

## Importers May Be Paying Duties Sooner After CBP Win

By **Sydney Mintzer and Timothy Lee** (February 6, 2020, 6:09 PM EST)

Recently the U.S. Court of Appeals for the Federal Circuit held in *Sunpreme Inc. v. U.S.* that U.S. Customs and Border Protection has the authority to interpret ambiguous anti-dumping and countervailing duty orders.

The court overturned the finding made by a three-judge Federal Circuit panel which affirmed the U.S. Court of International Trade's decision that CBP acted beyond its legal authority in suspending liquidation of goods prior to the initiation of a scope inquiry by the U.S. Department of Commerce.

The decision by the Federal Circuit clarifies that CBP has authority to determine whether imports are subject to an anti-dumping or countervailing duty order, regardless of any ambiguity in the language of an order. Prior to the decision, the presumption was that CBP only applied orders under instruction from Commerce and did not substantively interpret them.

Indeed, CBP often (but not consistently) deferred to Commerce by telling parties to submit a scope ruling request asking Commerce to resolve ambiguous orders. Because the Federal Circuit's decision gives CBP broader authority to use its own discretion, even when there is ambiguity, CBP will likely defer far less to Commerce when ambiguity arises, imposing anti-dumping/countervailing duties far sooner than if it had deferred to Commerce to issue a scope ruling.

### Background

On Dec. 7, 2012, Commerce issued anti-dumping and countervailing duty orders covering crystalline silicon photovoltaic cells imported from the People's Republic of China.[1] *Sunpreme Inc.*, a manufacturer of solar modules in China, believed that its solar modules did not fall within the scope of the orders and did not enter them into the United States subject to the orders.

*Sunpreme's* entries went unchallenged by CBP until early 2015, when CBP began to question whether the orders applied to *Sunpreme's* merchandise. CBP sought advice from its laboratory and found that *Sunpreme's* solar modules were subject to the orders.



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As a result, on April 20, 2015, CBP began suspending liquidation of (i.e., imposing estimated anti-dumping/countervailing duty duties on and suspending CBP clearance of) Sunpreme's solar modules. On June 2, 2015, CBP sought guidance from Commerce on whether Sunpreme's products were subject to the orders. Commerce responded that any such determination would need to be made by Commerce in a scope ruling proceeding, which would need to be requested by the importer or exporter — Sunpreme.

On Nov. 16, 2015, Sunpreme submitted a scope ruling request to Commerce, and Commerce subsequently initiated a formal scope inquiry on Dec. 30, 2015. Commerce ultimately found that Sunpreme's products fell within the scope of the orders and instructed CBP to continue suspending liquidation of Sunpreme's solar modules entered prior to the scope ruling, and to begin suspending liquidation of any relevant products entered on or after Dec. 30, 2015.

Sunpreme subsequently challenged Commerce's final scope ruling and its instructions to CBP.

When the case finally made its way to the Federal Circuit, the court ultimately affirmed Commerce's final scope ruling. With respect to Commerce's instructions to CBP, the court's main issue was whether CBP acted within its authority by interpreting the orders and thereby suspending liquidation of Sunpreme's products on April 20, 2015, eight months prior to Commerce's scope inquiry.

## **Decision**

The Federal Circuit ultimately held that CBP acted within its authority in initially interpreting the orders to cover Sunpreme's solar modules and begin suspension of liquidation. In arriving at this conclusion, the court focused on the interpretation of statutes and regulations and the case law relied on by the CIT.

In particular, the court found that under the law, CBP had a clear statutory mandate to "fix the final amount of duty to be paid on such merchandise and determine any increased or additional duties, taxes, and fees due." [2]

The court noted that as part of that mandate, "CBP is both empowered and obligated to determine in the first instance whether goods are subject to existing anti-dumping or countervailing duty orders." [3]

The court noted that CBP cannot expand or alter the scope of an order but that its authority and responsibility to determine whether they apply is not negated by an ambiguous order.

The court reasoned that any contrary result would limit CBP's ability to carry out its statutory role and would encourage gamesmanship by importers seeking financial windfalls. [4] Accordingly, the court found that CBP is required "to make a determination as to whether existing anti-dumping or countervailing duty orders apply to the subject goods," and ambiguity of such orders does not relieve CBP from its statutory obligation. [5]

The court also pointed to the implementing regulations, highlighting that on their face the regulations contemplate a scenario where products are subject to suspension of liquidation at the direction of CBP, after which Commerce initiates a scope inquiry and ultimately finds that the product in question is not included within the scope of the order.

The court also rejected the CIT's analysis, finding it inconsistent with case law and distinguishable from the case at hand. In particular, the Federal Circuit distinguished *AMS Associates Inc. v United States* [6] and *Xerox Corp. v United States* [7] from the present case, noting that AMS is factually distinct from

Sunpreme because (1) CBP in AMS originally determined that the goods were not within the scope of the ambiguous order, and (2) CBP had not suspended liquidation, but Commerce nonetheless ordered the suspension of liquidation retroactive to even before the initiation of the scope inquiry.

Accordingly, the court found that AMS has no bearing on Sunpreme because CBP ordered suspension of liquidation on April 20, 2015, and such suspension continued after Commerce's final scope ruling. In other words, there was nothing retroactive about Commerce's instruction to CBP.

The court likewise found that Xerox was distinguishable from Sunpreme because it dealt with a completely different legal question. The court acknowledged that Xerox described CBP's authority to fix the amount of duty to be paid as ministerial<sup>[8]</sup> but rejected the notion that this excluded CBP from interpreting ambiguous scope language.<sup>[9]</sup>

## **Implications**

The Federal Circuit's decision in Sunpreme recognizes CBP's statutory authority to evaluate both the product and an anti-dumping or countervailing duty order if CBP suspects that the importer's product may fall within the scope, regardless of any ambiguity in the language of an order.

Importers could face an increased likelihood that CBP will suspend liquidation of their products in the face of ambiguity, instead of deferring to Commerce for a final scope ruling as the agency often has done in the past. Therefore, importers could be subject to more estimated anti-dumping/countervailing duty duties extending to the period prior to Commerce's initiation of a scope ruling.

Consequently, importers should proactively monitor whether their products could be subject to an ambiguous order. Should questions arise, importers should consider the pros and cons of approaching Commerce and/or CBP to address the ambiguity.

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[1] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order, 77 FR 73017 (Dec. 7, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and anti-dumping Duty Order, 77 FR 73018 (Dec. 7, 2012).

[2] Sunpreme Inc., v. U.S. et al, No. 18-1116, 28 (Fed. Cir. 2020) (citing 19 U.S.C. § 1500(c)).

[3] Id. at 27.

[4] Id. at 28.

[5] Id.

[6] *AMS Associates., Inc. v. United States*, 737 F.3d 1338 (Fed. Cir. 2013).

[7] *Xerox Corp. v. United States*, 289 F.3d 792 (Fed. Cir. 2002).

[8] *Sunpreme Inc., v. U.S. et al* at 32.

[9] *Sunpreme Inc., v. U.S. et al* at 33.