HQ H028384

February 28, 2012

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Port Director
Port of Savannah
U.S. Customs and Border Protection
1 East Bay Street
Savannah, GA 31401

Attn: Eric Buchanan, Supervisory Import Specialist

Re: Internal Advice on deemed liquidation, duty deposit cap, antidumping duty rates

Dear Port Director:

This letter is in response to your request for internal advice, dated May 8, 2008, regarding whether entries of certain frozen warmwater shrimp from the People's Republic of China, are subject to antidumping duty ("ADD") order A-570-893.

FACTS:

King & Prince Seafood, Corporation ("KP") imports various seafood products into the United States. At issue here are 34 entries of warmwater shrimp. The entry documents declared that the goods originated in Indonesia and no antidumping duty ("ADD") was deposited. Of the entries, 14 were liquidated between July 8 through October 14, 2005, 20 remain unliquidated. The 20 unliquidated entries are: 082-XXXXX62-1, 082-XXXXX73-6, 082-XXXXX31-0, 605-XXXXX69-9, 605-XXXXX43-2, 605-XXXX49-7, 605-XXXX46-3, 605-XXX0339-6, 605-XXXXX17-0, 605-XXXX02-7, 605-XXXXX44-9, 605-XXXXX39-9, 605-XXXXX89-2, 605-XXX1122-5, 605-XXXXX20-9, 605-XXXXX86-1, 605-XXXXX85-3, 605-XXXXX28-9, 605-XXXXX29-7, 605-XXXXX12-1.

By Notice of Action dated, November 15, 2005, Custom and Border Protection ("CBP") notified KP that it was investigating its imports for evasion of the ADD order on frozen warmwater shrimp from China. After receiving this Notice, on January 11, 2006, KP filed what it termed a prior disclosure under 19 U.S.C. § 1592 and it produced information demonstrating that its shrimp supplier, P.T. Ocean Gemindo, had falsely identified Chinese-origin shrimp as having originated in Indonesia.

On June 1, 2007, CBP's Office of Regulatory Audit issued its report of an audit on the origin of KP's warmwater shrimp of the subject entries in Report 431-06-ADD-AU-20940. The audit concluded that KP falsely declared Chinese-origin shrimp on these entries that were actually subject to ADD order A-570-893. The report indicated that the Indonesian-origin shrimp was commingled with Chinese-origin shrimp. CBP instructed KP to pay this lost revenue and on July 2, 2007, KP tendered the lost revenue. CBP liquidated 14 of these entries July through October 2005. The remaining 20 unliquidated entries were first extended on September 24, 2005, but ultimately suspended on various dates between September and October of 2007.

On December 8, 2004, Commerce published its final results in the investigation wherein it directed CBP to continue suspending liquidation of entries within the scope and required CBP to collect security for antidumping duties. Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 Fed. Reg. 70997 (December 8, 2004) (amended by Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China, 70 Fed. Reg. 5149 (February 1, 2005)). On July 31, 2006, Commerce published its notice, which rescinded review for certain exporters. Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 71 Fed. Reg. 43107 (July 31, 2006). This Notice included various exporters including Fuqing Dongwei Aquatic Products Industry Co. Ltd. ("Fuqing Dongwei") and Shantou Jinhang Aquatic Industry Co. ("Shantou Jinhang"). Commerce issued Message No. 6212211 dated, July 31, 2006, to CBP instructing liquidation of entries subject to the ADD order that were exported by various companies including Fuqing Dongwei at the cash deposit or bonding rate in effect on the date of entry.

On March 25, 2008, CBP received KP's letter requesting refund of the ADD it deposited for 34 entries and requesting that the Port seek internal advice as to whether it was entitled to a refund. KP added a supplemental letter to CBP dated, June 9, 2009. You forwarded these submissions to our office on May 8, 2008, and requested internal advice pursuant to 19 C.F.R. § 177.11(a). We note that five of KP's entries were protested and are addressed separately in our decision on further review. Thus, those entries will not be addressed in this internal advice.

ISSUE:

Whether KP is entitled to refunds of its paid ADD deposits.

LAW AND ANALYSIS:

KP argues that, it is entitled to a refund pursuant to 19 U.S.C. § 1520(a) and (c) of its antidumping duty ("ADD") deposits for its liquidated entries, because at time of liquidation, antidumping duties were not assessed and in its view, CBP cannot later

request this lost revenue. KP further requests a refund for ADD deposited on unliquidated entries because they were in excess of what was owed. However, KP does not demonstrate that these deposits were erroneously or excessively collected. Thus, KP is not entitled to refunds of these paid amounts.

The statute, 19 U.SC. § 1520(a) provides that refunds may be given for duties or other receipts in the following cases:

> (1) Excess deposits. Whenever it is ascertained on liquidation or reliquidation of an entry or reconciliation that more money has been deposited or paid as duties than was required by law to be so deposited or paid.
> (2) Fees, charges, and exactions. Whenever it is determined in the manner required by law that any fees, charges, or exactions, *other than duties* and taxes, have been erroneously or excessively collected.
> (3) Fines, penalties, and forfeitures. Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or is remitted.
> (4) Prior to liquidation. Prior to the liquidation of an entry or reconciliation, whenever an importer of record declares or it is ascertained that excess duties, fees, charges, or exactions have been deposited or paid.

(emphasis added). In seeking refunds on its liquidated entries, KP relies on subsection (2). KP argues that, the duties constitutes fees that were erroneously collected "since the prior liquidation finalized the amount of charges and duties that KP owed on them." See KP's March 20, 2008 Letter. However, Section 1520(a)(2) specifically excludes duties from this subsection and thus, KP may not rely upon it because the subject tenders are for duties owed. Similarly, in HQ 223999 (February 9, 1993) CBP denied a Protest and reliance on Section 1520(a)(2) when the importer requested refunds on its voluntarily tender of ADD deposits post liquidation of its entries. Further, that ruling also explained that the voluntary tender of antidumping duties did not amount to exactions, which would be covered by Section 1520(a)(2). Therefore, KP is not entitled to refunds of duties deposited for its liquidated entries per 19 U.S.C. § 1520(a)(2). Moreover, KP argues that, "Customs had no authority to require a tender on an already liquidated entry." See March 20, 2008 Letter. However, KP cites no legal authority for this claim and moreover, it voluntarily tendered this money to avoid the initiation of a penalty action. See KP's January 11, 2006 Letter to CBP. CBP did not "require" payment, nor was this payment ordered by a penalty action.

KP also requested pursuant to 19 U.S.C. § 1520(a)(4) a refund of the amounts paid to CBP for lost revenue reflecting its twenty unliquidated entries. KP argues that these entries deemed liquidated and thus, duty must be assessed at the rate asserted by the importer upon entry. Since, KP falsely entered these goods as shrimp from Indonesia, with no antidumping duty, it argues these entries deemed liquidated at a rate of zero

percent. Therefore, KP argues, its payments were erroneously collected and thus, it is entitled to a refund. However, these entries have not deemed liquidated and KP's argument fails.

KP asserts its right to refunds under 19 U.S.C. § 1520(a)(4) for its deposits for the unliquidated entries as they should have deemed liquidated at a rate of zero by operation of law pursuant to 19 U.S.C § 1504(d). Section 504(d) of the Tariff Act of 1930, codified at 19 U.S.C. § 1504(d) provides:

> . . . *when a suspension* required by statute or court order *is removed*, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b), within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

(emphasis added). Therefore, this provision explains that once suspension is removed and there is no extension of liquidation, liquidation must occur with six months after Commerce's notice of suspension removal or the entries will be deemed liquidated at the rate asserted by the importer at entry.

All of these entries properly remain suspended. Commerce published the Partial Rescission of the First Administrative Review, whereby it removed liquidation suspension for certain exporters, including Fuqing Dongwei and Shantou Jinhang. See Certain Frozen Warmwater Shrimp from the People's Republic of China: Partial Rescision of the First Administrative Review, 71 Fed. Reg. 43107 (July 31, 2006); see also, Message No. 6212211 (July 31, 2006) (instructing CBP to liquidate applicable entries for Fuqing Dongwei). However, each of KP's entries at issue include shrimp subject to other ADD orders for which CBP has not yet received notice of the lifting of suspension of liquidation. Entries remain suspended as long as one line item of the entry is subject to an antidumping order in which liquidation is suspended. See HQ 230076 (February 6, 2006) ("liquidation of the protested entry was suspended as long as at least one line item of goods was subject to an antidumping order and in connection with which liquidation was suspended."). For this reason, the entries remain properly suspended as suspension has not yet lifted for all of the line items on each of the entries. Consequently, these entries are not deemed liquidated per 19 U.S.C. § 1504(d). As they have not deemed liquidated, the ADD owed is what was instructed by Commerce and not what was deposited at the time of entry. Therefore, since Section 1520(a)(4) provides refunds for "excess duties, fees, charges, or exactions that have been deposited or paid" prior to liquidation, these deposits should not be refunded as they are not in excess.

In addition to being suspended because the statutory suspension of liquidation has not yet lifted, certain entries are also suspended pursuant to a court injunction. KP relies on Message 5041208 dated, February 10, 2005, in arguing that CBP should not have included in its calculation of duties owed the ADD for entry 605-XXXXX17-0, because it should have been deemed liquidated as entered on January 14, 2005. Commerce issued Message 5041208, on February 10, 2005, which instructed CBP to liquidate entries subject to the ADD order that were entered between January 13 and January 26, 2005. However, this entry remains suspended because one of the entry's exporters, Shantou Red Garden, is involved in litigation where there is a preliminary injunction issued by the Court of International Trade ("CIT"). See Shantou Red Garden Foodstuff, Co, Ltd. v. U.S., Court No. 05-00080. Therefore, this entry remains properly suspended. KP similarly argued that Message 6212211 instructs liquidation for exporter Shantou Jinhang, however, entries 082-XXXXX62-1 and 605-XXXXX17-0, which used Shantou Jinhang, also remain properly suspended by court order as these entries also are subject to preliminary injunctions issued by the CIT for exporters, Shantou Red Garden and Shantou Jinhang. See Shantou Red Garden Foodstuff, Co, Ltd. v. U.S., Court No. 05-00080; and Beihai Zhengwu Industy Co. Ltd. *et al*, v. U.S., Court No. 05-00182.

In KP's June 9, 2009 letter, it requested a refund of its deposited duties for its unliquidated entries due to ongoing litigation before the CIT. However, KP fails to provide how it is entitled to such refunds under 19 U.S.C. § 1520(a). KP merely states it should receive such refund because "the margins CBP used… are not yet final due to the pendency of litigation at this time in the U.S. Court of International Trade challenging Commerce's final margin calculations in the investigation." See Letter from King & Prince Seafood Corporation (June 9, 2009). Simply because an ADD rate is being litigated does not mean it is "excessive." This claim is outside the scope of CBP's authority. It is well established that Commerce is the administrating authority of the antidumping laws. The role of Customs in the antidumping process is "simply to follow Commerce's instructions in collecting deposits of estimated duties and in assessing antidumping duties…at the time of liquidation." HQ 228611 (July 31, 2001); HQ 225382 (July 3, 1995); see also, Mitsubishi Electronics America, Inc. v. United States, 44 F. 3d 973 (Fed. Cir. 1994). As further stated in Mitsubishi Electronics America v. U.S., "Customs has a merely ministerial role in liquidating antidumping duties under 19 U.S.C. 1514(a)(5). Customs cannot 'modify [Commerce's] determinations, their underlying facts, or their enforcement."' 44 F.3d at 977. CBP properly followed Commerce's antidumping instructions. Only Commerce or the U.S. courts can determine that a new ADD rate should be applied. We are without authority to address KP's claims in that respect.

KP next argues that 23 of its entries should not have had antidumping duties assessed because they had a zero rate duty cap. The statute, 19 U.S.C. § 1673f(a), provides that:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 733(d)(1)(B) [19 USCS § 1673b(d)(1)(B)] is different from the

> amount of the antidumping duty determined under an antidumping duty order published under section 736 [19 USCS § 1673e], then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 735(b) [19 USCS § 1673d(b)] is published shall be--
>
> (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
>
> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

This statute explains that if the ADD deposited before the final order were lower than the final calculated ADD, then the duties owed will be capped at the amount originally paid.

KP states that because 23 of its entries were made before February 1, 2005, the date of the Antidumping Duty Order, then the antidumping duties for these entries should be capped at that amount, pursuant to 19 U.S.C. § 1673f(a). See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China, 70 Fed. Reg. 5149 (February 1, 2005). Thus, KP argues that since it posted zero duties on those entries, the ADD should be capped at that amount. However, as discussed above, CBP has a ministerial role in liquidating antidumping duties and merely follows Commerce's instructions when assessing and collecting said duties. See Mitsubishi Electronics America, Inc. v. U.S., 44 F.3d 973, 977 (Fed. Cir. 1994) (holding that CBP has a ministerial role in liquidating antidumping duties and "cannot modify Commerce's determinations, their underlying facts, or their enforcement"). CBP applied the ADD rates and instructions issued by Commerce in Message 5041209 (Feburary 10, 2005). CBP has not received any instructions from Commerce implementing 19 U.S.C. § 1673f(a) for the remaining entries. Therefore, CBP has properly applied Commerce's instructions when calculating the amount of ADD owed.

KP further argues that, CBP used the wrong ADD rate in its calculation for unliquidated entry 605-XXXXX22-5, which entered on March 23, 2005, and was exported by Zhanjiang Regal Integrated Marine Resources CO., Ltd. ("ZR"). CBP calculated an antidumping duty rate of 112.81% for ZR. KP argues that because Commerce later published final results of its new shipper review for ZR,[1] which established a rate of zero, CBP should have used that rate in calculating the deposits. However, Message Number 8014201 (January 14, 2008) establishes that the zero rate established in the new shipper review for ZR only applies to imports by Transpac Foods Ltd. These instructions also state that for merchandise not imported by Transpac Foods Ltd., the "all others" rate of 112.81% applies. Therefore, since KP, and not Transpac Foods Ltd., imported the subject shrimp, CBP properly followed Commerce's instructions and calculated the ADD owed at 112.81%.

[1] See Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of the Antidumping Duty New Shipper Review, 71 Fed. Reg. 70362 (December 4, 2006).

Last, KP argues that, it is entitled to refunds under the now repealed 19 U.S.C. § 1520(c). See 108 Pub. L. No. 429, 118 Stat. 2434 (December 3, 2004). Though that statute is now repealed, it may still be invoked for "merchandise entered, or withdrawn from warehouse for consumption, on or after the 15th day after the enactment of this Act." Since the Act was enacted on December 3, 2004, any merchandise entered up until December 18, 2004, may still use 19 U.S.C § 1520(c). Twenty of KP's entries at issue in this internal advice were entered before December 18, 2004, and thus, Section 1520(c) could be applicable for those entries if its terms are met.

Section 1520(c) provided:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—(1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service *within one year after the date of liquidation or exaction*."

(emphasis added). Therefore, any alleged "errors, mistakes, or inadvertence" must be brought to the attention of CBP within one year of liquidation.

Section 1520(c) can only be invoked with respect to five of the twenty above referenced entries because KP failed to raise this claim for fifteen of the entries within a year of liquidation. See HQ 223999 (February 9, 1993) (holding that a request for a voluntary tender of duty is not an "exaction" and therefore, the deadline runs from the date of liquidation). The fifteen entries cannot be the subject of a claim because they were liquidated by October 2005 and any alleged "error, mistake or inadvertence" was brought to the attention of CBP in KP's letter on March 20, 2008, which is more than one year from liquidation. Of the five entries to which Section 1520(c) could apply, one is the protested entry 605-XXXXX66-5, and therefore, is not part of this internal advice. Only the following unliquidated entries will be here discussed: 082XXXXX62-1, 082XXXXX73-6, 082XXXXX31-0, 605XXXXX69-9. However, as applied to these unliquidated entries, KP is requesting relief for which Section 1520(c) does not provide. The remedy provided by Section 1520(c) is reliquidation, which is inapplicable to these unliquidated entries. Moreover, KP has not established any "clerical error, mistake of fact, or other inadvertence" in the calculation of ADD owed. The alleged mistakes that KP argues is that CBP should not have required cash deposits on liquidated entries, should have deemed liquidated the entries, failed to apply the duty rate cap, and it applied the wrong ADD rate. As discussed above, CBP properly followed Commerce's instructions when determining the amount of ADD owed. Therefore, KP's 1520(c) argument also fails.

KP finally argues that, CBP is not authorized to collect lawful duties, taxes, or fees through 19 U.S.C. § 1592(d) because no violation of Section 1592(a) has occurred. KP argues that it did not violate 19 U.S.C. § 1592(a) because it used reasonable care. However, this claim will not be addressed at this time as CBP has yet to initiate a 19 U.S.C. § 1592(a) penalty claim. Since KP's arguments are premature, we refrain from addressing them.

HOLDING:

Under the facts described herein, and in response to the request for internal advice, we find that refunds should not be granted pursuant to 19 U.S.C. § 1520.

You are to mail this decision to counsel for the importer 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 Customs 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,

Myles B. Harmon,
Director
Commercial and Trade Facilitation Division