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Legal Principles Applicable to Judicial Review of Classification Cases

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INTRODUCTION

When Customs classifies merchandise imported into the United States, and the importer contests that classification, the standards which the trial court, the Court of International Trade, must apply are specific to classification cases, and involve unique nuances[1]. This paper will focus on the applicable standard of review in classification cases in the Court of International Trade, and also on the different standard of review which the Court of Appeals for the Federal Circuit must apply if the case is appealed to that court. Superficially, these standards may appear to be straightforward, but related issues such as deference have muddied the waters somewhat. Therefore, clarification and discussion may prove useful. As well, we will consider how the doctrines of *res judicata* and *stare decisis* fit --or do not-- into the context of a classification case.

STANDARDS OF REVIEW IN CLASSIFICATION CASES

A. 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. United States, 2003 Ct. Int'l Trade LEXIS 117, Slip Op. 03-117 (September 5, 2003); Intercontinental Marble Corp. v. United States, 264 F.Supp.2d 1306, 1309, Slip Op. 03-47 (CIT April 30, 2003); E.T. Horn Co. v. United States, Slip Op. No. 03-20 (Feb. 27, 2003). This standard is set forth by statute, in 28 U.S.C. §2640, which provides:

> Sec. 2640. - Scope and standard of review

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[1] For valuation cases, the CIT also does an independent review. See, Four Seasons Produce, Inc. v. United States, 2001 Ct. Int'l Trade LEXIS 157, Slip Op. 01-151 (CIT 2001); see also United States v. Mead Corp., 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001). It examines questions of law *de novo* and applies the presumption of correctness to Customs' factual determinations. See, Salant Corp. v. United States, 24 CIT 24 (2000). Customs' Decision Letters on valuation are entitled to Skidmore respect rather than Chevron deference. Id. *Stare decisis* applies to valuation cases (see, Orbisphere Corp. v. United States, 13 CIT 866 (1989)), although it is rarely utilized. Unlike in classification cases, however, collateral estoppel (*res judicata*) is applicable in reappraisement litigation. See, Heartland By-Products, Inc. v. United States, 223 F.Supp.2d 1317, 1329 (2002), *citing* J.E. Bernard & Co. v. United States, 66 Cust.Ct. 545, 324 F.Supp. 496 (1971).

> (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. United States, 110 F.3d 774, 776 (Fed. Cir. 1997).

B. 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. Filmtec Corp. v. United States, Slip Op. No. 03-153 (CIT November 25, 2003), *citing* Rollerblade Inc. v. United States, 24 CIT 812, 813, 116 F.Supp.2d 1247, 1250 (2002), aff'd 282 F.3d 1349 (2002), quoting Bausch & Lomb. v. United States, 148 F.3d 1363, 1365 (Fed.Cir. 1998).

C. 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. Pillsbury Corp. v. United States, Slip Op. No. 03-140, (CIT Oct. 27, 2003); Rollerblade Inc. v. United States, 112 F.3d 481 (Fed.Cir. 1997).

D. The question of deference

Customs' classification ruling will receive Skidmore deference according to its power to persuade (United States v. Mead Corp., 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1136 (Fed.Cir. 2001); Park B. Smith v. United States, 347 F.3d 992 (Fed.Cir. 2003). 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 United States 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[2]. 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. United States, 264 F.3d 1126, 1136 (Fed. Cir. 2001).

E. Standard of review on appeal

Upon further appeal to the Court of Appeals for the Federal Circuit, the appellant bears the burden of establishing reversible error in the decision of the Court of International Trade, by showing that the court 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 to the finder of fact. See, Park B. Smith v. United States, supra. The first step in determining and applying the correct Customs classification requires the Court of Appeals to determine the meaning of any disputed terms in the relevant tariff provision, the second step is to apply the provision to the specific imported merchandise, with appropriate deference to the finder of fact. Id. On questions of law, the Federal Circuit defers neither to the CIT or Customs, and reviews the matter *de novo*. Park B. Smith v. United States, supra; Clarendon Mktg. v. United States, 144 F.3d 1464, 1466 (Fed.Cir. 1998); Universal Elecs. Inc. v. United States, 112 F.3d 488, 493 (Fed.Cir. 1997).

THE DIFFERENT STANDARD OF REVIEW IN TRADE CASES

These classification-specific standards contrast strikingly with trade cases, in which the standard of review is very different. For judicial review of antidumping and countervailing duty determinations, 28 U.S.C. §2640(b) specifies that the standard of review is that set out in 19 U.S.C. §1516a(b), which provides:

> (b) Standards of review
> (1) Remedy
> The court shall hold unlawful any determination, finding, or conclusion found -
> (A) in an action brought under subparagraph (A), (B), or (C)

[2] The case also clarified that if a classification regulation is a reasonable interpretation and implementation of an ambiguous statutory provision, it must be given judicial deference (Chevron deference). Contrastingly, policy statements, interpretive rules, agency manuals, and enforcement guidelines lacking the force of law are not entitled to Chevron deference, are only entitled to Skidmore deference. Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

> of subsection (a)(1) [i.e. a determination not to initiate an investigation, a determination by the Commission not to review an investigation based on changed circumstances, or a negative determination by the Commission as to material injury or threat thereof] of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or
> (B)(i) in an action brought under paragraph (2) of subsection (a) of this section [e.g. final affirmative determinations, final negative determinations, determinations to suspend an investigation, determinations as to whether the merchandise falls within the specified scope], to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, or
> (ii) in an action brought under paragraph (1)(D) of subsection (a) of this section[five-year review final determination], to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Obviously, this is quite dissimilar to the standard of review applicable in classification cases. The record for review is specified in the statute and is quite exhaustive[3]. On appeal of countervailing duty determinations or anti-dumping determinations made by the Department of Commerce, CAFC applies anew the standard of review applied by the Court of International Trade in its review of the administrative record. In doing so, the CAFC upholds Commerce's determination unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law. The appellate court reviews *de novo* the trial court's answers to all questions of law for abuse of discretion, including statutory interpretation questions; evidentiary decisions, including waiver for failure to timely present evidence or raise an issue. Findings of fact by the trial court are reviewed for clear error. F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027 (Fed.Cir. 2000). On the question of deference, the Federal Circuit reviews questions of statutory interpretation without deference. Micron Tech., Inc. v. United States, 243 F.3d 1301 (Fed.Cir. 2001). See also, U.S. Steel Group v. United States, 225 F.3d 1284, 1286 (Fed.Cir. 2000). However, in reviewing an agency's construction of a statute that it administers, the appellate court addresses two questions as required by the Supreme Court's decision in Chevron U.S.A., Inc. v. Natural

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[3] 19 U.S.C. §1516a(b)(2) specifies the record for review as including a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of *ex parte* meetings, and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." Id. at 842. If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress. Id. at 843. If, however, Congress has not spoken directly on the issue, this court addresses the second question of whether the agency responsible for filling a gap in the statute has rendered an interpretation that "is based on a permissible construction of the statute." Id.. See also, Micron Tech., Inc. v. United States, supra, 243 F.3d at 1308. Finally, unlike in classification cases (discussed below), the doctrine of collateral estoppel applies in countervailing duty and antidumping duty cases. See, e.g., Koyo Seiko Co. v. United States, 186 F. Supp. 2d 1332, 1340-1341 (CIT 2002).

RES JUDICATA, AND STARE DECISIS AS APPLIED IN CLASSIFICATION CASES

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 United States 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. Therefore, collateral estoppel (issue preclusion) does not exist in classification cases[4].

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 was created in Schott Optical Glass, Inc. v. United States, 750 F.2d 62, 65 (Fed.Cir. 1984), it states that "[a] court will reexamine and overrule a prior decision that was clearly erroneous" (citing 2 early CCPA cases). 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 (additional expert testimony and excerpts from treatises). The CIT had refused to admit such evidence. 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

[4] See also, Avenues in Leather, Inc. v. United States, 317 F.3d 1399, 1404, Slip. Op. No. 02-1239 (Jan. 29, 2003).

clearly erroneous". Id. at 64. The Court said the additional evidence should have been allowed and that while it could not say what effect the evidence might have had and "[n]or do we suggest that the Court of International Trade necessarily must admit every item of evidence that Schott offers[], . . . [t]he admissibility of each item must be determined by that court upon the basis of the usual criteria of relevance, probative force, authenticity, accuracy, etc.".

So the importer could try to advance evidence that the first decision was clearly erroneous, and the CIT must evaluate every piece of evidence offered on its own merits. See also, Avenues in Leather, Inc. v. United States, 317 F.3d 1399, Slip. Op. No. 02-1239 (Jan. 29, 2003); DaimlerChrysler Corporation v. United States, 2000 CIT LEXIS 126, Slip. Op. No. 00-124 (2000.); Boltex Manufacturing Co. v. United States, 24 CIT 972, 984-5, 140 F.Supp.2d 1339, 1351-2 (2000); E.I. Dupont de Nemours v. United States, 23 CIT 343 (1999); Gulfstream Aerospace Corp. v. United States, 21 CIT 1083 (1997); Heraeus-Amersil, Inc. v. United States, 13 CIT 764 (1989).

2. Proving that the product or issue is slightly different. This was recently discussed by the CAFC in Avenues in Leather, Inc. v. United States, 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:

> In assuming that Avenues attempted to relitigate the holding of Avenues I, the Court of International Trade believed that there was no new issue of fact or law in this case based on its perfunctory decision that the Calcu-Folios were "substantially the same" as the Avenues I folios. That assumption caused it to improperly apply the doctrine of collateral estoppel against Avenues. As we explained above, the application of collateral estoppel in customs classification cases is contrary to settled Supreme Court precedent. By refusing to consider Avenues's evidence and determining that Avenues I's classification was determinative of this case, the trial court actually estopped the importer from presenting evidence and litigating the proper classification of the Calcu-Folios as allowed by Stone &

> Downer. Because that application of collateral estoppel violates Supreme Court doctrine, we must reverse the trial court's summary judgment. 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. See Tex. Instruments Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1568 (Fed. Cir. 1996) (providing that collateral estoppel must involve the same issue of fact or law). **The goods in this case are different from the merchandise in** Avenues I. In the previous appeal, we reviewed Avenues's challenge to the Customs Service's tariff classification of the "Pro-Folio" line (style 3345) and the "Present-O-Folio" lines (styles 3343, 3345, 3349). Avenues I, 178 F.3d at 1242-43; Avenues in Leather, Inc. v. United States, 11 F. Supp. 2d 719, 721-22 (Ct. Int'l Trade 1998), aff'd, 178 F.3d 1241 (Fed. Cir. 1999). The present litigation involves a challenge to the tariff classification of Calcu-Folio style numbers 3532 and 3533, not the Pro-Folio or the Present-O-Folio goods at issue 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.** In our previous decision, we rejected Avenues's attempt to classify its folios under subheading 4820.10.20(EN) and upheld the Customs Service's classification under subheading 4202.11.00.(EN) Avenues I, 178 F.3d at 1244-46. Here, Avenues asserts that its Calcu-Folios should be classified eo nomine under subheading 4820.30.00(EN) rather than ejusdem generis under subheading 4202.12.20.(EN) **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. See Stone & Downer, 274 U.S. at 236-37. Consequently, the Court of International Trade erred when it applied collateral estoppel to this case and failed to consider whether Avenues's evidence could create a genuine issue of triable fact. **This is a new entry and thus a new case.** Avenues was entitled to a trial on the classification of the Calcu-Folios.

[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. Judge Barzilay characterized this principle in Heartland By-Products, Inc. v. United States, 223 F.Supp.2d 1317, Slip. Op. No. 02-22 (2002), (in an opinion subsequent to the reversal by the CAFC of her earlier decision in Heartland), as "simply a specific exception to traditional rules of res judicata in certain classification decisions." Id. at 1329.

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.