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Re: Enforce and Protect Act ("EAPA") Case Number 7184; *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 FR 57145 (November 4, 2009); Diamond Tools Technology LLC; 19 U.S.C. § 1517

Dear Messrs. Barclay and Pickard:

This is in response to a request for *de novo* administrative review of a determination of evasion dated September 17, 2019, made by the Trade Remedy & Law Enforcement Directorate ("TRLED"), Office of Trade ("OT"), U.S. Customs and Border Protection ("CBP"), pursuant to 19 U.S.C. § 1517(c), in Enforce and Protect Act ("EAPA") Case Number 7184 (hereinafter referred to as the "September 17 Determination").¹ The request for review, dated October 30, 2019, was submitted to CBP OT Regulations and Rulings ("RR") by White & Case LLP, on behalf of Diamond Tools Technology LLC ("DTT"), pursuant to 19 U.S.C. § 1517(f) and 19 CFR § 165.41(a).

I. Background

Inasmuch as the facts in this case were fully set forth in the September 17 Determination, we will not repeat the entire factual history herein.

In brief, according to the record evidence, on March 22, 2017, TRLED initiated a formal investigation under Title IV, section 421 of the Trade Facilitation and Trade Enforcement Act of 2015, in response to an allegation of evasion.

¹ See Notice of Final Determination of Evasion in EAPA Case Number 7184, dated September 17, 2019.

On February 24, 2017, the Diamond Sawblades Manufacturers Coalition² (“DSMC”) had filed an EAPA allegation against DTT. CBP acknowledged receipt of the properly filed allegation on March 1, 2017. DSMC alleged that DTT was importing Chinese-origin diamond sawblades into the United States by transshipment through Thailand to evade the payment of antidumping (“AD”) duties on diamond sawblades from the People’s Republic of China (“China”), Case No. A-570-900.³

The allegation of evasion pertained to the antidumping duty order issued by the U.S. Department of Commerce (“Commerce”) on imports of diamond sawblades from China.⁴

Commerce defined the scope of the relevant AD duty orders as follows:

The products covered by these orders are all finished circular sawblades, whether slotted or not, with a working part that is comprised of a diamond segment or segments, and parts thereof, regardless of specification or size, except as specifically excluded below. Within the scope of these orders are semifinished diamond sawblades, including diamond sawblade cores and diamond sawblade segments. Diamond sawblade cores are circular steel plates, whether or not attached to non-steel plates, with slots. Diamond sawblade cores are manufactured principally, but not exclusively, from alloy steel. A diamond sawblade segment consists of a mixture of diamonds (whether natural or synthetic, and regardless of the quantity of diamonds) and metal powders (including, but not limited to, iron, cobalt, nickel, tungsten carbide) that are formed together into a solid shape (from generally, but not limited to, a heating and pressing process). Sawblades with diamonds directly attached to the core with a resin or electroplated bond, which thereby do not contain a diamond segment, are not included within the scope of these orders. Diamond sawblades and/or sawblade cores with a thickness of less than 0.025 inches, or with a thickness greater than 1.1 inches, are excluded from the scope of these orders. Circular steel plates that have a cutting edge of non-diamond material, such as external teeth that protrude from the outer diameter of the plate, whether or not finished, are excluded from the scope of these orders. Diamond sawblade cores with a Rockwell C hardness of less than 25 are excluded from the scope of these orders. Diamond sawblades and/or diamond segment(s) with diamonds that predominantly have a mesh size number greater than 240 (such as 250 or 260) are excluded from the scope of these orders. Merchandise subject to these orders is typically imported under heading 8202.39.00.00 of the Harmonized Tariff Schedule of the United States (“HTSUS”). When packaged together as a set for retail sale

² The individual members of the DSMC are Diamond Products Inc. and Western Saw Inc.

³ See Notice of initiation of an investigation on Diamond Tools Technology LLC and determination as to whether CBP has found a reasonable suspicion of evasion of the antidumping duty order on Diamond Sawblades from the People’s Republic of China, dated June 27, 2017 (“Notice of Initiation”). See also Notice of interim measures taken as to Diamond Tools Technology LLC concerning a reasonable suspicion as to evasion of the antidumping duty order on Diamond Sawblades from the People’s Republic of China, dated June 27, 2017 (“Notice of Interim Measures”).

⁴ See *Diamond Sawblades and Parts Thereof from the People’s Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 FR 57145 (November 4, 2009).

with an item that is separately classified under headings 8202 to 8205 of the HTSUS, diamond sawblades or parts thereof may be imported under heading 8206.00.00.00 of the HTSUS. The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of these orders is dispositive.

On June 27, 2017, in accordance with 19 CFR § 165.24, CBP issued the Notice of Initiation to all interested parties, and notified the parties of CBP's decision to take interim measures based upon reasonable suspicion that DTT, as the importer of record, entered covered merchandise into the customs territory of the United States through evasion.⁵ The entries subject to the investigation were those entered for consumption, or withdrawn from a warehouse for consumption, from March 1, 2016, one year before receipt of the allegation, through the pendency of the investigation.⁶ TRLED concluded that, based on the record evidence, there was reasonable suspicion that DTT had entered covered merchandise into the customs territory of the United States through evasion, and imposed interim measures.⁷

In addition, on August 9, 2017, DSMC filed a request for an anti-circumvention ruling with Commerce, requesting a determination of whether DTT imports of diamond sawblades comprised of Chinese cores and Chinese segments joined in Thailand prior to importation into the United States are circumventing the AD duty order on diamond sawblades from China.⁸ Commerce initiated the anti-circumvention inquiry on December 1, 2017. On July 16, 2019, Commerce published its final determination in the anti-circumvention inquiry.⁹ Commerce made a final affirmative determination that diamond sawblades made with Chinese cores and Chinese segments joined in Thailand and then subsequently imported into the United States are circumventing the AD duty order on diamond sawblades from China. Pursuant to Commerce's regulatory authority,¹⁰ Commerce instructed CBP to suspend liquidation and to require cash deposits of estimated duties on unliquidated entries of such diamond sawblades that were entered or withdrawn from warehouse for consumption on or after December 1, 2017, the date of the initiation of the anti-circumvention inquiry.¹¹

⁵ See Notice of Initiation and Notice of Interim Measures. Available, respectively, at: <https://www.cbp.gov/sites/default/files/assets/documents/2017-Aug/TRLED%20Notice%20of%20Initiation%20of%20Investigation%20%287184%29%20-%20P.pdf> and <https://www.cbp.gov/sites/default/files/assets/documents/2017-Aug/TRLED%20Notice%20of%20Initiation%20of%20Investigation%20%287184%29%20-%20P.pdf>.

⁶ See 19 CFR § 165.2. While the regulations set forth which entries CBP will specifically investigate, interim measures can be applied to all unliquidated entries.

⁷ The record evidence supporting the finding of reasonable suspicion is discussed in the Notice of Initiation and the Notice of Interim Measures.

⁸ See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Initiation of Anti-Circumvention Inquiry*, 82 FR 57709 (December 7, 2017). DSMC requested an anti-circumvention ruling for three companies: DTT; Bosun Tools (Thailand) Co., Ltd.; and, Kingthai Diamond Tools.

⁹ See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Determination of Anti-Circumvention Inquiry*, 84 FR 33920 (July 16, 2019).

¹⁰ See 19 CFR § 351.225(f)(3).

¹¹ See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Determination of Anti-Circumvention Inquiry*, 84 FR at 33921.

On November 21, 2017, as part of the EAPA investigation and prior to Commerce's initiating the anti-circumvention inquiry requested by DSMC, CBP made a covered merchandise referral to Commerce with regard to the diamond sawblades comprised of Chinese cores and Chinese segments joined in Thailand prior to importation into the United States by DTT.¹² Commerce found that such diamond sawblades are covered merchandise and informed CBP of this determination on July 10, 2019.¹³

On September 17, 2019, TRLED issued the September 17 Determination. TRLED found substantial evidence¹⁴ to demonstrate that DTT entered diamond sawblades that were covered by antidumping order A-570-900 by falsely entering diamond sawblades comprised of Chinese cores and Chinese segments assembled in Thailand into the customs territory of the United States as type "01" entries not subject to an AD duty order. As a result, no cash deposits were applied to the merchandise.¹⁵

II. Discussion

A. Administrative Review and Standard of Review

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 CFR § 165.45, upon a request for administrative review, CBP will apply a *de novo* standard of review and will render a determination appropriate under the law according to the specific facts and circumstances on the record. For that purpose, CBP will review the entire administrative record upon which the initial determination was made, the timely and properly filed request(s) for review and responses, and any additional information that was received pursuant to § 165.44. The administrative review will be completed within 60 business days of the commencement of the review.

¹² See Scope Referral Request for merchandise under EAPA Investigation 7184, imported by Diamond Tools Technology LLC and concerning the investigation of evasion of the antidumping duty order on diamond sawblades from the People's Republic of China (A-570-900), dated November 21, 2017 ("Scope Referral Request").

¹³ See Diamond Sawblades and Parts Thereof from the People's Republic of China: Notification of the Final Determination of the Anti-Circumvention Inquiry in Response to the Covered Merchandise Referral, dated July 10, 2019 ("Covered Merchandise Determination"). Because the scope referral involved issues in common with the anti-circumvention inquiry, Commerce considered both questions at the same time. However, Commerce issued two separate decision documents.

¹⁴ Substantial evidence is not defined in the statute. The U.S. Court of Appeals for the Federal Circuit has stated that "substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781-82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹⁵ See September 17 Determination, available at: <https://www.cbp.gov/sites/default/files/assets/documents/2019-Sep/TRLED%20-%20Final%20Determination%20%28508%20compliant%29%20-%20September%2017%2C%202019%20-%20%287184%29%20-%20PV.pdf>.

B. Law

Title 19 U.S.C. § 1517(c)(1) provides, in relevant part, as follows:

(1) Determination of Evasion

(A) In general

Except as provided in subparagraph (B), not later than 300 calendar days after the date on which the Commissioner initiates an investigation under subsection (b) with respect to covered merchandise, the Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.

The term evasion is defined in 19 U.S.C. § 1517(a)(5), as follows:

(5) Evasion

(A) In general

Except as provided in subparagraph (B), the term “evasion” refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

See also 19 CFR § 165.1.

Examples of evasion could include, but are not limited to, the misrepresentation of the merchandise’s true country of origin (e.g., through false country of origin markings on the product itself or false sales), false or incorrect shipping and entry documentation, or misreporting of the merchandise’s physical characteristics.¹⁶

Covered merchandise is defined as “merchandise that is subject to a CVD order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. 1671e), and/or an AD order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. 1673e).”¹⁷

Therefore, CBP must determine whether a party has entered merchandise that is subject to an AD or CVD order into the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act, that is material and false, or any omission that is material, that resulted in the

¹⁶ *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations*, 81 Fed. Reg. 56477, 56478 (August 22, 2016).

¹⁷ *See* 19 CFR § 165.1.

reduction or avoidance of applicable AD or CVD cash deposits or duties being collected on such merchandise.

C. DTT's Arguments

DTT requests that we reverse the September 17 Determination of evasion, arguing that DTT did not enter covered merchandise into the United States through evasion because CBP allegedly cannot prove the three elements of evasion required under EAPA.

Specifically, DTT argues that any diamond sawblades imported into the United States from Thailand prior to December 1, 2017 are not "covered merchandise" based upon the anti-circumvention determination by Commerce and, therefore, DTT did not make any material false statements or material omissions and did not avoid payment of AD duties owed. DTT argues that scope and anti-circumvention determinations by Commerce can only have a prospective effect and only apply to imports entered on or after the date upon which Commerce initiated such an inquiry. Although Commerce determined that the diamond sawblades imported from Thailand by DTT are covered merchandise within the scope of the AD duty order for diamond sawblades from China, DTT claims that they only became covered merchandise upon Commerce making the circumvention determination.

DTT argues that CBP's justification for including all entries covered by the EAPA investigation in the final determination is impermissible. DTT reiterates that the diamond sawblades imported into the United States prior to December 1, 2017 are not "covered merchandise" due to the legal effect of Commerce's affirmative final circumvention determination. According to DTT, CBP does not have the authority to treat entries prior to December 1, 2017 as "covered merchandise."

In sum, DTT argues that, given that entries prior to December 1, 2017 are not "covered merchandise" for the reasons stated, DTT did not make material false statements or material omissions with respect to those imports and did not avoid payment of AD duties owed on those imports.

D. DSMC's Arguments

DSMC requests that we affirm the September 17 Determination of evasion, arguing that CBP correctly found that entries by DTT prior to December 1, 2017 are covered merchandise and that all three elements of evasion required under EAPA exist.

DSMC argues that the two distinct statutory and regulatory schemes at play—those of Commerce and CBP, respectively—make it such that those entries made prior to December 1, 2017 are still covered merchandise as part of the EAPA investigation conducted by CBP. DSMC states that DTT is conflating the two different authorities of Commerce and CBP in such a way that would create a situation in which CBP becomes beholden to the statutes and regulations governing Commerce in the event an EAPA investigation commences prior to any referral made to Commerce on a related matter.

According to DSMC, since all entries that are part of the EAPA investigation are considered covered merchandise, DTT accordingly made false statements and material omissions to CBP regarding DTT's imports and avoided payments of AD duties owed on those entries.

E. Administrative Review Analysis

The term "evasion" under EAPA refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.¹⁸

The term "covered merchandise" means merchandise that is subject to a countervailing duty order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. § 1671e), and/or an antidumping duty order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. § 1673e).¹⁹

The crux of this administrative review is whether the subject entries made prior to December 1, 2017 are covered merchandise.

Upon receipt of an allegation that DTT was transshipping Chinese-origin diamond sawblades through Thailand for importation into the United States, CBP initiated the EAPA investigation here at issue and imposed interim measures due to finding reasonable suspicion that DTT was evading an AD duty order. During the course of the investigation, CBP transmitted a scope referral to Commerce to provide answers to CBP's questions regarding whether the merchandise at issue is covered under the AD duty order on diamond sawblades from China. Commerce responded in the affirmative as to those diamond sawblades made of Chinese cores and Chinese segments joined in Thailand and did not place any temporal limitation on this determination.²⁰ In other words, diamond sawblades made of Chinese cores and Chinese segments and joined in Thailand are covered by the AD duty order on diamond sawblades from China.

DTT has argued that a temporal limitation on when the entries are considered covered merchandise exists due to Commerce's circumvention determination, resulting from the investigation which commenced on December 1, 2017. In making this argument, DTT relies upon the statutory and regulatory authority given to Commerce when issuing scope rulings and associated case law to demonstrate that, in this case, CBP does not have the authority to consider those entries made prior to December 1, 2017, as covered merchandise. This reliance is misplaced.

EAPA provides new statutory authority to CBP to address various fact patterns related to possible evasion of AD duties. One such component of this authority is CBP's ability to

¹⁸ See 19 U.S.C. § 1517(a)(5)(A).

¹⁹ See 19 U.S.C. § 1517(c)(1) and 19 CFR § 165.1.

²⁰ See Covered Merchandise Determination, page 5.

impose interim measures, including extending or suspending liquidation, collecting cash deposits, and taking other steps deemed necessary to protect the revenue of the United States (and domestic industry) during the pendency of an EAPA investigation.²¹ CBP exercised that authority and, pursuant to 19 U.S.C. § 1517(e), made certain entries eligible for ultimate AD duty assessment, should the facts so warrant, upon conclusion of the EAPA investigation and/or any relevant Commerce administrative review during which assessment rates are established. As it turns out, the merchandise at issue is covered merchandise and CBP, therefore, properly executed its EAPA authority and made protection of the revenue and domestic industry possible through the imposition of interim measures.

Additionally, as TRLED noted in its September 17 Determination, Commerce placed no temporal limitation on its Covered Merchandise Determination. CBP, upon receipt of Commerce's Covered Merchandise Determination, and using its EAPA authorities, properly applied the Covered Merchandise Determination, which confirmed that the diamond sawblades are covered merchandise. Given that EAPA explicitly permits CBP to require cash deposits of AD duties on past entries that have not been liquidated, CBP properly did so.²²

Furthermore, using December 17, 2017 as the start date for considering entries at issue in the EAPA investigation to be covered merchandise would essentially negate the purpose of this EAPA investigation (and future investigations). To do so would disincentivize CBP from making covered merchandise referrals to Commerce in future EAPA investigations, would fail to protect the revenue, and would fail to protect interested parties in instances where a scope referral to Commerce is needed during the course of an EAPA investigation.

The role Commerce plays during the course of an EAPA investigation is to determine whether the merchandise is covered merchandise, if such a determination is needed.²³ Once that determination is transmitted to CBP, CBP has the authority to make a determination as to whether evasion occurred.²⁴ Nothing within the EAPA statute nor the corresponding regulations provides Commerce any role with respect to issuance of any instructions to CBP regarding the suspension or extension of liquidation of entries, or otherwise, that fall under the EAPA investigation which gave rise to such a referral.

Moreover, the case law upon which DIT relies with regard to the prospective nature of Commerce scope determinations has changed during the course of this administrative review. Although the cited case did not involve CBP's additional and independent authorities under EAPA, it is instructive. The relevant part of *Sunprime Inc. v. United States*²⁵ involves CBP's suspension of liquidation of entries prior to the initiation of a scope inquiry by Commerce and the subsequent instructions to CBP by Commerce to

²¹ See 19 U.S.C. § 1517(e).

²² See *id.*

²³ See 19 U.S.C. § 1517(b)(4).

²⁴ See 19 U.S.C. § 1517(c)(1)(A).

²⁵ 924 F.3d 1198 (Fed. Cir. 2019), *rev'd in part*, *Sunprime Inc. v. United States*, No. 2018-1116, 2020 U.S. App. LEXIS 244 (Fed. Cir. Jan. 7, 2020).

continue suspending liquidation of those pre-scope inquiry entries upon the issuance of Commerce's final scope ruling. The United States petitioned for *en banc* rehearing of its cross-appeal in *Sunpreme* in which a panel of the United States Court of Appeals for the Federal Circuit had upheld the Court of International Trade's conclusion that Commerce could not instruct CBP to continue suspension of liquidation for entries prior to the initiation of the scope inquiry. The petition was granted and decided on January 7, 2020. The Court reversed and reinstated Commerce's instructions to CBP in full.²⁶

While *Sunpreme* pertains to a scope determination made by Commerce prior to the passage of EAPA, the Court's holding provides relevant analogy. The *Sunpreme en banc* decision held that the regulation relevant therein governing scope decisions by Commerce calls for the continuation of the suspension of liquidation for merchandise already subject to suspension of liquidation.²⁷ CBP has the independent authority pursuant to EAPA to investigate allegations of evasion and to impose interim measures designed to protect the revenue of the United States.²⁸ Those interim measures include extending or suspending the liquidation of unliquidated entries.²⁹ Herein, the diamond sawblades were already subject to a lawful suspension and extension of liquidation when Commerce began its anti-circumvention inquiry, due to the interim measures imposed by CBP pursuant to its independent authority during the pendency of the EAPA investigation.

Commerce made an affirmative determination with regard to the covered merchandise referral and transmitted same to CBP pursuant to Commerce's obligations under the EAPA statute. There is no temporal limitation on this determination and to find such a limitation would create a result contrary to that intended by the Federal Circuit's *en banc* holding in *Sunpreme*.³⁰ Therefore, we find that all entries that have been suspended or extended as a result of this EAPA investigation, regardless of the date of entry, are covered merchandise.

As TRLED determined, a finding of evasion does not require an intentional or purposeful attempt by an importer to avoid duties; the act of entering "covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material and that results in any cash deposit or other security of any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise" constitutes evasion as defined by EAPA.³¹ Entries investigated and made during the period of March 1, 2016 through the pendency of the TRLED investigation were entered as "01" entries, supposedly not covered by an AD duty order, when they were indeed covered and should

²⁶ See *Sunpreme Inc. v. United States*, 2020 U.S. App. LEXIS 244 (Fed. Cir. Jan. 7, 2020).

²⁷ See 19 CFR § 351.225(f)(1). See also *Sunpreme*, 2020 U.S. App. LEXIS 244, at *36-38.

²⁸ See 19 U.S.C. § 1517(b) and (e).

²⁹ See 19 U.S.C. § 1517(e)(1) and (2).

³⁰ See *Sunpreme*, 2020 U.S. App. LEXIS 244, at *40 (stating that—in the context of a scope determination made by Commerce after CBP had already suspended liquidation—a holding that CBP cannot determine whether goods are subject to an antidumping or countervailing duty order when such an order lacks perfect clarity would result in significant limitation on CBP's "ability to perform its statutory role and would encourage gamesmanship by importers hoping to receive the type of windfall that *Sunpreme* seeks [in this case]").

³¹ See 19 CFR § 165.1. See also 19 U.S.C. § 1517(a)(5).

have been entered as "03."³² Failure to do so was a material falsity. As a result of interim measures allowed under EAPA, those entries are available for collection of AD duties. That is what Congress intended by enacting EAPA.

Given that entries made by DTT prior to December 1, 2017 are covered merchandise, we find that the definition of evasion under the regulations and statute have been met based upon substantial evidence in the record.

III. Decision

Based upon our *de novo* review of the administrative record in this case, including the timely and properly filed request for administrative review and response, the September 17 Determination of evasion under 19 USC § 1517(c) is AFFIRMED.

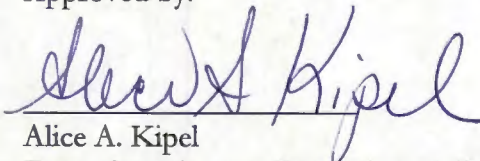
This decision does not preclude CBP or other agencies from pursuing additional enforcement actions or penalties. Pursuant to 19 CFR § 165.46(a), this final administrative determination is subject to judicial review pursuant to section 421 of EAPA.

Sincerely,



Brian T. Barulich
Acting Chief, Penalties Branch, Regulations & Rulings
Office of Trade
U.S. Customs & Border Protection

Approved by:



Alice A. Kipel
Executive Director, Regulations & Rulings
Office of Trade
U.S. Customs & Border Protection

³² See September 17 Determination, page 8. Entry type "03" is the code that CBP requires importers to use to designate an entry as subject to AD duties; entry type "01" is not used for entries that are subject to AD duties. The instructions for CBP Form 7501 (Entry Summary) clearly state that code 03 shall be used for entries subject to antidumping duties.