

Protecting and Collecting the Revenue: Pressing Issues United States Customs and Border Protection Faces in a Time of Economic Recovery*

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I. Introduction

Much has been written about the financial crisis over the last few years. We have been told by economists that it has been the worst financial crisis since the Great Depression.³ We know that the financial crisis has impacted just about every sector of the United States economy. It has impacted financial institutions and businesses both large and small, stock markets, governments, the housing market and countless American citizens. Therefore, it would seem one can reasonably surmise that the crisis has impacted commerce and trade. Known is the fact that U.S. Customs & Border Protection (“CBP”) statistics show that the total value of imports declined 25 percent in fiscal year (“FY”) 2009.⁴ Not known is the extent to which the crisis has contributed to the increasing number of outstanding antidumping/countervailing duty

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² Unless otherwise indicated, the views expressed in this paper are strictly those of the author, personally, and do not reflect the views of U.S. Customs and Border Protection.

³ See National Bureau of Economic Research, Report of the Business Cycle Dating Committee (Sept. 20, 2010), available at <http://www.nber.org/cycles/sept2010.html>; David Lawder, Greenspan: U.S. recovery “extremely unbalanced.” Reuters (Feb. 23, 2010, 1:22 PM EST), <http://www.reuters.com/article/idUSTRE61M4B120100223>.

⁴ See CBP Import Trade Trends: Fiscal Year 2009 Year End Report 2 (Mar. 2010), available at http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/trade_trends/09_yr_end.ctt/09_yr_end.pdf.

(“AD/CVD”) claims, the disappearance of importers owing significant amounts of AD/CVD duties, and the rise in litigation with sureties refusing to pay under customs bonds. With that said, the purpose of this paper is not to establish or postulate such a connection, but to recognize and discuss how CBP is moving forward to address these issues as the economy moves towards a sustained recovery.

Over the past two years, CBP litigation referrals to the Department of Justice (“DOJ”) and affirmative collection actions filed against sureties and/or importers by the DOJ in the Court of International Trade (“CIT”) covering AD/CVD duties have noticeably increased. The issues from these cases have also been raised against numerous bills, which remain unpaid and under protest at the administrative level. Further, there are numerous claims that await further collection action as either the sureties tied to the underlying customs bonds refuse to pay notwithstanding CBP’s demands and/or the connected importers cannot be located or are insolvent. CBP is aware that its collection efforts have been a source of concern for affected domestic producers (“ADPs”) on the one hand, see *Sioux Honey Ass’n v. United States*,⁵ and a topic of inquiry by the U.S. Government Accountability Office (“GAO”) on the other.⁶ To be sure, CBP takes collections very seriously as it fully recognizes duties are not only a significant source of revenue for the United States, but also an important means for protecting domestic businesses and industries. CBP also understands that AD/CVD collections impact ADPs through distributions made under the Continued Dumping and Subsidy Offset Act (“CDSOA”). In fact,

⁵ 2010 Ct. Int’l. Trade LEXIS 100 (Ct. Int’l Trade Aug. 27, 2010).

⁶ See U.S. Gov’t Accountability Office, Report to Congressional Requesters, Antidumping & Countervailing Duties: Congress & Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collections, GAO-08-391 (Mar. 2008).

last year CBP collected \$23.5 billion in duties on goods with an import value of \$1.7 trillion and made available more than \$320 million to ADPs under the CDSOA.⁷

At present, CBP is actively engaging many importers and sureties by demanding payment on the connected claims and taking appropriate legal action as time and resources allow. Further, CBP is actively looking for many importers who owe a significant claim amount. On the first point, the discussion herein must be limited as presently there are multiple collection cases pending in the CIT and it would be inappropriate to discuss the issues squarely before the court at the time of this writing. However, an issue of significant concern and not directly before the CIT, the issue of interest on customs bonds, will be discussed. On the last point, it is a stark reality that various revenue laws, namely the AD/CVD system which involves the retrospective assessment of duties, have translated to the loss of hundreds of millions of dollars. In fact, despite CBP's mission driven efforts to locate and collect from many importers with significant outstanding claims, many of these claims will ultimately be written off.

II. Interest in Excess of the Bond Amount

In recent dealings with sureties it has come to CBP's attention that some sureties mistakenly believe that their liability on customs bonds can never exceed the face amount of the bond, even for interest. To this end, CBP is concerned that some sureties may be putting forth dubious defenses and/or forestalling payment notwithstanding the full amount of a customs bond being legally due, believing such action amounts to an interest-free loan from the Government. Indeed, if liability on surety bonds could not exceed the face amount of the bond, the basic

⁷ See Import Trade Trends, *supra* note 4, at 3; CBP, FY 2009 CDSOA Annual Distribution Report 157 (Dec. 10, 2009), http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf.

principle of time value of money would seemingly dictate not paying until the cost of not paying outweighed the benefit. CBP believes that Congress anticipated this problem early on when it included the modern-day 19 U.S.C. § 580 in the Act of March 2, 1799. In 1799, a time when the United States was struggling with its own solvency, no doubt Congress expected that section 580 would protect the Treasury by helping to avoid additional collection costs, to minimize the burden on taxed and limited government resources, and to ensure that bonded debts were promptly paid. Over 200 years later CBP believes that these three compelling reasons remain.

Under section 580, the Government is entitled to six percent interest per year on all bonds on which an action is filed for the recovery of duties, from the time “when said bonds became due.” A few features of this statute are worth highlighting briefly. First, and most importantly, section 580 provides a substantial financial incentive for the prompt payment of bonded duty debts. Consider for a moment the stark contrast between a \$5 million bond liability on the day before and the day after the Government files suit to recover under the bond. Because of section 580 interest, what was a \$5 million debt may have grown by another million or two within twenty-four hours depending on the length of time between when the bond became due and when the collection action was filed. Factor in the expected length of the litigation, and it is not difficult to see that a surety’s liability can grow by 50% or more under section 580, growth that can be avoided by prompt payment after a proper CBP demand. Two other features bear mentioning. Section 580 only applies to sureties, not importers. Also section 580 applies unconditionally; when the Government brings suit to recover duties on a bond, it gets six percent interest from when the bonds became due as a matter of law.⁸

⁸ See United States v. Fed. Ins. Co., 857 F.2d 1457 (Fed. Cir. 1988).

Notwithstanding section 580, it is also worth noting that decisions in the CIT and the Court of Appeals for the Federal Circuit stand for the proposition that the Government is frequently entitled to interest in excess of the face amount of a bond, from the time of the Government's lawful demand on the bond.⁹ Many sureties seem to grasp these principles, as reflected by the significant number of CBP demands on sureties that are promptly paid. It behooves the rest to recognize that not paying on demand could cost them significantly more than the face amount of their bonds and that such practices are neither in the interest of the Government nor the sureties.

III. The Disappearance of Importers and Assets

An issue that CBP continues to face is the disappearance and/or insolvency of importers who owe significant unsecured claim amounts – particularly AD/CVD duties. Now it is important to recognize that the vast majority of importers follow the law and pay all amounts owed to CBP in a timely manner. However, in 2008 CBP disclosed through the GAO that over \$613 million in AD/CVD duties dating back to 2001 remained uncollected.¹⁰ Unfortunately, a sizable portion of these claims are owed by importers that have disappeared, have no assets, or have declared bankruptcy. This reality poses significant challenges to CBP.

CBP employs every reasonable measure to locate importers owing outstanding claims to CBP. In large part this is done through electronic databases, searches in internal CBP systems, tracking of any refunds issued before the claims materialized, follow up on discovered leads and agent investigations. Unfortunately, these efforts are too often met with limited or no success as it is often discovered that these importers have effectively disappeared, legally dissolved and/or

⁹ See, e.g., Ins. Co. of N. America v. United States, 951 F.2d 1244 (Fed. Cir. 1991).

¹⁰ GAO Report, supra note 6, at 3, 13.

stopped operating within the United States long before the bills first became due. CBP has also worked to address this problem by revising its bonding formula and centralizing its bond operations. Further, it continues to zealously pursue claims in bankruptcies and receiverships.

CBP also recognizes that it has some valuable collection tools to utilize in its pursuit to collect outstanding claims against importers. First, “it is a longstanding principle that customs duties are a personal debt upon the importer that arises from a statutory rather than a contractual obligation.”¹¹ In other words, there is no statute of limitations on duties owed by importers. Therefore, even when a claim for duties is “written off” CBP can, absent unique circumstances, reopen and pursue the claim at a later time. Second, the CIT has recognized that courts can under certain circumstances “pierce the corporate veil.”¹² Thus, given the requisite facts CBP could pursue the successor of an importer or its parent company. Third, under the right circumstances CBP can assert a priority in both a bankruptcy case and a receivership.¹³ These are tools that CBP employs but they are of little use if an importer owing amounts to CBP disappears without any apparent assets or successor, which unfortunately happens too often with large claims.

Interestingly, an effective, but unfortunately rarely available means shown to keep importers from evading their legal obligations under the customs and tariff laws of the United States has been domestic competitors independently reaching out to CBP officials with valuable enforcement and/or collection information. It is a fact and business reality that those directly impacted are often the first and sometimes the only ones to discover that a dissolved importer

¹¹ See United States v. Ataka America Inc., 826 F. Supp. 495, 498 (Ct. Int’l Trade 1993) (citing United States v. Cobb, 11 F. 76, 79 (C.C.D. Mass. 1882)).

¹² Id. at 499.

¹³ See 11 U.S.C. §§ 507(a)(8)(F)-(G); 31 U.S.C. § 3713.

competitor is actually operating as a mere continuation under a new name and importer number (whether explicitly or through an asset sale) or is employing what amounts to an unlawful scheme to evade its legal obligations and circumvent the laws intended to eliminate unfair competitive practices. CBP encourages competitors and other affected parties to provide CBP with valuable collection information on such importers, and if reluctant, to consider the damage that has already been caused to them and the market as a whole and the need to deter other importers considering or currently engaging in such unlawful practices.

IV. Conclusion

In conclusion, during the time of the financial crisis the number of collection actions against sureties has increased along with the disappearance of importers owing significant claim amounts, particularly AD/CVD duties. Whether there is a connection between these occurrences and the crisis or whether it is merely a coincidence CBP can only speculate. Regardless, CBP hopes to eliminate needless surety litigation by ensuring that all sureties recognize the potential interest costs that they face by not timely paying upon CBP's first demand and ultimately forcing the Government to file suit. In some instances timely payment could substantially reduce surety liability. With regards to importers who disappear, along with their assets, owing significant claim amounts to CBP, CBP will continue to use every reasonable means at its disposal to locate them and their assets. Moreover, CBP encourages competitors and affected parties to share any valuable information they have concerning importers who are taking dubious or unlawful measures to evade their legal obligations under the customs and tariff laws of the United States. Trade is critical to an economically prosperous and competitive country. Going forward it will be in the interest of the United States and the trade community to continue to evaluate and amend customs and tariff laws with an eye towards maximizing the collection of revenue and

discouraging fraud and harmful competitive practices. Failure to do so could jeopardize a long term and successful economic recovery, an untenable prospect in the eyes of CBP and the law abiding citizens it serves.

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