NO. 22-1102

IN THE
Supreme Court of the United States

ACQUISITION 362, LLC, DBA STRATEGIC IMPORT SUPPLY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent contends that the absence of conflicting decisions between circuits and that the Federal Circuit has exclusive jurisdiction over these claims (*see* 28 U.S.C. § 1295(a)(5)) negates the need for further review of the Federal Circuit's denial of A362's appeal. However, that argument either ignores or misses the essential crux of this matter, which is whether the Federal Circuit's decision essentially eliminates one of the statutory means by which importers can file protests under 19 U.S.C. § 1514(c)(3)(B) and 19 C.F.R. § 174.12(e)(2). This novel and important question deserves consideration by this Court. A clear and authoritative ruling from the highest court is essential to provide clarity surrounding the Court of International Trade's ("CIT") jurisdiction in instances where the U.S. Customs and Border Protection ("CBP") fails to follow the Department of Commerce's ("Commerce") orders and to ensure consistency and predictability in international trade matters.

1. A362 protested the CBP's decision not to act on Commerce's instructions, not the timing of the liquidations, making A362's protests timely under 19 USC § 1514(c)(3)(B) and 19 C.F.R. § 174.12(e)(2).

Respondent remains steadfast in its position that the CIT lacked subject matter jurisdiction to review the substance of A362's underlying claims because of the timing constraints set forth in 19 U.S.C. § 1514(c)(3)(A) and 19 C.F.R. § 174.12(e)(1). Such a

perspective ignores the 28 U.S.C. § 1581(a) jurisdiction available under 19 U.S.C. § 1514(c)(3)(B) and 19 C.F.R. § 174.12(e)(2) and cannot be sustained.

The statutes that give the CIT subject matter jurisdiction specifically contemplate that importers may need to file protests that do not relate to liquidation, and provide an alternative means to obtain CIT jurisdiction under 28 U.S.C. § 1581(a):

> (3) A protest of a decision, order, or finding described in subsection (a) shall be filed with the Customs Service within 180 days after but not before—
>
> > (A) date of liquidation or reliquidation,
> >
> > ***or***
> >
> > (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3) (emphasis added). In turn, 19 C.F.R. § 174.12(e) allows protests to be made:

> within 180 days of a decision relating to an entry made on or after December 18, 2004, after any of the following […]
>
> (1) The date of notice of liquidation or reliquidation, or the date of liquidation or reliquidation, as determined under §§159.9 or 159.10 of this chapter;
>
> ***or***
>
> (2) ***The date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made....***"

19 C.F.R. § 174.12(e) (emphasis supplied).

Here, the triggering event that started the period in which A362 could file a timely action was when CBP decided not to act upon the specific instructions from Commerce and failed to issue A362 a significant refund of duties paid years prior, which refund should have been issued automatically and without the need for any further action by A362.

As A362 outlined in detail in its initial Petition, on June 17, 2019, Commerce issued Amended Final Results resulting from its completed administrative review of the CVD Order for the Period of Review. *See Countervailing Duty Order on Certain Passenger*

Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2016, 84 FR 28011 (June 17, 2019) (the "Amended Final Results"); *see also* Appx. 133a. As a result, the manufacturer Dongying Zhongyi was assigned a lower CVD rate of 15.56% for the Period of Review, and A362 (as the importer of tires manufactured by Dongying Zhongyi) was entitled to a refund of the difference in CVD rates from the paid-in rate of 30.61% to the amended rate of 15.56%.

As a necessary part of the implementation of its Amended Final Results, Commerce issued Message No. 9184301 to CBP on July 3, 2019, giving the CBP instruction and authority to issue refunds resulting from the Amended Final Results. When CBP decided not to act as instructed by Message No. 9184301, A362 filed timely protests on December 12, 2019 and December 13, 2019 – a period within 180 days of both the issuance of the Amended Final Results and the issuance of Message No. 9184301 – indicating A362's entitlement to the automatic refunds that should have issued for the difference between the 30.61% CVD rate paid by A362 at the time of import and the lower 15.56% CVD rate ultimately assessed by the Amended Final Results (the "Protests"). Appx. 31a.

In arguing that that A362's reliance on 19 U.S.C. § 1514(c)(3)(B) and 19 C.F.R. § 174.12(e)(2) fails, Respondent again mischaracterizes A362 as taking issue with the liquidation date, and therefore being unable to invoke 19 U.S.C. § 1514(c)(3)(B) because such a protests are only available when the dates of liquidation are "inapplicable." What this argument misses is that

A362 has never claimed the ***liquidation*** to be erroneous. As of the date of the liquidations in October and November of 2018, A362 had no basis to protest either the liquidations themselves, nor the rates applicable to the entries. Instead, it was not until CBP decided not to follow Commerce's instructions or issue the refund to which A362 was entitled as a matter of law that A362 had any reason to protest CBP's actions. This is precisely the situation where the dates of liquidation are "inapplicable" and the alternative route to jurisdiction for the CIT's review under 19 U.S.C. § 1514(c)(3)(B) applies.

2. Any protest by A362 within the 180-day timeframe of liquidation would have been premature

Commerce conducted the administrative review of the CVD rate applicable to the import of tires manufactured by Dongying Zhongyi between October 16, 2017 and June 17, 2019. A362's entries were liquidated in the middle of this administrative review at the 30.61% CVD rate A362 paid at import. To be clear – it is not the timing of the liquidation that is at issue. Nor was the rate identified at the time of liquidation ever the issue. There was simply no erroneous action by CBP to protest at the time of liquidation. As a result of this plain fact, it follows that any protest within 180 days of liquidation would have been a premature protest for which A362 would have no "justification for the objection" as required by 19 C.F.R. § 174.13(a)(6).

Indeed, such a premature, overly broad, or indefinite protest by A362 would be invalid as a matter of long-standing law. *See, e.g., Lowa, Ltd. v. United States*, 5 C.I.T. 81, 86, 561 F.Supp. 441, 445 (1983),

aff'd 724 F.2d 121 (Fed. Cir. 1984) (holding that a premature protest "may not serve as a basis for invoking this court's jurisdiction under 28 U.S.C. § 1581(a)"); *United States v. E.H. Bailey & Co.*, 32 C.C.P.A. 89, 98 (1944) (ruling that "[a] protest is not sufficient … which alleges merely that the amount of duties assessed by the collector is erroneous," because "[s]uch a blanket form, if sufficient, could be used in every case"). Had A362 filed its Protests within 180 days of the liquidations, or indeed filed them at any time prior to the issuance of the Amended Final Results in June 2019, A362 would have been unable to identify CBP's erroneous actions as mandated by 19 C.F.R. § 174.1 and would have been without any legitimate legal basis to protest the amount of duties withheld.

a. If A362's Protests are untimely when measured against the date of liquidation, supplemental jurisdiction under 28 U.S.C. § 1581(i) is appropriate

A362 filed its Protests as soon as it had a legally-sustainable basis to do so. If, as Respondent and the lower courts suggest, A362's Protests are untimely when measured under the date of liquidation, the relief offered under 28 U.S.C. § 1581(a) is manifestly inadequate and supplemental jurisdiction before the CIT under 28 U.S.C. § 1581(i) is appropriate.

28 U.S.C. § 1581(i) jurisdiction is available only when the potential avenues for jurisdiction under § 1581(a) are "manifestly unreasonable." Essentially, this means that if an importer could have availed itself to § 1581(a) jurisdiction in the past, but failed to

do so, an importer is not permitted to invoke § 1581(i) jurisdiction. *See, e.g., Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008) (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1328 (Fed. Cir. 2006))(explaining that, for a protest remedy to be manifestly unreasonable, it must be an "exercise in futility, or 'incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'").

The Federal Circuit held that, because A362 could have obtained an adequate remedy by timely filing a protest of the "premature" liquidations, A362 could not turn to jurisdiction under 28 U.S.C. § 1581(i). However, this analysis again assumes A362 had a valid legal basis to protest the liquidations within the 180 days following liquidation. As discussed *supra*, any protest during the 180-day period following the liquidation would have been a legally unsustainable, sham protest. A362 filed a protest as soon as it had a sustainable legal basis – the "justification for the objection" required by 19 C.F.R. § 174.13(a)(6) – to protest the entries. Here, the basis for that process did not arise until after the filing deadline passed. As such, A362's compliance with 28 U.S.C. § 1581(a) is "incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain'" and as such it is a "manifestly inadequate remedy, which allows the CIT to utilize its residual jurisdiction under 28 U.S.C. § 1581(i). *See Hartford*, 544 F.3d at 1294 (emphasis omitted).

3. *Carbon Activated* and *Juice Farms* are inapposite.

Respondent and the Federal Circuit place significant reliance on *Carbon Activated Corp. v. United States* and *Juice Farms, Inc. v. United States* in their effort to curtail one of the statutory mechanisms that should have been available for A362 to obtain review of Respondent's failure to issue a required and significant duty refund. *See Carbon Activated Corp. v. United States*, 791 F.3d 1312 (Fed. Cir. 2015); *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). However, what these arguments confuse is the fact that the importers in *Juice Farms* and *Carbon Activated* each had a basis to protest ***at the time of liquidation***, whereas A362's right to protest only arose subsequent to the CBP's decision not to act following the issuance of the Amended Final Results and its explicit implementation instructions.

In *Juice Farms*, Commerce suspended liquidation of an importer's entries pending an administrative review, but Customs liquidated the entries in violation of that suspension. 68 F.3d at 1345. Years later, the importer learned of the improper liquidation and protested the liquidations. *Id.* Given the timing, CBP denied the protests as untimely. *Id.* Thus, the question in *Juice Farms* was whether the limitations period set forth in 19 U.S.C. § 1514(a) applied equally to legal and illegal liquidations and whether the bulletin notices adequately informed the importer of the liquidations. *Id.* at 1346.

Juice Farms is simply not relevant here, because A362's complaint has never been that the liquidations

were improper or that A362 had insufficient notice of the liquidations. Here, there was no suspension, so A362 had nothing to protest when liquidation occurred, whereas the importer in *Juice Farms* could have protested the illegal liquidation of its entries when CBP liquidated the entries despite Commerce's suspension.

Carbon Activated is factually similar to *Juice Farms*, and similarly inapposite to the issues presented here. In the *Carbon Activated* case, Commerce instructed CBP to suspend liquidation of entries imported during the period under review. *See Carbon Activated Corp. v. United States*, 791 F.3d 1312, 1313 (Fed. Cir. 2015). Despite this explicit instruction, CBP liquidated the entries under review. *Id.* Because the importer did not file a protest of the liquidation within 180 days, the Federal Circuit agreed the CIT lacked jurisdiction to hear the importer's appeal of CBP's actions. *Id.* at 1317. Again, like in *Juice Farms,* the importer had a basis to protest the liquidation of the entries, because that liquidation occurred in direct contravention to a Commerce directive. *Id.* at 1315 (holding that "[i]f, however, Customs disregards Commerce's suspension instructions and liquidates the entries, an importer may protest the liquidation pursuant to 19 U.S.C. § 1514"). That is not analogous to the case at hand where there was no directive to suspend A362's liquidations, and in the 180 days that followed the liquidations, A362 had no legal basis to argue that the fact liquidation occurred was improper.

CONCLUSION

For the reasons in this Reply Brief, and those in A362's original Petition for Writ of *Certiorari*, the Court should grant review in this case.

Respectfully Submitted,

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