Customs' Refusal to Issue a Binding Ruling: Is there a Remedy? *

By Jerome L. Hanifin
Counsel, Import/Export Compliance
Sojitz Corporation of America

Introduction

The Customs Modernization Act[1] ushered in the era of:

> "informed compliance," which is premised on the belief that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and an opportunity to comment.[2]

Underpinning the concept of "informed compliance" is the "reasonable care" standard. An importer is expected to exercise "`reasonable care' in discharging those activities for which the importer has responsibility."[3]

Congress stated that the exercise of "reasonable care" by an importer "include[s], but are not limited to: furnishing of information sufficient to permit Customs to fix the final classification and appraisal of merchandise; taking measures that will lead to and assure the preparation of accurate documentation and providing sufficient pricing and financial information to permit proper valuation of merchandise."[4]

Furthermore:

> In meeting the "reasonable care" standard, the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program; consulting with a Customs broker, a Customs consultant, or a public accountant or an attorney; using in-house employees such as counsel, a Customs administrator, of if valuation is an issue, a corporate controller, who have experience and knowledge

[1] Public Law No. 103-182, Title VI (1993).
[2] S. Rep. No. 103-189, at 64 (1993).
[3] Id. at 73.
[4] Id. at 73.

> of customs laws, regulations, and procedures; or, when appropriate, obtaining analyses from accredited labs and gaugers for determining technical qualities of an imported product.

(Emphasis added.)[5]

As noted above, central to the ability of an importer to meet its legal obligations under the "informed compliance" framework and to exercise "reasonable care" is the ability to obtain binding rulings from U.S. Customs and Border Protection ("Customs").

As a general matter, Customs has become proficient in responding to requests for binding rulings in a reasonable amount of time.

However, what is an importer to do when Customs refuses to issue a binding ruling? Under what circumstances might this occur? Does the importer have any recourse?

These are the questions explored here.

Statutes and Regulations

The statutory basis for the binding ruling program states in relevant part that:

> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with law (including regulations establishing procedures for the issuance of binding ruling prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.

(Emphasis added.)[6]

The language in parenthesis setting out a mandate to issue regulations creating a pre-importation binding ruling program was added as part of the changes included in the Customs Modernization Act.[7]

---

[5] Id. at 73.
[6] 19 U.S.C. § 1502(a) (2006)
[7] Public Law No. 103-182, Title VI (1993).

Of note, the statute does not speak to those occasions when Customs may withhold taking action on a ruling request.

In interpreting this statutory language, Customs has promulgated the regulations contained in Part 177 of Title 19 of the Code of Federal Regulations, entitled "Administrative Rulings."

Of importance for this discussion is the specific regulation setting out when Customs will decline to issue a ruling, which is reproduced here in its entirety:

> Sec. 177.7 Situations in which no ruling will be issued.
>
> (a) Generally. No ruling letter will be issued in response to a request for a ruling which fails to comply with the provisions of this part. Moreover, no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature or in any instance in which it appears contrary to the sound administration of the Customs and related laws to do so. No ruling letter will be issued in regard to a completed transaction.
>
> (b) Pending litigation in the United States Court of International Trade. No ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom. Litigation before any other court will not preclude the issuance of a ruling letter, provided neither the Customs Service nor any of its officers or agents is named as a defendant.
>
> [T.D. 75-186, 40 FR 31929, July 30, 1975, as amended by T.D. 85-90, 50 FR 21430, May 24, 1985]

(Emphasis added.)[8]

It is interesting to note that this regulation has not been amended since the passage of the Customs Modernization Act in 1993.

When Customs Will Not Issue a Ruling

Most of the situations in which a ruling will not issue set out in Customs' regulation are not controversial. To summarize: no ruling will issue where an importer has not provided the information required for Customs to issue a ruling, no hypothetical

[8] 19 C.F.R. § 177.7

rulings, and rulings will only be issued for prospective transactions. In addition, issues pending before the U.S. Court of International Trade, the Court of Appeals for the Federal Circuit, and on rare occasions, the Supreme Court, will not be subject to a binding ruling.[9]

One can understand the logic behind these reasons for withholding rulings. After all, as the authorizing statute states, this is a prospective ruling program and, as to situations where an issue is pending before a court, the importer already knows what Customs position is, and would be expected to follow it. The importer would then have the option of availing itself of traditional protest jurisdiction to challenge Customs' already articulated legal position.[10] In fact, given the potential deference that a binding ruling can earn under Skidmore v. Swift & Co.,[11] an importer often will not want Customs to issue an adverse binding ruling in such circumstances.

The problem lies with Customs' ability to unilaterally decide that issuing a binding ruling would be "contrary to the sound administration of the Customs and related laws."[12]

This has the effect of giving Customs a blank check to refuse to issue a ruling. Even worse, by the very nature of the decision, the importer would be unlikely to know that Customs was invoking this reason for not issuing a ruling, as no explanation on Customs part is required.

Nevertheless, as discussed below, such a decision, can under limited circumstances, be challenged before the Court of International Trade.

---

[9] 19 C.F.R. § 177.7.
[10] 19 U.S.C. §§ 1514-1515 (2006); 28 U.S.C. 1581(a) (2000 & Supp. V).
[11] 332 U.S. 134 (1944).
[12] 19 C.F.R. § 177.7(a)

Is this an exclusive list of why Customs would withhold a decision on a ruling request? In fact, Customs did provide a more detailed explanation of its reasons for withholding rulings.

Customs Proposed Regulations

In 2001, Customs proposed revisions to its binding ruling regulations to incorporate the changes made by the Customs Modernization Act.[13] The proposed revisions also included "organizational changes to clarify current administrative practice."[14]

Among the changes proposed by Customs was a new section setting out an expanded set of situations where Customs would not issue a ruling. While Customs ultimately abandoned the proposed revisions to this section of its regulation, the proposed regulation is instructive in understanding the additional reasons why Customs may decide not to issue a ruling.

Customs' proposed regulation listed the following new reasons for not issuing a binding ruling:

> . . .
> (d) When confidentiality issues raised in a ruling request cannot be resolved (see subpart D of this part);
> (e) When Customs determines that issuance of an information letter would be more appropriate;
> (f) When the ruling requester has previously received a ruling involving an identical or similar transaction and:
> (1) A decision on an appeal from that previous ruling has been issued under Sec. 177.20; or
> (2) A modification or revocation involving that previous ruling is pending or has been issued under Sec. 177.21;
> (g) If the issue involved is identical or similar to one that is the subject of a pending modification or revocation under Sec. 177.21;

[13] Administrative Rulings, 66 Fed. Reg. 37,370 (proposed July 17, 2001) ("Proposed Regulation").
[14] Id.

(h) An established and uniform practice involving an identical or similar transaction exists or is undergoing a change under Sec. 177.22;

(i) A limitation of a court decision involving an identical or similar transaction is pending under Sec. 177.23;

(j) A protest review decision involving an identical or similar transaction is pending under part 174 of this chapter;

. . . .[15]

Once again, most of the situations articulated in the Proposed Regulation for withholding action on a ruling request seem reasonable, i.e., irresolvable confidentiality issues. In fact, most deal with situations where Customs is already considering the issue and plans to issue a decision.

More troubling was Customs' belief that importers should be limited in the number of times the importer can obtain a ruling on, what Customs considers to be, the same issue.[16] Often, what Customs may consider the same issue, is not. In addition, at least as far as the ruling request deals with classification, the proposal ignored the long established principle of Customs jurisprudence that res judicata does not apply to Customs classification cases.[17]

In the face of overwhelming opposition from the importing community, Customs withdrew it proposed revisions to Part 177, with the exception of those necessary to

---

[15] 66 Fed. Reg. at 37,385.

[16] Customs rationale for this provision is that:

The list of circumstances in which a prospective ruling will not be issued has been expanded. One of these circumstances would include a case in which the ruling requester has previously received a ruling on an identical or similar transaction and that previous ruling has been the subject of an appeal under Sec. 177.20 or a modification or revocation under Sec. 177.21. The purpose of this provision is to limit a ruling requester to no more than ``two-bites-at-the-apple." It has been included by Customs as a matter of administrative necessity in order to set an appropriate limit to the number of times that a private party may avail himself of administrative ruling and related procedures involving the same issue.

66 Fed. Reg. 37,371.

[17] See United States v. Stone & Downer Co., 274 U.S. 225, 233-37 (1927).

implement statutory changes relating to the modification or revocation of rulings, internal advice, protests decisions, and treatment provided to substantially identical transactions.[18]

In the end, and regardless of the reason, some importers will be frustrated by Customs refusal to issue a binding ruling when requested.

What, if anything, can they do about it?

Judicial Review of the Refusal to Issue a Ruling

Judicial review of Customs' refusal to issue a binding ruling is specifically available under 28 U.S.C. § 1581(h) (2000 & Supp. V) which provides that:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(Emphasis added.)

This is the only avenue of judicial review available to an importer. Review would not be available under 28 U.S.C. § 1581(a) as the refusal to issue a ruling is not a protestable decision.[19] Likewise, jurisdiction would be unlikely to be available under 28 U.S.C. § 1581(i) as in almost every case Section 1581(h) would represent a remedy that would not be manifestly inadequate.[20]

The standard of review for cases brought under section 1581(h) is set out in 28 U.S.C. § 2640(e) (2000 & Supp. V), which provides that "[i]n any civil action not

---

[18] Administrative Rulings, 67 Fed. Reg. 53,483 (Aug 16, 2002).
[19] 19 U.S.C. §§ 1514-1515; 28 U.S.C. 1581(a).
[20] Jurisdiction under 28 U.S.C. § 1581(i) is not available if jurisdiction under another section of 1581(i) was or could have been available, unless the remedy under that other available section is manifestly inadequate. Miller & Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988).

specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5."

In a case challenging Customs' refusal to issue a binding ruling, the Court of International Trade "shall— **(1)** compel agency action unlawfully withheld or unreasonably delayed . . . ."[21]

Despite the jurisdictional basis for such a challenge, a review of 1581(h) cases decided by the Court of International Trade reveals no such challenges.

Why might this be so?

One reason might be the general reluctance of any federal court to review agency inaction.[22]

The Supreme Court in Heckler v. Chaney[23] established the principle that an agency decision not to take enforcement action is presumptively unreviewable. In order for review to occur, the reviewing court must determine that underlying statute provides a meaningful standard against which to judge an agency's inaction.[24] Since that decision, the courts have extended the concept to almost all instances of agency inaction.[25]

It is understandably hard to get a court to second-guess an agency decision not to take action. In the context of the refusal to issue a binding ruling, what would there be for the court to review. Presumably, other than the ruling request itself, no, or very little, agency record would exist for the court to review.[26]

---

[21] 5 U.S.C. § 706(1) (2006)
[22] See Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 28 Va. Envtl. L.J. 461, 465-467, 475-480 (2008).
[23] 470 U.S. 821 (1985).
[24] Id. at 827-835.
[25] Two Sides of the Same Coin, 28 Va. Envtl. L.J. at 475-480.
[26] Section 1581(h) cases are reviewed on the agency record. See 28 U.S.C. § 2640(e) (2000 & Supp. V); 5 U.S.C. § 706.

Nevertheless, the fact that Section 1581(h) specifically provides for challenges to Customs inaction on ruling requests should suffice to defeat the presumption embodied in Heckler and it progeny that agency inaction is unreviewable.

Unfortunately, the authorizing statute for the binding ruling program does not provide a hard standard against which to judge Customs' refusal to issue a ruling.[27]

The legislative history of the binding rulings provision is also of little help. In discussing the program, the House of Representatives Ways and Means Committee stated, "[t]hese amendments will provide greater certainty to importers through the binding rulings program while permitting Customs to accelerate the entry process."[28] The Senate Finance Committee also provides little guidance:

> This section also authorizes the Secretary to prescribe regulations for the issuance of binding rulings prior to the entry of merchandise. The Committee expects that these changes will provide greater certainty to importers through the binding rulings program and facilitate the entry process.[29]

Despite the lack of clear guidelines, a reasonable inference can be made that Congress expected Customs to expeditiously issue binding rulings.

And, given the explicit grant of jurisdiction in the Court of International Trade to review Customs' refusal to issue a binding ruling, it can be expected that a Judge could fashion a reasonable standard to apply in judging decisions not to act.

Therefore, problems with establishing a standard of review do not fully explain why there have been no cases.

---

[27] 19 U.S.C. § 1502(a).
[28] H.R. Rep. No. 103-361, pt. 1 at 138 (1993).
[29] S. Rep. No. 103-189, at 89 (1993).

The most likely explanation, inherent in all Section 1581(h) cases, is that the importer must prove that, unless it obtains judicial review, Customs' refusal to issue a binding ruling has resulted in irreparable harm to the importer.

The Court of Appeals for the Federal Circuit outlined four requirements for invoking the jurisdiction of this Court under 28 U.S.C. § 1581(h):

> (1) judicial review must be sought prior to importation of goods;
> (2) review must be sought of a ruling, a refusal to issue a ruling or a refusal to change such ruling;
> (3) the ruling must relate to certain subject matter; and
> (4) irreparable harm must be shown unless judicial review is obtained prior to importation.[30]

As stated by the Court of International Trade in Heartland By-Products v. United States:[31]

> Irreparable harm is that which "cannot receive reasonable redress in a court of law." Manufacture de Machines du Haut Rhin, 6 CIT at 64, 569 F. Supp. at 881-82 (quoting BLACK'S LAW DICTIONARY 706-707 (5th ed. 1979)). "In making this determination, what is critical is not the magnitude of the injury, but rather its immediacy and the inadequacy of future corrective relief." National Juice Products v. United States, 10 CIT 48, 53, 628 F. Supp. 978, 984 (1986) (citations omitted). To fulfill its burden, Plaintiff must "set forth sufficient documentation to support its allegations in establishing the threat of irreparable harm." Thyssen Steel Co., Southwestern Division of Thyssen, Inc. v. United States, 13 CIT 323, 326, 712 F. Supp. 202, 204 (1989) (citing 718 Fifth Avenue Corp. v. United States, 7 CIT 195, 198 (1984)).

As the case law over the years has demonstrated, this is a very hard standard to meet.

Moreover, how much harder would it be to meet when the refusal to issue a binding ruling does not constrain the ability of an importer to import or otherwise conduct its business in a way that would meet this stringent definition of irreparable harm.

---

[30] American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1551-52 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

[31] 74 F Supp 2d 1324 (CIT 1999), rev 'd, 264 F 3d 1126 (Fed Cir 2001).

Customs' inaction simply prevents the importer from having the benefit prior to importation of Customs' views on the legal issues raised by the importation. It is hard to see a situation where the lack of certainty as to Customs' position in such a situation would rise to the level of irreparable harm.

Conclusion

Most of the time, when Customs refuses to issue a binding ruling, it has good reasons.

However, there will always be occasions when Customs' refusal may not be as justified as it believes. When that situation intersects with an importer who can overcome the difficult burden of showing that, absent court review of Customs' refusal, it will be irreparably harmed, we will see the first case in the Court of International Trade challenging such a refusal.

Absent these unique circumstances, importers are forced to accept the fact that Customs is virtually unfettered in its ability to refuse to issue a binding ruling.

*This is a draft of an article that is forthcoming in 17 Tul. J. Int'l & Comp. L. (2009). Reprinted with the permission of the Tulane Journal of International and Comparative Law.