Revocation and Modification of Rulings and Treatments: Does Section 625(c) Work?

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I. INTRODUCTION

This Article examines the manner in which the United States Customs and Border Protection (Customs) has administered section 625(c) of the Tariff Act of 1930, as amended at 19 U.S.C. § 1625(c). Does this administration fulfill the goals of the statute? I will also look at what the courts have said about Customs' administration.

19 U.S.C. § 1625(c) provides:

> A proposed interpretive ruling or decision which would—
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period.

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> The final ruling or decision shall become effective 60 days after the date of its publication.[1]

Thus, in the event Customs decides to revoke or modify a position embodied in an interpretive ruling, a decision, or a treatment, it must: (1) notify the public, (2) provide a comment period of not fewer than thirty days, (3) publish a final decision within thirty days of the end of the comment period, and (4) delay the effective date of the change for sixty days.[2]

The obvious purpose of the statute is to provide some assurance to the public sector that when it bases an investment or other business decision on a Customs position, the position will remain in force until formally revoked or modified, that any change will be preceded by an opportunity to comment, and that any change will be implemented on a prospective basis, not retroactively.

At first blush, section 625(c) seems straightforward. On reflection, it is not. In fact, one could make the case that parts of it are hopelessly confused. The problem is the use of the same terms "interpretive ruling or decision" to describe both the action to be taken and the prior action that is affected.[3] Surely the action to be taken was intended to be a much broader class than the prior action affected. Given the purpose of the statute, *any* decision that has the effect of revoking or modifying an existing position, as embodied in a ruling or a broad statement of policy, such as a General Notice, should be subject to prior notice, opportunity for comment, and a prohibition against retroactive application. There should be no limit to the types of action that can have that effect. If, as the Government has argued, only rulings or broad statements of policy are deemed capable of affecting existing Customs positions, the effectiveness of the statute to achieve its purpose would be seriously compromised.

There has been a significant amount of litigation involving section 625(c) for the simple reason that it is of such great importance to the private sector as well as the Government. The litigation generally has involved a matter of interest to a particular importer. When Customs has decided to change a position of broad application, it has not hesitated to provide an opportunity for comment.[4]

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1. 19 U.S.C.A. § 1625(c) (2008) (amending Tariff Act of 1930 § 625(c)).
2. *Id.*
3. *Id.*
4. General Notice, Dutiability of Royalty Payments, 27:6 Cust. Decs. at 1 (Feb. 10, 1993); Interpretive Rule Concerning Classification of Unisex Footwear, 72 Fed. Reg. 53,790 (Sept. 20, 2007); Proposed Interpretation of the Expression "Sold for Exportation to the United

II. INTERPRETIVE RULING

The first issue in determining whether section 625(c) applies is whether the Customs action is an interpretive ruling or decision. Rulings and protest review decisions issued by Customs' Headquarters Office or its National Import Specialist Division clearly are interpretive rulings. Internal advice memoranda qualify as interpretive rulings.[5] Preclassification ruling letters have been held to fall within the term.[6] The term "interpretive ruling" has been construed liberally—in keeping with the purpose of the statute. It is important to keep in mind that not every importer who relies on the position taken in an interpretive ruling necessarily enjoys the benefits of section 625(c). The benefit of a delay in implementation of a change is confined to the party who obtained the ruling.

In order to invoke the protections of section 625(c) on the basis of a change in a ruling, an importer must be the party to whom the ruling was issued and the change must affect the same merchandise described in the ruling.[7]

The courts have accepted this restriction and have held that rulings do not bind Customs as to merchandise that is merely substantially identical to the merchandise described in the ruling.[8] Instead, it must be the *same* merchandise. The restriction relating to the nature of the merchandise should be kept in mind when drafting ruling requests. Ideally, the description in the ruling request will be sufficient to enable Customs to issue the correct ruling but not so specific that it is unnecessarily limited. For example, a style number is useful shorthand for tying specific merchandise to a ruling, but it may be overly narrow. Other merchandise with different style numbers, but with the same defining characteristics, will not necessarily enjoy the benefits of the ruling if Customs decides to modify or revoke the ruling. A better approach is to describe the merchandise emphasizing the defining characteristics and hope that the description will be adopted in the ruling.

States" for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales, 73 Fed. Reg. 4254 (Jan. 24, 2008). It is unclear whether this approach is based on section 625(c) or 19 C.F.R. § 177.10(c) (2005) involving a change in an established and uniform practice.

5. Cal. Indus. Prods., Inc. v. United States, 436 F.3d 1341, 1351 (Fed. Cir. 2006) (defining the term as "including any ruling letter, or internal advice memorandum").

6. Motorola, Inc. v. United States (*Motorola I*), 350 F. Supp. 2d 1057, 1068 (Ct. Int'l Trade 2004).

7. 19 C.F.R. § 177.9(b). The Regulation refers to articles identical to the samples submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.

8. *Motorola I*, 350 F. Supp. 2d at 1074.

There is no single answer to this dilemma and the solution will vary depending on the nature of the merchandise.

As noted above, only the importer to whom the original ruling was issued is entitled to a prospective application of the change. Other importers who may have relied on the ruling are subject to a retroactive application of the change. However, as a practical matter, Customs usually does not apply these changes retroactively.[9]

III. DECISION

The scope of the term "decision" has been less easily discerned than the term "interpretive ruling." In *International Custom Products, Inc. v. United States*, the court was faced with determining whether a Notice of Action was within the statute's ambit.[10] The Government argued that a Notice of Action was not the type of decision intended by Congress to be subject to the strictures of the statute and that only interpretive, instructive, and far-reaching directives issued by Customs' Headquarters Office fall within the parameters of the term.[11]

The court said that the Government's position was inconsistent with the purpose of the statute and held that the Notice of Action was a decision and, as such, required adherence to the requirements of section 625(c).[12] The principal question in understanding the scope of the term "decision" is whether it is modified by "interpretive." I read "interpretive" as modifying "rulings" but not "decisions." I interpret the term "decision" to include any action that leads to a determination of whether a particular Customs position applies.[13] A liquidation, a protest denial, or a notice of action qualifies—all are decisions. I do not believe that the term is as narrow as the Government has argued. If it is, the utility of the statute in protecting importers from precipitous changes in Customs' positions is severely compromised. As *International Custom Products* points out, if the term "decision" is limited in the manner

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9. This author's view is that an importer does not have an obligation to advise Customs that it has relied on the revoked or modified ruling. However, the importer must apply the new ruling without delay.

10. Int'l Custom Prods., Inc. v. United States, 549 F. Supp. 2d 1384, 1389 (Ct. Int'l Trade 2008).

11. *Id.* at 1390.

12. *Id.* at 1391, 1393.

13. Determining whether a decision modifies or revokes an existing classification position usually is not difficult. It is often more difficult in the appraisement area. A decision to deny an appraisement based on the first-sale principle would not necessarily involve a revocation or modification. A decision that a particular transaction fails to satisfy the requirements of the first-sale principle is not implicated. A decision based on the validity of the principle could be implicated.

asserted by the Government it would be easy to sidestep the statute.[14] If Customs decides that a ruling is incorrect and should be revoked, instead of following the revocation procedure mandated by the statute, it could simply liquidate under the provision it now deems correct. Under the Government's theory, a liquidation that applied the revised position would not be a decision. The court in *International Custom Products* was correct in refusing to accept the Government's narrow interpretation of what constitutes a decision under section 625(c).[15]

IV. TREATMENT

When Customs decides to issue a ruling or a decision that could modify the treatment previously accorded to substantially identical transactions, it must follow the notice and prospective application requirements of the statute.[16]

The issue here is how one establishes the existence of a treatment. 19 C.F.R. § 177.12(c) lays out what is required in great detail.[17] In order to substantiate a claim for treatment under section 625(c), an importer must present evidence of a consistent treatment by Customs on identical or substantially identical transactions.[18] The showing must go back two years prior to the date of the most recent liquidation subject to the claim.[19] The entry information must include a list of every entry of the merchandise both liquidated and unliquidated up to the point where the importer was advised to use the new classification asserted by Customs, the entry number, port of entries, and identification of any entries that were subject to examination by Customs.[20] The request must provide the tariff classification, dollar value, and the volume of the merchandise.[21] Customs also requires a statement from the importer that there have been no entries of the merchandise under a tariff provision different from the claimed treatment provision for the same or similar merchandise.[22] This information is then verified with the affected ports.[23]

This is an onerous standard and arguably inconsistent with the spirit of the statute. Nevertheless, the courts have approved Customs'

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14. *Int'l Custom Prods.*, 549 F. Supp. 2d at 1390-93.
15. *Id.* at 1391.
16. 19 C.F.R. § 177.12(c) (2005).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

approach.[24] The principal difficulty in the treatment area is establishing that Customs made a conscious determination. Because most entries are handled pursuant to so-called "by-pass" procedures, establishing that a Customs officer examined the classification or appraisement of the merchandise can be difficult.

Customs found a treatment in only one ruling.[25] There, the claim involved the classification of posters entered beginning in 1992.[26] The importer was able to establish that Customs had examined the imported merchandise on five occasions in 1995 and 1996.[27]

The ruling does not describe the evidence establishing that the merchandise had been examined. Most likely, the importer was able to show that Customs had requested samples and, after examining the samples, had not altered the entered classification. It is unlikely that many importers are in a position to assert that Customs had examined the subject merchandise four to five years earlier. Few importers will have record-keeping procedures that require the retention of routine requests for samples. If this type of evidence is necessary to establish a treatment, it is easy to see why so few such claims have prevailed.

In order to substantiate the existence of a treatment, the importer must also show that transactions claimed to be covered are "substantially identical" to those that Customs previously examined.[28] This does not require them to be completely identical.[29] It does, however, require "such similarity or near resemblance as to be fundamentally equal or interchangeable."[30]

In *Arbor Foods, Inc. v. United States*, the court held that a powder blend of ninety-eight percent sugar and two percent gelatin was not substantially identical to blends containing five percent and six percent gelatin.[31] In *California Industrial Products, Inc. v. United States*, the United States Court of Appeals for the Federal Circuit dealt with a

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24. Motorola, Inc. v. United States, 436 F.3d 1357, (Fed. Cir. 2006); Arbor Foods, Inc. v. United States, No. 03-00414, slip op. (Ct. Int'l Trade May 17, 2006).

25. United States Int'l Trade Comm'n Rulings and Harmonized Tariff Schedule, HQ 964515 (Aug. 16, 2001). There are numerous rulings that deny the presence of a treatment.

26. *Id.*

27. *Id.*

28. 19 C.F.R. § 177.12(c).

29. Cal. Indus. Prods., Inc. v. United States, 436 F.3d 1341, 1351 (Fed. Cir. 2006).

30. Motorola, Inc. v. United States (*Motorola I*), 350 F. Supp. 2d 1057, 1074 (Ct. Int'l Trade 2004) (quoting WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY 1155 (11th ed. 1988)).

31. Arbor Foods, Inc. v. United States, No. 03-00414, slip op. at *1 (Ct. Int'l Trade May 17, 2006).

drawback contract involving the exportation of trim or steel scrap.[32] The court held that any differences in two letters of intent were not significant because both referred to the same general drawback contract.[33] Cellular phone battery packs based on nickel chemistry were not considered substantially identical to battery packs based on lithium chemistry.[34]

These cases do not provide much in the way of guiding principles. The determination of whether there are substantially identical transactions is by its nature a case-by-case exercise, one that is not easily given to a strict set of rules of general application.

As noted above, only the party to whom a ruling is issued is entitled to prior notice of a change in position. In the case of a treatment, however, a party claiming a treatment can rely on the treatment accorded to others.[35]

Given the difficulty of establishing a treatment based on entries, it is not surprising that some plaintiffs have argued that a series of rulings constitute a treatment under section 625(c).[36] In *Motorola v. United States (Motorola II)*, the plaintiff argued that the issuance of two preclassification ruling letters established a treatment.[37] The approach was rejected.[38] The courts pointed out that if an interpretive ruling could qualify as a treatment, section 625(c)(1) would be superfluous.[39] The Federal Circuit noted that interpretive rulings bind Customs only as to the items identified therein, even if the other merchandise is substantially identical.[40] Treatments, on the other hand, apply to substantially identical merchandise, which as we have seen, is less onerous than the stricter standard of identity applicable to rulings. Thus, allowing rulings to constitute a treatment would expand the scope of rulings to merchandise not covered there. For these reasons, the court held that a series of rulings did not constitute a treatment.[41]

Nevertheless, it seems to me that the existence of a large number of rulings that stake out a position on a specific classification or appraisement principle arguably support the existence of a treatment. Clearly, two preclassification decisions on a narrow classification

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32. 436 F.3d at 1345.
33. *Id.* at 1351-52.
34. *Motorola I*, 350 F. Supp. 2d at 1074.
35. *Cal. Indus. Prods.*, 436 F.3d at 1356.
36. Motorola v. United States (*Motorola II*), 462 F. Supp. 2d 1367, 1371 (Ct. Int'l Trade 2006), *aff'd*, 509 F.3d 1368 (Fed. Cir. 2007).
37. *Id.*
38. *Id.* at 1382.
39. *Id.* at 1381.
40. *Id.*
41. *Id.*

question are not sufficient for this purpose. Given these decisions it is obvious that in order to establish the presence of a treatment, it is necessary to satisfy the onerous requirements of 19 C.F.R. § 177.12(c).

V. SECTION 625(C) DOES NOT APPLY TO ALL CHANGES

Not all changes in rulings require that Customs follow section 625(c). Changes made to correct clerical errors are exempt by the terms of the statute.[42] In *Forest Laboratories, Inc. v. United States*, the court addressed whether section 625(c) applied where Customs, without observing the requirements of section 625(c), modified a ruling that erroneously stated that a chemical product was entitled to duty-free treatment because it was listed in the Pharmaceutical Appendix.[43] The court decided that section 625(c) did not apply.[44] It argued that the error amounted to a change in a tariff rate and that Customs did not have the authority to do so.[45] This analysis is questionable. The ruling did not change a rate of duty. It held, albeit erroneously, that the chemical was listed in the Pharmaceutical Appendix and for that reason entitled to duty-free treatment.[46] This was a legal error, not much different than a classification decision based on a misreading of prior rulings or a chapter note.

This decision could place in jeopardy the application of section 625(c) to a ruling modification intended to correct an error in interpreting the requirements of a preference program or a duty suspension provision. These types of errors could be characterized as impermissible rate changes and would seem to fall within the same category as the error in *Forest Laboratories*.[47]

There is another circumstance where section 625(c) does not apply: a change that is necessary to implement a court decision.[48] There the court held that the requirements of section 625(c) were not applicable because "[t]he interested public was given notice of the modification in the way vessel repair expenses would be . . . dutiable . . . by way of . . . this court's decision."[49]

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42. 19 U.S.C.A. § 1625(c) (2008).
43. 476 F.3d 877, 879-80 (Fed. Cir. 2007).
44. *Id.* at 883.
45. *Id.*
46. *Id.* at 881-83.
47. *Id.*
48. Sea-Land Servs., Inc. v. United States, 23 Ct. Int'l Trade 679, *aff'd*, 239 F.3d 1366 (Fed. Cir. 2001).
49. 239 F.3d at 1373.

VI. TIMING OF PUBLICATION

Section 625(c) states that "the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period."[50] Customs does not often meet this obligation. During the period 2004 through June 2008, Customs published 166 modifications and revocations of rulings.[51] Of these, only thirty-four were published within thirty days of the end of the comment period. Does the failure to meet the publication requirement invalidate a revocation or modification? The courts have said no.[52]

In *Avecia, Inc. v. United States*, the plaintiff argued that a revocation was ineffective because it was not published within thirty days of the end of the comment period.[53] The court rejected this assertion.[54] The court said that the purpose of the statute was notice, and the failure to provide notice within the thirty days voided agency action in the absence of prejudice to the party in interest.[55] This is probably the correct result. Any delay in the effective date of an adverse change does not prejudice the importer and a delay in a favorable change will be applied to all entries that are not final.

VII. CONCLUSION

Section 625(c) addresses a basic principle of democratic government—citizens are entitled to transparency and consistency in their dealings with government. This does not mean that the government may not alter a policy or position. It can—but it must provide prior notice and apply the change prospectively only, not retroactively.

Section 625(c) is imperfect but workable most of the time. Generally, Customs administers the statute appropriately. The main deficiency in Customs' administration of section 625(c) is the hurdles that it has created to establish a treatment. Unfortunately, the courts have approved Customs' approach.

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50. 19 U.S.C.A. § 1625(c) (2008).

51. This information is based on the author's review of the Customs Bulletins and Decisions published during this period, which are available at http://www.cbp.gov/xp/cgov/trade/legal/bulletins_decisions/.

52. Avecia, Inc. v. United States, 469 F. Supp. 2d 1269 (Ct. Int'l Trade 2006).

53. *Id.*

54. *Id.* at 1284 (citing Diamond Match Co. v. United States, 44 Cust. Ct. 67 (1960), *aff'd*, 49 C.C.P.A. 52 (1962)).

55. *Id.*