

within the next two weeks. Be sure to wear your CCS pin proudly for what you have accomplished and post your certificate for all to see. And, after the first of the year, start your efforts to accumulate the 20 CEUs you will need to renew your certification for 2009!

For Faster Reply, Label Your Message

Whenever communicating by email with the NEI, please remember to indicate the topic of your message in the subject line of the email. If it is about a membership form or proctoring challenge, just jot it down in the **subject line**. The NCBFAA is expanding its staff to accommodate the growing workload presented by our ever more successful NEI initiatives. To facilitate the learning of these new people as well as insure a speedier reply to your needs, noting the focus of your message in the subject line will go a long way toward accomplishing those critical objectives.

For example, if you have an issue about event attendance put "Form 210" or "Individual Verification of Attendance" in the subject line and it will be routed to the appropriate section.

Feeling Festive

By Lawrence M. Friedman

In this CCSContact issue, the lawyers of Barnes, Richardson & Colburn have provided useful information and insight into issues affecting importers, brokers, and customs compliance professionals. Feel free to contact them with comments and/or suggestions at www.barnesrichardson.com or lfriedman@barnesrichardson.com.

Halloween will be here before you know it; then, in rapid succession, Thanksgiving, Hanukkah, and Christmas. That means we will be seeing more festive articles on store shelves. And, as a holiday bonus, we may also be seeing a lowering of the status of the Explanatory Notes in classification law.

The gist of the festive articles controversy is this: are useful articles like mugs, sweaters, and cookware "festive articles?" Heading 9505 covers "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles" The subheadings specifically call out "Articles for Christmas festivities" including ornaments and nativity scenes.

Customs has long maintained that heading 9505 excludes utilitarian articles decorated in a holiday motif. An early test of this theory was a case called Midwest of Cannon Falls, Inc. v. United States. In 1997, the Court of Appeals for the Federal Circuit reviewed a decision of the Court of International Trade holding that numerous utilitarian but holiday-themed articles (including a terra cotta turkey container and a jack-o-lantern pitcher) were not classifiable as festive articles. The Court reversed and found that a utilitarian function does not preclude classification as a festive article. In rejecting comparisons to the examples of festive articles in the Explanatory Notes, the Court stated that "we will not employ [the EN's] limiting characteristics to narrow the language of the classification heading itself." Thus, the Court found that the language of the tariff schedule did not support the limitation Customs sought to impose on heading 9505.

The issue reached the Court of Appeals again in Park B.

Smith v. United States. This 2003 decision concerned the classification of table runners, placemats, napkins, and rugs having varying levels of association with holidays and festivals. Some of the merchandise included specific holiday symbols such as Santa Claus, ghosts, and bunnies. Other merchandise was in color schemes traditionally associated with holidays such as red and green for Christmas and browns for autumn.

The Court of Appeals again held that the utilitarian function of the merchandise did not preclude classification in heading 9505. Rather, the Court held that various legal notes throughout the tariff excluding festive articles from other classifications, such as textile articles and ceramics, indicated that festive utilitarian articles were clearly intended to be classified in heading 9505. The Court followed Midwest of Cannon Falls to establish a two part test for festive articles. First, the merchandise must be closely associated with a festive occasion. Second, the article must be used or displayed principally during that festive occasion.

While this seems like a reasonably clear test, litigation continued. This year, the Court of International Trade issued a 104 page opinion covering 208 styles of merchandise including cake toppers, pillars, separators, place card holders, and bakeware. Some of the merchandise was associated with holidays such as Christmas and Valentine's Day. Other merchandise was designed for use with private festivities such as birthdays and weddings. In Wilton Industries, Inc. v. United States, the government had a new additional point in its favor. In 2003, the Explanatory Notes

were amended consistent with Customs' interpretation to specifically exclude from heading 9505 utilitarian articles. The government argued that the change in the ENs was not a new rule but a clarification of the existing meaning of the ENs and, therefore, the tariff language. The Court, however, refused to apply the amendment to the entries at issue which had occurred before the change in the ENs and instead relied on the prior decisions in Midwest and Park B. Smith. This is an important and subtle distinction in which the Court implied that the Explanatory Notes, by themselves, do not trump settled U.S. law.

Which brings us to the recent decision of the Court of Appeals for the Federal Circuit in Michael Simon Design, Inc. v. United States. First, as a point of disclosure, I note that my law firm represented the plaintiff in this case, which involved the classification of sweaters with holiday designs. The Court of Appeals quickly rejected the utilitarian articles argument, making the important point that the HTSUS is not ambiguous on this issue. As a result, Customs' decisions to the contrary are not entitled to any deference from the Court of Appeals or the Court of International Trade. Further the Court noted that the 2003 amendment to the ENs is contrary to U.S. law as embodied in the language of the tariff schedule and interpreted by U.S. courts. Thus, the amendment was also entitled to no weight.

This line of cases appears to have settled the classification of festive articles. But, it also seems to have raised new and interesting questions about the status of the Explanatory Notes as a source of law. Clearly, the ENs cannot reverse a settled

judicial interpretation of tariff language. It remains to be seen whether a change in the ENs, without a corresponding change in the HTSUS, is enough to permit CBP to modify the treatment of merchandise or revoke standing rulings.

As a perhaps final chapter to the festive articles saga, the U.S. International Trade Commission ("USITC"), pursuant to the authority delegated by Congress under 19 U.S.C. § 3005, amended the HTSUS effective in 2007 to reverse the festive articles eligibility of (and raise the tariff rates on) almost all utilitarian holiday goods. While Congress itself can certainly raise taxes or tariffs, Congress limited the USITC's authority to those HTSUS tariff amendments that "ensure substantial rate neutrality." Thus, the festive articles story may have another chapter to be written if the USITC's HTSUS amendments are challenged.

Enhanced PORTAL Security Enforcement Began 9/28

As of September 14, CBP required all ACE Portal users to have complied with the new TLS security protocol and CBP began enforcing this requirement on September 28.

In an earlier announcement, CBP said that Federal Regulations require that sensitive data be protected when being disseminated over the Internet. Transport Layer Security (TLS) is the government approved security mechanism to protect sensitive data during Internet transmission. ACE had allowed the widely used Secure Socket Layer (SSL) protocol in addition to TLS. To comply with government regulations, CBP

has phased out SSL. ACE users must make a simple settings change to their Internet Explorer (IE) web browser settings to continue using the Portal. Make certain your Internet browser is Internet Explorer (IE) 6.0.2 or higher.

To check the installed version, open the Browser and Click on Help. Then click on About Internet Explorer, which is your last choice in the dropdown. Verify the version number on the first line of the next screen you see (IE 6.0 or greater). Then, to turn on TLS, while Internet Explorer is open, Click on Tools and select Internet Options. In the next pop up window, select the advanced tab and scroll down to the very bottom and check the Use TLS 1.0 box. Save your changes. When you complete this you have successfully upgraded your security setting to TLS.

APHIS Announces Web-based PCIT

Phytosanitary Certificate Issuance and Tracking (PCIT) is a web-based tool that allows U.S. exporters to apply for phytosanitary certificates online, schedule inspections and print out copies of their certificates. It provides a secure method for certifying officials and industry to communicate online and replaces the previous paper system. It also provides for the tracking and tracing of federal phytosanitary certificates. More information is available at <https://pcit.aphis.usda.gov/pcit/>.

C-TPAT Strengthens Ability to Manage Supply Chain

C-TPAT members remain firmly committed to the program, according to the results of a survey conducted by the