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Classification Problems and Procedures under United States Customs

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CLASSIFICATION PROBLEMS AND PROCEDURES UNDER UNITED STATES CUSTOMS

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Of especial significance to the American importer is the question of classification of his merchandise by the customs officials. This classification will determine the rate and amount of duty applicable on the importation. The amount of duty assessed may determine the whole matter of profit or loss on the entire business transaction which is the subject of the importation. The tariff statutes seek to be specific on the matter of classification of imports, but in order to cover completely the limitless variety of items that find their way into world commerce, the statutes necessarily have relied widely on class designations. However, these class designations themselves are highly specific, and this creates as well as eliminates problems. It results in competing or closely similar paragraphs, with considerable latitude for interpretation in determining which of two or more paragraphs properly applies to a given set of facts.

The classifications given in the tariff schedule appear to be amazingly complex and arbitrary at first glance. But it is to be remembered that protectionism is the basic motive behind the American tariff, and the schedule as devised is not arbitrary or absurd, but reflects the specific products and concerns of American industries that Congress determined should be protected. The schedule is a result of hearings at which vast detailed amounts of technical industrial information was submitted to the government. This information is gathered continuously through the years, and the experiences and provisions of prior tariff schedules are drawn upon also in devising new tariffs. The reported cases on classification tend to be concerned largely with partly manufactured or processed articles designed for use as parts in completed consumer goods which are assembled by American industry. The high degree of specificity of such articles and their endless and changing variety appear to be the primary causes of classification problems.

I.

Tariff laws and procedures are firmly grounded on unquestioned constitutional foundations. The power to regulate foreign commerce is expressly accorded to Congress in the Constitution.[1] It is a well-settled principle that while Congress cannot delegate its legislative functions, it may provide administrative machinery with authority and discretion necessary to apply enacted legislation. There has never been a serious question

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1. U.S. CONST. Art. I, § 8.

as to the propriety of the authority vested in the Secretary of the Treasury as the chief executive officer responsible for the administration of the tariff.[2] This is despite the breadth of the statutory language which directs him to promulgate rules and regulations "not inconsistent with the law."[3] The tariff acts have never succumbed to an attack that the guides for administrative action are insufficient, probably because the nature of the legislation is such that the breadth of the authority granted was necessary.[4] Congress must be permitted to make effective its authority to regulate foreign commerce. Such authority of the collector and other customs officials as is not expressly set forth in the statute descends from the Secretary of the Treasury through such regulations as he may promulgate.[5]

Customs matters have their own special remedial procedures.[6] After the collector has all the information at his disposal concerning an importation, he makes a determination of the duty owed, his decision being known as a "liquidation." This liquidation becomes final and binding on all parties, including the government, after sixty days, unless a protest is made to the collector within that period. In such event, the collector re-examines his original liquidation, and makes a "reliquidation" within ninety days of the date of the protest. Any party dissatisfied by the reliquidation may within sixty days file a reprotest with the collector, in which case the collector turns the matter over to the customs court. Despite its name, the customs court is not a court, but an administrative tribunal, and was known until 1926 as the Board of General Appraisers; it is however, an independent tribunal, not subject to the authority of the Secretary of the Treasury.[7] Appeal from decisions of the customs court lies within sixty days[8] to the Court of Customs and Patent Appeals,[9] the point at which customs matters first enter the judicial system. From this court, appeal lies to the Supreme Court in the usual manner by certiorari. These procedures are specifically provided for in the tariff act.[10] This system evolved to its present form gradually as the procedural needs developed through experience, the original remedy for customs actions having been until 1864 a common law suit against the collector.

Thus the importer has at his disposal all the traditional judicial safeguards against wrongful or arbitrary administrative action. The present procedural machinery for customs litigation appears to be highly satis-

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2. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).
3. 46 STAT. 731 (1930), 19 U.S.C. § 1502 (a) (1952).
4. Passavant v. United States, 184 U.S. 214 (1893).
5. 46 STAT. 731 (1930), 19 U.S.C. § 1502 (c) (1952).
6. A brief summary and history of customs litigation procedures is given by Erwin N. Griswold in *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1174 — 1176 (1937).
7. Nicholas v. United States, 7 Ct. Cust. App. 97 (1916).
8. Ninety days in cases of appeals from territories or possessions.
9. In 1929 the Court of Customs Appeals was merged with the Court of Patents Appeals forming the present Court of Customs and Patents Appeals.
10. 46 STAT. 734 (1930), 19 U.S.C. § 1514 *et seq.* (1952).

factory, and it is rare that a customs case finds its way to the Supreme Court.

Though the collector is at the bottom of this hierarchy of tribunals, he nevertheless may well be the most important level for the average importer as a practical matter. If an importer feels aggrieved by a liquidation, it may be very costly for him to pursue his remedies. If he wishes to withdraw the merchandise while litigation is in progress, as would often be the case, he must post bond for the full amount of the duty assessed and may thereby incur large financing costs if the sum involved is a large one. In cases where the amount in dispute would not warrant the costs of litigation, the collector becomes in effect the final arbiter of the question. In all the customs apparatus the collector may be regarded as the most crucial factor to an effective functioning of the tariff system.

Of course, the considerations discussed in the preceding paragraph are common in principle to most legislation. With at least approximate correctness it may be said that a law is neither good nor bad but administration makes it so. In the first instance the effective functioning of any law depends upon the competence and integrity of the officials to whom its original application is entrusted. Perhaps less reliance is placed on this in administrative than in judicial matters, but the principle is of highest importance in both fields due to the costliness of correction of errors and implementation of the safeguards provided. In this regard the United States customs organization enjoys an enviable reputation.

With particular regard to classification, the collector's practical authority is buttressed by the forces of inertia which rally to the support of his liquidation. The burden of overcoming the correctness of the collector's classification is on the importer,[11] and the courts consistently indulge in every presumption in favor of his classification.[12] On this principle are grounded most of the decisions in classification cases. Often the language of the court is such as to suggest that it would have been just as satisfied had the original classification been made as urged by the importer, but decide against him because there is not such clear and inherent superiority of his classification as would overcome the presumption in favor of the collector. The collector cannot reclassify after the liquidation has become final, except in cases of fraud. It is proper for the collector to reliquidate on well-grounded suspicion of fraud,[13] but of course his finding of fraud is not conclusive.[14] In order to sustain such reliquidation the government must prove the fraud.[15]

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11. Henry Pollak, Inc. v. United States, 19 C.C.P.A. 215 (1913); W. J. Lake & Co. v. United States, 27 C.C.P.A. 247 (1939).

12. Pacific Guano & Fertilizer Co. v. United States, 15 Ct. Cust. App. 218 (1927); Greenberg & Josefsberg v. United States, 28 C.C.P.A. 138 (1940); Wo Kee & Co. v. United States, 28 C.C.P.A. 280 (1941).

13. Vitelli & Son v. United States, 7 Ct. Cust. App. 743 (1914).

14. United States v. Federal Sugar Refining Co., 211 Fed. 1016 (S.D.N.Y. 1913).

15. Zucca v. United States, 10 Ct. Cust. App. 133 (1920).

II.

Several rules for classification have evolved. However, these might best be described as "rules of thumb," and the reported cases show that in many instances these rules are not easy or obvious of application to specific facts. Moreover, these rules develop refinements and conflicts of priority which greatly increase the complexity of the problem.

The sovereign principle for the interpretation of any document is the intent of its makers, as may be gleaned from a study of the contents of the document itself. When this principle is applied to legislation such as the tariff acts, the primary concern of the courts must be the expressed intent of Congress. As an aid to determining congressional intent with respect to classification under the tariff acts, the rule of relative specificity is frequently resorted to by the courts.[16] Subject to other overriding expression of legislative intent,[17] merchandise shall be dutiable under the paragraph of the schedule that most closely describes it.

There is no quarrel with this very sound and logical principle, but it is far from simple to apply. For example, an *eo nomine* designation presumably is the highest degree of specificity, so that an import which is an article expressly named in the statute supposedly presents very little in the way of a classification problem. But the case of *United States v. Salomon & Bro.*,[18] shows how illusory such an assurance can be. The merchandise there in question was Fuller's earth, chemically processed with acids. The Tariff Act of 1930 provided one rate on "Fuller's earth, . . . wrought or manufactured," and a higher rate on "clays or earths artificially activated with acid or other material."[19] At first blush it might seem apparent that the first part of the paragraph is more specifically applicable. Yet the collector held otherwise and the court sustained him. The court considered the legislative history of the act and reviewed committee hearings, where it appeared that at the time of passage of the act Congress considered that it was not possible to activate Fuller's earth with acid, and this technological development occurred subsequently. On this basis the court inferred a legislative intent to assess all acidly activated clays and earths at a particular rate, and if Fuller's earth later were to become so treated, it would fall in that class rather than its *eo nomine* designation. The words "wrought or manufactured" would not apply to acid processing of Fuller's earth in view of the legislative history and intent as found by the court. Despite the seeming paradox,

16. P. Biersdorf & Co. v. United States, 31 C.C.P.A. 158 (1944); Abercrombie & Fitch Co. v. United States, 31 C.C.P.A. 56 (1943); United States v. Eimer & Amend, 28 C.C.P.A. 10 (1940); Middleton v. United States, 28 C.C.P.A. 214 (1940); United States v. William Cooper & Nephews, 22 C.C.P.A. 31 (1931).

17. Adolphe Hurst & Co. v. United States, 33 C.C.P.A. 96 (1946); United States v. E. DeGrandmont, Inc., 21 C.C.P.A. 17 (1933); United States v. Clay Adams Co., 20 C.C.P.A. 285 (1932).

18. 22 C.C.P.A. 490 (1934).

19. 64 STAT. 1075 (1930), 19 U.S.C. § 1001, Par. 207 (1952).

the court's decision cannot be said to be unsound, especially when the presumption in favor of the collector's classification is brought to bear.

The rule of relative specificity has also yielded to an interpretation that legislative intent gives highest priority for classification purposes to the use for which the import is designed. This is in keeping with the recognized motive of the statute to protect American industry against foreign competition. The draftsmanship of the statute follows a practice of providing rates for a list of specifically described or *eo nomine* designations, and concluding with a rate for all items of the same type and class not specially provided for. The question of relative specificity is often whether the import conforms with the specific designations or falls into the general residue class designation. In the case of *Julius Forstmann & Co. v. United States*,[20] the import involved was textile machinery having as essential features electric motors and devices. As it did not fit any specific textile machinery in the schedule, the collector classified it under "all other textile machinery, finished or unfinished, not specially provided for."[21] The importer claimed the proper classification to be under "articles having as an essential feature an electric element or device, such as electric motors, fans, (etc.)."[22] In upholding the collector the court said that legislative intent (protection) showed that it was desired to have classification by use to prevail over general or even *eo nomine* classifications. Thus if the import fell under a use designation anywhere in the tariff, even a residue class, this designation would prevail over a more exact designation elsewhere unconcerned with use.

On the other hand, this priority of use doctrine does not apply unless the article at time of importation has been fully dedicated for all practical purposes to a particular use, even though the importer's actual intended use of it may be apparent. In *Worthington v. Robbins*,[23] the importer was a watchmaker, and he was importing "hard white enamel" to be used in making watch dials. Evidence showed that the article could be put to many other industrial uses besides, and would have to undergo further processing before being used for dials. The collector was held in error for classifying it as watch material rather than as an article "manufactured in whole or in part, not herein enumerated or provided for."

In laying the rule of relative specificity against the matrix of legislative intent, the courts have also given effect to the motive of protection of domestic labor. The more advanced the stage of manufacture and processing the merchandise presented for import is in, the greater the rate of duty intended will be presumed.[24] Thus, in determining between two

20. 28 C.C.P.A. 222 (1940).
21. 64 STAT. 4 (1930), 19 U.S.C. § 1001, Par. 372 (1952).
22. 48 STAT. 944 (1934), 19 U.S.C. § 1353 (1952).
23. 139 U.S. 337 (1891).
24. United States v. O. M. Baxter, Inc., 16 Ct. Cust. App. 257 (1928); United States v. Field & Co., 15 Ct. Cust. App. 254 (1927).

competing paragraphs, the court may go into the matter of the extent of additional processing or manufacture the merchandise will undergo in this country before reaching the consumer market.[25]

In the event the rule of specificity fails to determine a classification issue, the statute ungenerously provides:

> . . . If two or more rates of duty shall be applicable to any imported article, it shall be subject to duty at the highest of such rates.[26]

Obviously this provision begs the question of relative specificity, and the factual and interpretative investigation necessary to determine that issue must be made before this rule of the highest rate can be applied. For example, it has been held in a case involving lace handkerchiefs that a designation of articles composed of lace is the same as a designation of articles from which threads have been omitted, drawn, punched, or cut out, with threads reintroduced after weaving, and the designation providing the higher duty was the correct one.[27] The lengthier description merely itemized the process of making lace and hence was no more specific than the word "lace" itself. Doubt has been raised whether this highest rate rule applies when under one competing paragraph the import would be free and would be dutiable under the other[28]; or where under one paragraph the duty would be *ad valorem* and under the other specific.[29] The weight of the authority seems to be that these distinctions do not affect the applicability of the provision.

The phrase "not specially provided for," of common recurrence in the statutes, has received some particular attention with regard to the issue of classification. It has been held not to lessen the specificity of the other provisions of the paragraph to which it is appended.[30] On the other hand, if two competing paragraphs are equally specific in all other respects, and one has this phrase appended to it and the other does not, the paragraph not containing the phrase will be deemed the more specific and will govern. The reason for this is that the inclusion of this phrase advises the collector that the designation may be otherwise provided for,

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25. "Lines enumerated between different articles in the tariff are sometimes very nicely drawn, and a trifling amount of labor is often sufficient to change the nature of the article and determine its classification." Saltonstall v. Wiebusch, 15 Sup. Ct. 476 (1895); see also United States v. Bayersdorfer & Co., 12 Ct. Cust. App. 377 (1924).

26. 19 U.S.C. § 1001, Par. 1559 (1952); this seems to answer earlier cases to the effect that cases of doubt should be resolved in favor of the importer, as any intent of Congress to impose higher duty would have to come from clear, unambiguous language. Net & Twine Co. v. Worthington, 12 Sup. Ct. 55 (1891); Hortranft v. Weigmann, 7 Sup. Ct. 1240 (1886); United States v. Isham, 17 Wall. 491 (U.S. 1873).

27. United States v. Tam, 15 Ct. Cust. App. 252 (1927).

28. *Cf.* Meyer v. United States, 124 Fed. 296 (S.D.N.Y. 1901) and Loggie v. United States, 127 Fed. 813 (1st Cir. 1905).

29. *Cf.* Wyman v. United States, 13 Ct. Cust. App. 241 (1925) and Jackson v. United States, 2 Ct. Cust. App. 70 (1911) with United States v. Merck & Co., 91 Fed. 639 (S.D.N.Y. 1899).

30. United States v. Schwarz, 140 Fed. 302 (E.D. Pa. 1905); United States v. Richardson, 13 Ct. Cust. App. 280 (1925).

and in so pointing to such other designation Congress desired that it should prevail.[31]

It is apparent that the tariff acts contemplate the possibility of new types of articles being imported, and that they too should be dutiable if they fall into any class designated in the act. The schedule is not just an itemized list of all the items of commerce in existence at the date of enactment. As stated by the court in *United States v. L. A. Salomon & Bro.*:

> It must be remembered that the tariff acts are intended to bring within the purview of their provisions imported merchandise which is described therein, notwithstanding the fact that such merchandise, at the time of the law's enactment, was not known in our international commerce. It is well established that tariff statutes are made for the future as well as for the present.[32]

However, in determining the proper classification of new articles, the court, with legislative intent ever its guide, may go beyond the literal and mechanical wording of the statute and consider the matters of use and the objective of protection. A new article which fits in a literal way within a class designation, may escape duty thereunder where its use is of a different type and it does not compete with the articles described in the paragraph;[33] so to classify it would not serve the legislative purpose of protection.

III.

Sound and successful business operations involve the prediction of costs in order to determine whether a proposed transaction is prudent and whether profit may be realized. For the importer the amount of his tariff may be a major element in his total costs, and hence the prediction of his classification may be vital to his practical decision. From the foregoing it may seem that the uncertainties surrounding classification are a large obstacle in his way. A *priori* reasoning from a study of the tariff schedule would be perilous and unrewarding, and even expert opinion based on familiarity with classification principles would offer no sure guaranty. However, means are provided whereby the importer can determine with absolute certainty the amount of tariff for which he will become liable. Moreover, to put these problems in proper perspective, it must be remembered that this discussion concerns rare and exceptional cases; an extremely small percentage of the total number of liquidations is protested. Nevertheless, these problems are real ones to the average importer, as he never can be sure when he may encounter them in a practical way.

Aside from the matter of absolute assurance, the importer has a

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31. Drakenfield & Co. v. United States, 9 Ct. Cust. App. 124 (1919).

32. See note 18, *supra*; also, United States v. Marshall Field & Co., 18 C.C.P.A. 403 (1931); Klots v. United States, 139 Fed. 606 (2d Cir. 1905); Chicago Mica Co. v. United States, 21 C.C.P.A. 401 (1934).

33 Gimbel Bros. v. United States, 22 C.C.P.A. 146 (1934).

number of means of predicting the classification of his proposed import with a very high degree of probability. He can draw on his own experience and observation and such expert advice as he may seek. Beyond that he would find customs officials very helpful and cooperative in informal conversations, though he could get no binding commitment from the government in this way. Moreover, he can rely on prior government classifications that have become established practice. This is despite the fact that the government has a right to change a particular practice of classification if it subsequently decides this practice was erroneous.[34] However, this change cannot come about suddenly or arbitrarily, and Bureau of Customs regulations afford the importer a high degree of protection against such a change in an established classification. If such a change is to result in a higher rate of duty, it can come about only after instructions from the Bureau, and will apply only to merchandise imported after ninety days from the date of publication of these instructions in Treasury Decisions.[35] This regulation does not apply to changes resulting from court decisions, but that is not necessary, as reports of court decisions are public and available to the importer. In addition, the importer may have his classification determined in advance by sending through a sample or token import of the article in question prior to importation in commercial quantities.

But he is provided with the means of ascertaining absolutely the amount of his tariff by Bureau of Customs regulations. By sending to the Commissioner of Customs a full description of the proposed import, including information as to value, component material, use, and commercial designation, and a sample if possible, he may get a ruling as to its classification in advance.[36] If there is not already a controlling Treasury Decision covering the article, the ruling is published as a Treasury Decision, a copy being sent to the applicant.[37] Such a Treasury Decision becomes a uniform practice, which invests the Commissioner's ruling with the stability and safeguards surrounding established government classifications.[38] The government bears the costs of this procedure, which may be substantial, especially if complicated samples must be submitted for analysis. If the importer obtains such a ruling, it remains for him to ensure that the importation when offered actually conforms to the description or sample on which the ruling was based in order to obtain that classification. He should be aware that small discrepancies in this regard may place him in another classification.

There is other procedural recognition of the peculiar importance

34. Gulbenkian v. United States, 175 Fed. 860 (S.D.N.Y. 1909), *aff'd* 186 Fed. 133 (2d Cir. 1911).
35. U.S. Treas. Reg., Bureau of Customs, § 16.10 (a).
36. *Id.* at § 16.10a (a).
37. *Id.* at § 16.10a (b).
38. *Id.* at § 16.10a (c).

of classification problems. Classification cases arising under Section 1516 (b) of the tariff act[39] are accorded a special priority on the dockets of both the Customs Court[40] and the Court of Customs and Patent Appeals.[41]

While all this machinery assists the importer in his classification problems, it of course cannot hope to eliminate them. The importer may have cause to complain of the delay and red tape involved in getting a Bureau ruling. But it may be that this is part of that unavoidable red tape which must be regarded as necessary cost or overhead for the protection of individual rights. Undoubtedly in the field of government there is much unnecessary red tape, but some of it is only seemingly so, and in the final analysis can be justified in principle as a means of discriminating and sensitive protection of individual rights. On the side of the customs officials there is complaint that much of the criticism concerning classification stems from the importers' failure to avail themselves of their opportunities for ascertaining their classifications in advance. Of course, there are undoubtedly cases where the nature of a business transaction is such as to leave the importer little time to make his decision, and the delay involved in ascertaining his classification would be fatal to the transaction, so that in effect these procedures are unavailable to him. However, he should accept such situations in good grace as being among the innumerable instances in any business activity where a decision must be made quickly without opportunity for mature consideration of all pertinent factors.

Moreover, the ninety day period[42] before a higher rate resulting from a change in an established classification practice will take effect may be far from solving an importer's problems. In some cases heavy investments may have been made in plant and organization for the purpose of carrying on an importing business or program in reliance on the then existing tariff rate and classification. If the classification changes to a higher rate so as in effect to destroy the venture, ninety days may not be sufficient time to wind up the operation without incurring serious losses or to recover a substantial part of the investment. In such cases probably no particular waiting period would be especially helpful, but at least this mitigates the discomfitures resulting from classification changes.

So long as the time-honored and well entrenched tariff system prevails, classification problems will continue to be an unavoidable hazard of the importing business. The procedural machinery designed for the importer's benefit can only hope to mitigate rather than eliminate these problems.

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39. Title 19 U.S.C.A. These are cases involving a special procedure whereby the Secretary of the Treasury upon request furnishes the importer with the classification of designated merchandise.

40. 62 STAT. 982 (1948), 28 U.S.C. § 2638 (1952).

41. 62 STAT. 980 (1948), 28 U.S.C. § 2602 (1952).

42. Until September 6, 1952 (T.D. 53093, 17 FED. REG. 8066), the period was thirty days.

There are certainly valid criticisms to be made, but when viewed from the whole perspective, the system of classification procedures appears to be reasonably designed to assist the average importer and to be available to him. The procedure for ascertaining classification in advance has been in effect only since 1950, which is perhaps insufficient time for a body of precedent and routine practice to develop on which to base a sound critical appraisal.

The political question as to the wisdom of the protective tariff is beyond the scope of this discussion. In recognizing this legislative motivation, the courts carefully refrain from editorial comment on it. However, it is of interest to note that problems of classification have as their progenitor the policy of protection. The hairline distinctions made in the schedule result from a conscientious effort to make the protection uniform according to the varying degrees of protection sought or required by the various domestic interests. Thus, as a hypothetical example, growers of one type of apple may have demonstrated a need for a 25 percent protection, while growers of a similar but different variety had need of only 20 percent protection. In fairness to both industry and the consumer, the tariff act seeks to be sensitive to these differences, and in order to separate the rate for the two types of apples, the statute will have to distinguish between them through separate and carefully worded classifications. On the other hand, if the motive for the tariff were purely revenue, a straight *ad valorem* duty on all imports indiscriminately would suffice, and the need for classifications would disappear. Such a tariff would not need to differentiate locomotives from silk stockings.