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Mathias Rabinovitch
Trial Attorney, U.S. Department of Justice

Bears, Backhoes, and Bottle Toppers: A Survey of Judge Restani's Customs Classification Through 40 Years.

Introduction

Nearly every item imported into the United States is assessed a specific rate of duty on the basis of its tariff classification. This process is accomplished by use of the Harmonized Tariff Schedule of the United States, a detailed nomenclature of goods. From live horses (Chapter 1) through works of art (Chapter 97), each product category is assigned an article number and accompanying description. Disputes over the proper tariff classification of these varied articles are decided, *de novo*, by the Court of International Trade. In her forty years on the bench, Judge Restani has been no stranger to resolving these disputes. Her decisions have addressed products such as backhoe loaders, freight containers, and floating docks; glass jars and bottle caps in the shape of teddy bears; motor vehicles and motor fuel; sulfates, carbonates, and photographic plates; and even a twin-turboprop Grumman G-159 Gulfstream I.

This paper briefly introduces the concept of customs classification, beginning with the law in existence at the time of Judge Restani's appointment to the bench in 1984, the Tariff Schedule of the United States. The Harmonized Tariff Schedule of the United States was introduced in 1989 and is used to this day, as modified by Congress. The paper then surveys several decisions issued by Judge Restani from 1984 through 2023. The decisions are categorized by recurring themes in the classification of imported merchandise. First are multifunctional items that are designed or shaped in ways that render the article more than what they initially seem. Second, are new articles of commerce that require classification into provisions created prior to their existence. Third are articles pieced together by combining other clearly-defined articles of commerce. Finally, the paper will examine articles classified, or alleged to be classified, within the special classification provisions of the tariff schedule.

This abridged version of the paper covers the first two categories of merchandise classified by Judge Restani.

Tariff Classification

Tariff classification is a process of assigning a code to a product that is being imported. The code is then used to determine the applicable duty rate and other possible trade measures. The old Tariff Schedule of the United States (TSUS) was replaced by the Harmonized Tariff Schedule of the United States (HTSUS) in 1989. The HTSUS is based on the international

Harmonized System (HS) of nomenclature, which is used by most countries around the world. The HS is a six-digit code that is used to classify goods based on their material composition, product name, and/or intended function. The HTSUS extends this classification to a statutory eight-digit subheading level, with each subheading assigned a duty rate. The ten-digit level is for purposes of statistical reporting and the collection of trade data.

Classification in accordance with the HTSUS follows a set of interpretive rules called the General Rules of Interpretation. There are six rules, considered in numerical order. According to GRI 1, the classification of goods shall be determined according to the terms of the headings and any relative section or chapter notes. The other GRIs provide further guidance. For example, GRI 2(a) provides that reference in a heading to an article includes that article incomplete or unfinished if the article has the "essential character" of the complete or finished article. Because GRI 1 is paramount, the headings and relevant notes are to be exhausted before inquiries, such as those of GRI 3, are considered, *e.g.*, specificity or essential character. In *Telebrands Corporation v, United States*, Judge Restani emphasized that the "HTSUS is designed so that most classification questions can be answered by GRI 1, so that there would be no need to delve into the less precise inquiries presented by GRI 3." *Telebrands Corp. v. United States*, 36 C.I.T. 1231, 1235 (2012), aff'd, 522 F. App'x 915 (Fed. Cir. 2013).

Dolls and Bears

Many imported articles are combinations or multifunction items that are not specifically provided for in the tariff schedule. Under the Tariff Schedule of the United States (TSUS), some of these articles were said to be "more than" the article described by the tariff statute. In the case of articles classified by Judge Restani, certain products' physical characteristics were morphed almost as to break free from a generic or common description. Below is a review of cases concerning dolls that opened like a book, string lights morphed into angels, and bottle toppers and jars shaped into bears.

Dan-Dee Imports, Inc. v. United States

Judge Restani's earliest reported case classifying merchandise under the tariff schedule in effect in 1984, the TSUS, concerned merchandise packaged as "Tell A Story Dolls" from the Republic of China (Taiwan). *Dan-Dee Imports, Inc. v. United States*, 7 C.I.T. 241 (1984); *Dan-Dee Imports, Inc. v. United States*, 10 C.I.T. 5 (1986). The merchandise consisted of colorful stuffed cloth figures that represented children's storybook characters. The figures had a "general human shape," although some bore animal faces in anthropomorphic form. 10 C.I.T. at 5. Each figure uniquely contained three or four apron-like flaps. When raised, the flap would reveal "a new face" that covered the previous figure and exposed a new "page" of words of a children's story printed on a background depiction of clothing to maintain the appearance of the figure. *Id.*

Thus, as the flaps are raised, a new character appears. For example, one item depicting the Little Red Riding Hood contained four flaps with the story of that character printed on the flaps. *Dan-Dee Imports*, 5 C.I.T. at 242. The final flap contained the face of a wolf, which corresponds with the last segment of that story.

Customs classified the merchandise as dolls under item 737.22 of the TSUS, with duties assessed at a rate of 17.5% *ad valorem*. The importer claimed classification under item A737.95, TSUS, as toys not specifically provided for, duty free under the General System of Preferences (GSP) treatment of the time. Essentially, the question presented was whether the flaps/pages were incidental to the doll-like figures or whether this feature rendered the figures "more than" a doll, and thus classified under the more general provision for toys. *Id.* at 244. Following trial, the court held that the articles were more than a doll, since it could be read and the "book" aspect was fundamental to the marketing of the article. Testimony revealed that, although the figure could be "mothered" and held as a doll, the article was used to amuse and teach children in more complex ways, with older children and adults able to read the cloth pages containing essential elements of the story. The court also dismissed classification under item 737.52, TSUS, which provided for toy books. Because the major intended use of the merchandise was the amusement of children, in addition to fostering mental development, its toy and doll-like features made it more than a doll. Judge Restani thus classified the articles classifiable as toys, not specially provided for.

House of Lloyd, Inc. v. United States

In an opinion decided not long after the Story Dolls case, Judge Restani similarly addressed the issue of a doll-like figure with additional features or aspects that complicate its classification. In *House of Lloyd, Inc. v. United States*, 13 C.I.T. 414 (1989), the court was presented with an article described as an "Angel Tree Top," or tree topper, measuring somewhat less than eight inches in height. The merchandise consisted of Christmas string lights shaped into an angel with wire, paper, and gauze, attached to a wire tree top holder and with a 72 inch wire cord. Specifically, the article consisted of a plastic head with a light; beneath it wings made of wire and gauze, a paper collar with a red ribbon bow, arm-like projections made of wire, paper, and gauze, each of which held a light; and a wire and gauze conical form in the lower half, suggesting a gown, with seven lights. 13 C.I.T. at 414. The court described the device as bearing "a suggestion of a humanoid" but explained that, except for the plastic head, not much about it was doll-like. *Id.* Nevertheless, Customs classified the merchandise under item 737.24, as non-stuffed dolls. The importer claimed that its merchandise were other electrical articles not specifically provided for, under TSUS item 688.43. (The TSUS did it contain a provision for "festive articles," which would likely have been at issue for this merchandise. *Rubie's Costume Co. v. U.S.*, 196 F. Supp. 2d 1320 (CIT 2002)). The Judge agreed. In so concluding, the court held that it "cannot accept a blanket rule that every decorative article with some doll-like feature

is simply a doll." *Id.* at 416. Rather, the court found, the article consisted of "a string of lights which [was] worked into the angel shape and head and attached to the wire tree top holder to make the lights suitable for the top of the tree as opposed to encircling the tree." *Id.* Moreover, the electrical parts were intertwined with the angel-shaped housing, such that simply removing the electrical aspect would destroy the product; even if possible, the court concluded the product would be of little commercial value.

These two doll cases bring up a curious note regarding classification under the TSUS versus the HTSUS. In both *Dan-Dee* and *House of LLoyd*, Customs classified the merchandise under various provisions for "dolls." This is uncommon under the current tariff nomenclature, the HTSUS, which describe dolls under a broader duty-free provision that also covers toys. *See* Subheading 9503.00.00, HTSUS (2023) (providing for, *inter alia*, "dolls, other toys"). Given the present duty-free nature of both toy and doll provisions, notwithstanding the applicability of any other additional tariffs, importers have little incentive to dispute classification of merchandise under either a doll or a toy provision.

In Zone Brands, Inc. v. United States

The provision for "toys" was addressed again by Judge Restani in *In Zone Brands, Inc. and Good2Grow, Inc. v. United States*, 456 F. Supp. 3d 1309 (CIT 2020), this time under the Harmonized Tariff Schedule of the United States (HTSUS). The merchandise at issue were "bottle toppers" made to depict the heads or busts of various popular children's characters, such as the Care Bears, along with Iron Man, Thor, Sponge Bob, Angry Birds, Ariel, and Paw Patrol. The articles contained a spout with a valve and threaded base to screw onto specific juice bottles. 456 F. Supp. 3d at 1314. The bottle toppers were sold without the juice bottles online, but were most often sold with the bottles in-store. *Id.* Based on undisputed facts, the merchandise was targeted to children ages ten and younger, who also comprised the majority of consumers. *Id.*

The plaintiffs sought duty-free treatment for its imported merchandise by seeking to classify the bottle toppers as "toys" under subheading 9503.00.00, HTSUS, challenging U.S. Customs and Border Protection's classification under subheading 3923.50.00, HTSUS, which provided for "[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: Stoppers, lids, caps and other closures." *Id.* at 1313. Because Note 2(y) to Chapter 39 specifically excluded articles of Chapter 95 (such as toys), the court first had to determine whether the merchandise was classified under heading 9503. Note 1(v) to Chapter 95, in turn, provided that headings of that chapter excluded certain tableware, kitchenware, and similar articles "having a utilitarian function." The court concluded that the applicability of Note 1(v) turns on whether the bottle topper's principal purpose is utilitarian in nature. To answer that question, the court turned to analyzing whether the principle use of the bottle topper was to provide "amusement, diversion, or play" – the analysis required to classify

merchandise as a "toy" of Chapter 95. *Id.* at 1317. As a "principle use" provision, tariff classification was dictated by Additional Rule of Interpretation (ARI) 1. ARI 1(a) required the court to determine what group of goods are commercially fungible with the bottle toppers and then to look at the factors laid out in *United States v. Carborundum Company*, 536 F.2d 373, 377 (CCPA 1976) to determine the principal use of the subject merchandise. The *Carborundum* factors include: use of the merchandise, physical characteristics of the merchandise, economic practicality, expectations of the ultimate purchasers, channels of trade, environment of sale, and recognition in trade.

The court addressed each of these factors in turn. The bottle toppers were "first and foremost" bought and used for their functional attributes. The functional aspects of the bottle toppers were not hidden, but obvious, and made them distinct from the "prototypical" toy. And rather than being economically impracticable, the toppers were designed and used by the plaintiff to sell juice. In sum, the court acknowledged "the amusement value to the bottle toppers, but conclude[d] that this [was] incidental to the product's practical purposes." *Id.* at 1321. Thus, the merchandise was not classifiable as toys of heading 9503. *Id.*

Kraft, Inc. v. United States

Twenty eight years before the *In Zone Brands* decision, the Judge handled a similar article in *Kraft, Inc. v. United States*, 16 C.I.T. 483 (1992). That case concerned merchandise described as "bear jars" manufactured in Canada. These articles consisted of "empty glass jars molded in the shape of a small seated bear" with a capacity exceeding one pint. 16 C.I.T. at 484. Customs claimed classification under item 546.52, TSUS, which provided for "Articles chiefly used in the household or elsewhere for preparing, serving, or storing food or beverages, or food or beverage ingredients; smokers' articles, household articles, and art and ornamental articles, all the foregoing not specially provided for…other glassware" at a duty rate of 38% *ad valorem*. Plaintiff claimed classification under item 545.27, TSUS, which provided for "Containers (except ampoules) chiefly used for the packing, transporting, or marketing of merchandise…holding over 1 pint," duty free.

After a one-day trial, the court found several pertinent facts. First, nearly all of the imported bear jars were used by the ultimate U.S. customer to pack grape jelly or strawberry jam. The jelly and jam was also found to be more valuable than the jar, which were destroyed if not used to pack the food products and were not sold empty by the importer. Second, the jars contained elements essential for sanitary food storage and safe transport. Third, the jars were designed to be used in a hot pack process. Fourth, the jars were part of a promotion program the goal of which was to reinforce a strategy that the jams and jellies are fun and appealing to kids. Fifth, promotions of merchandise based on the design of packaging played a critical role in the marketing of goods. The container establishes the image of the product in a consumer's mind

and attaches the consumer's attention to it (comparing the instant product to Mrs. Butterworth's pancake syrup). And finally, the lug finish, mold seam, and other utilities made the jar unlikely to be purchased without the jam or jelly and unusable for home canning or preservation.

As in *In Zone Brands*, the court determined the classification of the bear jars through the application of the *Carborundum* factors because it found each of the competing tariff items to be "use" provisions. At the time, General Headnote 10(e)(i), TSUS, was substantially similar to the language of Additional Rule of Interpretation 1(a). Thus the court applied the *Carborundum* factors and determined that the bear jars form part of the class or kind of "usual and ordinary" containers that are used to pack and market food products, classified under item 545.27, TSUS. The court explained its reasoning as follows:

> The purchasers of food products packed in glass containers expect to receive a sanitary product and may also be attracted to the food products by the design of the package. Evidence on the price of the products in comparison with the price of the jar indicates the consumers ordinarily would not purchase the food product as a means to acquire the container. Acquisition of the container is incidental. The bear jars were used by plaintiff to deliver a clean, quality product to the consumer and to attract the consumer's attention to the product in an attempt to increase sales.

16 C.I.T. 483 at 489. The shape of the glass jar containers were designed as such solely to attract the attention of the consumer. Thus, the court held that the bear jars, used chiefly to pack and market grape jelly and strawberry jam, were properly classified under item 545.27, TSUS, as "glass containers for packing, transporting and marketing merchandise." *Id.* at 488

In Zone Brands and *Kraft* feature common utilitarian articles that have been shaped arguably into something else—and in both instances the item was shaped into a bear. In fact, Judge Restani cited to the *Kraft* decision in *In Zone Brands* and noted that a "feature introduced to differentiate a product and increase sales does not necessarily shift a product's classification from one HTSUS heading to another." 456 F. Supp. 3d at 131; *Kraft Inc.*, 16 C.I.T. 483 at 489 (noting that attractive packaging "plays a key role in the marketing of food products"). In both instances, an attractive shape was used to lure in more sales. But in both instances, that wasn't enough to shift the classification of the products to a competing heading.

New Products, Same Terms

A foundational tenet of tariff classification is that a tariff term that describes the product by name covers "all forms of the named article" even including new and improved forms. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (quoting *HayesSammons*

Chem. Co. v. United States, 55 CCPA 69, 75 (1968)); *Casio, Inc. v. United States*, 73 F.3d 1095, 1098 (Fed. Cir. 1996). That principle highlights a struggle when importers seek to classify a new article of commerce.

Regaliti, Inc. v. United States

In 1992, Judge Restani was presented with a women's garment then "known in the fashion industry as 'leggings'" in *Regaliti, Inc. v. United States*, 16 C.I.T. 407 (1992). The garments were described by the court as "form-fitting combination leg and lower torso coverings which are of varying lengths, from below the knee to ankle length and which may include stirrups running under the mid-part of the foot." 16 C.I.T. at 407. The garments were 95% cottons and 5% spandex. At issue were three relevant possible classifications. Customs classified the garments under subheading 6104.62.20, HTSUS, which provided for women's trousers and breeches. Plaintiff's preferred classification was under subheading 6115.19.00, HTSUS, which provided for cotton "[p]anty hose, tights, stockings, socks and other hosiery, including stockings for varicose veins, and footwear without applied soles." In the alternative, plaintiff claimed classification in the basket provision for other women's or girls' garments, of cotton, in subheading 6114.20.00, HTSUS.

The case went to trial and ultimately turned on whether leggings were "tights" or "trousers." Witnesses had testified that the leggings were not commonly understood in fashion as "trousers" but fit the general description of "pants." *Id.* at 408. Under heading 6104, the court found, articles considered trousers or pants are covered by the provision for general knit streetwear bottoms. *Id.* The leggings at issue were clearly pants, or "streetwear bottoms," and thus classifiable under subheading 6104.62.20, HTSUS. *Id.* But the "more difficult question" was "whether the articles at issue are tights." *Id.* If so, the legging would be classified therein under the tariff classification rules of the time.

The court first dismissed lexicographic sources of "tights" as not particularly helpful for defining fashion legwear, as they apparently "become dated very quickly." *Id.* at 409. The parties agreed, however, that tights were items resembling pantyhose and also sold in hosiery departments, but of thicker material and which may also lack feet. *Id.* The court also concluded, applying *noscitur a sociis*, that tights under heading 6115 must cover "hosiery articles, commonly thought of as underwear or innerwear, and not street clothes." *Id.*; *see also id.* at 410 (stating that garments "classified under heading 6115 must be hosiery or very similar to hosiery. That is the thrust of the provision").

In this case the court found no evidence that the leggings at issue were sold as hosiery. Rather, the leggings were found to be "displayed on pants hangers with other street wear items." *Id.* In addition, the articles were described as "fairly thick, stretchy material and are usually

worn with tee shirts, tunics, sweaters, jackets or leotards, covering most of the lower torso." *Id.* The court added: "[t]he truly fit or very young may wear them with no covering over the lower torso, for example with short tops known as 'crop tops.'" And in response to the fact that the leggings were used as exercise wear, as argued by the plaintiff, the court noted that "[g]yms and health clubs have become places to display fashions. While less modesty may be the norm in comparison to street attire, denizens of health clubs likely would not consider themselves to be exercising in underwear." *Id.* In sum, the leggings at issue were not similar to hosiery and were not marketable as such. Rather, they were a new type of pants classified as women's trousers of heading 6104.

Marubeni America Corp. v. United States

Judge Restani was presented with a new-ish article of commerce in *Marubeni America Corp. v. United States*, 17 C.I.T. 360 (1993). In that case, the issue was whether the Nissan Pathfinder, a two-door sports utility vehicle (SUV) was a "Motor Vehicles for the transport of goods" under heading 8704, HTSUS, or a "Motor cars and other motor vehicles principally designed for the transport of persons other than those of heading 8702, including station wagons and racing cars" under heading 8703, HTSUS. The court compared Nissan's compact pick-up truck, the Hardbody, which was classified as a truck, with the Pathfinder and noted that the Pathfinder had undergone numerous design changes to accommodate passengers. Although the Pathfinder's cargo carrying capability was inferior to that of the Hardbody, it compared well with that of station wagons, which were specifically identified as classified under heading 8704. Moreover, the court observed that regulatory schemes and industry terminology that classify sports utility vehicles as a subcategory of trucks did not control classification. The court ultimately concluded that the Pathfinder was principally designed for the transportation of persons and was thus classifiable under item 8703.23.00, HTSUS, as a passenger vehicle.

Norca Engineered Products, LLC v. United States

The Judge addressed another vehicle in *Norca Engineered Products, LLC v. United States*, Slip. Op. 23-108, Ct. No. 21-00305 (CIT 2023). That case concerned cast iron counterweights for self-propelled compact or mini excavators imported from the People's Republic of China. The parties agreed on the classification of the cast iron counterweights at the eight-digit level of the HTSUS, but disagreed on the applicable ten-digit level, which controlled whether the counterweights would be subject to additional duties under Section 301 of the Trade Act of 1974. Classification at the ten-digit level turned on the classification of the compact excavator, for which the counterweights were a part.

Customs determined that the compact excavators were "backhoes" of heading 8431.52.10, which provided for "[b]ackhoes, shovels, clamshells and draglines." The plaintiff claimed that the excavator was not a "backhoe" under its common and, more specifically,

commercial meaning. Indeed, marketing information regarding products called a "backhoe" appeared to refer to a different machinery than that of an excavator. Nevertheless, the court, under an *eo nomine* analysis, cited lexicographic sources for the definition of a "backhoe," which defined the term as a machine with "an articulated arm that digs towards the vehicle." The compact excavators performed just that. Accordingly, the merchandise met the tariff definition of a backhoe.

By contrast, plaintiff's view of backhoes "as a narrow subtype of excavators that excludes mini excavators [was] at odds with the structure of the HTSUS." The excavator was clearly classified under heading 8429.51, 8429.52, or 8429.59, which are covered by the article description for "mechanical shovels, excavators, and shovel loaders." The tariff was further broken down into machinery that have a "360 degree revolving superstructure" and those that do not. The broad provision for mechanical shovels, excavators and shovel loaders with a 360 degree revolving superstructure, under subheading 8429.52, was further broken down under 8429.52.10, HTSUS ("backhoes, …") and 8429.52.90 ("Other"). Thus, under the HTSUS, an excavator is a broad term that includes backhoes. The court could not accept a commercial meaning of the terms "backhoe" and "excavator" that were at odds with the hierarchical structure of the HTSUS. Accordingly, relying on dictionary definitions, the court concluded that the machines are backhoes because they have a bucket and an extending arm that draw the bucket towards the power unit.