

REVOCATION AND MODIFICATION OF
RULINGS AND TREATMENTS: DOES SECTION 625(c) WORK? *

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Introduction. This paper examines the manner in which United States Customs and Border Protection (“CBP”) has administered Section 625(c) of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1625(c). Does this administration fulfill the goals of the statute? We will also look at what the courts have said about CBP’s administration.

19 U.S.C. § 1625(c) provides that:

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

Thus, in the event CBP decides to change 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 30 days; 3) publish a final decision within 30 days of the end of the comment period; and 4) delay the effective date of the change for 60 days.

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 CBP 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 as I see it 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. The action to be taken surely 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 the effect. If, as the Government has argued, only rulings or broad statements of policy are deemed capable of affecting existing CBP 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 CBP has decided to change a position of broad application, it has not hesitated to provide an opportunity for comment. Examples are: General Notice, Dutiability of Royalty Payments, 27:6 *Cust. Bull. & Decs.* at 1 (February 10, 1993); Interpretive Rule Concerning Classification of Unisex Footwear, 72 *Federal Register* 53790 (2007); Proposed Interpretation of the Expression “Sold for Exportation to the

United States” for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales, 73 *Federal Register* 4254 (2008).¹

Interpretive Ruling. The first question in determining whether Section 625(c) applies is whether the CBP action is an interpretive ruling or decision. Rulings and protest review decisions issued by CBP’s Headquarters Office or its National Import Specialist Division clearly are interpretive rulings. Internal advice memoranda qualify as interpretive rulings. *Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 27 ITRD 2056, 2064 (Fed. Cir. 2006) (term defined as “including any ruling letter, or internal advice memorandum”). Preclassification ruling letters have been held to fall within the term. *Motorola, Inc. v. United States* 350 F. Supp. 2d 1057, 26 ITRD 2261 (CIT 2004) (“*Motorola I*”). The term interpretive ruling has been construed liberally – in keeping with the purpose of the statute.

It is important to keep in mind that the mere existence of an interpretive ruling does not mean that every importer who relied on the position taken in the ruling enjoys the benefits of Section 625(c), particularly a delay in the date of implementation of a change.

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. 19 C.F.R. § 177.9(b).²

¹ It is not clear whether this approach is based on Section 625(c) or 19 C.F.R. § 177.10(c) involving a change in an established and uniform practice.

² 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.

The courts have accepted this restriction and have held that rulings do not bind CBP as to merchandise that is merely substantially identical to the merchandise described in the ruling. *Motorola I*. 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 CBP 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 get the benefits of the ruling if CBP 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. 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, CBP usually does not apply these changes retroactively.³

Decision. The scope of the term decision has been somewhat less easily discerned than the term interpretive ruling.

³ Query whether an importer in this situation has an obligation to advise CBP that it has relied on the revoked or modified ruling. I think not. However, the importer must apply the new ruling without delay.

In *International Custom Products v. United States*, 594 F.Supp. 2d 1384 (CIT 2008), the court was faced with determining whether a Notice of Action was within the statute's ambit. The Government argued that a Notice 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 CBP's Headquarters Office fall within the parameters of the term.

The court asserted that the Government's position that the term decision should be limited 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).

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 CBP position applies.⁴ 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 CBP's positions is severely compromised. As *International Custom Products* points out, if the term decision is limited the Government could sidestep the statute easily. If CBP 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

⁴ Determining whether a decision modifies or revokes an existing classification position usually is not difficult. It is often more difficult in the appraisal area. A decision to deny an appraisal 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 is implicated.

in *International Custom Products* was correct in refusing to accept the Government's narrow interpretation of what constitutes a decision under Section 625(c).

Treatment. When CBP 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.

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.

In order to substantiate a claim for treatment under Section 625(c), an importer must present evidence of a consistent treatment by CBP on identical or substantially identical transactions. The showing must go back two years prior to the date of the most recent liquidation subject to the claim. 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 CBP, the entry number, port of entries, and must identify any entries that were subject to examination by CBP. The request must provide the tariff classification, dollar value and the volume of the merchandise. CBP 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. This information is then verified with the affected ports.

This is an onerous standard and one that can be argued is not consistent with the spirit of the statute. Nevertheless, the courts have approved CBP's approach. *Motorola*

Inc. v. United States, 436 F.3d 1357, 27 ITRD 2068 (Fed Cir. 2006); *Arbor Foods, Ind. v. United States*, 28 ITRD 1705 (CIT 2006).

The principal difficulty in the treatment area is establishing that CBP made a conscious determination. Since most entries are handled pursuant to so-called “by-pass” procedures, establishing that a CBP officer examined the classification or appraisalment of the merchandise is difficult.

I was able to find only a single ruling where CBP found a treatment. HQ 964515 (August 16, 2001)⁵ There, the claim involved the classification of posters entered in 2002. The imports began in 1992 and the importer was able to establish that CBP had examined the imported merchandise on five occasions in 1995 and 1996.

The ruling does not describe the evidence establishing that the merchandise had been examined. I assume that the importer was able to show that CBP had requested samples and, after examining the samples, had not altered the entered classification. I think it is unlikely that many importers would be in a position to assert that CBP 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 CBP previously examined. This does not require complete identity. *Cal. Ind. Prods.*, 27 ITRD 2064. It does, however, require “such similarity or near resemblance to be

⁵ There are numerous rulings that deny the presence of a treatment.

fundamentally equal or interchangeable.” *Motorola v. United States*, 436 F.3d 1357, 26 ITRD 2261, 2274 (Fed. Cir. 2006).

In *Arbor*, the court held that a powder blend of 98% sugar and 2% gelatin was not substantially identical to blends containing 5% and 6% gelatin. In *Cal. Ind. Prods.*, the Federal Circuit dealt with a drawback contract involving the exportation of trim or steel scrap. The court held that any differences in two letters of intent were not significant because both referred to the same general drawback contract. Cellular phone battery packs based on nickel chemistry were not considered substantially identical to battery packs based on lithium chemistry. *Motorola I*.

These cases do not provide much in the way of guiding principles. The determination of whether there is substantial identify 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 others. *Cal Ind. Prods*.

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). In *Motorola Inc. v. United States*, 462 F.Supp.2d 1367, 29 ITRD 1013 (2006); *aff'd*, 509 F.3d 1368, 29 ITRD 1865 (Fed. Cir. 2007), plaintiff argued that the issuance of two preclassification ruling letters established a treatment. The approach was rejected. The courts pointed out that if an interpretive ruling could qualify as a treatment, Section 625(c)(1) would be superfluous. The Federal Circuit noted that interpretive rulings bind CBP only as to the items identified therein, even if the other

merchandise is substantially identical. 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.

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

Section 625(c) Does Not Apply To All Changes. Not all changes in rulings require that CBP follow Section 625(c). Changes to correct clerical errors are exempt by the terms of the statute.

In *Forest Laboratories v. United States*, 476 F.3d 877, 28 ITRD 2089 (Fed. Cir. 2007), the court addressed whether Section 625(c) applied where CBP, 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. The court decided that Section 625(c) did not apply. It argued that the error amounted to a change in a tariff rate and that CBP did not have the authority to do so. 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. 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*.

There is another circumstance where Section 625(c) does not apply; a change that is necessary to implement a court decision. *Sea-Land Services, Inc. v. United States*, 23 CIT 679, 69 F. Supp. 2d 1371, 21 ITRD 1872, *aff'd*, 239 F.3d 1366, 22 ITRD 2200, 2207 (Fed. Cir. 2001). 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 [].”

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.” CBP does not often meet this obligation. During the period 2004 through June 2008, CBP published 166 modifications and revocations of rulings. Of these, only 34 were published within 30 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.

In *Avecia Inc. v. United States*, 469 F.Supp.2d 1269, 29 ITRD 1090 (CIT 2006), plaintiff argued that a revocation was ineffective because it was not published within 30 days of the end of the comment period. The court rejected this assertion, citing *Diamond Match Co. v. United States*, 44 Cust. Ct. 67, 181 F.Supp. 952 (1960), *aff'd*, 49 CCPA 52 (1962). The court said that the purpose of the statute was notice and the failure to provide notice within the 30 days did void agency action in the absence of prejudice to the party in interest. 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.

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.

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

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