

GLOBAL STRATEGY FOR UNIFORM TARIFF CLASSIFICATION

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Abstract: It is in the nature of an international business that the industry spends vast sums on duties and other charges on imported equipment. Lack of clarity on tariff classification is also responsible for significant delays in customs clearance to the detriment of the project timescales. Both these factors have a marked impact on customer's budgets and time to market. This paper argues for an industry process that will benefit suppliers and customers alike, saving time and money and reducing risk. A global strategy for uniform tariff classification is one that seeks consistent classification of a company's products in its home market and in every export market. The WCO's Harmonised System (HS) facilitates uniformity in customs classification and provides a good basis for a global approach to uniform classification. All countries, territories and customs or economic unions applying the HS should classify any given commodity the same way even if, in practice, the classification numbers and nomenclature and the wording of the rules of interpretation vary from country to country. The authors posit that the best way to achieve uniform tariff classification is to obtain a binding tariff ruling in each target market and recommend that a company first obtain a binding tariff ruling for each product in its home market, on the basis of a simplified technical specification specially designed for use with customs authorities, and then apply for a ruling confirming the same classification on the basis of the same technical specification in each export market. The paper discusses the practicalities and potential difficulties of the suggested approach. This topic is particularly timely since the HS nomenclature has been completely revised, effective January 1, 2007, and many jurisdictions have implemented the changes as of the same date.

1 INTRODUCTION

A global strategy for uniform tariff classification is one that seeks consistent tariff classification of a company's products in its home market and in every market to which it exports.

While the main, or even the only, goal of an exporter considering global tariff-classification initiatives may be to achieve the lowest possible duty rate in every jurisdiction, a strategy for uniform tariff classification is to be distinguished from a one aimed at minimising duty rate without regard to the correct tariff classification.

Since not all jurisdictions apply the same duty rate to any given tariff classification, a strategy aimed at achieving the lowest possible duty rate, to be successful, might require the exporter to take inconsistent positions as to product classification in different jurisdictions, whether actively, by intentionally seeking classification rulings that are inconsistent with those sought in other jurisdictions, or passively, by simply allowing inconsistent ad-hoc treatment by local customs authorities at the point of entry. The discovery of these inconsistencies by customs authorities is likely to result in retrospective recovery of unpaid duties plus interest, as well as fines in the case of deliberate conduct.

The World Customs Organisation's Harmonised System ("HS") facilitates uniformity in customs tariff classification and provides a good basis for a global approach to uniform tariff classification, because the International Convention on the Harmonised

Commodity Description and Coding System ("HS Convention") requires the contracting parties to use all the headings and subheadings of the HS with their related six-digit numerical codes and to apply the general rules for the interpretation of the HS.¹ Currently more than 200 countries and customs or economic unions, including 128 (countries and the EU) signatories to the HS Convention², which account for about 98% of world trade, use the HS as the basis for customs tariffs.³ The nomenclature appended to the HS Convention is periodically amended, usually every five years. The most recent amendments entered into force on January 1, 2007.

2 ADVANTAGES AND DISADVANTAGES OF A CLASSIFICATION STRATEGY AIMED AT UNIFORMITY

A global strategy for uniform tariff classification has both advantages and disadvantages:

A. Advantages

1. Predictability

A binding ruling issued by the appropriate customs authority provides a degree of certainty that allows the holder to predict the treatment its products will receive upon entry into the relevant jurisdiction. Because it provides confirmation of the correct tariff classification, the importer's liability for customs duty and other charges, or its eligibility for certain refunds or customs facilitations, are known in advance. Rulings issued by headquarters, regional or other senior customs offices are generally binding on the local customs authorities at

the point of entry and are typically valid for several years.⁴

There can be no assurance that the correct tariff classification will correspond to a low or zero duty rate in any given jurisdiction, but a ruling that does confirm a low or zero duty rate gives the holder a degree of certainty as to the amount of customs duty it can save and therefore enables it to be more competitive, passing on the benefit of these cost savings to its own customers, who will generally be the importer of record of the goods in question.

Local customs authorities in some jurisdictions may even give weight to a binding ruling issued in another jurisdiction in making a classification decision, since they may consider such rulings persuasive evidence of the correct classification in their own jurisdiction.

2. *Control of the Application*

The applicant, which knows its products better than anyone else, can control the content of the application and, therefore, bearing in mind the commodity descriptions and the rules of interpretation of the HS, present the relevant supporting information to the customs authorities to guide them to the correct classification.

3. *Efficiency*

Obtaining a binding ruling in one jurisdiction may facilitate getting rulings for the same commodity in other jurisdictions. Since the same CTD can be used in support of each application for a given commodity, the applicant only has to write one CTD per product.

4. *Adjustments of Past Duty Paid*

If the duty rate applicable to the classification confirmed by a binding tariff ruling is lower than that applicable to the classification previously assigned to the commodities, the holder of the ruling may be entitled to rely on it to claim a refund of past overpayments of duty. EU customs regulations, for example, provide for the repayment of overpaid customs duty for up to the preceding three years.⁵

If the duty rate applicable to the classification confirmed by a ruling is higher than that applicable to the classification previously assigned to the commodities, the applicant may be able to mitigate any risks associated with underpayment of duty caused by the previous (incorrect) classification. EU customs regulations, for example, provide for the recovery of underpaid customs duty for the preceding three-year period.⁶

5. *Qualification for Preferential Treatment under Trade Agreements*

A tariff ruling confirms eligibility for participation in the General System of Preferences (GSP)⁷ and other

trading agreements whose benefits depend on tariff classification.

6. *Information as to Other Trade Regulations*

A tariff ruling may alert the applicant about any import or export licensing requirements or about quotas or other quantitative restrictions that may apply to the goods in question.⁸

B. Disadvantages

1. *Increased Visibility to Local Authorities*

In some jurisdictions where different governmental departments and agencies routinely exchange information, the filing of an application for a tariff ruling, which may be perceived as a request for a tax benefit, may attract the attention of local tax and other authorities, in addition to that of the customs authorities with which the application is filed, all of which may show greater interest in the applicant and its business than previously, including in the form of more frequent audits of the applicant or its affiliates.

2. *Resources*

The implementation of a global strategy for customs classification requires the allocation of internal (legal, technical, sales, purchasing and logistics) and possibly also of outside resources (legal counsel or customs consultants).

3. *No Guaranty of Lower Duty Rate*

As noted above, a global strategy for customs classification is aimed at consistent correct tariff classification, not necessarily low duty rate. While the HS Convention requires the contracting parties to adhere to certain rules concerning tariff classification, it does not require them to align the corresponding duty rates.

3 GETTING BINDING TARIFF RULINGS

The Internet is often a good source of information on individual countries' application requirements as well as on their customs tariffs generally.⁹ Not all countries issue binding tariff rulings, but, in those that do, the application process is broadly the same. The application would typically include: (i) a specific form or a covering letter setting forth the request; (ii) a request for confidential treatment; (iii) details of the product function(s); (iv) the required customs classification number; (v) the technical description of the product; (vi) product samples; and (vii) any binding rulings obtained in other jurisdictions for the same product.

The application should ask the examining authority to give the applicant prior notice of its intention to issue a ruling contrary to that sought so that the applicant can attempt to address the authority's concerns and offer additional information if appropriate.

Only the holder of a binding tariff ruling (i.e., the person to which it was issued) is legally entitled to use the ruling.¹⁰ Other companies may try to rely on it anyway, but if challenged, either at the time of importation or in the context of a retrospective audit, they must demonstrate to customs that their product is the same as the holder's, and that task may be difficult if they are not sufficiently familiar with the holder's product and the supporting materials submitted with its ruling application.

4 HOW COUNTRIES INTERPRET THE HS

While countries applying the HS should consistently apply the headings and subheadings of the HS with their related six-digit numerical codes and follow the general rules for the interpretation of the HS,¹¹ the HS Convention allows each contracting party to "make such textual adaptations as may be necessary to give effect to the [HS] in its domestic law"¹² and to establish "subdivisions classifying goods beyond the level of the Harmonised System, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code."¹³

Accordingly, interpretation of the HS by national customs authorities will be broadly consistent, but inconsistencies may occur at the level beyond the first six digits of the classification code, such as when one country has more subdivisions under a given heading or subheading than another. In addition, the HS provides that a contracting party that is a "developing country" may elect to apply the HS partially.¹⁴

Another source of inconsistency, and the one that exporters are in the best position to avoid, arises when the information presented to the customs authority is incomplete or unclear and therefore offers no guidance at all as to the correct classification or leads the customs official to an inaccurate interpretation. This situation most often occurs when no jurisdiction has issued a binding ruling in respect of the item and the interpretation is based on an invoice or shipping documentation. By ensuring that the shipping documents always include a copy of a binding ruling, even one issued by a jurisdiction other than the destination country, exporters can make the job of foreign customs officials easier and guide them to an accurate interpretation.

5 MAKING USE OF BINDING RULINGS

While much of the discussion in this paper has been on the importance of binding tariff rulings and how to get them, the successful implementation of a strategy for uniform tariff classification will depend at least as much on the use that a company makes of the rulings it obtains.

Employees responsible for completing the shipping documents and for handling customs formalities should be involved from the outset in the company's global

strategy for uniform tariff classification. They should understand the importance of binding rulings and how to use them.

It should be obvious that the shipping documents should always mention that a binding ruling has been issued for the goods and indicate the same commodity code as that assigned in the ruling. In addition, a copy of the ruling should be enclosed with the shipping documents whenever the product covered by the ruling is shipped to the issuing jurisdiction. But even these precautions may not be enough to ensure that customs at the point of entry will classify the product in accordance with the ruling if the customs officer isn't convinced that the item presented for customs clearance and the one described in the ruling are one and the same.¹⁵

To minimise the risk of such challenges, the holder of a binding ruling should ensure that the product description used in the shipping documents always conforms precisely to that given in the ruling and in the related CTD and you should enclose a copy of the CTD on the basis of which the ruling was issued with the shipping documents.

Another way to reduce the likelihood of challenges is to add a statement in the shipping documents about the function of the product, as distinct from the mere description of the goods. If, for example, the exporter states on the shipping invoice, "Function: telecommunications equipment for use in the XYZ Submarine Cable System," then it is not only saying what the equipment is but also clarifying what it is being used for, and this information may serve as one more indicator of the correct classification.

6 CONCLUSION

A global strategy for uniform tariff classification, if it takes advantage of the fact that so many countries, territories and customs or economic unions use the same basic tariff nomenclature and apply the same rules of interpretation for classification, affords numerous benefits to companies trading globally. The most important among these is the certainty of the correct commodity code to be entered on customs entries, and, if a tariff ruling does confirm a low- or zero-duty rate, it provides a degree of certainty of cost savings that the holder can then pass on to its own customers.

A global strategy for uniform tariff classification allows the company to stay in control of the application process, deciding when, where and how to present applications for binding rulings. It is an efficient approach, because work done in support of one application can be reused for subsequent applications in other jurisdictions, and rulings obtained in one jurisdiction may even be regarded as persuasive evidence of the correct classification by customs authorities in other jurisdictions, either in connection

with applications for rulings or, when presented at the frontier with shipping documents, in connection with individual customs entries. Rulings that confirm a lower duty rate than previously applied may be used in support of applications for refunds. Those that confirm a higher rate of duty at least put a cap on the potential exposure for recovery of unpaid duty. Tariff classification confirmed by a ruling may also confirm eligibility for preferential treatment under certain trade agreements.

7 REFERENCES

¹ International Convention on the Harmonised Commodity Description and Coding System, June 14, 1983 (as amended June 24, 1986), art. 3.1(a)(i), (ii), available at http://www.wcoomd.org/ie/En/Conventions/convention_s.html [hereinafter HS Convention].

² See http://www.wcoomd.org/ie/en/Topics_Issues/topics_issues.html.

³ World Customs Organisation, *The Harmonised System: The language of international trade*, at <http://www.wcoomd.org/ie/En/AboutUs/aboutus.html>.

⁴ See, e.g., HM Revenue and Customs, About Binding Tariff Information (BTI), at <http://www.hmrc.gov.uk/>.

⁵ Council Regulation 2913/92 establishing the Community Customs Code, art. 236, 1992 O.J. (L 302), 1, available at http://europa.eu.int/eur-lex/lex/RECH_reference_pub.do.

⁶ *Id.* art. 221(3).

⁷ See, e.g., 19 U.S.C. §§ 2461-67 (2007); Commission Regulation 2454/93 laying down provisions for the implementation of Council Regulation 2913/92, art. 66-97, 1993 O.J. (L 253), 1 available at http://europa.eu.int/eur-lex/lex/RECH_reference_pub.do (on EU GSP program).

⁸ See, e.g., HM Revenue and Customs, About Binding Tariff Information (BTI), at <http://www.hmrc.gov.uk/>.

⁹ See <http://www.wcoomd.org/ie/En/CustomsWebSites/customswebsites.html>.

¹⁰ E.g., Council Regulation 2913/92 establishing the Community Customs Code, arts. 5, 12(2), 64, 1992 O.J. (L 302), 1, available at http://europa.eu.int/eur-lex/lex/RECH_reference_pub.do; Commission Regulation 2454/93 laying down provisions for the implementation of Council Regulation 2913/92, art. 10, 1993 O.J. (L 253), 1, available at

http://europa.eu.int/eur-lex/lex/RECH_reference_pub.do.

¹¹ See *supra* note 2 and accompanying text.

¹² HS Convention, *supra* note, art. 3.2.

¹³ *Id.* art. 3.3.

¹⁴ *Id.* art. 4.

¹⁵ Council Regulation 2913/92 establishing the Community Customs Code, art. 12(3), 1992 O.J. (L 302), 1, available at http://europa.eu.int/eur-lex/lex/RECH_reference_pub.do.