Legal Principles Applicable To Judicial Review Of Customs Classifications Cases

By Sandra Liss Friedman

When Customs classifies merchandise imported into the U.S., and the importer contests that classification, the standards which the trial court, the U.S. Court of International Trade, must apply are specific to classification cases and involve unique nuances. Superficially, these standards may appear to be straightforward, but related issues such as deference have muddied the waters somewhat.

The Applicable Standard

Classification decisions, turning on the proper construction of the Harmonized Tariff Schedule of the United States (HTSUS), are questions of law that are subject to *de novo* review by the Court of International Trade. *See, e.g., Reser's Fine Foods, Inc. v. U.S.*, 2003 Ct. Int'l Trade LEXIS 117, Slip Op. 03-117 (September 5, 2003).This standard is set forth by statute, in 28 U.S.C. §2640, which provides:

> Sec. 2640. - Scope and standard of review
> (a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:
> (1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930. . . .

This *de novo* standard does not apply to factual questions, only legal ones. One of the difficulties in determining what standard may apply to a particular issue in a particular case is that there may be some perceived overlap between legal and factual issues. A useful rule of thumb for applying the correct principles would be to say that determining the proper *scope* of a classification in the HTSUS is a statutory interpretation and thus a question of law, whereas determining whether an imported item *falls within that scope* is a question of fact. *See, Bauerhin Tech. Ltd. Partnership v. U.S.*, 110 F.3d 774, 776 (Fed. Cir. 1997).

Applying The Standard

Procedurally, the Court analyzes the classification in two steps: first, it construes the relevant classification headings; second, it determines under which of the properly construed tariff terms the merchandise falls. *Rollerblade Inc. v. U.S.*, 24 CIT 812, 813, 116 F.Supp.2d 1247, 1250 (2002), *aff'd* 282 F.3d 1349 (Fed. Cir. 2002), quoting *Bausch & Lomb. v. U.S.*, 148 F.3d 1363, 1365 (Fed.Cir. 1998).

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The Factual Questions And Presumptions

For the "factual" part of the analysis, i.e. whether the product falls within the delineated scope, certain presumptions also complicate matters. The presumption of correctness that Customs enjoys rests upon the challenging party, but only applies to the factual basis for the decision, not the legal component, and does not add evidentiary weight, but merely shifts the burden of proof to the challenger. *Rollerblade Inc. v. U.*S., 112 F.3d 481 (Fed.Cir. 1997).

The Question Of Deference

Customs' classification ruling will receive *Skidmore* deference according to its power to persuade. *See U.S. v. Mead Corp*., 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001). This power to persuade depends on the thoroughness evident in the classification ruling's consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and those factors which give it the power to persuade. *Id.* While one might wonder what exactly *de novo* review signifies in the context of deference, in *U.S. v. Haggar Apparel Co.,* 526 U.S. 380, 143 L. Ed. 2d 480, 119 S. Ct. 1392 (1999), the Supreme Court rejected the idea that *de novo* review means that the court could not owe deference. The Court stated: "De novo proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and apply those determinations to the law, de novo." *Id.* at 391. However, *Mead* decided that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings; rather *Skidmore* deference is applied. Therefore, the importer's burden of establishing that the Customs ruling is incorrect must be met in the context of the persuasive power of Customs' reasoning. *See, Heartland By-Products, Inc. v. U.S.*, 264 F.3d 1126, 1136 (Fed. Cir. 2001).

Res Judicata And Stare Decisis

When deciding what is necessary to satisfy the standard of review and overcome the burden on the challenging party, there are several other considerations that may be relevant. The first is the doctrine of *res judicata.* The Supreme Court in *U.S. v. Stone & Downer Co.,* 274 U.S. 225, 47 S.Ct. 616 (1927) has rejected the application of the doctrine of *res judicata* in classification cases, stating that

> circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation. The business of importing is carried on by large houses between whom and the Government there are innumerable transactions . . . and there are constant differences as to the proper classifications of similar importations. The evidence which may be presented in one case may be much varied in the next. The importance of classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through.

Id. at 236. Therefore, for public policy reasons, the Supreme Court reached the conclusion that each new entry is a new classification cause of action, giving the importer a new day in court.

The second related consideration is the concept of *stare decisis.* When an importer is faced with a situation where the classification of a product has already been litigated by a competitor, with unsatisfactory result, it has two main options to try to persuade the Court to disregard/distinguish its case from the previous case with a similar product. The options are:

(1) *Overcoming the doctrine of* stare decisis. An exception to the rule on *stare decisis* was created in *Schott Optical Glass, Inc. v. U.S.*, 750 F.2d 62, 65 (Fed.Cir. 1984), where the court states that "[a] court will reexamine and overrule a prior decision that was clearly erroneous." There had been a previous case, *Schott I.* In the second case, the plaintiff had sought to introduce evidence most of which had not been introduced in the previous case, to show that the court's interpretation of "other optical glass" in *Schott I* was erroneous. The CIT refused to admit such evidence. On appeal, the CAFC said that "[i]f the importer cannot introduce new evidence relating to the correctness of the prior decision, frequently it will be impossible for it ever to build the foundation for the legal argument that the decision was clearly erroneous." *Id*. at 64. So the importer could try to advance evidence that the first decision was clearly erroneous, and the CIT must evaluate that evidence offered on its own merits.

(2) *Proving that the product or issue is slightly different.* This was recently discussed by the CAFC in *Avenues in Leather, Inc. v. U.S.*, 317 F.3d 1399, Slip. Op. No. 02-1239 (Jan. 29, 2003). In that case, classification of certain folio merchandise was at issue. The CAFC restated the same basic rule from *Schott Optical*, but found the exception to *stare decisis* had not properly come into play. In the ruling on the summary judgment motion in the CIT, the CIT had construed Avenue's challenge on the summary judgment motion as an attempt to relitigate *Avenues I* by invoking the exception to *stare decisis*. Therefore the CIT held that the importer was required to prove that the decision was "clearly erroneous." However, the CAFC decided that in the case before it, the CIT had improperly invoked *Schott Optical*, as the case did not involve the exception to *stare decisis* because the point of law that had been decided in *Avenues I* had not been challenged by the importer, as applied to the merchandise in that case. It only sought a chance to present evidence that its folios were not similar to the containers in the relevant subheading. Therefore, the CIT had evaluated the motion for summary judgment under an erroneous standard and incorrectly applied the doctrine of collateral estoppel in the guise of *stare decisis*. The Court stated:

> Even if Supreme Court precedent permitted issue preclusion in this litigation, collateral estoppel could not apply in this case because of new issues of fact and law that are different from those in Avenues I. *The goods in this case are different from the merchandise in* Avenues I. . . . *Moreover, different issues of law are presented in this litigation. This case implicates HTSUS subheadings different from those at issue in Avenues I. . . . Because this is a new entry and because a court has not previously classified the Calcu-Folios*, the trial court should not have estopped Avenues from presenting its case at trial.

[Emphasis added]. Therefore, if the importer can advance certain differences in the product, or a different legal theory, an argument can be made that as per this case they are entitled to a trial on that classification.

Conclusion

From the foregoing discussion we are able to draw several conclusions. The first is that an attorney litigating such a case must pay careful attention when planning her case to delineating the questions of law that are involved (which questions receive *de novo* review by the Court) as opposed to questions of fact (in which the presumption of correctness applies, shifting the burden to the importer). Secondly, because *Skidmore* deference will be enjoyed by Customs for a classification ruling, the attorney must apply the specifics of her case to the *Skidmore* factors (the thoroughness evident in the classification ruling's consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and those factors which give it the power to persuade) and see which may weigh in her favor. Thirdly, the attorney must consider whether there are any cases which have involved a similar product, and if those outcomes are unfavorable, attempt to ensure that the doctrine of *stare decisis* will not be applied by the Court, either by proving that the product is different from the previously considered one, raising a new legal argument, or arguing that the decision of the previous court was clearly erroneous. Finally, should the importer lose the case at the trial level, it must establish reversible error on appeal by showing that the CIT erred in its interpretation of the law, or that its findings of fact are clearly erroneous with due consideration to the appropriate level of deference.