

GLOBAL COMMERCE

Revoking rules rattles importers

THE TRADE COMMUNITY IS currently quite concerned with Customs' revocation of a New York ruling on the classification of certain sugar syrups.

The issue in dispute is whether a sugar syrup mixture containing molasses imported from Canada is classifiable according to a provision of the Harmonized Tariff Schedule that is subject to a tariff rate quota (TRQ).

After first issuing a New York ruling stating that it is not, Customs, under strong political pressure, reversed itself and ruled that such a mixture is, in fact, subject to the TRQ.

Certain sugar syrups get sweet classification

By way of background, Customs issued a New York ruling dated May 15, 1995, classifying certain sugar syrups described as "produced from sugar cane or sugar beet and will contain sugar solids, water and more than 6% soluble non-sugar solids," within a tariff provision not subject to the TRQ. This description of the merchandise fully comports with the definition of items classifiable within such provision.

In a joint petition dated Jan. 14, 1998, the United States Cane Sugar Refiners Association and the United States Beet Sugar Association contested this classification. The associations highlight that the soluble non-sugar solids, referenced in the definition of the product, consist of a mixture of cane or beet sugar and molasses and water added in Canada. The molasses is then extracted after importation. The associations advise that the resulting sugars are used in the production of food products. Nevertheless, the petition alerts Customs that there is no commercial use for the syrups as imported and that the addition

and subsequent extraction of the molasses serves simply to avoid the TRQ. Upon review, Customs issued a notice of proposed

revocation last June 9, and requested comments.

Interestingly, it received 30 comments (including submissions from two congressmen), as well as a letter signed by 26 U.S. senators. The commenters argued the validity and the merits, or lack thereof, of both the procedure of this revocation and of tariff engineering generally.

The procedural arguments simply raised the question of whether Customs must follow the provisions outlined in the statute under which the joint petition was brought, or under a different statute that outlines the procedures for revocation and modification of customs rulings. The agency ultimately determined that although a petition may be filed requesting action under one provision, it does not deprive the Customs Service of its authority to revoke a ruling under another.

Tariff engineering subject to debate

The more controversial issue, of course, is that of tariff engineering. In its revocation notice, Customs highlighted that many commenters took the position that in the absence of a "use" provision of the tariff schedule, Customs has no discretion to consider the commercial identities and/or uses of imported merchandise.

Therefore, it must classify imported merchandise in its condition as imported.

Customs, however, reasoned that while an importer has the right to fashion merchandise to obtain the lowest rate of duty and the most favorable treatment available, there are limitations to that concept. With respect to the case at hand, Customs concluded that the importer went beyond what is

permissible under the concept of tariff engineering.

Customs determined that the importer engaged in a process that does not constitute a valid part of the manufacture or production of the syrup. It stated that sugar and molasses are mixed in Canada, with water added to the mixture to form a syrup. This addition of molasses is sufficient to ensure that the syrup exceeds the 6% limitation forcing classification in a provision not subject to the TRQ.

Customs' emphasis on tariff engineering is misplaced. It is "hombok" law that merchandise is classifiable in its imported condition. If the agency wants to prevent any tariff engineering for a particular product, it should ask Congress to implement a "use" provision that would eliminate the possibility for creativity. Thus, the answer here is not administrative revocation but congressional action.

In this matter, not only were the number of comments submitted on this issue rare for a simple ruling revocation, but the ruling itself, reversing Customs' former position, is uncharacteristically lengthy and detailed. Customs thoroughly reviews the case history and administrative precedent on the subject, as well as provides a brief history of the TRQ.

Impact on future rulings is what matters

Regardless of any of the substantive legal issues which relate to the tariff classification of the sugar syrups at issue, there is a much greater problem looming over the trade community. The concern relates to the impact this revocation will have on future planning issues by all types of companies, rather than simply importers of certain types of sugar.

Ironically, it is often for the purpose of avoiding this situation, that importers file a binding ruling request at the outset.

While it may be debated whether the importer subject to this new ruling crossed the boundaries of legitimate tariff engineering, it fully disclosed the information necessary for Customs to issue a binding ruling. It was presumably upon that determination that the company structured its operations and

planned its future. Without this certainty, importers would be hard-pressed to make any plans.

How can Customs now recommend that an importer file a binding ruling request, when the importer cannot be certain that its ruling request will remain effective, regardless of whether its competitors pressure Customs to change its position? Again, the United States Cane Sugar Refiners Association and the United States Beet Sugar Association may have a valid claim with regard to the classification of this merchandise, but Customs is engaging in a very questionable practice in reversing itself on this issue. In addition, the fact that 25 senators submitted a letter and two congressmen provided comments raises the troubling specter that Customs is being influenced by political interests.

Yes, Customs rulings are revoked regularly but these revocations are generally concerned with narrow issues, such as the tariff classification of a single article in a line of many products. In this case, the company procured a ruling in order to establish policies and procedures upon which to structure its business.

Accordingly, Customs has an obligation to use great caution in issuing initial rulings so that importers are not financially ruined if the agency later concludes that its determination was incorrect. Canada has raised this issue with the World Trade Organization and the sugar case is expected to be heard by the U.S. Court of International Trade in mid-October (with the decision soon thereafter).

Certainly, the trade community will be carefully reviewing the court's opinion to determine whether customs' ruling revocation policy will be held "sweet" or not. Whatever the outcome, perhaps legislation is needed for such instances where irrevocable harm could occur to a business as a result of admitted administrative error.

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CUSTOMS UPDATE

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