TALKING TRADE

Customs Update

Steven S. Weiser & Ari L. Kaplan

Customs’ presumption of correctness creates headaches for traders in court

It is an established legal precept that decisions of the U.S. Customs Service enjoy the benefit of a “presumption of correctness.”

For any party challenging the government in court, this means the plaintiff has the dual burden of proving that the decision made by Customs was erroneous and that the argument the plaintiff proposes is correct. Moreover, this burden must be overcome by a preponderance of credible evidence.

The policy in favor of the presumption of correctness is based on Customs’ purported expertise in matters of import regulation and compliance. This seeming reverence to the agency has been unintentionally, but fortuitously, weakened considerably by the Customs Modernization Act of 1993.

In an move that has exposed Customs’ underbelly of dysfunctional operations, Congress now requires the agency to publish notice of all rulings it plans to revoke or modify at least 30 days prior to taking such action.

This procedure has revealed an incredible phenomenon: Customs revokes and/or modifies a significant percentage of the rulings it issues annually. For example, in an average year, according to Customs’ Operational Oversight Office, Customs Headquarters issues approximately 1,145 rulings. Of those, almost 15% are revoked, modified or proposed for such action.

That means that for every 22 rulings Customs issues weekly, Customs will admit to being incorrect in at least two cases, in whole or in part.

As a result of these constant errors in judgment, the continuance of the longstanding presumption of correctness which Customs enjoys is highly questionable. Indeed, courts have held that where the classification of the Customs Service is clearly erroneous, or where Customs’ classified identical merchandise in two different categories, there is no presumption of correctness and therefore the importer has no burden of overcoming it.

Bringing Customs down a peg is gaining support

Thus, there is clear support for the contention that Customs is not entitled to the presumption, especially in light of its poor record of consistency.

That Customs corrects itself so often is certainly remarkable. The majority of rulings from headquarters are issued after months and months of review and revisions by legal staff and supervisory attorneys — after they are analyzed by National Import Specialists, recognized technicians in their respective fields.

Moreover, by and large, these mistakes have not been voluntarily corrected. Rather, it is the importing community that not only must seek the initial binding ruling in the interest of active compliance, but also must go to the added expense (not to mention the time involved) of challenging the conclusions of Customs, often with the aid of counsel.

Importers work harder at fathomng rulings

One is left to wonder why this situation has arisen in this agency. By fostering the uncertainty that constant revocations and modifications create, Customs has developed a disjointed and incoherent body of law that importers spend more time trying to understand than to follow.

In doing so, the agency contravenes the central purpose of the Mod Act, i.e., to promote informed compliance.

How can importers continue to comply with Customs’ decisions if the certainty of such rulings is of dubious value? How many issues have been wrongly decided by Customs, but not yet raised?

Were it not for the time and expense involved for importers who seek to correct the government, a significantly higher percentage of current rulings would not be reviewed.

A good number of the officials deciding these cases are talented, hard-working individuals. Unfortunately, they are constrained to submit substandard work in an effort to run an agency that is underfunded and overstressed.

In his first speech since being confirmed, Commissioner Ray Kelly cited his two primary objectives as transforming the Customs Service into the government’s most celebrated enforcement agency and creating a “user-friendly” administrative body for the benefit of the trade community.

To achieve his lofty goals, the commissioner will have to hire more skilled and motivated officers to represent the Customs Service. Moreover, he will have to revitalize current employees who have been relegated to issuing determinations that are wrong almost 15% of the time, perhaps significantly more often.

A tall order at small office cubicles

And he will have to accomplish this while most of even the senior staff residing at Customs’ headquarters in the Ronald Reagan Building in Washington are juggling to work in cubby holes that are too small.

Whatever the cause of this blatant inconsistency, Customs should be forced to earn back the credibility and confidence upon which the presumption was originally based. Once it does so, the question of whether it is entitled to mandatory judicial consideration of its expertise should be reconsidered.

Until then, the presumption serves only to preserve the current fiction of near-invincibility, which brings the importing public to tears.

Customs Update is a weekly column examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, partner and associate, respectively, in the international law firm of Graham & James LLP, N.Y., and reflects the opinion of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, N.Y. 10048.

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