



# What's News in Tax

Analysis that matters from Washington National Tax

## CIT Issues Decision in Section 301 Cases

April 6, 2022

by Luis (Lou) Abad and Donald Hok, Washington National Tax

The Court of International Trade found that tariffs on Chinese imports were valid, meaning that duties paid will likely not be refunded to importers if the USTR can remedy procedural deficiencies.

In a highly anticipated decision involving more than 3,600 lawsuits, the U.S. Court of International Trade held in *In Re Section 301 Cases*, Slip Op. 22-32 (Ct. Intl. Trade 2022) that the United States Trade Representative (“USTR”) had the authority to impose over \$200 billion in tariffs on imports of Chinese-origin goods (the “List 3 and 4A” section 301 tariffs). However, the court found that the USTR failed to respond adequately to public comments during the notice and comment rulemaking process and remanded the cases to the USTR for further reconsideration and explanation regarding the USTR’s rationale for imposing the List 3 and 4A tariffs, as well as the reasons for placing or removing products from the lists. Below we summarize the CIT’s decision, which can be accessed [here](#).

### Lists 3 and 4A Are Judicially Reviewable

The CIT rejected both of the government’s claims that the modification action to impose the List 3 and 4A tariffs was not reviewable by the judiciary. Specifically, the CIT determined that List 3 and 4A implicate an agency action rather than a non-reviewable presidential action and were thus reviewable under the Administrative Procedures Act (“APA”). The CIT found that this case involved authority delegated by Congress to an agency—in this case, the USTR—to modify section 301 actions.

The CIT also rejected the government’s claim that the plaintiff’s claims are non-justiciable pursuant to the political question doctrine. The CIT determined that it was not reviewing the USTR’s discretionary decisions regarding the appropriateness of certain actions pursuant to section 301, but rather was

reviewing whether the USTR's conduct (i.e., its modification action) burdened U.S. commerce in a legally relevant way.

### USTR Properly Exercised Its Authority

The CIT also addressed the substantive argument of whether the USTR exceeded its modification authority. Central to this litigation, section 307 of the Trade Act governs the modification or termination of the USTR's actions taken pursuant to section 301. The statute provides, *inter alia*:

The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—

- (A) any of the conditions described in section 2411(a)(2) of this title exist,
- (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are ***the subject of such action*** has increased or decreased, or
- (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.<sup>1</sup>

The CIT found the statute was unambiguous and that List 3 and 4A were properly promulgated by the USTR pursuant to section 307(a)(1)(B). In interpreting the phrase “the subject of such action,” the CIT found a clear link between the broadly defined subject of the original section 301 action (i.e., unfair trade acts, policies and practices) and China's retaliation to List 1 and 2 by imposing its own tariffs on U.S. goods, which was the subject of the modification action (i.e., List 3 and 4A). Thus, both were the “subject of” the section 301 action. The CIT found that the fear of retaliatory action from China by individual companies that experienced China's unfair trade practices was within the scope of the practices that were the subject of the original section 301 actions.

### Foreign Affairs Exemption Did Not Apply

The CIT also found that the foreign affairs exemption of the APA, which exempts the agency from notice and comment procedures, did not apply. The USTR's failure to invoke the foreign affairs exemption in a final rule coupled with the fact that the USTR conducted its section 301 processes consistent with Notice of Proposed Rulemaking and comments procedures suggested that the USTR did not intend to invoke the exemption. Moreover, the government did not point to any “definitely undesirable international consequences” to trigger the foreign affairs exemption.

### Case Remanded to USTR

The CIT then focused on the substance of the APA claim and found that the USTR failed to respond adequately to comments received in accordance with the APA. The USTR's statements failed to apprise the court how the USTR came to the decisions underlying the specific section 301 tariff actions

<sup>1</sup> § 2417(a)(1). *Emphasis added.*

it took. However, rather than vacating the USTR's section 301 action, the CIT remanded the case to the USTR to reconsider or further explain its actions consistent with the CIT's opinion (i.e., to correct the administrative record).

### Plaintiff's Remaining Arguments Rejected

The CIT also rejected other plaintiff arguments regarding the extent of notice provided with respect to List 3, the deadlines set for the submission of comments and the permissible scope of those comments, as well as the amount of the USTR interested parties allowed to testify at the hearings. The court stated that none of these arguments presented additional grounds for remand.

The USTR has until June 30, 2022, to file its remand results. It is unlikely, however, that the USTR will significantly alter Lists 3 and 4A based on a review of the public comments alone. As a result, absent an appeal of the CIT's decision by either party, the Lists 3 and 4A section 301 tariffs, which generally range from 7.5 to 25 percent, will largely remain as originally imposed, continuing to significantly affect U.S. importers by raising the costs of both imported finished goods and raw materials. While this decision is undoubtedly disappointing to those hoping that the USTR's actions imposing tariffs under Lists 3 and 4A would be vacated resulting in a refund of those tariffs, KPMG's Trade & Customs practice can help U.S. importers explore opportunities to blunt the impact of section 301 tariffs through potential duty mitigation strategies, including how to reduce the customs value (or tariff basis) of imported goods, applying for section 301 exclusions or duty drawback, and the use of the de minimis value exception. For more information on tariff mitigation services, check [KPMG's Tariff Recovery & Mitigation page](#).

□ □ □ □

The information in this article is not intended to be "written advice concerning one or more federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230 because the content is issued for general informational purposes only. The information contained in this article is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author or authors only, and does not necessarily represent the views or professional advice of KPMG LLP.