citba.org
Customs and International Trade Bar Association
Quarterly Newsletter
October 2010
Volume 8, Issue 3

CITBA & Related News

UPCOMING PROGRAMS

INTERNATIONAL LAW WEEKEND

OCTOBER 21–23, 2010
The overall theme for this year's International Law Weekend is "International Law and Institutions: Advancing Justice, Security and Prosperity." Events will take place at the Association of the Bar of the City of New York on October 21, 2010, and at Fordham University School of Law on October 22 and 23. CITBA is pleased to be a co-sponsor of International Law Weekend 2010. Accordingly, CITBA members are able to attend events at International Law Weekend free of charge. Details on this event can be found here.

NYSBA INTERNATIONAL SECTION'S FALL MEETING

OCTOBER 26–28, 2010
The New York State Bar Association International Section's 2010 Fall Meeting will be held in in Sydney, Australia from October 26-28, 2010.

The Fall Meeting's panels will qualify for CLE credit in both New York and Australia. Additionally, the speakers for this event include the Chief Justice of New South Wales, former Australian High Court Justice Michael Kirby and U.S. Ambassador to Australia Jeffrey L. Bleich. CITBA is pleased to announce that it is a cooperating entity for this program. Details on the 2010 Fall Meeting can be found here.

ABA SECTION OF INTERNATIONAL LAW FALL MEETING

NOVEMBER 2–6, 2010
The ABA Section of International Law's 2010 Fall Meeting will be held from November 2-6, 2010 in Paris, France. CITBA is a cooperating entity for this program and its members will enjoy the same discount registration rates that members of the ABA receive.

The ABA Section of International Law expects over 1,000 international practitioners from over 60 countries in attendance. Attendees will be able to take advantage of a unique opportunity to network, and earn a full year's worth of CLE credits from a number of topical and cutting-edge CLE programs arranged in several program tracks. Details on the 2010 Fall Meeting can be found here.

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Links of interest:

CITBA Homepage

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US Customs and Border Protection

Bureau of Industry and Security

Office of Foreign Assets Control

International Trade Administration

US International Trade Commission

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Judicial Conference of the U.S. Court of International Trade

November 18, 2010

The 16th Judicial Conference of the U.S. Court of International Trade will be held on November 18, 2010 from 8:30am to 5:30pm. The title of the conference is "The Court in its Fourth Decade: Addressing the Challenges of Change. The conference will be held at the Trump Soho Hotel, 246 Spring Street, New York, New York. Registration information for this event is available at http://www.cit.uscourts.gov/Judicial_Conference/16th%20Judicial %20Conference/Registration%20Form.pdf.

SAVE THE DATE!

CITBA Deluxe Cocktail Reception

On November 17, 2010, the evening before the CIT judicial conference, CITBA will host a cocktail reception at Battery Gardens (opposite 17 State Street) New York, New York.

ANNOUNCEMENTS

News from the Clerk of the Court of International Trade

By: Tina Potuto Kimble

As of September 1, 2010, documents filed electronically with the U.S. Court of International Trade are now subject to mandatory e-service. Generally speaking, the Court's transmission of the Notice of Electronic Filing of that document will constitute service. It should be noted that paper service will still be required for documents that are not electronically filed (such as those containing business proprietary information), initial jurisdictional filings requiring service in accordance with CIT Rule 4, or as the Court may otherwise order. For further information, please view the amendments to Administrative Order 02-01 on the Court's website at www.cit.uscourts.gov.

USCIT Rule 73 – Filing of Official Documents

USCIT R. 73 provides the basis for the Clerk to request "from the appropriate customs officer" documents relating to an action commenced in the Court. The court has reported that soon it may be hard pressed to find storage space for such documents.

The Advisory Committee to the Court has been requested to determine if there are ways to reduce the impending space squeeze. One of the ideas put forth by the Clerk's office is to change the operative date when the documents are sent by CBP to the Court from the date the summons is filed to some later date, for example the date of the complaint.

Members of the Advisory Committee have voiced their opinions about this change and the problems it may create. We seek to afford CITBA members, and others who may learn of this proposal, the opportunity to comment as well. If interested, please respond via email to msor888@rode-qualey.com

USCIT Historical Society

The USCIT Historical Society is in the process of developing and expanding its collection. To this end, it is seeking artifacts from members of the bar. For example, old news articles on important cases, communications that attorneys might have had with now deceased judges, originals or copies of briefs in significant cases, and the related decisions; or other materials of historical interest. If you have any materials or items of interest that you would be willing to donate to the Historical Society, please contact either contact either Pat Gill at patrickdgill@rode-qualey.com or Mel Schwechter at mschwechter@dl.com.

Feature Articles

Customs-Related USCIT Jurisdictional Provisions to be Considered By House Trade Subcommittee

By Patrick C. Reed*

Over the summer there has been a potentially important development in CITBA's facilitation of proposed legislation to expand the jurisdiction of the Court of International Trade. In July, the staff of the Trade Subcommittee of the House Ways & Means Committee asked the working group on the legislation to submit a revised version of the proposed legislation that is limited to certain customs-related provisions. The subcommittee staff indicated that these provisions would be considered for inclusion in the Customs Reauthorization legislation. The provisions the subcommittee staff asked the working group to include relate to protests, liquidation issues in antidumping and countervailing duty cases, customs brokers' license cases, the residual jurisdiction of the Court of International Trade, and government penalties and seizures. The proposals are summarized below. Copies of the draft legislative language and a more detailed explanation will be available on the CITBA website.

Protest Provisions. The proposed legislation would amend 19 U.S.C. § 1514(a) by adding two categories of CBP decisions that are subject to protest: (1) the assessment or collection of duties, taxes, or fees, whether or not voluntarily tendered, under 19 U.S.C. § 1592(c) or (d) or 1593a(c) or (d); and (2) demands by CBP for payment or repayment of duties, taxes and fees otherwise than in accordance with 19 U.S.C. §§ 1500 & 1501.

In substance, the first amendment overrules *Carlingswitch Inc. v. United States*, 651 F.2d 768 (1981), which held that a voluntary tender of unpaid duties in a prior disclosure is not a protestable "exaction," leaving an importer no remedy if the importer made an overpayment in the voluntary tender. The amendment codifies *Brother International Corp. v. United States*, 246 F. Supp.2d 1318 (CIT 2003), which distinguished *Carlingswitch* and held that a payment made after a demand by U.S. Customs is not voluntary. As a result, the amendment eliminates the existing uncertainty over whether, in any given future case, a court will rule that the facts are analogous to *Carlingswitch* or *Brother*. It also removes a constitutional cloud that exists in light of *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), which held that a tax statute with no procedure for refunds of overpayments is unconstitutional.

The second amendment harmonizes CBP procedures after post-entry regulatory audits with IRS procedures after income tax audits. Under this procedure, the importer would have the option of filing a protest against a demand for payment of additional duties, taxes, or fees. Then, if the protest is denied, the importer would be entitled to commence an action in the Court of International Trade without paying the demanded duties, taxes, or fees, since these amounts are not liquidated. This procedure is intended to be analogous to the established procedure in income tax law in which a taxpayer, without paying the tax, may file a petition in the Tax Court challenging a deficiency assessment. As in tax cases, interest on unpaid duties would continue to run during the litigation.

Liquidation Issues in Antidumping and Countervailing Duty Cases. The proposed legislation amends provisions of 19 U.S.C. §§ 1504, 1516a, and 1675 relating to the suspension of liquidation of entries in antidumping and countervailing duty cases. First, the suspension of liquidation during administrative reviews will remain in effect until the 30-day period for filing a summons and complaint in the Court of International Trade elapses. This amendment corrects the existing and problematic race to the courthouse that has become necessary because the Commerce Department is supposed to issue liquidation instructions within 20 days, i.e., before the 30-day period for filing the summons and complaint elapses. Second, if a party requests judicial review of a determination in an administrative review or a scope review, liquidation of entries covered by the action is suspended pending the final disposition of the court, including all appeals. This makes it unnecessary to obtain a preliminary injunction against liquidation. In cases challenging administrative reviews, these preliminary injunctions are always or nearly always granted on consent in light of *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983). Third, after the conclusion of judicial review, the provision for deemed liquidation within 6 months under section 1504(d) does not apply to entries subject to judicial review under section 1516a. This avoids the possibility that a court decision could be nullified if CBP does not liquidate the entries within the required 6-month period, as occurred in *Cemex S.A. v. United States*, 279 F. Supp. 2d 1357 (CIT 2003).

Customs Brokers' License Cases. The proposed legislation makes a series of amendments to statutory provisions in Title 19 and Title 28 regarding customs brokers' license cases. It expands the jurisdiction of the United States Court of International Trade to cover all possible bases for the denial, suspension, or revocation of a customs broker's license or the imposition of monetary penalties in lieu thereof. It also clarifies the statutory terminology ("summons and complaint" replaces "petition"), resolves an ambiguity in the statute regarding service of process, and clarifies the provisions governing standing and remedies. These amendments correct a statutory gap identified in *Retamal v. U.S. Customs and Border Protection*, 439 F.3d 1372 (Fed. Cir. 2006), which noted that although the CIT has jurisdiction under 28 U.S.C. § 1581(g) to review the revocation of brokers' licenses under certain statutory provisions, revocation under 19 U.S.C. 1641(g) is not among them.

Residual Jurisdiction under 28 U.S.C. § 1581(i). The legislation rewrites the Court's grant of residual jurisdiction to cover cases arising out of any law of the United States providing for (1) revenue from revenue or tonnage, (2) tariffs, duties, taxes, or fees on the importation of merchandise; (3) embargoes or other quantitative restrictions on the importation of merchandise; (4) any prohibition or condition on the importation of merchandise; (5) importation without otherwise applicable duties, taxes, or fees on the importation of merchandise, or deferral of such duties, taxes, or fees (e.g., GSP cases); or (6) administration and enforcement with respect to the matters referred to in paragraphs (1) to (5) of subsection (i), subsections (a) through (h) of section 1581, or section 1582.

The revised language relating to "tariffs, duties, taxes, or fees on imported merchandise" omits the existing clause "not for the raising of revenue." This overrules a misleading dictum in Supreme Court in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988), which incorrectly stated that the CIT has jurisdiction in cases involved tariffs, duties, taxes, or fees on the importation of merchandise, "but not if they are for the 'raising of revenue,'" apparently overlooking the court's jurisdiction involving "revenue from imports."

The new language giving the CIT residual jurisdiction over cases involving "any prohibition or condition on the importation of merchandise" fills a gap identified in K-Mart, in which the Supreme Court pointed out this omission and ruled that an "embargo" is not necessarily synonymous with a prohibition or condition on importation. The new language extending the residual jurisdiction to cases involving importation without duties, taxes, or fees, or with duty-deferral, overrules such cases as in *Int'l Labor Rights Education and Research Fund v.*

Bush, 752 F. Supp. 490 (D.D.C. 1990), in which a district court assumed jurisdiction in a case under the GSP statute because the court viewed the statute as providing for duty-free importation rather than tariffs.

The court's residual jurisdiction is also extended to cases involving administration and enforcement with respect to matters under 28 U.S.C. § 1582 (in addition to the existing provisions). This overrules cases such as *Trayco, Inc. v. United States*, 994 F.2d 832 (Fed. Cir. 1993), in which the Federal Circuit held that a district court had jurisdiction in an importer-initiated lawsuit challenging a customs penalty. The amendment codifies *Bridalane Fashions, Inc. v. United States*, 22 CIT 1064, 32 F. Supp. 2d 466 (1998), in which the CIT assumed jurisdiction over an importer-initiated lawsuit to contest U.S. Customs's refusal to accept a prior disclosure.

Jurisdiction in Actions by the Government under 28 U.S.C. 1582. The proposed legislation rewrites 28 U.S.C. § 1582. New subsection (a) of 1582 gives the United States Court of International Trade exclusive jurisdiction of any civil action which is commenced by the United States for the following purposes: (1) to recover a civil penalty under any provision of the Tariff Act of 1930 or any other provision of law governing the importation or exportation of merchandise; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; (3) to recover customs duties; or (4) to enforce a summons under 19 U.S.C. § 1510. New subsection (b) of section 1582 gives the Court of International Trade exclusive jurisdiction of any seizure, other than a seizure of narcotics or other controlled substances, under the Tariff Act of 1930 or any provision of law relating to the importation of merchandise.

The amendment expanding the jurisdiction in penalty cases corrects the anomaly that existing section 1582 limits the court's jurisdiction to enumerated customs penalties, but omits such important customs penalties as those for importation of counterfeit goods under 19 U.S.C. § 1526, which was enacted after the Customs Courts Act of 1980.

*Simons & Wiskin; Past President of CITBA

Canadian International Trade Tribunal Weighs in on NAFTA Inventory Management

By Lawrence M. Friedman*

In *Tara Materials, Inc. v. President of the Canada Border Services Agency*, Appeal No. AP-2009-016 (Aug. 3, 2010), Canada arrived at a workable—though not necessarily beneficial—solution for a question that has vexed producers looking to certify as NAFTA-originating goods produced with originating and non-originating materials.

Tara exports artists' canvases from the United States to Canada. In 2007, CBSA conducted an on-site verification to determine whether Tara's goods were originating under the North American Free Trade Agreement. As a result of the verification, it was determined that Tara's production resulted in goods that are originating 72% of the time and non-originating 28% of the time. The difference in results is because some of the textiles Tara used were from non-NAFTA suppliers. Tara claimed that the fabric was fungible and commingled into its production inventory.

Where a producer uses fungible originating and non-originating materials in the production of a finished good, the NAFTA permits the producer to employ an inventory management system to determine the origin of the material used to produce any given finished item. This is set out in Article 406 of the NAFTA, which states in part that: "where originating and non-originating fungible materials are used in the production of a good, the determination of whether the materials are originating need not be made through the identification of any specific fungible material, but may be determined on the basis of any of the inventory management methods set out in the Uniform Regulations."

In the United States, the regulations implementing this provision are at 19 C.F.R. Pt. 181, App. § 7(16). Under the regulations, origin of the materials may be determined based upon an inventory accounting methodology set out in Schedule X. Those methodologies include specific identification, First In First Out, Last in Last Out, and averaging. Similar language appears in Subsection 7(16) of Canada's NAFTA Rules of Origin Regulations.

According to the Canadian International Trade Tribunal decision, there was no disagreement that finished canvases produced from originating fabric are originating under the NAFTA. Similarly, there was no disagreement that finished canvases made from non-originating materials are not originating. The disagreement relates to the application of the Schedule X averaging inventory management system when fungible materials are used in the production of what will ultimately be fungible goods.

Under the averaging methodology, the producer determines the ratio of originating to non-originating materials in inventory. Schedule X states that the ration can be applied to determine the origin of <u>materials withdrawn from inventory</u>. Schedule X, § 5. However, with respect to goods, the determination applies to "<u>each shipment</u>" of fungible goods. Schedule X, § 14(1). Moreover, the regulations specify, at § 7(16.1), that when both fungible materials and fungible goods are withdrawn from the same inventory, the same inventory management system must be used for both.
According to CBSA, the averaging method Tara adopted resulted in a determination that 28% of the finished goods were non-originating. As a result, 28% of each shipment should be treated as non-originating.

Tara countered that it had selected the averaging methodology applicable to fungible materials, not fungible goods. As a result, the "per shipment" limitation applicable to finished goods did not apply to its products. As a result, Tara claimed the right to allocate 100% of its originating goods (or 72% of its production) to exports to Canada, where they benefit from NAFTA treatment. The remaining 28% would be sold to U.S. customers, who do not necessarily care about the NAFTA status of the goods. Essentially, Tara argued that the inventory management systems for materials in § 7(16)(a) and for goods in § 7(16)(b) are mutually exclusive.

The tribunal disagreed. Rather, the Tribunal held that the two regulations address two distinct segments of the production and distribution process. Section 7(16)(a) deals with the origin of materials used in production. Section 7(16)(b) deals with the output of that process and how the origin of the finished goods is to be determined. Thus, the two determinations are applied in succession. Schedule X requires that the latter determination be applied <u>to shipments</u>.

Thus, CBSA won the battle over the legal interpretation of the regulations. It also went on to win the war in this particular case.

The regulations with respect to fungible goods clearly apply only to "fungible goods [that] are physically combined or mixed in inventory . . . ." On this point, the Tribunal found that canvases of the same size and style are "essentially identical" and, therefore, fungible. Further, the Tribunal found that the originating and non-originating goods were mixed in inventory.

The remaining question was whether § 7(16.1) applied to these circumstances to require the use of the same inventory accounting methodology for materials and for goods. Recall that the regulation states it applies where "when both fungible materials and fungible goods are withdrawn from the same inventory." According to Tara, it maintained separate physical inventories of materials and finished goods. Consequently, it may choose to apply the specific identification methodology to its finished goods and is not bound by the application of the averaging ratio to shipments. CBSA disagreed, arguing for an expansive definition of inventory that encompassed both materials and finished goods.

The Tribunal refused to accept Tara's narrow definition. According to the Tribunal, it is unlikely that producers would ever physically mix production materials and finished goods in the way Tara suggested. Rather, both materials and finished goods were both held at the same facility. The Tribunal found that sufficient to hold that the goods and materials were mixed into the same inventory. As a result, § 7(16.1) applied, forcing Tara to apply the averaging methodology to each shipment of finished goods.

This resolution of the question presented is certainly not the best for producers. Companies that rely on mixed originating and non-originating sourcing to produce goods in North America would prefer to have the maximum flexibility in allocating its originating goods to customers who can most benefit. Nevertheless, this decision, assuming it remains the final word, does provide a solid basis on which producers can determine how to manage their NAFTA systems.

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CBP ISSUES FURTHER RULINGS ON TRANSFER PRICING

By: Damon V. Pike and Cylinda Parga*

In addition to HQ H029658 (Dec. 9, 2009) which was highlighted in the Winter 2009-10 CITBA newsletter, U.S. Customs has recently issued two further HQ rulings which display further flexibility when importers seek to use income tax transfer pricing rules to support their declared values for imported merchandise. These two rulings are discussed in detail below.

HQ H037375 (December 11, 2009)

In this case, the importer was a U.S. subsidiary of a global group of companies operating in the healthcare sector. The company imported disposable medical products from a sister-company located in Switzerland. As part of its business planning, the importer engaged an outside accounting firm to create a transfer pricing study to analyze and document the intercompany sale of the imported goods, in accordance with Section 482 of the Internal Revenue Code ("IRC"). The importer did not, however, obtain an Advance Pricing Agreement from the IRS.

The transfer pricing study utilized the Resale Price Method ("RPM") to evaluate the intercompany transactions between the importer and its Swiss affiliate and determine whether the transactions qualified as "arm's length" transactions under Section 482 of the IRC. The RPM method calculates the arm's length price for the subject goods by reducing the resale price by an appropriate gross margin; the gross margin is determined by examining the resale margin from comparable uncontrolled transactions involving either the same reseller ("internal" comparables) or other unrelated resellers ("external" comparables). Any differences between the subject transactions and the comparable transactions that have a material effect on price (and thus on the gross margin) must be accounted for to nullify the differences in the gross margin calculation. The transfer pricing study in this case used both internal and external comparables.

The foregoing formed the factual basis for CBP's inquiry whether the importer could validly use transaction value as the basis of appraisement for the imported merchandise. CBP used the "circumstances of sale" test to complete its inquiry, meaning that it examined the circumstances of the sale between the related parties to verify that the relationship did not influence the price actually paid or payable for the imported goods.

The importer submitted its transfer pricing study to provide evidence that it met the circumstances of sale test. Pursuant to its current (but still evolving) policy, CBP noted that it does not consider a transfer pricing study determinative that the circumstances of sale between related parties meet the arm's length requirement necessary for the proper use of transaction value. However, in this instance, CBP determined that the transfer pricing study contained useful information for evaluating the circumstances of the sale, as the study analyzed comparable companies that were in the same industry as the importer and were in fact direct competitors of the importer which sold the same "class or kind" of merchandise as the importer.

The transfer pricing study demonstrated that the importer's gross margin used to calculate the transfer price was within the range of gross margins reported by the comparable competitor companies. CBP determined that this indicated that the price between the related parties was set in a manner consistent with the normal pricing practices within the industry, which in turn meant that the price was not influenced by their relationship between the parties. Thus, according to CBP, the transfer price met the circumstances of sale test. Based upon this determination, CBP concluded that transaction value was the appropriate method of appraisement for the sales between the parties.

HQ H032883 (March 31, 2010)

This case involved related-party sales of highly specialized textile fabrics designed for industrial paper-making machines. The U.S. buyer at issue purchased the textile fabrics from a Canadian subsidiary, which also functioned as the non-resident importer of record. CBP issued the ruling in response to an internal advice request prepared by the U.S. company after the importer received multiple Customs Form 28 "Requests for Information" regarding the valuation of the purchased fabrics.

The U.S. buyer presented a variety of information to support its assertion that transaction value was the proper method of appraisement for the value of the goods it purchased from its Canadian sister company. The main documentation submitted by the buyer included: (1) the company's original Transfer Pricing Study, completed in 2002; (2) two updates of the Transfer Pricing Study, completed in 2005 and 2007; and (3) an "Enterprise Pricing Model" ("EPM") document effective beginning in 2007, which EPM was essentially the company's internal inter-company pricing guide. The company provided these documents in addition to the standard transactional documents relevant to its intercompany transactions, e.g., purchase orders, commercial invoices, CBP entry summaries, etc.

In determining whether the transactions met the requirements for transaction value appraisement, CBP conducted the same inquiry as it did in the two previously discussed cases: (1) whether the sales between the related companies constituted bona fide sales under CBP regulations, and (2) if the transactions were bona fide sales, did the circumstances of the sale establish that the price paid or payable by the U.S. buyer to the Canadian seller was not influenced by the relationship between the parties, i.e., that the price was set at "arm's length."

In a lengthy analysis, CBP concluded that the facts of the case established that the transactions between the parties constituted bona fide sales. CBP based this conclusion upon the documentation provided by the buyer showing that all of the products purchased were custom- ordered for specific customers (as opposed to being ordered for inventory), that all payments from the buyer to the seller could be linked to specific shipments, and that the title to and risk of loss for the products transferred to the U.S. buyer at the Canadian plant. With this preliminary question answered, CBP turned its attention to the more complicated "circumstances of sale" analysis.

Unlike Ruling HQ H029658, which focused much attention on examining whether the prices were set in a manner consistent with the normal pricing practices of the industry, in this case CBP focused mainly on examining whether the price for the textile fabrics was adequate to ensure that the Canadian seller would recover all of its costs plus a profit equal to the Canadian company's overall profit on sales of goods of the same class or kind over a set period of time. Equal profits would indicate to CBP that the relationship between the buyer and seller did not influence the price of the fabrics, which would in turn establish that transaction value was the proper method of appraisal for the transactions.

To begin its "all costs plus a profit" inquiry, CBP examined the costs and profit on representative sample transactions provided by the U.S. buyer. The U.S. company purchased two kinds of goods from its Canadian sister-company: (1) "finished" goods, i.e., goods that needed no additional processing; and (2) "works in progress," i.e., goods that needed additional processing before being resold to consumers in the United States. CBP examined the costs and profits of each type of good separately. For finished goods that the U.S. buyer purchased from its Canadian sister-company, CBP determined that the Canadian seller made a gross profit margin well in excess of the company's total profit margin for finished goods sold to all its customers. CBP likewise determined that for work-in-progress goods, the Canadian seller made a gross profit margin on sales to its U.S sister company in excess of the margin it made on its total sales of work-in-progress goods. Because its profit margins on the related-party transactions exceeded its margins taken as a whole, CBP concluded that this factor tended to show that the transfer price for the goods was not influenced by the relationship between the parties. After examining this persuasive "circumstance" of sale, CBP proceeded to discuss the multiple transfer pricing studies submitted by the U.S. buyer to supply additional evidence that the circumstances of sale did not influence the price in the related-party

transactions. The submitted transfer pricing studies pertained to the U.S. buyer.
CBP began its examination of the transfer pricing studies by once again stating that the mere existence of a transfer pricing study is not determinative of the validity of the transfer price between related parties for customs valuation purposes, and that CBP must still examine the circumstances of the sale. CBP further noted that transfer pricing studies may offer useful information regarding the circumstances of the sale, but that how much weight a transfer pricing study is given depends upon the level of detail provided by the study. Significant factors influencing CBP's regard for transfer pricing studies in valuation cases include whether the study has been reviewed and approved by the IRS, whether the products examined in the study are comparable to the imported products at issue, and the methodology selected for the study.

Based upon these factors, CBP expressed some doubts about the weight that it should give the transfer pricing studies submitted in this case. CBP first noted that none of the studies were reviewed or approved by the IRS, leaving CPB to speculate as to whether the studies would be acceptable to the IRS. CBP expressed further concerns regarding the fact that the studies utilized the comparable profits method ("CPM") to evaluate the distribution and manufacturing activities of the related parties. Although CBP acknowledged that it had in the past given weight to studies using the CPM methodology, it noted that it generally did so only in the presence of "special" circumstances such as: (1) the IRS's approval of the transfer pricing methodology through an Advance Pricing Agreement; (2) CBP's participation in the APA approval process, providing CBP access to information presented to the IRS; (3) the importer executing a waiver allowing CBP to access all of the documents submitted to the IRS during the APA approval process; (4) all of the importer's products were covered by the approved APA; and (5) the APA was bilateral, meaning that it was examined and accepted by the taxing authorities of two separate countries. (Note that these factors were present in HQ H029658 discussed above, and resulted in CBP giving the transfer pricing study significant weight in that case.)

After enumerating the above factors, CBP noted that none of them were present in this case. CBP was further troubled by the fact that the comparable companies selected to evaluate the related parties' distribution activities in the transfer pricing study were not engaged in the distribution of the same class or kind of merchandise as the companies at issue in the ruling. For these reasons, CBP stated that it was "reluctant" to rely solely on the analysis of the distribution activities presented in the transfer pricing studies.

CBP's reluctance to heavily rely the analysis of distribution activities presented in the transfer pricing reports was offset, however, by the information presented regarding the manufacturing and sales of the textile fabrics. This information consisted of the Canadian seller's most recent income statement, its 2007 transfer pricing study update, and the U.S. buyer's EPM, a model the U.S. buyer uses to determine the prices of all of the products produced, finished, or distributed from related parties such as the Canadian seller. The prices in the EPM are updated on a yearly basis based upon the requirements of the transfer pricing studies.

CBP found that the above information related to the manufacture and sale of the textile fabrics did substantiate the validity of the transfer prices under the all costs plus a profit inquiry. The Canadian seller's income statement showed earned profits on the work-in-progress fabrics that comported with the formula set by the EPM. Further, a significant number of the comparable companies identified in the transfer pricing study update to evaluate manufacturing activities manufactured and sold the same class or kind of goods as the imported merchandise at issue (as opposed to the dissimilar comparable companies chosen to evaluate the distribution activities, described above). CBP found that the fact that a number of the comparable companies sold the same class or kind of merchandise as the Canadian seller supported the finding that the price of the work-in-progress fabrics was sufficient to ensure the recovery of all of the seller's costs plus a profit.

For the finished goods sold by the Canadian seller to its U.S. sister company, CBP first noted again that the transfer pricing study was not relevant because of the lack of truly comparable companies in the distribution analysis. However, CBP then acknowledged that the income statement submitted by the Canadian seller demonstrated that the net profit it earned from selling finished goods to its U.S. sister company was similar to the net profit it earned from selling finished goods to unrelated parties. Because of this consistency, CBP found that the transfer price of the finished fabric goods between the related parties was set in a manner consistent with how the seller set its prices in sales to unrelated buyers.

Based upon all of the foregoing information, CBP ultimately ruled that transaction value was the appropriate method of appraisement in the transactions between the U.S. buyer and Canadian seller.

Conclusion

The two HQ rulings discussed above demonstrate that U.S. Customs HQ is developing a welcome flexibility in attempting to grapple with the very complicated issues involved when importers seek to validate the use of "transaction value" with income tax transfer pricing rules. Further changes in CBP's policy on this issue are expected shortly, as a "1625" notice will soon be issued which proposes to revoke or modify existing HQ rulings on this topic – and propose a new policy that will address the controversial subject of "compensating adjustments" and their impact on customs valuation, i.e, whether duty refunds should be allowed for such adjustments. Overall, however, the new direction which CBP HQ seems to taking is a welcome development in the years-long debate on transfer pricing and its impact on customs valuation.

* Mr. Pike is President of The Pike Law Firm, P.C., which is based in Atlanta, GA. Ms. Parga is a staff attorney with the firm.

CITBA Online –

Please look for further announcements and copies of past newsletters at http://www.citba.org.

Membership

CITBA now allows dues payment through PayPal. PayPal allows members to send money without sharing financial information, with the flexibility to pay for membership using their account balances, bank accounts or credit cards. PayPal is an eBay company and is made up of three leading online payment services. More information about Pay Pal can be found at https://www.paypal.com.

Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website http://www.citba.org/joinCITBA.php

Are you already a member, but late in paying your dues? Get current today and enjoy the benefits of membership. Contact Page Hall at hall@adduci.com for details.

Pro Bono Opportunities

The U.S. Court of International Trade has an ongoing need for attorneys who are able to serve as pro bono counsel for pro se plaintiffs in Trade Adjustment Assistance cases before the Court. There are two types of Trade Adjustment Assistance cases that call for pro bono representation. The first type arises when workers seek judicial review either after the U.S. Department of Labor's negative determination on the original petition or after the U.S. Department of Labor's negative determination on its reconsideration. The second type of case occurs when the U.S. Department of Agriculture denies a petitioner's claim seeking compensation for a decline in net farm income from one year to the next as a result of imports. The majority of these cases are filed by participants in the Alaska salmon industry and the Gulf Coast shrimp industry.

If you would like to volunteer to serve as pro bono counsel or if you would like more information about the pro bono program, please contact:

Case Management Operations Manager
Scott Warner
(212) 264-2031

You can also learn more about TAA by visiting the CITBA website at http://www.citba.org/announcements.php and reading the Executive Summary of a course first presented at "What You Need to Know About Trade Adjustment Assistance Cases – From All Sides" sponsored by the U.S. Court of International Trade, the American Bar Association, and the Customs and International Trade Bar Association, in April, 2005.

Additional and more detailed information can be obtained at the TAA Coalition web site (http://www.taacoalition.com), which includes a "Primer on TAA petition process," among other informative materials.

Please send questions or comments about this Newsletter to:
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