

HQ H194977

February 28, 2012

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Port Director
Port of Savannah
U.S. Customs and Border Protection
1 E Bay Street
Savannah, GA 31401

Attn: Eric Buchanan

Re: Application for Further Review of Protest No. 1-703-08-100163

Dear Port Director:

This is in response to the application for further review (“AFR”) for Protest number 1-703-08-100163, filed on behalf of King & Prince Seafood, Corporation (“KP”), on March 6, 2008. We have reviewed the Protest and our decision follows.

FACTS:

King & Prince Seafood, Corporation (“KP”) imports various seafood products into the United States. At issue here are 5 entries of warmwater shrimp exported by Fuqing Dongwei Aquatic Products Industry Co., Ltd. (“Fuqing Dongwei”) that were entered between December 2004 and June 2005. The subject entries are as follows: 605-XXXXX66-5, 605-XXXXX72-2, 605-XXXXX41-9, 605-XXXXX88-1, and 605-XXXXX52-3. The entry documents declared that the shrimp originated in Indonesia and no antidumping duty was deposited.

By Notice of Action dated, November 15, 2005, Custom and Border Protection (“CBP”) notified KP that it was investigating its imports for evasion of antidumping duty order on frozen warmwater shrimp from China. After receiving this Notice, on January 11, 2006, KP filed what it termed a prior disclosure under 19 U.S.C. § 1592 and it produced information demonstrating that its shrimp supplier, P.T. Ocean Gemindo, had falsely identified Chinese-origin shrimp as having originated in Indonesia.

On June 1, 2007, CBP's Office of Regulatory Audit issued its results of an audit on the origin of KP's warmwater shrimp of the subject entries in Report 431-06-ADD-AU-20940. The audit concluded that KP falsely declared Chinese-origin shrimp on these entries that were actually subject to antidumping dut order A-570-893. The report indicated that the Indonesian-origin shrimp was commingled with Chinese-origin shrimp. As a result, CBP issued Notices of Action advancing the rate of duty and liquidating accordingly. CBP instructed KP to pay this lost revenue. On July 2, 2007, KP tendered the lost revenue CBP requested and on October 26, 2007, CBP liquidated these five entries. CBP twice extended these entries and sent notices of extension to the importer and surety on September 24, 2005 and July 1, 2006.

On December 8, 2004, the U.S. Department of Commerce ("Commerce") published its final results in the investigation wherein it directed CBP to continue suspending liquidation of entries within the scope and required CBP to collect security for antidumping duties. Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 Fed. Reg. 70997 (December 8, 2004) (amended by Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China, 70 Fed. Reg. 5149 (February 1, 2005)). On July 31, 2006, Commerce published its notice, which rescinded review for certain exporters, including Fuqing Dongwei Aquatic Products Industry Co., Ltd. (A-570-893-029). Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 71 Fed. Reg. 43107 (July 31, 2006). Commerce issued Message No. 6212211 dated, July 31, 2006, to CBP instructing liquidation of entries subject to the antidumping duty order that were exported by various companies including Fuqing Dongwei at the cash deposit or bonding rate in effect on the date of entry.

KP subsequently filed its protest, 1-703-08-100163, on March 6, 2008 arguing that its entries deem liquidated. The Port of Savannah suspended this Protest on March 20, 2008, and forwarded it to our office for further review.

ISSUE:

1. Whether the protested entries deem liquidated.
2. Whether CBP should have charged interest on the antidumping duties.
3. Whether KP is entitled to refund of its paid duties based on another actor's alleged fraud.
4. Whether KP's tendered payment was in excess of what was owed.

LAW AND ANALYSIS:

We note initially that the instant Protest was timely filed within 180 days of the liquidation of the entry. Under 19 U.S.C. § 1514(a), “decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to . . . the liquidation or reliquidation of an entry . . . shall be final and conclusive . . . unless a protest is filed in accordance with this section.” The subject entries were liquidated on October 27, 2007, and KP filed this Protest on March 6, 2008, within the deadline. Also, pursuant to 19 U.S.C. § 1514(a)(5), the matter protested--the liquidation of the subject entry--is subject to protest.

KP argues in its protest that CBP liquidated these entries past the 19 U.S.C. § 1504(d) deadline and hence, they are deemed liquidated at the rate of duty asserted by the importer at the time of entry. Since KP falsely stated that it owed no duties upon entry, it is now arguing that these five entries are deemed liquidated at a rate of zero percent and that no duties should be paid on those entries. Last, KP requests a refund for the amount of duties it paid for these five entries. However, as discussed below, since these entries were lawfully extended and liquidation properly occurred within the extension period, the entries did not deem liquidate.

As discussed above, the issue of whether entries are deemed liquidated is governed by section 504(d) of the Tariff Act of 1930, codified at 19 U.S.C. § 1504(d). This statute provides:

. . . when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b), within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d). Therefore, this statute explains that, absent extension, if CBP did not liquidate KP’s five entries by six months after the date of the notice, those entries would be liquidated by operation of law and its duties will be those asserted by KP upon entry.

KP entered these shipments on various dates, the first beginning on December 16, 2004 and the last ending on June 11, 2005. KP falsely entered all five of these entries under entry type “01” as opposed to “03.” Entry type “01” is for free and dutiable

consumption entries that are not subject to antidumping duty orders. In contrast, entry type “03” delineates entries that are subject to antidumping or countervailing duties. Since KP entered these goods as 01 entries, they remained under that entry code until CBP changed them to 03 on August 25, 2007.

On July 16, 2004, Commerce informed CBP in Message Number 4198205 that, it should suspended liquidation of the subject entries while Commerce conducted the administrative review of the applicable antidumping order A-570-893. Commerce lifted this suspension of liquidation on July 31, 2006, in its Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China. 71 Fed. Reg. 43107 (July 31, 2006). See Message No. 6212211 (July 31, 2006). Therefore, pursuant to 19 U.S.C. § 1504(d), absent extension of liquidation, CBP had six months from July 31, 2006, or January 31, 2007, to liquidate applicable entries, otherwise they would deem liquidate.

However, as of January 31, 2007, the liquidation of these entries was properly extended. CBP may extend liquidation for one year periods not to exceed a total of four years from entry. 19 U.S.C. § 1504(b); 19 C.F.R. § 159.12; See, e.g., HQ 225239 (September 20, 1994) (“Section 159.12(e) provides that the total time for which extensions may be granted may not exceed 3 years (i.e., up to four years from the date of entry).”). Liquidation must occur within one year from entry and each extension adds one year from that date. See 19 U.S.C. § 1504(a)(1); 19 C.F.R. § 159.12(a). All entries were liquidated on October 26, 2007, before the applicable extension period had expired, and thus, they were timely liquidated. Therefore, the protested entries did not deem liquidate.

KP also argues that pursuant to 19 U.S.C. § 1677g(a), two of its entries, 605-XXXXX66-5 entered on December 16, 2004, and 605-XXXXX72-2 entered on January 27, 2005, should not have had interest assessed. 19 U.S.C. § 1677g(a) provides that interest is only owed on entries that were made on or after the publication of an antidumping duty order. See also, Message No. 6212211 (July 31, 2006) (referencing the applicability of Section 778 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677g(a)). Since the publication of the antidumping duty order occurred on February 1, 2005, consistent with Commerce’s instructions and 19 U.S.C. § 1677g(a), we conclude that interest should not have been assessed on these two entries that entered before the date of publication of the antidumping duty order, and this protest should be granted in part.

KP next argues that it should not owe any antidumping duties as it alleges it was defrauded into believing the shrimp was of Indonesian-origin and not subject to an antidumping duty order. KP relies on U.S. v. Golden Ship Trading Company, which held that CBP could not recover duties under 19 U.S.C. § 1592(d) because the Defendant’s negligence in mismarking the country of origin on its t-shirts was not the “but-for cause”

of CBP's failure to collect the proper duty. 25 CIT 40, 43-44 (2001). This matter is not analogous to these facts because unlike Golden Ship, CBP is not pursuing a 19 U.S.C. § 1592(d) claim to recover lost duties. Instead, the question presented concerns the lawfulness of the liquidation of the entries based on the rate advance.

The authority to determine the applicable antidumping duty rate is within the jurisdiction of Commerce. See 19 U.S.C. §§ 1673-1675, 1677(1). CBP has a ministerial role in liquidating antidumping duties and merely follows Commerce's instructions when assessing and collecting said duties. See Mitsubishi Electronics America, Inc. v. U.S., 44 F.3d 973, 977 (Fed. Cir. 1994) (holding that CBP has a ministerial role in liquidating antidumping duties and "cannot modify Commerce's determinations, their underlying facts, or their enforcement"). KP argues that it used reasonable care in entering the goods and that in some manner, this provides a basis for their protest of the assessment of the anti-dumping duties. However, this argument is without merit. As discussed above, the dispositive issue is whether CBP lawfully collecting antidumping duties. This does not depend on the degree of care exercised by KP. Moreover, this argument does not challenge any decision made by CBP in the liquidation of the entries pursuant to Commerce's instructions. Since CBP lacks the authority to change or disregard the Antidumping Duty Order and liquidation instructions issued by Commerce, CBP also lacks the authority to grant KP the relief requested in its Protest. See 19 U.S.C. § 1514(a). See, e.g., HQ H028635 (March 18, 2011).

KP finally argues that the estimated antidumping duties that it tendered were above the applicable statutory duty cap. The statute, 19 U.S.C. § 1673f(a), creates a duty cap by providing that if there is a difference between the deposited estimated antidumping duty and the final assessment of the duty, then the difference:

shall be . . . (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

On February 10, 2005, Commerce sent Message Number 5041209 where it set the antidumping duty deposit rate for Fuqing Dongwei (A-570-893-029) at 53.68%, effective January 27, 2005. Thus, when KP deposited the required duties on July 2, 2007, this was the rate that was in effect for Fuqing Dongwei. CBP properly followed Commerce's instructions and thus, this matter is similarly not protestable.

HOLDING:

Under the facts described, and in response to the request for further review, you are directed to deny the protest in part and grant the protest in part with respect to the assessment of interest on two of the entries. This must be accomplished prior to mailing of the decision, in accordance with Section IV of the Customs Protest/Petition Processing Handbook (CIS HB, December, 2007). You are to mail this decision, together with CBP Form 19, to the protestant no later than 60 days from the date of this letter.

No later than 60 days from the date of this letter, Regulations and Rulings of the Office of International Trade will make the decision available to CBP personnel, and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and by other means of public distribution.

Sincerely,

Myles B. Harmon,
Director
Commercial and Trade Facilitation Division