Customs Update

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Supreme Court to decide how much deference is due to Customs by courts

It's so unprecedented that the Supreme Court's interest in trade issues deserves a bit more discussion. On Sept. 29, the Supreme Court agreed to hear United States v. Haggard Apparel Co. This, as you recall, was the first time that the court had addressed Customs cases in two consecutive terms.

Just last March, the court heard oral arguments in United States v. United States Shoe Corp. In a unanimous decision rendered in less than four weeks, the court struck down the Harbor Maintenance Fee on exports as unconstitutional.

That the Supreme Court will consider successive trade issues is a striking demonstration of the importance to which international trade has risen.

By way of background, the issue in Haggard is whether the oven-baking process that Haggard uses to cure its fabrics abroad is "incidental to assembly" as that term is defined by tariff laws.

This distinction is crucial because subheading 8002.00.00, Harmonized Tariff Schedule (formerly Item 807.00, Tariff Schedules of the United States), provides a partial duty allowance for certain U.S.-made components that are assembled abroad and returned, so long as the components are not advanced in value or improved except by the actual assembly itself or by operations that are incidental to the assembly.

The Court of Appeals for the Federal Circuit unanimously affirmed the decision by the Court of International Trade, which held this process to be incidental to assembly.

While the issue (i.e., what constitutes an incidental assembly operation) could be significant on the future assembly of various goods involving U.S. components, the Supreme Court has elected to hear this case in order to review the extent of the deference that courts must give Customs' regulatory interpretations of tariff classifications.

In Levi Strauss, the court held that stone washing was an incidental operation and, therefore, the importer was entitled to preferential duty treatment on U.S. components sent abroad for such purpose.

In its opinion, the court addressed the deference argument. It noted that it was bound by precedent that contradicted the government's assertion of deference to Customs.

It further highlighted that the court of international trade is statutorily mandated to find "the correct result," as deference to Customs may be completely incompatible therewith.

Essentially, the pivotal question boils down to how much power an administrative agency should wield. In its unique position as the gatekeeper of the nation's borders and as an enforcer of the regulations of numerous other agencies, the Customs Service has been granted significant influence.

In addition, as the government's second most revenue-producing entity, it is an essential component of the overall administrative machine.

However, like virtually all federal agencies operating under budgetary constraints, it has inadequacies and is as likely as any large bureaucracy to fall short of its objective.

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Failing in the face of the nation's founders

Customs says it is statutorily correct

Customs, of course, argues that based upon its statutory presumption of correctness, the courts should yield to its decisions.

The appeals court recently addressed this issue in another possible Supreme Court contender, Levi Strauss & Co. v. United States.

Consequently, the act of mandating objective courts of law, whose mission it is, among others, to oversee the executive branch, to oversee agency determinations flies in the face of our comprehensive system of checks and balances.

One may argue that forcing deference upon Customs' determination, as a matter of law, for example, tariff classification, would effectively strip the trade community of its one opportunity for a true appeal. Accordingly, although the trader would still be entitled to judicial review of agency action, this review would be severely restricted.

In fairness, it is to be noted that judicial deference is often extended to an agency that possesses a highly specialized knowledge of a particular area.

Considering Customs' wealth of experience in handling tariff classification matters, it would not be beyond reason to defer to its findings and conclusions.

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However, one might observe that in today's environment, the expertise of all governmental authorities has dwindled, more likely than not, because of economic reasons. Customs has not been unblemished.

Thus, what the Supreme Court will decide in Haggard is to what extent Customs is entitled to deference. Is Customs always presumptively correct (in which case a heavy burden would rest with the trader to rebut such presumption)?

Or, is the playing field between the importer and Customs fairly level? The trading community will be examining the outcome very closely.

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. 10046.