

CUSTOMS-NOTES

Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

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CLASSIFYING MERCHANDISE UNDER THE HARMONIZED TARIFF SCHEDULES

Knowing how to correctly classify merchandise imported into the United States has taken on new significance with the passage of the North American Free Trade Implementation Act (NAFTIA) November of 1993. Contained within its provisions is the Customs Modernization and Informed Compliance Act (“the Mod Act”).

The Mod Act alters the basic relationship between Customs and the importer by shifting from Customs to the importer the legal responsibility for determining the correct value, classification, and rate of duty applicable to imported goods.¹

ACTING WITH REASONABLE CARE

Section 484 of the Tariff Act of 1930, as amended by the NAFTA now provides that

¹ Samuel H. Banks, Acting Deputy Commissioner of Customs, *An Overview of Customs Legislated Modernization*, Global Trade Talk, Vol. 4, No. 3 (1994).

the “importer of record”² shall use “*reasonable care*” when:

- (a) making entry and providing information necessary for Customs to determine whether the goods may be released;
- (b) completing the entry with the correct declared value, classification and rate of duty applicable to the goods and,
- (c) providing any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine

² Use of the term “importer of record” has special legal significance in 1484 and liability for failure to use “reasonable care” will fall upon a licensed Customs Broker who acts as “importer of record” for consignees who do not qualify as the “importer of record” because they do not own the merchandise, or otherwise choose not to accept this obligation. Brokers who act indiscriminately as an “importer of record” for entry purposes for their clients will be increasing their exposure to fines if they fail to take appropriate steps to ensure that reasonable care has been exercised.

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whether all other requirements of law have been met.³

Under the **reasonable care** standard, parties engaged in importing are presumed to be knowledgeable about customs regulations, rulings, interpretations and publications, as well as statutes, tariff schedules (including explanatory notes), and judicial decisions which govern their import transactions.

“The importer of record is responsible for knowing what he/she imports and the terms of the transaction, and bears a legal responsibility for using reasonable care to correctly enter the merchandise.” Customs Service Discussion Draft of the Reasonable Care Standard, dated January 22, 1996.

If the party is not experienced in customs matters, it is expected that it will turn to Customs for advice regarding the transaction, or retain the services of a licensed customs broker, attorney or other acknowledged expert who has the requisite experience and knowledge of customs laws, regulations and procedures.⁴ The failure to exercise “reasonable care” when carrying out its responsibilities will subject the importer of record to civil penalties under 19 U.S.C. § 1592.⁵

The Classification Of Goods

Currently, all goods entered or admitted into the United States must be classified in

³ 19 USC 1481 (1993).

⁴ House Report No. 361, 103 Cong., 1st Sess. 1993, page 120.

⁵ Id., at 121.

accordance with the principles of the Harmonized Tariff Schedules, or the “HTS.” The HTS has its roots in the “Harmonized Commodity Description and Coding System,” which is an international convention for the classification of goods. The Harmonized Commodity Description and Coding System was developed by the international Customs Cooperation Council (CCC).

Description of the Harmonized Tariff System

The HTS is a complete product classification system organized in a particular framework and employs a nomenclature system consistent with its organizational arrangement.

The HTS comprises approximately 5,000 article descriptions, which appear as four digit headings and six or eight digit subheading levels. These descriptions are arranged in 97 chapters which are themselves and grouped into 21 sections. In general, the sections of group articles together according to common branches of industry and commerce; for example:

- Section I: Live animals and Animal Products
- Section II: Vegetable Products
- Section V: Mineral Products
- Section XI: Textiles and Textile Articles

In roughly the last third of the system, however, commodities are grouped more according to their function or use; for example:

- Section XII: Footwear, Head-gear, etc.
- Section XVI: General Machinery and Appliances, Electrical Articles
- Section XVII: Vehicles, Aircraft, etc.

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It should be noted that the system is hierarchical. In order for an article to be classified at a given subheading it must be classifiable at its 6-digit level, and in order to be classified at the 6-digit level it must be classifiable at the 4-digit level.

This is an important consideration because section and chapter notes, which have legal effect, delineate the coverage of the various sections and chapters. Consequently, a given article must fall within its particular section and chapter before it can be classified in any one heading or subheading.

The HTSUS also contains Chapter 98, which is devoted to special classification provisions relating to articles exported and returned to the United States, personal exemptions, articles released from customs custody under bond and other special classification provisions.

Most, if not all of the sections and many chapters are preceded by notes which, like the general interpretative rules, form an integral part of the HS and have legal force. The function of the notes is to define the precise scope and limits of subheadings, headings or groups of headings, chapters, or sections. Generally, the notes provide general definitions delimiting the scope of a subheading or heading or the meaning of the particular terms; or they provide a non-exhaustive list of typical examples; or an exhaustive list of the goods covered by a heading or group of headings; or, finally, exclusions which list certain articles that must not be included in a particular subheading, heading, chapter or section.

The notes also provide various special rules and serve the important function of preventing the overlapping of provisions. This is sometimes done by giving a heading, chapter,

or section precedence over another heading, chapter or section, and sometimes by referring an article from one heading, chapter or section to another.

Principles Of Tariff Classification

In general, a good is classified under the HTS according to either the material from which it is made or according to its function. If the article is made from more than one material, it is generally classified according to the material from which the “*essential character*” of the article is derived. Likewise, if the article has more than one function, the function which provides the “*principal function*” is controlling.

If there is more than one tariff provision which describes the imported goods, the tariff provision which provides the most specific description is controlling.⁶ If, however, the article consists of a retail set, a mixture, or a combination of two or more parts or components, then classification will be determined according to the article, material or component which imparts the “*essential character*” of the article, provided there are no specific section or chapter notes which require other-wise.⁷

Under the concept of “informed compliance,” Customs expects importers, when classifying goods, to be familiar with the tariff schedules (including explanatory notes) and administrative rulings, as well as, statutes and judicial decisions which govern their import transaction.

⁶ General Interpretative Rule 1, HTSUS.

⁷ See General Interpretive Rules 1 and 2, HTSUS.

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Often, however, controversies arise between importers and Customs over which material imparts the “*essential character*” of the article, or which function provides the article with its “*principal function*.” More likely, however, under the Mod Act, importers and their brokers will discover that two or more provisions may apply to a single good.

In either of the above situations, importers must ensure that the appropriate steps are taken to resolve the controversy in a manner consistent with the principles of the Mod Act.

Ruling Requests & Protests

Because of streamlined commercial operations, Customs and its import specialists no longer review entries on a transaction by transaction basis. This places the burden of compliance on importers and their agents to determine the most appropriate classification of the goods prior to entry of the goods.

If the importer or agent are uncertain as to the specific classification of an article, it is incumbent upon them to bring the matter to the attention of Customs and seek advice as to the preferred classification of the goods.

While the preferred method of bringing such matters to the attention of Customs is through the rulings procedure,⁸ informal consultations are acceptable when the classification is non-controversial.

When the importer’s preferred classification is contrary to the local advice provided by Customs, importers are required to

⁸ See 19 C.F.R. § 177 for procedures regarding the filing of ruling requests. Section 177 has also undergone a significant rewrite. See Custom Discussion Draft regarding administrative rulings.

adhered to the advice and contest the matter via the protest procedure in accordance with Part 174 of the Customs Regulations.

Requests for rulings must set forth a complete description of the transaction and all of the facts associated with the merchandise,⁹ and include the requisite certification statement.¹⁰ Additionally, importers and their brokers are expected to identify any rulings which are applicable to the classification of the merchandise, including those which are both pro and con with respect to the importer’s preferred classification. Where there are rulings which suggest that the merchandise should be classified differently than the importer’s suggested classification, the rulings must be distinguished from the applicable situation.¹¹ Additionally, it is recommended that any advice from local import specialists be included in the ruling request.

If a party to whom a ruling was issued disagrees with the conclusion, it may, if the transaction is still prospective in nature, appeal the decision.¹² Appeals are limited to legal matters only.¹³ Filing an appeal on a current transaction does not suspend liquidation of the entries in question.

Protest Procedure

When an importer disagrees with the classification of merchandise which is the subject of current or past importations, the

⁹ 19 C.F.R. 177.

¹⁰ Proposed Section 177.2(b)(7).

¹¹ Customs Service “Discussion Draft” Of Reasonable Care Standard, dated January 22, 1996.

¹² Proposed Section 177.11.

¹³ *Id.*

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merchandise should continue to be classified in accordance with the recommendation of Customs, and an administrative protest, in the form and manner prescribed in 19 C.F.R. Part 174,¹⁴ be filed.

Under normal circumstances, the filing of an administrative protest under 19 U.S.C. 1514 and its denial under 19 U.S.C. 1515 is a prerequisite to obtaining judicial review of the matter before the United States Court of International Trade.¹⁵

A protest may be filed by the importer or consignee of the merchandise to contest the any of the following:¹⁶

- Appraised value
- Classification and rate of duty
- All charges or exactions
- Exclusion of merchandise or a demand for redelivery
- Any issue associated with the liquidation or reliquidation of an entry
- The refusal to pay drawback
- The refusal to reliquidate on account of clerical error or mistake of fact (19 U.S.C. 1520).

By law, all protests must be filed within 90 days of the date of liquidation of the entry in

¹⁴ Part 174 of the Customs Regulations regarding Administrative protests is also undergoing a substantial rewrite.

¹⁵ 28 U.S.C. § 1581(a).

¹⁶ See 19 U.S.C. § 1514

question (classification, valuation or liquidation) or date of decision of the matter if it does not involve the liquidation of the entry.

Requests For Further Review

In general, protests will be decided at the port level upon on principles and precedents previously enunciated by Customs headquarters. Where appropriate, however, and if requested by the importer, a decision on a protest will be made by Customs Headquarters in Washington D.C. Requests for further review must be made at the time of filing the protest.

Further review will only be granted where it has been established that one of the following conditions exist:

- The challenged decision is inconsistent with a Customs Ruling or other decision by a different Port;
- It involves legal or factual questions not previously ruled on by Customs or the courts;
- It involves an issue Customs refused to consider when presented with a request for internal advice; or
- The matter involves new facts or arguments not previously considered in the previous decision.

Decisions to forward a protest for further review are made by the Port in which the protest is filed. The decision, however, is made by a Customs officer who did not participate in the earlier decision which is the subject of the protest.

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19 U.S.C. 1515(c) also provides an appeal process to contest the improper denial of a request for further review. Requests to set aside a denial of a request for further review must be filed with Customs headquarters' within 60 days of notice of the denial of AFR treatment.

Requests To Correct Clerical Errors & Errors Of Fact

Notwithstanding the fact that a valid protest was not filed within the time period provided by 19 U.S.C. 1514, an importer or consignee may, within one year from the date of liquidation, request reliquidation of an entry to correct a clerical error, mistake of fact or other inadvertence not amounting to a mistake in the construction of a law and adverse to the interests of the importer.¹⁷

Generally, errors associated with the classification and duty rate applicable to merchandise are un-correctable under § 1520 on account of the error being made in the construction of a tariff provision, the applicability of which is a matter of law not fact. On the other hand, there have been a number of recent case where the court has found reliquidation appropriate under 1520 for errors in classification where the error relates to the nature of the merchandise, and not its classification.

Additional Information

For additional information on how to correctly classify imported articles or to contest a Customs Service decision, contact:

**George R. Tuttle Law Offices
Three Embarcadero Center**

¹⁷ 19 U.S.C. 1520(c)(1).

**Suite 1160
San Francisco, CA 94111
Tel. (415) 986-9780
Fax (415) 986-0908
Email- info @ tuttlelaw.com**

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