DEEMED LIQUIDATION: CAN THIS REMEDY BE REMEDIED?

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Concerning the state of the law with respect to 19 U.S.C. § 1504(d) "deemed liquidation" and how it applies to entries which are subject to antidumping and countervailing duty (AD/CVD) orders, the only area of agreement within the trade community appears to be that it is in serious need of remediation. How we got to this state, who is to blame for the specific problem and the many derivative problems, who should be responsible for the fix and how it should be fixed, are all issues where there is very little agreement and much finger pointing. As a general matter, the present state of confusion and perceived inequity in the application of the law has developed out of separate attempts by the legislative, executive, and judicial branches to remedy the specific problem of agency delay and importer contingent liability. Because of the uncoordinated actions on this issue by co-equal branches of government, the result over time has been a "solution" that appears not to work for anyone. I suggest that a solution can be found if all parties review, with an open mind, how we got here, what we really want to accomplish and how the burden of the proposed remedy can be fairly and reasonably apportioned so that it is, in fact, a remedy that will work for everyone.

DEFINING THE PROBLEM.

Step one in analyzing the "deemed liquidation" issue is to define the problem.

Disagreements start at this point. First, 19 U.S.C. § 1504 is a statutory provision that was enacted to ensure that Customs liquidated entries within six months of their entry. The consequence for not liquidating within six months was that the entry would be "deemed liquidated" at the rate and amount of duty asserted by the importer when entry was made and Customs would be prevented from liquidating at a higher rate. Pursuant to subsection 1504(d), if liquidation of an entry was suspended by a statutory requirement or by a court order, the entry would have to be liquidated within six months of Customs receiving notice of the lifting of suspension from the agency or the court. The interpretation and application of this Customs' statutory requirement to entries subject to AD/CVD orders, has resulted in practical problems and in the creation of additional problems as attempts are made to solve the original problems.

From an agency view, I would define the basic problem as: A statutory provision which was enacted to solve one problem based on a particular factual situation is being "made to fit" a different factual situation and is thereby creating inequitable results and procedural problems. 19 U.S.C. § 1504 was enacted to ensure that an importer that asserted a rate of duty, value, quantity, and amount of duty at the time of entry would not have to carry a contingent liability on its books and then have the entry finally liquidated, sometimes many years later, at a much higher rate or amount than asserted at entry. In the normal duty situation, this statutory provision always acts as a limitation on Customs, preventing it from collecting, after six months, a higher amount than the good faith assertion of the importer at the time of entry. If Customs wants to disagree with the importer's asserted rate, value or amount, then it must gather the facts, develop its argument and liquidate at a higher amount within six months or the entry is "deemed

liquidated" at the importer's lower asserted rate.

The factual situation, for section 1504 purposes, is not the same when an entry is subject to an (AD/CVD) order. In those cases an importer must identify that the entry is subject to an AD/CVD order and pay the cash deposit required by that order, even though it believes that it will legally be required to pay a lower rate or amount of duties when a proper administrative and/or court review is completed and the entry is finally liquidated in accordance with that review. As a result, a statutory provision which was enacted to protect importers and ensure that Customs acted in a timely manner is now being applied to situations where, because of the untimely action of the government, importers are being required to pay the amount they were required to assert at entry even when that amount is more than they would owe as a result of a Commerce or court determination. In other situations, as a result of the failure to timely liquidate, importers are being allowed to pay less than they would otherwise have to pay if the entry was timely liquidated in accordance with the Commerce or court determination. Payment by an importer of the lower amount in the AD/CVD situation does not result in the same type of remedy (adverse consequences applied to the untimely government agency) as payment of the lower amount in the normal duty situation. If we accept that the collection of the correct amount of AD/CVD duties is for the protection of the U.S. domestic industries, then the collection of a lower amount causes them harm.

To work toward a solution to the AD/CVD "deemed liquidation" issue, we need to agree on the larger basic problem. I would suggest that the basic problem is that a statutory provision which was meant to ensure timely agency action on liquidations by imposing sanctions/consequences on the agency for failure to timely act, is not fulfilling its purpose when,

in the area of AD/CVD entries a heavy burden of the sanctions/consequences are falling on the importers or domestic parties.

HOW DID WE GET TO THIS POINT?

The state of the law on deemed liquidation of AD/CVD entries has developed through a series of legislative, judicial and agency actions, often in response to the actions of the other branches and aided by the lobbying and litigating of private parties. A statutory provision which appears to have been enacted without considering the unique implications of the AD/CVD law, has, through litigation, judicial rulings and legislative amendment, been interpreted and applied to AD/CVD entries. Attempts by the executive branch, with the assistance of private parties, resulted in legislative changes, which resulted in more litigation, more judicial rulings and more administrative actions in response to the rulings. In short, we are here because each branch of government, with input from the private sector, attempted to solve a problem, often without fully understanding the needs or abilities of the other parties.

I present this as an alternative to the view that it is very simple how we got here -- "the government agencies did not and are not performing their functions in a timely manner!" If we do not acknowledge that this is a complicated problem with a complicated history then we will once again seek a simple solution that will not work or will not work for long.

MISCONCEPTIONS THAT STAND IN THE WAY OF A SOLUTION.

1) Customs has more than a ministerial duty in the proper liquidation of entries with AD/CVD duties.

Customs does not know the proper AD/CVD rate to assess on entries until Commerce gives it specific instructions. This is why section 1504(d) states that Customs must act withing six months after "receiving notice of the removal . . . from the Department of Commerce, other agency, or a court . . ." The courts have interpreted this notice as being the published Federal Register notice. However Customs cannot, except in very rare cases, liquidate entries based on the public information in the Federal Register notice. The actual liquidation rates are not contained in these notices. The courts view the agencies as "one government" and thus have determined that it is up to the agencies to work out the practical issues. The agencies have worked to make sure that the Commerce instructions are sent to Customs as soon as possible after the start of the six month clock, for Customs to fulfill its ministerial duty in a timely manner. Note therefore, that any suggestions that statutory or judicial sanctions or mandamus orders to Customs will solve the "deemed liquidated" problem is misguided. Sanctions and orders to Customs will only work if the statutory language or the court order requires Customs to take action within a certain time after it has received liquidation instructions from Commerce.

2) The problem is that Commerce is late in publishing Federal Register notices of final results of review or in publishing amended Federal Register notices which result from final and conclusive court decisions that require the agency to amend its determination.

Anyone who follows Commerce AD/CVD cases would have to agree that Commerce has not had a problem with the timely completion of, or publication of final results of administrative

reviews for the last ten to fifteen years. Any solution that suggests that there should be a statutory requirement for publication of final results of review with consequences for failure to publish is seeking to solve a problem that does not exist. There have been problems with publication of amended results of review based on final and conclusive court decisions. These problems were the result of the lengthy litigation proceedings and missteps between the litigation and administrative sides of cases. These problems have been addressed and there have been and should be fewer delays in the future. Even if late publication was a greater problem, however, it is not a problem for which private parties lack a solution. In the extreme situation, the courts can issue a mandamus in either the situation of a failure to publish Final Results or to publish amended final results. The fact that this has seldom happened is only a result of the fact that the real solution is to notify Commerce of the failure to act. Because in most cases the failure is simply the result of oversight, the problem will be corrected without the need to resort to the expense of court action.

3) Commerce/Customs is continuing to miss the six month liquidation deadline even after several court cases have clearly set out the law in this area.

In deciding what the real problems are in the section 1504(d) area and what needs to be done to correct them, it is important to keep in mind that Commerce and Customs had been operating under an interpretation of the law that the six months to liquidate started running from the time that Commerce sent the instructions to Customs. This was based on the practical reality that Customs could not liquidate until it had the instructions from Commerce and from the belief that the statute had been amended to reflect this interpretation. Once the courts ruled that the

government's interpretation was wrong, it was too late to "correct" the practice in many cases. Therefore, parties and perhaps the courts will continue to see many cases from the past where entries have been "deemed liquidated" and the government is powerless to prevent it from happening or to correct it once it has happened. This is not to say that "deemed liquidation" does not still happen sometimes, but with the binding court precedent in this area, the agencies have taken action to avoid entries missing the liquidation deadline.

4) The law is now clear as to when the six month "deemed liquidated" window starts to run so any future problems are the result of agency failure to act in a timely manner.

The question of when the six month clock starts to run will continue to be a problem for some time to come. So far the only definitive precedent is that it starts to run from the publication in the Federal Register of the final results of review or that it starts to run from the publication of the amended final results of review which result from a final and conclusive adverse court decision. The general precedent is that the six months runs from a "public" announcement of the lifting of suspension of liquidation. When does the six months run in cases where liquidation is not ordered as the result of the publication of the final results of review or the amended final results of review? There are many such factual situations still to be decided. All the agencies can do in the many situations not covered by specific court language is make the best legal interpretation that it can and hope that the courts will agree. If the courts do not agree, the entry will in many cases be "deemed liquidated" along with all the other similar entries that have entered and been liquidated before the court rules on the new factual situation. These questions concerning the various factual situations that may be considered the starting date arise

every day from Customs, Commerce analysts, and from the private sector.

5) Commerce/Customs does not need six months to accomplish the liquidation of entries subject to AD/CVD duties.

This is the belief that is driving the attitude that Commerce/Customs should be the party to give up some of the six months it has to accomplish liquidation. Because the agency response to the deemed liquidation consequence has been to set up tight deadlines and procedures to ensure that they do not suffer "deemed" entries, private parties and the court have experienced a need to expedite motions for injunctions and an increase in motions for TROs. Private parties do not like the fact that they now need to file their summons, complaint and proposed injunction before the end of the 60 day deadline that they have under the law to file. The court appears to be concerned that there will be many more situations where parties file for emergency action in the form of a TRO because Customs is about to liquidate their entries.

Commerce had an informal practice of not sending out liquidation instructions until after day thirty (and then waited 30 more if a summons was filed) when it believed the six months would not start running until it sent out its liquidation instructions. Now that Commerce has set up procedures and internal deadlines to avoid the adverse consequences of deemed liquidation, it is being asked to justify that it in fact needs the full six months. The answer is that in some cases Commerce/Customs needs the full six months to liquidate and in some cases they do not. However, there is no way to know in advance which cases will require the full time.
How much time will be required to liquidate entries subject to any particular public notice of lifting of suspension depends on many factors. One factor is the size of the case. This includes the number of entries, the number of parties - including importers and exporters, the number of

parties with company specific rates as opposed to country-wide average rates and the existence or non-existence of resellers. The time available to liquidate is also influenced by how many parties file court challenges and request injunctions and the problems or issues that arise from the injunctions. How clear the injunctions are and how much time must be spent in formulating an injunction that Customs can interpret and in formulating liquidation instructions that are consistent with the injunctions are all factors that take up the liquidation time line. If Customs has questions about the instructions or the injunctions, this can also use up some of the six months. Commerce/Customs is in the position of granting protests because entries have deemed liquidated because of many of these factual situations. There is no way that Commerce can develop a system of early liquidation of some reviews and of holding off on sending instructions in others based on prior knowledge of how long it will take to liquidate any particular set of entries. It is difficult to see how any subjective or "after the fact" system could be set up that would be viewed by the court as fair to the parties.

The idea that Commerce/Customs should wait 30 days and then 30 more, if a summons is filed at the 30 day mark, and then possibly another 30 days to allow the parties to obtain an injunction, does not recognize the heavy burden of injunction and instruction review and tracking of deadlines this requires of the agencies. It means that in many cases Commerce/Customs will wait 30 days and no law suit will be filed. The agencies have lost these 30 days for those entries. In some cases the agencies will wait 60 days because a summons was filed at 30 days. If no complaint is then filed at 60 days, the agencies are already 60 days behind on those entries. If the agency waits 30 more days after the complaint is filed, and a party does not file an injunction, then the agencies have lost 90 days of their statutory time to liquidate.

If Commerce were to send out instructions to Customs to liquidate within the first 15 days but tell Customs not to liquidate for 60 or 90 days, it would be no better off than waiting the 90 days to send instructions that can be immediately implemented. First of all, the room for mistake is increased with the sending of complete instructions to liquidate with a "hold" on them. Even if Customs does not make an error and liquidate too quickly, if any injunctions are filed at 90 days, then the agencies have the same problems they had when they attempted to send out liquidation instructions early in the process but now they are 3 months behind schedule. Once draft injunctions are proposed, Commerce has to discuss with the parties exactly what entries they want enjoined. The language must be exact and conform to the liquidation instructions or Customs cannot follow it. In cases where there are resellers involved, for example, the language must be completely clear so Customs knows which entries it must liquidate and which it cannot because of an injunction. Meanwhile, as the efforts are being made to clear up exactly what the party wants covered by the injunction language, the clock is ticking for all the entries that Commerce will eventually determine are not covered by the injunction. When the language is settled and the injunction is signed, the entries covered by the injunction are safe from deemed liquidation, for the moment, but all of the other entries that we now know are not covered by the injunction are 90 to 120 days into the deemed liquidation cycle. In a large case or a case with other issues, these entries may miss liquidation and be deemed liquidated. Remember we cannot focus only on the entries that are subject to a court injunction. The process for the agencies must be such that it has time to solve all problems and get entries liquidated that are not subject to the injunctions.

GUIDELINES TO CONSIDER WHEN DEVELOPING A SOLUTION

1) The “deemed liquidated” consequence that results from failure to timely liquidate entries subject to AD/CVD duties is not appropriate given that the consequence falls not only on the untimely agency but also on one of the private parties to the AD/CVD Order.

2) The “deemed liquidated” consequence of invalidating an entire administrative review proceeding and/or court ruling is too severe even if other corrective procedures are developed so that it is only rarely applied.

3) Recognize that in the AD/CVD area we face years of litigation over the issue of what is the “public notice of the lifting of suspension of liquidation” that starts the six month clock running. Every time the court rules against the agency interpretation of the public notice, many entries will already be deemed liquidated because of the agency’s good faith, but legally wrong, interpretation of the statute.

4) Do not exaggerate the importance of the issue of lateness or failure of agency publication of final results to the “deemed liquidated” problem or if you believe it is a problem, do nor accept the theory that administrative and judicial solutions do not already exist.

5) Recognize that the agencies did not create this problem through purposely or carelessly missing statutory deadlines but through a good faith interpretation of the law that was overturned by the courts.

6) Why start from scratch? Review what the executive and legislative branches attempted to accomplish through their earlier and failed legislative fixes and determine if we can start from there and do it right. Suggestions of what the past legislation attempted to do that we should now consider:

a) Do not provide a consequence for failure to liquidate within any set time period.

b) Provide a simple and inexpensive procedure for private parties to force the agency to act if it does not do so in a timely manner.

7) Finally, private parties must make it known to the executive and legislative branches that there is support for a reasonable, workable change in this area of law.

A reasonable solution can be found to this issue and a discussion at a CIT Conference is a good place to start. In the early 80s when Commerce had taken over the administration of the AD/CVD laws, there was a great deal of complaining because Commerce was not completing administrative reviews and ordering liquidation in a timely manner. At that time Commerce was required by statute to conduct an administrative review of every outstanding order whether any party wanted a review or not. The suggestion was made at a CIT Conference that the law should be changed so that Commerce would only have to review an order if a foreign or domestic party requested the review. It seems now like a rather obvious solution. It did not take long for this legislative change to happen. Because many of the right people to make it happen were at the

Conference. I believe we can have the same success with this issue.