

COMMITTEE INSIGHTS

Customs Law*

This short report briefly discusses three issues in U.S. customs law that will affect the practice of Customs Law Committee members: the payment of interest by the U.S. Customs Service (Customs) on overpayments of duties; the dutiability of payments in addition to invoice amounts by U.S. importers to foreign manufacturers; and country of origin marking challenges by U.S. industries.

I. Interest Payments

When Customs liquidates merchandise, the importer must pay any duty owed within fifteen days after the date of liquidation.¹ If payment is not received within thirty days, interest is due from the fifteenth day after the date of liquidation.² In addition, if there is a reliquidation of an entry as a result of a protest, an application for relief for a clerical error or mistake of fact,³ or a court order, interest is to be paid "on any amount paid as increased or additional duties."⁴ Both of these provisions were enacted as section 210 of the Trade and Tariff Act of 1984.⁵

Customs traditionally has interpreted these statutes as allowing it to collect interest on all duties determined to be due upon liquidation that are not paid in a timely manner.⁶ On the other hand, Customs has paid interest only on the

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1. 19 U.S.C. § 1505(c).

2. *Id.*

3. *Id.* § 1520(c)(1).

4. *Id.* § 1520(d).

5. Pub. L. No. 98-573, 98 Stat. 2948, 2977 (1984).

6. *See, e.g.,* Hospital Corp. of Am. v. United States, 752 F. Supp. 455 (Ct. Int'l Trade 1990), *appeal docketed*, No. 91-1117 (Fed. Cir. 1991).

refund of additional duties that were collected at either the time of liquidation or at the time of filing of a summons in the Court of International Trade challenging the duty assessment.⁷ In such cases, interest was paid from the date of payment of the increased duties to the date of issuance of the refund check, or from the date of payment of the increased duties to the date of filing of the summons, as well as from that date to the date the refund was issued pursuant to the court order.⁸

In numerous decisions in 1990⁹ the Court of International Trade has held that Customs must pay interest on all amounts refunded as a result of a protest or judicial action for the period from the date of liquidation through the date of the refund or the filing of the summons, regardless of when the monies were deposited with Customs.¹⁰ The court's rationale in reversing Customs' interpretation was that estimated duties deposited at entry become "increased or additional duties" when retained by Customs at the time of liquidation if there is a later refund of part or all of these duties. The court rejected Customs' position that the term "increased or additional duties" refers only to those duties that Customs finds are due at the time of liquidation in addition to any estimated duties already deposited.

These decisions are now on appeal and Customs has not changed its practice of not paying interest pending a decision on appeal.¹¹ Customs has stated that importers may seek review of a decision not to pay interest on a refund, but protests that request payment of interest are being held pending the decision on appeal.¹² Regardless of the resolution of these cases, there will most likely be more interest payments to importers and to Customs in the future. Customs plans to propose legislation in Congress in 1991 that would amend section 505 of the Tariff Act of 1930¹³ to permit Customs to assess interest on increased or additional duties or fees and to pay interest on excess duties and fees deposited with interest accruing from the date the monies were or should have been deposited to

7. *Id.*

8. See Customs Service Ruling 220810 (1989); C.S.D. 88-2 (1987). Interest is payable under 28 U.S.C. § 2644 on monetary relief obtained through a judgment or stipulation agreement filed in the Court of International Trade. Such interest is paid from the date of the filing of the summons until the date of payment of the refund.

9. See, e.g., *Kalan, Inc. v. United States*, 752 F. Supp. 455 (Ct. Int'l Trade 1990), *appeal docketed*, No. 91-1117 (Fed. Cir. 1991); *Hospital Corp. of Am. v. United States*, 752 F. Supp. 459 (Ct. Int'l Trade 1990), *appeal docketed*, No. 91-1172 (Fed. Cir. 1991). In related cases the court found jurisdiction under 28 U.S.C. § 1581(i) to decide if interest should be paid. See *Dornier Medical Sys., Inc. v. United States*, No. 90-99 (Ct. Int'l Trade 1991); *Hospital Corp. of Am. v. United States*, No. 90-100 (Ct. Int'l Trade 1990); *Schumpert Medical Center, Inc. v. United States*, No. 90-105 (Ct. Int'l Trade 1990); *ESWL Ltd. Partnership v. United States*, No. 90-101 (Ct. Int'l Trade 1990).

10. Because § 1505(c) applies only to duties determined to be due upon liquidation or reliquidation, § 1520(d) does not grant interest on a refund of estimated duties paid upon entry of the merchandise from the date of payment of those duties. See *Kalan, Inc. v. United States*, 752 F. Supp. 455, 456 (Ct. Int'l Trade 1990), *appeal docketed*, No. 91-1117 (Fed. Cir. 1991).

11. See Customs Telex 1653121 (Feb. 27, 1991).

12. *Id.*

13. 19 U.S.C. § 1505.

the date they are collected or refunded. Other Customs reform legislation that will soon be before Congress, a proposal supported by the Joint Industry Group, would also provide for the collection and payment of interest in certain cases.

II. Additions to Dutiable Value

The majority of merchandise imported into the United States is assessed duties on an ad valorem basis. Consequently, a determination of the value of the merchandise being imported is essential. The statute sets out numerous bases for the calculation of the value of imported merchandise,¹⁴ but the value of the overwhelming majority of merchandise imported into the United States is its "transaction value."¹⁵

The statute specifically defines transaction value as the price actually paid or payable¹⁶ when sold for exportation to the United States and enumerates five additions to the price paid or payable.¹⁷ Two of these additions are for royalties and license fees related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States,¹⁸ and for the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.¹⁹

Traditionally, Customs has held that if a payment by the importer to the foreign manufacturer of a royalty or license fee is not dutiable as such, it cannot be added to the price paid or payable as the proceeds of a subsequent resale, disposal, or use of the imported merchandise.²⁰ This longstanding position of Customs was overturned in a ruling issued in early 1991, in which Customs found certain royalty payments made by a U.S. importer to the foreign producer to be dutiable, not as royalty payments, but as proceeds of a subsequent sale.²¹

In this 1991 ruling Customs reviewed the legislative history of the valuation statute, which indicates that certain payments might be either royalties or the proceeds of a subsequent sale, use, or disposal.²² Based on this language, Customs found that its prior rulings were contrary to the congressional intent of the statute and rendered meaningless the proceeds of a subsequent resale provision of the law. Having made this change in statutory construction, Customs found the royalty payments to be proceeds of a subsequent sale because they

14. *See id.* § 1401a; 19 C.F.R. §§ 152.100–.104 (1990).

15. *See* 19 U.S.C. § 1401a(b).

16. *See id.* § 1401a(b)(4)(A).

17. *See id.* § 1401a(b)(1).

18. *Id.* § 1401a(b)(1)(D).

19. *Id.* § 1401a(b)(1)(E).

20. *See, e.g.*, Customs Service Ruling 542844 (1982); Customs Service Ruling 544061 (1988); Customs Service Ruling 544129 (1988); Customs Service Ruling 542900 (1982); Customs Service Ruling 542926 (1983); Customs Service Ruling 543529 (1985); Customs Service Ruling 544102 (1989).

21. Customs Service Ruling 544436 (1991).

22. H.R. Rep. No. 317, 96th Cong., 1st Sess. 80 (1979).

became due upon the importer's resale of the imported merchandise and inured to the benefit of the seller.

This ruling is a significant change in policy. Now, royalty payments made by an importer to a foreign seller based on the resale of the imported merchandise in the United States are probably part of dutiable value. This ruling also appears to signal an increased use of the "proceeds of any subsequent resale, disposal or use" provision by Customs in the future. In light of this ruling, importers should review their agreements with foreign sellers and modify them, if possible, to address this change in statutory interpretation. In addition, to avoid a penalty case, importers must ensure that customs knows of all payments to foreign producers of imported merchandise.

III. Country of Origin Marking

The Tariff Act of 1930, as amended, requires that, with certain exceptions, every article of foreign origin (or its container in certain cases) imported into the United States be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article or the container will permit in such a manner so as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article.²³ In *Norcal/Crosetti Foods, Inc. v. United States Customs Service*²⁴ the issue of what is conspicuous marking as well as the ability of U.S. producers to challenge country of origin marking of imported products were at issue.²⁵

In *Norcal* California packagers of frozen produce challenged a ruling by Customs that permitted the marking of the country of origin on the rear panel on frozen vegetable packages.²⁶ The court found that this ruling deviated from the clear language of the statute as well as from the congressional purpose behind the statute in that it permitted marking that was not conspicuous. The court said that the term "conspicuous" should be interpreted in a manner consistent with its common meaning and the Customs regulations.²⁷ The Court noted that in other rulings Customs had required that the country of origin marking be where the consumer expects to see the country of origin.²⁸ The court stated that conspicuous marking does not necessarily mean in type size comparable to the product description or in a contrasting color, but it does mean clear to the naked eye.

23. 19 U.S.C. § 1304.

24. No. 91-12 (Ct. Int'l Trade 1991), *appeal filed* (Fed. Cir. 1991).

25. The court found jurisdiction under 28 U.S.C. § 1581(i)(4) despite strenuous objections by the government, and both parties moved for summary judgment. *Norcal/Crosetti Foods, Inc. v. United States Customs Serv.*, 731 F. Supp. 510 (Ct. Int'l Trade 1990). The court seemed to recognize that if it lacked jurisdiction, the plaintiff would lose its day in court because *Norcal* had brought an action in the U.S. District Court for the Northern District of California that was transferred by stipulation to the court of International Trade.

26. Customs Service Ruling 731830 (1988).

27. See 19 C.F.R. § 134.41(b) (1990).

28. See C.S.D. 90-41 (1990).

In deciding if the marking were conspicuous, the court considered the location of the marking and whether consumers could be assured of easily finding the marking upon a reasonable inspection of the package. The court took judicial notice of the common method of displaying frozen vegetables, so that only the front panel is clearly visible. The court stated that consumers are not able to scan the labels of frozen food as easily as they do for dry goods because access is limited in that the food must remain in a freezer and must not defrost. These “special factors” involved in the marketing of frozen food products prevent consumers from having the opportunity to see the country of origin marking if it is on the back of the package in small print. The court noted that the front panel had an abundance of space that would accommodate the mandated disclosure more legibly than at present and that therefore the markings were not as conspicuous or as legible as the packages would permit.

Another important point in this decision was the discussion by the court of Customs’ apparent attempt to implement the country of origin marking requirement so that it would be administratively workable. Customs stated that the stamping of the country of origin together with an expiration date onto the packages would facilitate compliance with the marking laws and allow packers to have a small number of standard packages with space left available for inputting information unique to the package. In response, the court stated that Customs should not place the convenience of packers above the law and specifically noted that certain packages were marked with multiple countries of origin and as such were insufficiently marked and must be refused entry until marked with the actual country of origin.²⁹ On the other hand, seemingly recognizing the economic prohibition exemption in the statute,³⁰ the court stated that nowhere did defendants contend that any harm would befall Customs or amici curiae if the intent of Congress were implemented and the packages were marked in accordance with the law so that the consumer was actually informed of the source of the product.

Norcal is a significant decision. While it did not result in a change in the regulations or, in general, in the prior interpretations by Customs of the country of origin marking statute, it did suggest that country of origin marking must be in the most prominent location on the package and did demonstrate that Customs’ rulings in this area are subject to challenge and to review by the courts at the request of U.S. producers.

29. This statement appears to invalidate prior Customs rulings concerning the country of origin marking of orange juice, which allowed the imported juice concentrate to be marked “may contain concentrate from Florida and/or Brazil,” see C.S.D. 86-27 (1986), and country of origin marking concerning fasteners, see C.S.D. 84-56 (1983). Furthermore certain packages listed the name and U.S. address of the manufacturer, but without nearby notations of the country of origin as required by the regulations. See C.F.R. § 134.46 (1990). The court indicated that the country of origin should be on the same panel as the address of the U.S. distributor.

30. 19 U.S.C. § 1304(a)(3)(c); 19 C.F.R. § 134.3(a) (1990).

