

CLIENT ALERTS

Good News for Thousands of Plaintiffs in Litigation Challenging Section 301 List 3 and List 4A Tariffs

7.9.2021

A lawsuit filed at the Court of International Trade in September of 2020 challenging the U.S. Trade Representative's (USTR) authority to assess Section 301 List 3 and List 4A duties and its compliance with Administrative Procedure Act requirements in doing so (*HMTX Industries LLC et al. v. United States* (Court No. 20-00177)) is back in the news this week. As we previously reported, the lawsuit was subsequently amended to include the same claims against Section 301 List 4A duties. Other importers quickly filed over 3,500 "me-too" lawsuits challenging the List 3 and/or List 4A Section 301 duties on the same grounds as *HMTX* — hoping to benefit if the lead case is successful, but without incurring the large expense of fully litigating their own claims. Due to the unprecedented nature of this litigation, the CIT assigned all the lawsuits to a three-judge panel, with the first-filed lawsuit serving as the lead case.

In April 2021, the U.S. government took the position in a filing with the CIT that it believed the CIT lacked authority to order refunds for List 3 or List 4A duties paid after liquidation even if plaintiffs were to prevail on the merits. Plaintiffs filed a motion for a preliminary injunction as to the suspension of liquidation to protect their ability to seek refunds over such duties.

After briefing and oral argument, the three-judge CIT issued a divided opinion granting plaintiffs' request on July 6, 2021, and entered a preliminary injunction that suspends the liquidation of plaintiffs' unliquidated entries from China that are subject to Section 301 duties under List 3 and List 4A. The CIT has now temporarily restrained liquidation of any entries for the next 28 days and ordered the U.S. government to establish a repository through which plaintiffs who have filed a lawsuit may identify any unliquidated entries affected by the List 3 and List 4A duties. For all such identified entries, the U.S. government must either stipulate to the availability of refunds or suspend liquidation, to

Related People

Catherine M. Karol
Of Counsel

Related Services

International Business

International Trade and
Customs Specialty Team

CLIENT ALERTS

assure the availability of at least some refunds for duties paid should plaintiffs prevail on the merits.

While it is still very early in what promises to be a very long and complicated trial followed by one or more appeals, we are encouraged by a number of the Court's findings. In particular, one of the requisite findings in granting a preliminary injunction is the likelihood of the requesting party's success on the merits. The majority opinion (one judge of the three-judge panel dissented) provided a detailed preliminary analysis of the merits of both the Plaintiffs' and Defendant's cases. The Court found that "Plaintiffs: that "Plaintiffs raised sufficiently serious and substantial questions" about the President's and USTR's authority to increase tariffs under the Trade Act, which for purposes of this motion, met their burden to show a 'fair chance' of success on the merits." (The dissenting judge's disagreement with the majority was limited to the likelihood of irreparable harm; in his view, under to the governing statutes and Federal Circuit precedent, the CIT plainly has the authority to order refunds for both liquidated and unliquidated entries, despite the government's position to the contrary).

Because USTR published List 4A in the *Federal Register* on August 20, 2019, the two-year statute of limitations for filing a List 4A lawsuit based on publication date is set to expire on **August 20, 2021**. This means that importers still have an opportunity to file List 4A claims within two years after the USTR published this list in the *Federal Register*, arguably meeting the statute of limitations deadline for all the claims challenging these duties.

Most of the lawsuits challenging List 3 were filed by September 21, 2020, which was two years after the USTR published List 3 in the *Federal Register*, as this is arguably the deadline for the APA procedural claim. However, there is an argument that the cause of action challenging the USTR's authority under the Trade Act (i.e., the substantive challenge to List 3, as opposed to the procedural challenge to its method of promulgation under the APA) accrues each time List 3 duties are assessed on imports. A few "List 3" cases filed after September 25, 2020 rely on this "continuing claim theory". Under this "continuing claim theory" an importer may have the opportunity to file a "me-too" lawsuit based on each entry subject to Section 301 List 3 duties. Therefore, a lawsuit filed today may be considered timely for List 3 duties.

The injunctive order issued by the CIT is in effect for 28 days; it is not clear from the opinion whether the order can or will be extended beyond that and/or appealed. It is also not clear what (if any) impact may have on duties that have already been liquidated. We will be closely monitoring developments and will keep you apprised of additional details as they become available. While we continue to believe the pending *HMTX Industries* case has a steep hill to climb, we are pleased at positive outcome of the CIT's first ruling. The modest costs of filing suit and participating from afar, coupled with the potentially significant relief at issue, may be even more attractive for importers whose goods are covered by Section 301 List 3 and list 4A duties.

If you are interested in filing a "me-too" lawsuit to try to preserve your rights to potential List 3 and/or List 4A duty refunds, or if you have any questions about this pending litigation, please contact one of us.

CLIENT ALERTS

Catherine Karol

313.225.5308

karol@butzel.com

Mitch Zajac

313.225.7059

zajac@butzel.com

Leslie Alan Glick

202.454.2839

glick@butzel.com

Raul Rangel Miguel

202.454.2841

rangel@butzel.com

Bill Quan Yang

313.225.7094

yang@butzel.com

He Xian

517.372.4449

xian@butzel.com