NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

AD HOC SHRIMP TRADE ACTION COMMITTEE,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellee

HILLTOP INTERNATIONAL, OCEAN DUKE CORP.,
Defendants-Appellants

2014-1514

Appeal from the United States Court of International Trade in No. 1:11-cv-00335-DCP, Senior Judge Donald C. Pogue.

AD HOC SHRIMP TRADE ACTION COMMITTEE,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellee

HILLTOP INTERNATIONAL, OCEAN DUKE CORP.,
Defendants-Appellants

2014-1647

Appeal from the United States Court of International Trade in No. 1:10-cv-00275-DCP, Senior Judge Donald C. Pogue.

Before REYNA, CLEVENGER, and WALLACH, *Circuit Judges.*

PER CURIAM.

ORDER

On July 10, 2015, counsel for plaintiff-appellee Ad Hoc Shrimp Trade Action Committee filed a notice of supplemental authority, advising the court that the Trade Preferences Extension Act of 2015 recently amended 19 U.S.C. § 1677e, the statute at the center of this appeal, and that the amended statute "relates to the statutory corroboration requirements" associated with the appeal. Appellee's Notice of Suppl. Authority at 2 (citing Pub. L. No. 114-27, § 502, 129 Stat. 362, 383–84 (2015)). On August 10, 2015, defendants-appellants Hilltop International and Ocean Duke Corporation filed their own notice of supplemental authority, informing the court that the U.S. Department of Commerce ("Commerce") recently issued an interpretive rule that "clearly demonstrates that the [amended statute] does not apply to" the instant appeal. Appellants' Notice of Suppl. Authority at 1 (citing *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Prefer-*

ences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep't of Commerce Aug. 6, 2015) ("*Commerce Notice*")). To date, defendant-appellee the United States has not commented on these submissions or the recently-amended statute.

The court must decide whether the amended statute applies to the past conduct (and, thus, past entries) at issue in this appeal. "'[A] statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Fernandez–Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *United States v. St. Louis, S.F. & Tex. Ry. Co.*, 270 U.S. 1, 3 (1926)). The court must first assess "'whether Congress has expressly prescribed the statute's proper reach,' . . . and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying 'our normal rules of construction.'" *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). "If that effort fails, we ask whether applying the statute . . . would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment.'" *Id.* (quoting *Landgraf*, 511 U.S. at 278) (brackets omitted).

The amended statute does not state explicitly that it is retroactive or that it applies to final administrative determinations that remain subject to judicial review. However, applying normal rules of statutory construction, it appears that Congress intended amended 19 U.S.C. § 1677e to have prospective effect. Unlike with amended 19 U.S.C. § 1677e, Congress explicitly stated that other provisions in the Trade Preferences Extension Act of 2015 have retroactive effect. *See, e.g.*, Pub. L. No. 114-27, § 201(b)(2), 129 Stat. 362, 371 (2015) (providing for retroactive application of the generalized system of preferences to certain entries entered prior to the date of enactment); *see also id.* at §§ 405, 407(g), 129 Stat. at 377–79, 383

(stating that the reauthorized trade adjustment assistance laws apply to certification petitions filed prior to the date of enactment). That juxtaposition implies that, had Congress wanted amended 19 U.S.C. § 1677e to have retroactive effect or to apply to pending appeals, it would have said so. *See, e.g.*, *Lindh*, 521 U.S. at 327–30 (holding that, if legislation includes a provision that expressly applies to cases pending on the date of enactment and another provision that does not, the construction "indicat[es] implicitly" that the latter applies only to cases filed after the date of enactment); *United States v. Zacks*, 375 U.S. 59, 65–67 (1963) (discussing similar); *cf.* Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, §§ 1(b), 2(b), 126 Stat. 265, 265–67 (2012) (explicitly providing retroactive and prospective effective dates for various provisions within same enactment). The inference finds further support in Congress's simultaneous enactment of the provisions with different effective dates. *Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . . .").

The court acknowledges that Commerce reached a different conclusion on this question when it issued the *Commerce Notice*, an interpretive rule that receives a degree of deference dependent upon its subject. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006). However, based on normal rules of statutory construction, it may be that no deference is warranted. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." (citation omitted)); *see also Jeudy v. Holder*, 768 F.3d 595, 599 (7th Cir. 2014) ("There are exceptions to the *Chevron* rule, howev-

er, for the simple reason that some questions of law do not depend upon agency expertise for their resolution." (citation and internal quotation marks omitted)). It could be that Commerce reached its conclusion because it has not considered the application of the statutory construction rules outlined above. *See Commerce Notice*, 80 Fed. Reg. at 46,793 (discussing legal framework without mentioning relevance of rules of statutory construction).

Before it reaches a decision on this question, the court has determined that it would benefit from additional briefing by the parties. In particular, parties are directed to file a response addressing the following questions:

(1) Whether the normal rules of statutory construction warrant finding that amended 19 U.S.C. § 1677e has prospective effect?

(2) If the normal rules of statutory construction do not necessitate a particular result, whether Commerce's recent interpretive rule deserves deference and, if so, what degree of deference should be afforded?

Accordingly, upon consideration thereof,

IT IS ORDERED THAT:

The parties are directed to file a response to this Order no later than 5:00 p.m. on August 18, 2015. Each response should not exceed 10 pages. No opportunity for rebuttal will be given.

FOR THE COURT

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court