

Global Trade Report

NEVILLE PETERSON LLP

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COURTS, CONGRESS AND CBP ACTIVE ON TRADE FRONT

CIT Throws out Challenge to “Festive Article” Tariffs

The United States Court of International Trade (CIT) has rejected an inventive but flawed challenge to recent changes in the Harmonized Tariff Schedule of the United States (HTS) which resulted in duty increases for a variety of festive goods.

In *Michael Simon Design Inc. v. United States*, Slip Op. 09-75 (July 20, 2009), various importers challenged 2007 amendments to the HTS which precluded certain functional articles and textile goods from being considered “festive”. The changes were first adopted by the Brussels-based World Customs Organization (WCO), and were implemented in the United States by a Presidential Proclamation which followed a recommendation from the United States International Trade Commission (ITC).

The lawsuit, filed under the CIT’s 28 U.S.C. §1581(i) “residual” jurisdiction, asserted that the tariff change violated a requirement that the ITC follow “substantial rate neutrality” in proposing HTS amendments.

The CIT, per Judge Judith Barzilay, dismissed the case, arguing that it did not have subject matter jurisdiction over it. First, the Court held, the ITC’s recommendation to the President was not a final agency action of the kind which could be contested under the Administrative Procedure Act (APA). Second, the Court held, Presidential decisions, such as the implementing Proclamation, are not subject to challenge under the APA.

Having concluded that it lacked jurisdiction

to entertain the case, the Court was not forced to address the problematic issue of whether “substantial rate neutrality” was a standard capable of being violated, or just a guideline. Another problem with the case was that the HTS change being challenged did not change rates, but merely interpreted certain words in the tariff.

Copies of the Michael Simon design decision are available on the CIT’s website by [clicking here](#).

Customs Announces “10+2” Penalty Guidelines

Moving forward with its implementation of the Importer Security Filing (ISF) requirements imposed by the Safe Harbors Act – more commonly known as “10+2” – United States Customs and Border Protection (CBP) has published penalty guidelines applicable to importers who fail to file ISF messages timely. These guidelines are effective July 17, 2009, although Customs does not plan full enforcement of ISF requirements until January 2010.

Customs will employ the guidelines in the assessment and cancellation of claims for liquidated damages incurred by ISF importers and carriers who fail to submit required advance data, or who do not file timely.

The Guidelines specify, where an ISF filer receives information from another person, it will be allowed to file data based on what the submitting party reasonably believes to be true, assuming the party used normal commercial practices to collect the data and attempted to verify it. In addition to the assessment of liquidated damages failure to provided required

advance electronic cargo information in the time period and manner prescribed by the Customs regulations, Customs may issue a do not load (DNL) directive to the carrier, deny the carrier's preliminary entry-permit/special license to unlade and/or assess other applicable statutory penalties. Customs may also withhold the release or transfer of cargo until it receives and can review the required information.

CBP also reserves the right to limit the permit to unlade with respect to any cargo for which no ISF has been filed, and, if such cargo is unladen without permission, it may be subject to seizure. All seizures will be approved by CBP Headquarters.

Liquidated damages for failure to file the ISF cannot be assessed unless a Customs ISF bond is in place.

Late-filed ISF transmissions may result in a claim for liquidated damages, issued by Port Directors of Customs, in the amount of \$5,000 per late ISF. The same claim amount will apply to ISFs filed with inaccurate information. CBP will consider the transmission closest in time to, but prior to, 24 hours prior to lading, prior to lading, or 24 hours prior to arrival, whichever is applicable. This suggests that last minute pre-arrival corrections to ISF data will not be given any weight.

If an importer fails to withdraw an ISF as required by 19 CFR 149.2(e), Port Directors may assess a claim for liquidated damages against the party in the amount of \$5,000.

The Guidelines also deal with cancellation and mitigation of liquidated damages claims.

For the first violation respecting a late or inaccurate ISF or ISF update, the liquidated damages claim may be cancelled upon payment of an amount between \$1,000 and \$2,000, depending on the presence of mitigating or aggravating factors, if CBP determines that law enforcement goals were not compromised by the violation.

For subsequent liquidated damages claims, CBP will cancel the claim upon payment of an amount not less than \$2,500 if CBP determines that law enforcement goals were not compromised by the violation.

No relief will be granted if CBP

determines that law enforcement goals were compromised by the violation.

CBP will also consider mitigating, aggravating, and extraordinary factors, in determining the final assessed claim for liquidated damages or penalties. Mitigating factors include evidence of progress in the implementation of the ISF requirement during the flexible enforcement period (i.e., January 26, 2009 through January 26, 2010), a small number of violations compared to the number of shipments for which ISFs were required, Tier 2 or Tier 3 C-TPAT status (allows C-TPAT members to receive up to 50% additional mitigation, demonstrated remedial action to prevent future violations, and factors beyond the filer's control (acts of God, reasonable belief in accuracy of data provided by another)

Aggravating factors include lack of cooperation with CBP, impeding CBP activity, evidence of smuggling, multiple errors on the ISF, or a rising error rates.

Penalties may be assessed under 19 USC 1595a(b) and other laws for serious and repetitive violations.

Copies of the Guidelines are available from our offices.

Retaliatory Tariffs Lapsed, CIT Rules

Retaliatory tariffs of 100% ad valorem, imposed on European Union products as a result of the so-called "Beef Hormone" trade dispute lapsed in 2007, the United States Court of International Trade recently ruled. As a result, importers who paid these tariffs, on products such as Roquefort cheeses, mustard seed, crispbreads and meat products have an opportunity to claim refunds.

In *Gilda Industries Inc. v. United States*, Slip Op. 09-58 (June 16, 2009), Senior Judge R. Kenton Musgrave held that the United States Trade Representative had failed to solicit and receive an expression of interest from domestic interested parties in continuing the sanctions. As a result, the sanctions terminated in July, 2007 by operation of law.

In reaching this determination, the Court held that the "automatic termination" provisions set

out in 19 U.S.C. §2417(c) applied to each attempted extension of tariff retaliations, not just the first extension, and rejected the government's argument that the requirement was subject to "equitable tolling". The Court also held that a tardy attempt by the USTR to seek a request for extension from the domestic beef industry was ineffective.

In the wake of the Gilda Industries decision, a number of importers of cheese, mustard, and other affected commodities from the EU have filed their own CIT cases, seeking refunds of 100% retaliatory tariffs which they have paid.

Copies of the Gilda Industries decision are available from the CIT's website ([click here](#)), and information concerning how affected importers can submit their own claims for duty refunds is available from our firm.

Congress to Take Up MTB After Summer Recess

Congress has indicated that it will take up the Miscellaneous Tariff Bill (MTB) after the summer recess – a welcome indication to firms facing the expiration of temporary duty suspension or reduction measures at the end of 2009.

The MTB – a collection of minor tariff measures – typically contains temporary suspensions of tariff rates, technical corrections to trade statutes, or special relief legislation to address particular situations. Congress considered a package of miscellaneous tariff bills in 2008, but recessed without enacting any such measures.

Congressional staffers have indicated that bills which were the subject of Committee comment requests in 2008 will likely be introduced as an "omnibus measure" and prioritized for enactment. However, most temporary duty suspensions currently in effect are scheduled to expire December 31, 2009, and beneficiaries of most of those measures are scrambling to have Congressional representatives introduce bills to extend those measures for another three years.

Companies seeking new tariff suspensions or technical corrections will need to act quickly if

they want Congress to consider these measures during the current session.

Switchblade Knife Proposals Draw Congressional Response

Customs and Border Protection efforts to expand the types of knives which can be excluded from entry pursuant to the Switchblade Knife Act have drawn a Congressional response, and the legislature appears to be ready to amend the half-century old statute.

The controversy began some weeks ago, when Customs proposed revoking a large number of prior rulings and holding, in effect, that all knives with spring- and release-assisted opening mechanisms that require minimal "human manipulation" in order to instantly spring the blades to the fully open and locked position would be considered "switchblade knives", subject to exclusion from entry. Members of the Senate, led by Sen. John Cornyn (R-TX), responded by introducing an amendment to FY 2010 Department of Homeland Security appropriations legislation to state explicitly that assisted-opening pocketknives are exempt from regulation under the Switchblade Knife Act.

H.R. 2892, as passed by the Senate, would amend 15 U.S.C. §1244 by adding a new exception to the penalty provisions of the Switchblade Knife Act for knives that contain a spring, detent, or other mechanism designed to create a bias toward closure of the blade and that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure to assist in opening the knife.

Copies of the legislation are available from the Government Printing Office.

Customs, DHS in Push to Enforce Agency "Intellectual Property"

Customs brokers, freight forwarders and others involved in international trade have recently begun getting notices from Customs asking them to "cease and desist" from using, on

their websites and other advertising, DHS or Customs symbols, names and phrases, and threatening them with penalties if they fail to do so. The warnings have extended to such seemingly innocuous website content as photographs showing Customs officers performing their jobs, in settings in which Customs symbols and badges are visible.

Customs is threatening penalties under 31 U.S.C. §333(a), which prohibits any person from using an agency name, symbol, insignia or the like in a way creating the “false impression” that a government agency approves or endorses the service being advertised. The statute authorizes civil penalties for violators, and, in extreme cases (e.g., forging government letterhead) criminal sanctions.

The Customs enforcement blitz follows a recent posting to the Department of Homeland Security (DHS) website, in which the agency claims ownership of trademarks in various names and phrases (such as C-TPAT and “Customs-Trade Partnership Against Terrorism”), and threatens penalties on persons who use these phrases in advertising without approval. [One cannot help but notice that while C-TPAT is widely advertised as a “partnership” between the agency and the public, the public is not a partner in the ownership of the intellectual property of the program!]

It is questionable whether CBP could successfully defend its right to all the trademarks it claims. However, the agency seems apparently serious about enforcement efforts, which creates a number of issues for the trade community.

For instance, licensed Customs brokers surely must be able to advertise that they are licensed by Customs to provide services for others, and that they hold permits to transact Customs business in certain districts. Similarly, Customs has not only permitted but in some cases encouraged the use of C-TPAT and program symbols by participants in that program.

DHS has procedures whereby firms can seek permission to use agency names, symbols and other intellectual property in advertising. Our firm is happy to assist companies in seeking such approval.

Customs Ceases Tracking of Chinese Textiles, Apparel

United States Customs and Border Protection (CBP) recently announced that it has terminated its Electronic Visa Verification System (ELVIS) for textile and apparel products from the People’s Republic of China and ceased tracking textile products exported from China prior to December 31, 2008.

United States “safeguard” quotas on a broad range of textile and apparel products from China terminated for goods exported after December 31, 2008. At that time, the Committee for the Implementation of Textile Agreements (CITA) announced procedures for the “staged” admission of Chinese textile products which had been exported from China before that date, but had been excluded from the US for exceeding quota limits. Furthermore, the US still required a visa for textile and apparel items exported from China in 2008, even if those goods had been stored in other countries, and did not reach the United States until after quotas had expired.

With the termination of Elvis and quota monitoring, Chinese textiles may now enter the United States without restrictions.

New Dumping, CVD Petitions Target Ribbons, Bricks

Despite the removal of quotas from Chinese textiles, two new trade relief petitions target textile products from China, and one includes products of Taiwan as well.

Berwick Industries, Inc., of Berwick Pennsylvania, recently filed a petition for the imposition of antidumping and countervailing duties on imports of Narrow Woven Ribbons, With Woven Selvedges, from the Peoples’ Republic of China. The company also filed a petition seeking antidumping duties on such ribbons imported from Taiwan.

A memorandum describing the petition in detail is available from our website.

Meanwhile an antidumping petition against Woven Electric Blankets from the People’s Republic of China was recently filed by Jonden, Inc., of Florida.

Ohio-based Resco, Inc. recently filed a

petition seeking the imposition of antidumping and countervailing duties on imports of Magnesita Carbon Bricks from China and Mexico. These refractory bricks are used in steel mills and similar industrial installations.

Copies of the petitions, and additional information, are available from our office.

CIT Upholds Dumping Duties on “Mixed Wax” Candles

In a controversial decision, the United States Court of International Trade has upheld a Commerce Department “anticircumvention” determination which subjected “mixed wax” candles, containing 50% or more by weight of palm or other vegetable oils, to the longstanding antidumping duty order against Petroleum Wax Candles from the People’s Republic of China.

Judge Leo M. Gordon’s decision in *Target Corp. v. United States*, Slip Op. 09-59 (June 17, 2009) ([click here for decision](#)) is the latest development in a hotly-contested and long fought battle between the American Candle Association and importers of the popular mixed-wax candles.

The 20-year old antidumping order on Petroleum Wax Candles from China has by its terms been limited to candles containing 50% or more by weight of paraffin wax. In response, manufacturers and importers switched to mixed wax candles composed primarily of vegetable wax, mixed with minor amounts of paraffin

ITC Makes Affirmative Decision in Section 421 Probe of Chinese Tires

The United States International Trade Commission (ITC), by a 4-2 vote, has ruled that interim import measures should be put in place to protect United States manufacturers from “market disruption” by reason of increased imports of Consumer Tires from the People’s Republic of China. The Commissioners held that increased imports of automobile and light truck tires from China have disrupted the United States market for such tires, requiring some assistance to the US tire building industry.

The Commissioners proposed increased

waxes. On multiple occasions, Commerce held that these mixed wax candles were outside the scope of the dumping order.

In 2005, however, the National Candle Association petitioned Commerce to conduct an “anticircumvention” inquiry, claiming that mixed wax candles were “later developed products” which had been introduced in order to circumvent the dumping order, and should be brought under the order’s coverage. Importers and foreign producers argued that mixed wax candles were an entirely different “class or kind” of merchandise, and that a new antidumping petition and investigation would be needed to subject them to antidumping duties. After a year-long investigation, Commerce concurred, and extended the order to mixed wax candles.

Commerce held that mixed wax candles could be viewed as “later developed merchandise” either on the theory that they represented a new breakthrough in technology or that they were goods not in the marketplace when the antidumping petition was filed and had been introduced into the market to replace paraffin wax candles. The CIT did not find favor with the former argument, but sustained Commerce’s decision, following as remand, on the latter.

The case is viewed as a dangerous precedent which could lead to subjecting entirely new classes of goods to antidumping orders without requiring a full-fledged dumping investigation.

tariffs on Chinese tires for a three year period, with tariffs of 55% in the first year, 45% in the second and 35% in the third.

The ultimate decision on remedy rests with the President, who may impose higher tariffs, quotas, negotiate an Orderly Marketing Agreement to limit exports to the United States, or make Trade Adjustment Assistance available to affected workers and communities. The President may also elect not to impose any remedy at all if he concludes such option would be in the national economic interest, or compelled by national security concerns..

The United States Trade Representative is soliciting comments on what measures, if any, are necessary or appropriate to safeguard the tire industry. Comments are due by July 27, 2009,

and a hearing will be held, if requested, on August 7, 2009.

Copies of the ITC's decision and staff report are available from our office.

CBP Auditing Harbor Taxes on Domestic Shipments

Thanks to a new Army Corps of Engineers database that records additional information concerning domestic cargo vessel and barge movements, United States Customs and Border Protection has recently undertaken a program of auditing shippers to ensure payments of the Harbor Maintenance Tax (HMT) on domestic shipments of commercial cargo by water.

The HMT is assessed at the rate of 0.125% ad valorem on certain imported and domestic cargo being laden or unladen at U.S. port facilities, as well as goods arriving by water and admitted to Foreign Trade Zones. The HMT on exports was struck down as unconstitutional by the United States Supreme Court in 1998.

In the case of imports, the HMT is collected with the Customs entry document. In other cases, a quarterly vessel movement report and tax return must be filed. Recently, CBP's Finance Center in Indianapolis began mailing letters to companies whose names appeared as shippers on the Corps of Engineers database, but who had not filed quarterly HMT returns, asking them to file returns and pay taxes owed.

While the HMT applies to certain domestic movements of cargo by water, it does not apply to certain movements involving Alaska, Hawaii, Puerto Rico or United States insular possessions, nor to intraport or intracoastal waterway movements of cargo.

Additional HMT information and assistance is available from our offices.

OFAC Adopts New Sanctions Programs

The Office of Foreign Assets Control (OFAC) has imposed three new sanctions programs that

expand the list of parties identified on the "Specially Designated Nationals" (SDN) List. The new programs address parties that are either identified as Weapons of Mass Destruction Proliferators, engaged in military activities in the Democratic Republic of the Congo, or undermining the peace process in the Darfur region of Sudan. Such parties are subject to the same sanctions applied to other SDNs: United States persons are prohibited from providing any funds, goods or services to them, and cannot receive any funds, goods or services from them. In addition, financial transactions with them are blocked.

Intent Required for Export Conviction, Court Rules

A defendant must have intent to commit a violation of the export control laws in order to be convicted for violations of the Arms Export Control Act, according to the U.S. Court of Appeals for the Seventh Circuit.

In *United States v. Pulungan*, No. 08-3000 (June 15, 2009), the Circuit Court reversed the conviction of a man convicted of illegally exporting riflescopes from the United States to Indonesia by way of Saudi Arabia.

Pulungan purchased riflescopes from an online retailer, who indicated that it only sold the scopes in the United States. Believing – incorrectly – that there was an embargo on exports of goods from the U.S. to Indonesia, he arranged for the scopes to be transhipped to Saudi Arabia. He was convicted of exporting "[r]iflescopes manufactured to military specifications" without a State Department license.

On appeal, the Seventh Circuit threw out the conviction, holding that the government had not proven that the exported scopes were "defense articles". Although a witness from State's Directorate of Defense Trade Controls (DDTC) testified that the goods were "defense articles", made to military specifications, he declined to identify the specification or state why he thought

the exported scopes were made to those specifications. While courts may not review the propriety of an export classification in the civil realm, the Seventh Circuit ruled, an unexplained government assertion that particular goods were defense articles was too vague to support a criminal conviction. “A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian regimes.”

Nor the Court ruled, could the defendant be expected to infer that the riflescopes were defense articles based on the fact that the websites they were purchased from advertised that the only delivered in the United States. A broad range of considerations other than export controls, such as patent or trademark considerations, geographical limits in distribution contracts and the like, could have explained this limitation.

Finally, the Court held that, since there was no trade embargo to Indonesia at the time the exports were made, the defendant could not have been convicted of intent to export without a license. There was no reason for the defendant to believe the scopes were made to military specifications. Moreover, there was no license required for the planned exports to Indonesia.

Copies of the decision are available from our offices.

CPSC Issues Tracking Label Guidelines under CPSIA

The Consumer Product Safety Commission (CPSC) has issued a Guideline concerning “tracking label” requirements for children’s products pursuant to Section 103(a) of the Consumer Product Safety Improvement Act. Stating that the purpose of Section 103(a) “is not to impose significant additional burdens on manufacturers who already make available the required information to their products, but to bring those who do not up to a higher standard, the agency has set out a relatively flexible rule for manufacturers and importers to communicate required product data.

The new labeling requirements apply only to children’s articles made on or after April 14, 2009. There is no retroactivity. CPSC acknowledges that for a period after August 14, 2009, “[T]here will be products on sale that are in compliance with this Section because they meet the new requirements and products that are in compliance because they were manufactured before August 14, 2009.”

CPSC has also indicated that there will probably be a phased-in “education” period, during which it will issue warnings where goods lack tracking data rather than impose fines.

CPSC has also advised that manufacturers and importers are responsible for compliance with the tracking label requirements.

Although CPSIA Section 103(a) refers to “tracking labels”, CPSC has indicated that the real focus of the legislation is on “distinguishing marks”. Accordingly, manufacturers and importers “should look at the totality of the information permanently marked on the product and packaging and not interpret “label” to mean a singular collection of information in one discrete location. Companies can place the required information at various locations on the product.

Three basic elements are required of all manufacturers’ labeling: (1) location of production, (2) date of production and (3) cohort information (batch, run numbers, etc). The information should “allow the manufacturer to determine the specific source of each product.” Manufacturers are expected to depart from these requirements “only for considered and definable reasons”. Each manufacturer is responsible for making a “reasonable judgment” about what information should be marked on the product and its packaging, and what information is available, based on the nature of the manufacturer’s business.

The CPSC interprets Section 103 of the CPSIA to require that labeling information appear both on the packaging and on the product itself. In some cases, however, marking the product itself may be impracticable. These include the following situations, so exceptions are provided. Where the product is

typically sold in pairs or in sets – as, for instance, in the case of shoes – CPSC indicates that only one item of a pair, or one integral item of the set, needs to be marked with the required tracking label information. Items which can be separated and sold separately should be separately marked.

The CPSC acknowledges that there is some flexibility in determining dates of manufacture and required cohort information.

NEVILLE PETERSON LLP

For over two decades, Neville Peterson LLP has been one of the United States' leading specialty law firms concentrating exclusively in international trade and Customs matters. With offices in New York City and Washington, D.C., and affiliated offices abroad, the firm has provided counseling and representation to clients before Customs authorities, administrative tribunals and courts around the world.

The firm also has extensive experience in antidumping, countervailing duty and trade relief proceedings, as well as a full-range export controls practice.

In recent years, Neville Peterson LLP has also represented clients on the forefront of international intellectual property issues.

The firm has an extensive litigation practice, and regularly appears before the United States Court of International Trade, the Court of Appeals for the Federal Circuit, Federal District Courts as well as foreign tribunals.

NEVILLE PETERSON LLP

17 State St. 1400 16th St., N.W.
New York, NY 10004 Washington DC 20036
212 635-2730 202 861-2959

www.npwtradelaw.com
