to ensuring food safety, acknowledging that the program would require some legislative and regulatory changes.

The first step outlined by Commissioner Hamburg in a February 4, 2010 address involves increasing "shared responsibility" among food producers at the point of production, and working with foreign food safety regulators. Critical control point analysis will be stressed.

Second, companies will be held responsible for ensuring food safety throughout their supply chain, with importers being held responsible for safety in supply chains for imported foods. In this regard, the FDA has established liaison offices in numerous foreign countries to inspect foreign supply chain points.

Third, the FDA will deploy its resources strategically to identify food hazards. The agency predicts nationwide deployment of its PREDICT (Predictive Risk-Based Evaluation for Dynamic Import Supply Chain Targeting) system by spring of 2010. The system is designed to monitor import supply chains and target for inspection food imports having the greatest risk factors.

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