

Reproduced with permission from International Trade Daily, 72 [itd-bul], 4/15/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Classification

Court Says Customs Erred by Reclassifying White Sauce Without Notice and Comment

U.S. Customs and Border Protection (CBP) erred in not complying with notice and comment requirements under 19 U.S.C. § 1625(c) when it issued a notice of action that effectively reclassified all imports of a product called “white sauce,” the U.S. Court of Appeals for the Federal Circuit ruled April 14, affirming (*Int’l Custom Prods., Inc. v. United States*, 2014 BL 102601, Fed. Cir., No. 2013-1176, 04/14/14).

The appeals court rejected the government’s claim that a notice of action can never be an “interpretive ruling or decision” and therefore cannot trigger the procedural protections of § 1625(c).

This dispute involving the liquidation rate of International Custom Products, Inc.’s (ICP) entries of white sauce dates back to 2005.

Gregory H. Teufel, Eckert, Seamans, Cherin & Mellott, LLC, counsel for ICP, told Bloomberg BNA that the court’s decision closes what could have conceivably been a significant loophole in the regulations requiring notice and prospective application of revocations of ruling letters. “If the government were permitted to revoke ruling letters effectively by sending a notice of action like the way they did in this case, they could do it in other cases and do an end run around the regulations,” he said.

Customs, without providing notice and comment, in 2005 issued a notice of action stating that ICP’s unliquidated entries of white sauce would be classified under Harmonized Tariff Schedule of the United States (HTSUS) Subheading 0405.20.3000 as butter or dairy spreads, which substantially boosted applicable tariffs.

Custom previously issued an advance ruling letter providing for classification as “[s]auces and preparations therefor.” The reclassification resulted in an increase of approximately 2,400 percent in duties owed.

Effective Revocation? International Custom Products charged that Customs violated 19 U.S.C. § 1925(c) by effectively revoking the advance letter ruling without following proper procedures. The Court of International Trade (CIT) ruled in favor of ICP, which had asserted jurisdiction under the court’s residual jurisdiction statute, 28 U.S.C. § 1581(i)(4) (123 ITD, 6/28/05). However, the Federal Circuit vacated, finding that jurisdiction was lacking under the residual jurisdiction statute because the remedy provided by 28 U.S.C. 1581(a)—which provides for review of protest denials in the CIT—was not manifestly inadequate (202 ITD, 10/19/06). Subsection (i)(4) jurisdiction is unavailable when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection is manifestly inadequate.

International Custom Products filed the current lawsuit in 2007, essentially raising the same challenges it did in the earlier lawsuit but on § 1581(a) jurisdictional grounds after Customs denied a protest to the classification of the entry at issue. Because the company could not afford to pay the 2,400 percent increase in duties, it protested and paid duties on a single entry upon which this suit is based.

The lower court found that CBP’s notice of action was tantamount to an interpretive ruling issued contrary to law because it had the effect of revoking the ruling letter without the notice and comment procedures required by liquidating the entry under a different HTSUS subheading than specified in the ruling letter (225 ITD, 11/23/12).

On appeal, the government claimed that § 1625(c)’s notice and comment procedures do not apply because the notice of action did not effectively revoke the ruling letter. The government also claimed that a notice of action can never amount to an “interpretive policy type decision within the meaning of 19 U.S.C. § 1625(c)(1).”

The appeals court, in an opinion delivered by Circuit Judge Evan Wallach, rejected the government’s argu-

ments. Circuit Judges Jimmie V. Reyna and Kathleen O'Malley joined the opinion.

"Customs was required to comply with § 1625(c) when it used the Notice of Action to revoke the previously applicable Ruling Letter," the court said.

The North American Free Trade Agreement Implementation Act's legislative history, which enacted § 1625's procedural protections, states that "importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and an opportunity for comment," the court noted.

"The Notice of Action's reclassification of all pending and future white sauce entries after over six years of ICP's reliance on the Ruling Letter was just the type of 'change [in] the rules' that § 1625(c) was designed to address," the court said.

"The CIT did not err in holding that the Notice of Action in this case amounts to an interpretive ruling or decision subject to § 1625(c)'s notice and comment procedures. The Notice of Action was an interpretive document applying the HTSUS to the specific facts of all pending and future white sauce entries," the court said.

Gregory H. Teufel, Eckert, Seamans, Cherin & Mellott, LLC, of Pittsburgh, argued for plaintiff-appellee.

Edward F. Kenny, trial attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice in New York, argued for defendant appellant.

BY ROSSELLA BREVETTI

To contact the reporter on this story: Rossella Brevetti in Washington at rbrevetti@bna.com

To contact the editor responsible for this story: Jerome Ashton at jashton@bna.com

The court's opinion is available at http://www.bloomberglaw.com/public/document/INTERNATIONAL_CUSTOM_PRODUCTS_INC_PlaIntiffAppellee_v_U