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Two Recent Court of Appeals Decisions Clarify Effective Date for Affirmative Antidumping and Countervailing Duty Scope Rulings

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February 25, 2020 – Two recent Court of Appeals for the Federal Circuit decisions clarify when merchandise that has been determined by the U.S. Department of Commerce (“Commerce”) to be within the scope of an antidumping or countervailing duty order can become subject to such duties. These decisions address section 351.225(l) of Commerce’s regulations (19 CFR § 351.225(l)) and are important because, depending on the volume of trade involved, potential duties on entries that predate the scope ruling could be very significant.

In *Sunpreme, Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020), the manufacturer/importer, Sunpreme, had entered its merchandise as not within the scope of the 2012 antidumping and countervailing duty orders on solar cells from the People’s Republic of China, and as a result did not pay any cash deposits on these entries. Three years later, on April 20, 2015, U.S. Customs and Border Protection (“Customs”) began questioning that designation and decided that Sunpreme’s entries were subject to the orders. At that point, Customs began suspending liquidation of Sunpreme’s entries and requiring that Sunpreme pay antidumping and countervailing duty cash deposits on these entries. Sunpreme subsequently requested a scope determination from Commerce. Commerce initiated the scope inquiry on December 30, 2015 and in July 2016 ruled that Sunpreme’s entries were subject to the order. As part of this ruling, Commerce instructed Customs to continue the suspension of liquidation and collection of cash deposits for Sunpreme modules, which had begun in April 2015.

The full Court of Appeals reversed a panel decision and ruled that it was appropriate under 19 CFR § 351.225(l) for Commerce to direct the importer to pay antidumping and countervailing duties for products determined to be within the orders beginning with the initial suspension of liquidation by Customs of those products on April 20, 2015. The Court also ruled that Customs did not exceed its authority by ordering the suspension of liquidation based on its own interpretation of the Orders. The Court concluded that although Customs may not expand or alter the scope of such orders, Customs is both empowered and obligated to determine in the first instance

whether goods are subject to existing antidumping or countervailing duty orders. The Court further ruled that “[b]arring Customs from suspending liquidation based on ambiguous orders would create perverse incentives for importers, contrary to the remedial and revenue-driven policy of the statute.”

In *United Steel and Fasteners, Inc. v. United States*, 947 F.3d 794 (Fed. Cir. 2020), the Court of Appeals held that it was improper for Commerce to apply its decision that certain washers were within the scope of the antidumping duty order back to the date that the order was issued—which was well before Customs began collecting antidumping duty deposits on those entries. In that case, the order was issued on October 19, 1993 and the plaintiff United Steel and Fasteners, Inc. (US&F) imported the washers without declaring them subject to the antidumping duty order. Customs accepted this designation for approximately twenty years. In April 2013, Customs began to question whether this particular type of washer should, in fact, be subject to the order, but did not at that time suspend liquidation of US&F’s entries or require antidumping duty cash deposits. Based on the concerns raised by Customs, US&F requested an official scope ruling from Commerce. Commerce determined that the washers were subject to the order and issued a final scope ruling to that effect. Commerce sought to apply this ruling back to October 19, 1993, the date the antidumping order was issued. If Commerce’s decision had been upheld, the U.S. importer would have been liable for antidumping duties on this type of washer for twenty years of entries.

Instead the Court of Appeals again interpreted 19 CFR § 351.225(l) and held that Commerce’s scope determination was only effective as of July 8, 2013, the date when Commerce issued the final scope ruling (Commerce issued its final scope ruling in this case without initiating a formal scope inquiry). In reaching this decision, the Court noted that suspension of liquidation of these washers had not occurred prior to that time. The Court explained that: “When liquidation has not been suspended, Customs, and perhaps the Department as well, have viewed the merchandise as not being within the scope of an order, importers are justified in relying upon that view, at least until the Department rules otherwise.”

Thus, in both cases, the Court held that Commerce rulings that products were within the scope of the antidumping/countervailing duty orders were effective as of the date the particular products were first subject to suspension of liquidation. *United Steel and Fasteners, Inc.* also clarifies that Commerce cannot order the collection of duties for entries that predate the initiation of a scope inquiry by Commerce (or Commerce’s actual scope ruling if a final ruling is issued without first initiating a formal inquiry) if Customs had not already suspended liquidation of those entries. In both cases, it was Customs that first questioned whether it was appropriate for importers to classify these products as outside the scope of the order, and whether instead they were in-scope merchandise. The difference in result was due to the fact that in the *United Steel and Fasteners, Inc.* case, Customs decided not to begin suspending liquidation of the product, apparently based on the importer’s representation that it would promptly request a scope determination from Commerce. In the *Sunpreme, Inc.* case, on the other hand, Customs began suspension of liquidation before the manufacturer/importer even requested a scope ruling from Commerce.

Both cases show the risks that importers face from ambiguous antidumping or countervailing duty orders. They also show the need to work with Customs to address any concerns importers have about product coverage, as well as the need to go quickly to Commerce to get a scope determination in the event Customs decides to take a proactive approach and begins to suspend liquidation of a product that importers do not think should be subject to an antidumping or countervailing duty order.

The attorneys in Hughes Hubbard’s International Trade practice have experience addressing antidumping and countervailing duty issues with both Customs and Commerce. If you have any questions regarding the impact of these Court decisions, please contact one of Hughes Hubbard’s experienced International Trade attorneys.

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