Recently, U.S. Customs and Border Protection (CBP) took a new, creative tack in a long struggle with importers regarding application of the “deemed liquidation” statute, 19 U.S.C. § 1504, to entries subject to antidumping and countervailing duties (AD/CVD). Importers need to be aware that CBP is now taking the dubious position that it is entitled to “reliquidate” a “deemed liquidated” entry at any time, so long as it gives notice to the importer of the “deemed liquidation” and then reliquidates the entry within 90 days after the date of the notice. This novel interpretation of the law effectively guts the deemed liquidation statute and eliminates the finality afforded to AD/CVD entries that are not timely liquidated by CBP. We believe CBP’s interpretation is likely to be overturned in the courts, but until the courts do so, importers should be aware that CBP may use this legal maneuver to rectify its failure to collect additional duties owed from importers within the prescribed period.

The deemed liquidation law effectively sets a one-year “statute of limitations” on CBP to “liquidate” an entry; that is, to fix the final appraisement, classification, and duty rate on an imported product after entry. The deemed liquidation statute accomplishes this objective by stipulating that, unless suspension of liquidation is required by a statute or court order, CBP must liquidate an entry within one year after the date the merchandise is entered for consumption. If CBP does not do so, Section 1504(a)(1) stipulates that the entry is “deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record.” If suspension of liquidation is required under an antidumping or countervailing duty proceeding, Section 1504(d) provides that CBP must liquidate the entry within six months after CBP receives notice from the U.S. Department of Commerce (DOC) or relevant court that suspension of liquidation has been lifted.

In a recent Headquarters Ruling issued on April 18, 2014 (HQ H215035), CBP addressed a situation where an importer entered merchandise in 2005 that was subject to an antidumping duty order. At the time of entry, the foreign exporter of the merchandise did not have its own cash deposit rate, and therefore the “all others” rate applied, which was 7.91 percent. Later, the DOC conducted an administrative review for the period that covered the 2005 entry in question, and published final
results on December 10, 2007, assigning the exporter an assessment rate of 48.14 percent.

CBP did not liquidate the entry within six months of publication of the final results and it was deemed liquidated. On May 6, 2011, “[u]pon discovering the deemed liquidation had occurred,” CBP posted notice in the customs house bulletin that the entry was deemed liquidated on June 10, 2008, at the rate asserted by importer at the time of entry. Subsequently, on July 22, 2011, CBP reliquidated the entry at the 48.14 percent assessment rate determined by the DOC in the administrative review.

The importer protested the reliquidation, arguing that the reliquidation was improper because the entry was already deemed liquidated. CBP denied the protest, on the grounds that in 2004, Congress changed the statute providing for reliquidations, giving CBP the authority to reliquidate within 90 days of “the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent.” 19 U.S.C. § 1501.

CBP further explained that prior to 2004, Section 1501 provided only for reliquidations of entries liquidated in accordance with 19 U.S.C. § 1500, which is the general statutory authority for CBP to appraise, classify, and liquidate entries. At that time, controlling court authority held that CBP could not reliquidate under Section 1501 once deemed liquidation had occurred. United States v. Cherry Hill Textiles, 112 F.3d 1550, 1560 (Fed. Cir. 1997). However in 2004, Congress changed Section 1501 to permit reliquidation of “a liquidation made in accordance with section 1500 or 1504.” Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, 119 Stat. 2598 (emphasis added). Accordingly, CBP reasoned that it could now reliquidate an entry that had previously been “deemed liquidated,” so long as the reliquidation occurs within 90 days after CBP “gives notice” to the importer of the deemed liquidation.

Under CBP’s interpretation, the deemed liquidation statute becomes a dead letter. Rather than forcing CBP to liquidate within the prescribed time period or face a final deemed liquidation situation, CBP’s novel interpretation means that it can miss the deadline, later “discover” that deemed liquidation had occurred, then “give notice” to the importer of the deemed liquidation, and get an additional 90 days (voila!) to reliquidate the entry.

While it is reasonable for CBP to take the position that the statutory change to Section 1501 now allows it to reliquidate an entry that had been deemed liquidated, we believe it is unreasonable for CBP to argue that the 90-day deadline clock for reliquidation in that situation begins on the date that CBP “discovers” the deemed liquidation and “provides notice” to the importer of the deemed liquidation. This interpretation means that CBP is given license to “wake up” at any time and save itself from the consequences of its own inaction through reliquidation, so long as it reliquidates within 90 days after it gives the importer notice. Further, we believe that CBP’s ability to reliquidate does not necessarily mean that it can adjust the AD/CVD rates assessed at the time of entry. In contrast, the courts have been quite clear that deemed liquidation locks in the AD/CVD deposit rates unless they are adverse to the importer.

We expect that if CBP persists in this interpretation of the deemed liquidation and reliquidation statutes, the matter will be litigated, and eventually overturned. Meanwhile, importers should be aware that the deemed liquidation statute may not provide the AD/CVD rate finality afforded in the past, at least as long as the CBP’s current interpretation of the statute stands.

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