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CITBA & Related News

UPCOMING PROGRAMS

FEBRUARY 7, 2014
The "Nest" at the Willard Hotel, Washington DC
CITBA Winter Luncheon
From Uruguay to Bali and Beyond: International Trade Enforcement and Other Challenges
Speakers and panel including: CIT Judge Hon. Claire R. Kelly;
Sandra Bell, Executive Director, Regulations and Rulings, CBP;
Scott Kieff, Commissioner, UITC;
Chris Marsh, Deputy Asst. Secretary, AD/CVD Operations, Int'l Trade Admin., DOC;
Brad Ward, Director, Interagency Trade Enforcement Center.

FEBRUARY 27-28, 2014
Georgetown Law School, Washington DC
International Trade Update
The program, aims to provide the most important developments affecting the trade and Customs bars – and their clients – as well as critical interpretations of those developments by senior partners at law firms, top government officials, CIT judges, and corporate counsel who focus on trade and customs matters.

MARCH 6-7, 2014,
Washington Hilton Hotel, Washington, DC
US Customs and Border Protection –East Coast Trade Symposium
This year's theme is "Increasing Economic Competitiveness Through Global Partnerships and Innovation." Registration is now closed. However, to be placed on a waiting list, please go to https://apps.cbp.gov/tradesymposium/index.asp?w=17

APRIL 2/3, 2014 – date/time TBA
New York, NY – location TBA
CITBA Annual Meeting

APRIL 1-5, 2014
Waldorf Astoria, New York, NY
ABA Section of International Law 2014 Spring Meeting

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Bureau of Industry and Security

Office of Foreign Assets Control

International Trade Administration

US International Trade Commission

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PAST CITBA Events

November 21, 2013
US Court of Appeals, Washington DC
International Trade and Customs Litigation Conference
CITBA and the Federal Circuit Bar Association hosted the 2013 International Trade and Customs Litigation Conference which included presentations by Chief Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit and Chief Judge Donald C. Pogue of the U.S. Court of International Trade.

ANNOUNCEMENTS

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE
*By: Stephen Swindell**

The Court would like to stress the importance of updating your contact information and appearances in your cases. If you need to update your contact information, please submit a Request for Change in Information form which is available on the Attorney Information page of the Court's website. Without up-to-date information, the Court's docket will be inaccurate, the CM/ECF system will not be able to serve of documents filed in your cases and you will not receive important notices and information from the Court. Moreover, with confidential documents being accessible on the system, the timely and proper updating of your appearances in cases becomes all the more crucial. For those attorneys accessing confidential information under the authority of a Form 17 Business Proprietary Information Certification, please note that failure to remove yourself from a case when you are no longer entitled to access the confidential information in that case (*e.g,.* when you change firms) may be considered a violation of the Agency's APO.

To remove your viewing and filing rights for confidential information in a 1581(c) case, please file a Form 18 Notification of Termination of Access to Business Proprietary Information Pursuant to Rule 73.2(c) or a Form 18-A Notification of Termination of Government Attorney Access to Business Proprietary Information Pursuant to Rule 73.2(c). Parties are also required to file a Form 14 Joint Notice Regarding Termination of Access to Confidential Information within 28 days of entry of final resolution, including any judgment resulting from subsequent appeals. In non-1581(c) cases, termination of your viewing and filing rights for confidential information will be determined by the terms of the Judicial Protective Order in your case.

If you are no longer participating in a case, make sure that the appropriate documentation is filed on your behalf. If you had access to confidential information in a 1581(c)case, the filing of a Form 18 is sufficient to remove you from a case. In non-1581(c)cases, the filing of a Form 11 Notice of Appearance or a letter stating you are no longer appearing in the case will do the same.

The Court would like to remind those attorneys that are registered as Confidential Information Filers that they must change their CM/ECF passwords at least once a year per Section 3 (e) of Administrative Order 02-01. The Court has begun sending reminder emails to those attorneys whose passwords are close to expiring. If you do not change your password, your ability to file any document and access any confidential document on CM/ECF will be terminated until you either update your password or change your status from a Confidential Information Filer to another status by submitting a Request for Change in Information form to the Court.

Lastly, in case you think all we do at the Clerk's Office of the CIT is think up new bureaucratic rules for you to follow, we wanted to let you know about a new feature requested by an attorney that we have now put in CM/ECF. The Court has created a new docket event regarding protests and entries sent to the Court in 1581(a) cases. When they are received from U.S. Customs and Border Protection, the Clerk's Office will make an entry on the Court's docket. The CM/ECF system will generate and transmit a Notice of Electronic Filing of the event to all parties involved in the action. This way anyone who wants to look at the entries in their cases will know when they are available.

**Stephen Swindell is the Supervisor for Case Management at the Court of International Trade*

FEDERAL CIRCUIT AND CIT CASE SUMMARIES

*By: Claudia Burke & Stephen Tosini**

Federal Circuit Affirms Commerce Interpretation of Effective Date Provisions for Trade Remedy Orders. *Wind Tower Trade Coalition v. United States* [Newman, Moore, *Wallach*, J.J.]. On January 24, 2014, the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's denial of preliminary injunctions in three joined matters covering Wind Towers from China and Vietnam. The Federal Circuit agreed with the Court of International Trade that the Department of Commerce (Commerce) had reasonably determined the effective dates of its trade remedy orders under the applicable statutes. Both courts held that the Wind Tower Trade Coalition (WTTC), representing the domestic industry, had failed to show a fair likelihood of success on the merits of its claim that Commerce erred in not applying earlier effective dates. The statutes governing the effective dates for Commerce's orders, and the resulting treatment of duties collected provisionally during Commerce's and the International Trade Commission's (ITC's) investigations in trade matters, depend on whether the ITC finds present injury or merely threat of injury to the domestic industry in its final vote. In this case, the ITC made a mixed determination, with three commissioners finding no injury or threat at all, two commissioners finding present material injury, and one commissioner finding a threat of injury (leading to an overall affirmative determination because a three-to-three tie is considered affirmative). The Federal Circuit held that Commerce had interpreted the statutes reasonably in light of the ITC's mixed determination, as well as that the "balance of the hardships" and "public interest" factors did not favor granting preliminary relief.

Federal Circuit Holds Sureties Liable for Antidumping Duties on Imports from China. *United States v. Great American In. Co. and Washington Int'l Ins. Co.,* [Prost, Plager, *Taranto*, JJ.]. On December 28, 2013, the Federal Circuit, affirming the judgment of the Court of International Trade, held that sureties that issued bonds to protect the revenue from importers' failure to pay duties must cover unpaid antidumping duties on imports from China. The Federal Circuit rejected the sureties' arguments that they were relieved from their obligations on the bonds because Customs and Border Protection (CBP) failed to provide specific notice of the potential liability and because their agent issued bonds beyond his authority. The Federal Circuit reversed the Court of International Trade's ruling that the government was not entitled to post-judgment interest. With respect to prejudgment interest, the Federal Circuit held that the Government might be able to recover both equitable and statutory interest, but it failed to preserve the novel claims adequately in this case. The total recovery in this case, including post-judgment interest, approximates $6.5 million.

Federal Circuit Denies Rehearing *En Banc*, Declining to Adopt a Special Standard of Review for Substantial Evidence Determinations by the Court of International Trade. *NSK Corp. v. United States International Trade Commission* [Lourie, Dyk, Prost, Moore, O'Malley, JJ. concurring, *Wallach*, Reyna JJ, Rader, CJ dissenting]. On October 25, 2013, the Federal Circuit denied a petition for rehearing *en banc* seeking to change the standard for Federal Circuit review of the Court of International Trade's substantial evidence determinations. The court held that review of agency

action from the Court of International Trade to the Federal Circuit is no different than conventional Administrative Procedure Act review in other courts, which adopts for the reviewing court the same standard applied by the trial court. As such, the court held that its previous articulation of the standard of review in *Atlantic Sugar Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1994) was correct.

Court of International Trade Enters Default Judgment for Penalties Against Grossly Negligent Importer of Misclassified Wallets and Handbags. *United States v. Lafidale, Inc.* (Ct. Int'l Trade) [Restani, J.]. On January 10, 2014, the Court of International Trade granted the Government's renewed motion for default judgment and entered judgment in the amount of $324,687 for civil penalties that CBP had imposed upon Lafidale for its gross negligence in misclassifying imported wallets and handbags. Specifically, upon importation, Lafidale had improperly classified the merchandise under a code of the Harmonized Tariff Schedule that applied to products "wholly or mainly covered with paper," when the merchandise was covered with plastic and was subject to a higher duty rate. The Government filed suit to recover the penalties prescribed for grossly negligent violations of 19 U.S.C. § 1592. Lafidale did not respond to the complaint. In October 2013, the court denied the Government's initial motion for default judgment based upon discrepancies in an affidavit supporting the amount of lost duties. After the Government renewed the motion with an updated affidavit, the court held that the Government had satisfactorily established the amount of lost duties and entered the default judgment requested.

Court of International Trade Sustains All Aspects of Commerce's Fifth Administrative Review of Its Antidumping Duty Order Covering Shrimp from India. *Apex Exports and Falcon Marine Exports Ltd. v. United States*, [Goldberg, S.J.] On December 31, 2013, the Court of International Trade denied motions for judgment on the agency record filed by both foreign exporters and domestic producers challenging Commerce's fifth administrative review of its antidumping duty order covering shrimp from India, and entered judgment for the United States. The determinations that the court sustained included: (1) Commerce's exclusion of interest income that the foreign exporters realized as a result of refunded antidumping duty cash deposits in a previous review from its calculations because the interest was not akin to short-term working capital; (2) Commerce's continued use of "zeroing"—the practice of disregarding non-dumped sales for purposes of calculating dumping margins—in annual administrative reviews after Commerce had discontinued using zeroing in antidumping investigations; and (3) Commerce's determination not to revise its calculations of the exporters' United States price to deduct the amount it ultimately calculated in antidumping duties, as if the duties were a run-of-the-mill movement expense incident to exporting the subject merchandise into the United States, because doing so would artificially inflate the dumping margin.

Court of International Trade Sustains Rescission of New Shipper Antidumping Review Regarding Garlic Imports From China. *Qingdao Maycarrier Import & Export, Ltd. v. United States* [Tsouclas, S.J.]. On December 13, 2013, the Court of International Trade dismissed an action brought by a Chinese importer, Quingdao Maycarrier Import & Export, Ltd. (Maycarrier), challenging Commerce's rescission of a new shipper antidumping review regarding imports of fresh garlic from China. In 2011, Maycarrier requested a new shipper review to demonstrate that it should be accorded a dumping rate specific to itself, and not the rate applicable to others under an antidumping order. In 2013, Commerce rescinded the new shipper review upon finding that Maycarrier was the same entity as an exporter that entered merchandise prior to the period of the review. The court held that (1) Commerce had authority to rescind the review under the relevant regulatory provisions; (2) Commerce did not fail to apply the standard for determining whether companies are affiliated; and (3) substantial evidence supported Commerce's determination that Maycarrier and the other exporter were the same entity.

Court of International Trade Denies Motion to Dismiss in Challenge to Initiation of Administrative Review. [Musgrave, J]. On December 6, 2013, the Court of International Trade denied the

Government's motion to dismiss complaint brought under section 1581(i) regarding the initiation of an administrative review. Suntec, a participant in prior administrative reviews of an antidumping duty order on nails, alleged that it never received notice from the petitioner of its request for the administrative review, as required by 19 C.F.R. § 351.303(f)(3)(ii). Commerce subsequently initiated the review, but Suntec did not participate. Suntec filed a complaint seeking to rescind the results with respect to it, alleging that the review should not have been initiated with respect to it, given the failure of petitioner to provide notice. The court first found that it possessed residual jurisdiction to consider Suntec's complaint because Suntec was not challenging the result of the administrative review, but Commerce's decision to initiate review. In denying the motion for failure to state a claim, the court acknowledged that Suntec had constructive notice of the initiation of the administrative review, by virtue of publication in the Federal Register. Nonetheless, the court found that Suntec's allegation of substantial prejudice by the failure to receive notice of the request for initiation was one that should be addressed on the merits and determined that Suntec should be able to proceed with demonstrating, on the facts, that it was substantially prejudiced by the failure to receive petitioner's notice.

Court of International Trade Sustains Commerce's Remand Results in Antidumping Challenge Brought by Thai Producers of Plastic Bags. *Thai Plastic Bags Indus. v. United States* [Pogue, C.J.]. On November 13, 2013, the Court of International Trade upheld Commerce's remand results in the antidumping administrative review of polyethylene retail carrier bags from Thailand. The court rejected the Thai producer's argument that its general and administrative expenses should have been reduced by revenue from the sale of lands and buildings, because Commerce's decision to include this revenue was consistent with Commerce policy intended to increase the accuracy of antidumping margin calculations. The court also held that Commerce's reduction of selling expenses for a particular respondent in evaluating surrogate financial statements was supported by substantial evidence, and, as a result, Commerce did not need to calculate a profit amount from the Thai producer rather than the surrogate producer.

Court of International Trade Sustains Commerce's Remand Determination Regarding Drill Pipe Green Tubes Produced in China. *Downhole Pipe & Equipment, LP, et al. v. United States, et al.* [Tsoucalas, SJ]. On November 4, 2013, the Court of International Trade sustained Commerce's remand determination regarding the use of certain surrogate values to value an input to steel pipe from China. When Commerce determines whether sales in another country are being made at less than fair value, it compares the home market price of a particular product with the United States price, but when the home market is a nonmarket economy, Commerce must rely upon surrogate values from other countries to derive an accurate home market price. Plaintiffs, Chinese drill pipe producers, challenged, among other things, Commerce's decision to use import data for one Indian Harmonized Tariff Schedule (IHTS) category to calculate the surrogate value for green tube, a material used to produce drill pipe. Although the plaintiffs proposed alternative IHTS categories, Commerce determined that the average unit values applicable to goods imported under its selected IHTS category represented the best available surrogate value for Chinese drill pipe green tube. The court held that Commerce provided a reasonable explanation for its selection of one IHTS category, reasonably concluded that the plaintiffs' proposed alternatives were not representative of Chinese green tube, and confirmed its decision with a CBP National Import Specialist. The court also sustained Commerce's methodology for calculating labor wage rates.

Claudia Burke and Stephen Tosini are attorneys with the Department of Justice, Civil Division, National Courts Section.* ***These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

FEATURE ARTICLE

Identifying Royalty Payments That Are Dutiable

*By: Amie Ahanchian, Lauren Maccarone and Luis Abad**
KPMG LLP

Introduction

Certain kinds of royalty payments may be subject to customs duties (or "dutiable") in the United States, and a failure to adequately declare them upon entry could lead to customs violations. This article will explain how to identify which royalty payments are dutiable and must be declared to U.S. Customs and Border Protection ("CBP").

Royalty payments ("Royalties") are generally usage-based payments made by one party (the "licensee") to another (the "licensor") for the on-going right to use an asset. Such assets may include, but are not limited to forms of intellectual property such as trademarks, patents, or copyrights, and tangible property items such as machinery or an ingredient. Typically, the parties will contract for the use of the asset over a specified period of time for a specific payment amount. For example, the parties might agree that the licensor will pay the licensee $5 each time a particular trademark is used, or that the licensor will pay the licensee 5 percent of the total revenue made through sales of products, utilizing that trademark over the course of a year. CBP has laid out clear rules for when an importer of record ("Importer") should include royalties in the customs value of an imported good.

United States Customs Value

The preferred method of customs appraisement under the Tariff Act of 1930 is transaction value, defined in 19 U.S.C. § 1401a(b)(1) as the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts for enumerated statutory additions.

The "price actually paid or payable" for an imported good is "*the total payment* (whether direct or indirect, and exclusive of any charges, costs or expenses incurred for transportation, insurance and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." Following *Generra Sportswear Co. v. United States*, a landmark case regarding transaction value, CBP presumes that all payments made by the buyer to the seller are part of the price actually paid or payable for imported merchandise. However, this presumption is rebuttable, such that the payment will not be part of the price actually paid or payable, where the importer presents evidence clearly establishing that the payment is totally unrelated to the imported merchandise.

The "Generra Presumption," as it is commonly referred, may be applicable to royalties. Where a royalty is paid directly from an importing buyer, the licensee, to the seller of the goods, the licensor, for the right to import the purchased goods, CBP may presume the royalty is included in the "price actually paid or payable". However, if the importer can establish that the payment is totally unrelated to the imported merchandise, the royalty will not be included in the price actually paid or payable. Even where the royalty is paid for the right to utilize a certain asset rather than for the right to import, it may still be potentially included in customs value as a statutory addition.

There are five (5) statutory additions to the price actually paid or payable. We are primarily

concerned with those listed in 19 U.S.C. § 1401a(b)(1)(D) and (E). Subsection (D) requires the importer to include in transaction value "any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise..." CBP has articulated three factors or questions that should be considered in determining whether a particular royalty payment falls within this provision (i.e., whether it is a condition of sale).

1) Was the imported merchandise manufactured under patent?
2) Was the royalty involved in the production or sale of the imported merchandise?
3) Could the importer buy the product without paying the fee?

The royalty will likely be deemed an addition where the answers to the first two questions are yes, and the answer to the last question is no. In answering these questions, CBP has taken into account specific considerations including:

1) The type of intellectual property rights at issue;
2) To whom the royalty was paid (related vs. an unrelated party);
3) Whether the purchase of the imported merchandise and the payment of the royalties are inextricably intertwined; and
4) Payment of the royalties is made on each and every importation.

In short, the importer must determine whether the royalty is paid by the buyer of the goods to the seller (or a party related to the seller), and whether the importation of the goods in question would continue absent the payment.

Where it is determined that the royalty is not dutiable under subsection (D), one must also explore the possibility that the royalty payment is dutiable under subsection (E) as proceeds of a subsequent resale, disposal, or use of the imported merchandise that accrues, directly or indirectly, the seller. This might occur where the obligation to pay the royalty arises from the licensee's resale of an imported good. This analysis under subsection (E) can become complicated when the royalty is triggered by the sale of a product manufactured in the United States using information (i.e. trademarks or technical specifications) or imported components covered by a license. In HQ H024566, CBP held that a royalty fee paid by the buyer of imported parts to the seller, while triggered by the sale of domestically manufactured turbochargers incorporating the imported parts and licensed technical information, would not be included in the transaction value as dutiable proceeds of a subsequent resale because the royalty fee was calculated on the value of the finished turbochargers sold *minus the costs of any imported materials used*. CBP reasoned that because the royalty fee was not calculated on the costs of the imported good used in manufacture, the royalty was not tied to the imported goods. CBP's determination in HQ H023566 leaves open the question of whether the royalty would have been considered a proceed of a subsequent resale of the imported good had the cost of the imported goods used in manufacturing the merchandise not been deducted from the price used to calculate the royalty, notwithstanding that the royalty was paid for the right to manufacture in the United States.

In the case that a royalty is deemed dutiable as an addition under subsections (D) and (E), the total cost of the payment should be allocated to the price actually paid or payable for the relevant imported goods. In the case that the value of the royalties is unknown at the time of import, the importer may consider filing temporary declarations and filing for reconciliation at a later time.

Conclusion

Importers making royalty payments for the use of intellectual property, whether concerning finished

goods imported into the United States or goods imported for inclusion in domestically manufactured merchandise that is later resold, should ensure that they are correctly including the value of the royalties upon declaration to CBP. Failure to correctly report value upon importation could result in penalties and fines. However, CBP might allow mitigation of damages if incorrect values are corrected via post-entry amendments in a timely fashion.

Note that while this article discusses the dutiability of royalties in the United States, similar customs valuation requirements may apply to importers in all countries that are signatories to the World Trade Organization's (WTO) Valuation Agreement, formally known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) 1994. In fact, in April 2011, the World Customs Organization's Technical Committee on Customs Valuation (TCCV) issued Advisory Opinion 25.1 to assist WTO countries in interpreting Article 8.1(c) of the GATT, which pertains to whether royalty and license fees paid to a third-party licensor (unrelated to the seller) are dutiable. While non-binding on WTO members, this commentary provides further support for the global applicability of the valuation regulations on royalty and license fees.

Yet companies may find a "one size fits all" global approach to be insufficient. Despite minimum standards required by the WTO, member countries are permitted some flexibility in how they treat royalty and license fees. For example, the European Union is expected to publish new draft legislation in 2014 that will alter its procedural rules for determining customs value as it relates to royalties, such that fees will more often be included in the "price actually paid or payable."

In closing, importers are encouraged to monitor developments and guidance from customs authorities and examine the dutiability of royalty payments when determining the customs value of imported merchandise in the United States and in other global jurisdictions.

* Amie Ahanchian is a managing director with the Trade and Customs practice of KPMG LLP ("KPMG"), based in Washington, D.C.; Lauren Maccarone is an associate with KPMG's Trade and Customs practice, based in Philadelphia, and Luis Abad is a principal with the Trade and Customs group of the Washington National Tax practice of KPMG, based in New York City. ***This article represents the views of the authors only, and does not necessarily represent the views or professional advice of KPMG LLP.***

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