

Decisions of the United States Court of International Trade

Slip Op. 09–80

POLLY U.S.A., INC. ET AL., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 06–00312

[Customs’ denial of Polly’s protest is sustained; Customs’ Motion for Summary Judgment is granted].

Dated: August 6, 2009

Law Firm of Knar K. Mouhibian (Knar K. Mouhibian) for Plaintiffs Polly U.S.A., Inc., Mansheen Industries Ltd., and W & W Garments (PTY) Ltd.

Tony West, Assistant Attorney General; Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Amy M. Rubin), for Defendant United States.

OPINION

Goldberg, Senior Judge:

I INTRODUCTION

This case involves an entry of unisex medical uniforms made at the port of Dallas, Texas by Polly USA, Inc., Mansheen Industries Ltd., W & W Garments (PTY) Ltd. (collectively “Polly”) in March of 2005. The United States Customs and Border Protection (“Customs”) denied Polly’s claim to a trade preference under the African Growth and Opportunity Act (AGOA) based on deficiencies and discrepancies in Polly’s documentation. Polly challenged this denial, and both parties filed cross-motions for summary judgment. For the foregoing reasons, Customs’ denial of Polly’s protest is sustained, and Customs’ motion for summary judgment is granted.

II. BACKGROUND

In March 2005, Polly exported unisex medical uniforms to the United States. This entry contained three different style numbers: 10506, 10106, and 50506. The garments were entered under subheading 9819.11.12 of the Harmonized Tariff Schedule of the United

States (HTSUS), which provides duty-free treatment to certain apparel items imported from designated sub-Saharan countries under AGOA. In its country of origin declaration, Polly represented the merchandise as having been fully manufactured in the country of Swaziland, a designated beneficiary under AGOA.

In April 2005, Customs requested additional documentation from Polly establishing that the goods were fully manufactured in Swaziland. Customs specifically requested the production records for the items, including cutting and sewing records, information about production processes and timelines, and worker documentation and records. Customs warned Polly that if the documents failed to establish a traceable production timeline, its claim for preferential treatment would be denied. In response, Polly provided additional supporting documentation. Customs, however, denied Polly's AGOA claim because Polly failed to provide all of the documentation requested by Customs, and because the documentation failed to establish the required traceable production timeline. Customs then liquidated the entry under subheading 6211.33.00, HTSUS, and imposed a duty of 16% *ad valorem*.

Subsequently, Polly filed Protest No. 5501-06-100018 requesting that Customs reconsider its AGOA preference claim. Customs denied this protest based upon Polly's "inconsistent production timelines" and again finding that Polly failed to provide sufficient documentation. Polly then filed this action to challenge the denial of its protest. After the initial briefing, the parties filed cross-motions for summary judgment.¹

III. JURISDICTION & STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581(a). On a motion for summary judgment, the Court must determine whether there is an issue of material fact which may impact the outcome of the suit. *Texas Apparel Co. v. United States*, 12 CIT 1002, 1004, 698 F. Supp. 932, 934 (1988). If no issues of material fact are in dispute, this Court may grant summary judgment to either party when ruling on the applicable cross-motions for summary judgment. *Id.* However, this Court is under no obligation to grant a motion for summary judgment merely because the parties contend that there are no factual issues in dispute. *TIE Commc'ns, Inc. v. United States*, 18 CIT 358, 360 (1994).

¹ In its answer, Customs filed a counterclaim seeking additional duties because, in its view, part of the entry was misclassified; specifically, all of the merchandise was initially classified as "medical uniforms", and Customs now argues that some of the items, "medical uniform-pants", should be classified under the separate heading 6204.63.55, dutiable at a rate of 28.6% *ad valorem*. As Customs has not briefed this issue, the Court deems this argument waived. *Fermodyl Labs., Inc. v. United States*, 66 Cust. Ct. 439, 440 n.1, C.D. 4230 (1971).

IV. DISCUSSION

The issue presented in this case is whether Customs has correctly determined that Polly failed to establish its claim to an AGOA preference.² The parties do not dispute that there are discrepancies in Polly's documentation, but Polly argues that this is largely immaterial. The argument on this point is two-fold. Polly first argues that Customs erred in denying its protest because all that it was required to do in order to receive the AGOA preference was to file its country of origin declaration. In Polly's view, this declaration was sufficient to establish that its entry was fully manufactured in Swaziland, and Polly further argues that Customs was, in fact, barred from requesting additional documentation under its regulations and advisory materials. In the alternative, Polly argues that even if Customs had the authority to request additional documentation, its documentation met this burden, and Customs erred in focusing on record keeping discrepancies which are unavoidable and natural in light of the current economic situation in Swaziland. Both of these arguments are addressed in turn.

A. Customs' Authority to Request Documentation

Polly's first argument is that its country of origin declaration is, of itself, sufficient to establish its entitlement to duty-free treatment under AGOA. This argument lacks merit. Polly's argument relies on a misunderstanding of the AGOA preference and the applicable regulations. To support its argument, Polly cites to 19 C.F.R. § 12.130 (2004), which provides that if a port director is unable to determine the country of origin from the importer's declaration, the port director can then request additional documentation from the importer. In Polly's view, this demonstrates that Customs lacks the authority to request additional documentation if it is able to determine the country of origin from the face of the declaration. However, 19 C.F.R. § 12.130 implements 7 U.S.C. § 1854 (2000), which applies only to goods whose importation into the United States is limited by international agreement. AGOA is not an international agreement limiting importations from foreign countries, but is instead an agreement which encourages importations from sub-Saharan countries by providing duty-free treatment to those goods. Therefore, 19 C.F.R. § 12.130 is inapplicable to a claimed AGOA preference.

² Polly's other claims are without merit. Polly's various due process claims fail based on its failure to exhaust administrative remedies or are otherwise premature. Polly's remaining claim under former section 19 U.S.C. § 1520(c) fails as this section was repealed before the entry in dispute was made. Miscellaneous Trade and Technical Corrections Act of 2004, 108 Pub. L. 429, § 2105, 118 Stat. 2434, 2598 (2004).

The regulations actually governing verification of claims for preferential treatment under AGOA are 19 C.F.R. § 10.217 (2004) and 19 C.F.R. § 10.178a (2004). Section 10.217 provides that claims for preferential treatment are subject to “whatever verification the port director deems necessary.” Section 10.178a goes farther and imposes a duty upon importers to “establish and implement internal controls which provide for the periodic review of the accuracy of the declarations or other records.” In light of these regulations, Polly’s country of origin declaration alone did not establish its entitlement to preferential treatment, and Customs had the authority to request documentation establishing a traceable production timeline demonstrating that the entry was fully manufactured in Swaziland.

B.

Customs’ Determination that Polly Failed to Establish a Traceable Production Timeline.

Polly’s second argument is that Customs erred in finding that its entry was not fully manufactured in Swaziland. Polly argues that the documentation it submitted was more than sufficient to establish this fact, and that Customs is attempting to impose an unrealistic high standard of record keeping in light of the economic situation in Swaziland. This argument also lacks merit.

Generally, Customs requires items entered duty-free or subject to reduced rates to put forth evidence establishing their country of origin. Specifically, in the AGOA context, 19 C.F.R. § 10.178a provides:

(e) Importer requirements. In order to make a claim for duty-free treatment under this section, the importer:

- (1) Must have records that explain how the importer came to the conclusion that the article qualifies for duty-free treatment;
- (2) Must have records that demonstrate that the importer is claiming that the article qualifies for duty-free treatment because ... it is the product of a beneficiary sub-Saharan African country or because it is the manufacture of a beneficiary sub-Saharan country.... If the importer is claiming that the article is the product of, or the manufacture of, a beneficiary sub-Saharan African country, the importer must have records that indicate that the manufacturing or processing operations reflected in or applied to the article meet the country of origin rules

- (3) Must establish and implement internal controls which provide for the periodic review of the accuracy of the declarations or other records referred to in paragraph (e)(2) of this section;

19 C.F.R. § 10.178a. Customs' regulations also require that "[a]ny evidence of country of origin submitted . . . shall be subject to such verification as the port director deems necessary. In the event that the port director is prevented from obtaining the necessary verification, the port director may treat the entry as dutiable." 19 C.F.R. § 10.173(c) (2008).

Here, the port director required Polly to submit various records to establish that the unisex medical uniforms were fully manufactured in Swaziland. While Polly did submit documentation, Customs found many inconsistencies and concluded that Polly had failed to establish a traceable production timeline. Overall, Polly's disputed entry consisted of three styles, 10506, 10106, and 50506, and Customs took issue with the production timeline Polly provided for each style. First, the records for style 10506 indicate that at least some of the sewing on this style occurred before the actual cutting of the cloth—an impossibility. Further, when the time cards provided by Polly were correlated to the sewing reports, there were multiple instances where the sewing reports indicate that the sewing was performed by a worker who was not clocked in on that day; i.e., by a worker who was not actually present to perform the sewing operations. In the documentation for style 10106, Polly's daily reports identify which workers performed various operations, but Polly failed to provide the requested corresponding time cards and salary information necessary to verify this data. Polly also failed to provide information identifying which employees performed specific operations, providing instead only daily summaries. On style 50506, the dates listed for the respective work tasks are difficult, if not impossible, to reconcile as they are often spread months apart, and do not appear to actually reflect the entry at issue. Furthermore, certain processing operations were again performed by employees who were not recorded as being present at the factories on the day the operations were performed.

Polly does not dispute the inconsistencies and gaps Customs found in its documentation, but instead argues that as the majority of the records support its proffered production timeline, it should be given the benefit of the doubt — particularly in light of the fact that the merchandise was ostensibly created in a small developing country where record keeping, at least to the extent Customs desires, is both impractical and impossible. This Court, however, while sensitive to the purposes of AGOA and the hardships faced by Swaziland, cannot fault Customs for denying Polly's claim to preferential treatment as Customs has the discretion to enter these items as dutiable if the documentation is found to be substantially insufficient—either in quality or quantity. As no factual dispute exists as to the nature of

these gaps, this Court grants summary judgment in favor of Customs as Polly has failed to make a prima facie case that it was entitled to a trade preference based upon its failure to establish a traceable production timeline. *Holford (USA) Ltd., Inc. v. United States*, 26 CIT 760, 766 (2002).

**V.
CONCLUSION**

Customs' denial of Polly's protest is SUSTAINED, and Custom's motion for summary judgment is GRANTED.

Dated: August 6, 2009

New York, New York

/s/ Richard W. Goldberg
Richard W. Goldberg
Senior Judge



WORLD CUSTOMS ORGANIZATION
 ORGANISATION MONDIALE DES DOUANES
 Established in 1952 as the Customs Co-operation Council
 Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
 COMMITTEE

NC1445E1a

-
 44th Session

O. Eng.

Brussels, 17 July 2009.

**DRAFT AGENDA FOR THE 44TH SESSION OF
 THE HARMONIZED SYSTEM COMMITTEE**

From : Monday, 21 September 2009 (10.00 a.m.)

To : Friday, 2 October 2009

N.B. : Thursday 17 September (10.00 a.m.) to Friday 18 September 2009:
 Preessional Working Party (to examine the questions under Agenda
 Item IV)

I. ADOPTION OF THE AGENDA

- | | |
|--------------------------|---------|
| 1. Draft Agenda | NC1445E |
| 2. Draft Timetable | NC1446B |

II. REPORT BY THE SECRETARIAT

- | | |
|---|--|
| 1. Position regarding Contracting Parties to the HS
Convention and related matters | NC1447E |
| 2. Report on the last meetings of the Policy
Commission (61st Session) and the Council
(113th/114th Sessions) | NC1448E |
| 3. Approval of decisions taken by the Harmonized
System Committee at its 43rd Session | NG0150E
NG0153B
NC1444B
NC1449E |
| 4. Capacity building activities of the Nomenclature
and Classification Sub-Directorate | NC1450E |
| 5. Co-operation with other international organisations
..... | NC1451E |
| 6. New information provided on the WCO Web site | NC1452E |
| 7. New version of the HS Commodity Data Base | NC1453E |
| 8. Annual survey to determine the percentage of
national revenue represented by Customs duties | NC1454E |

9. Survey on Free Trade Agreements	NC1455E
10. Progress report on the use of working languages for HS matters	NC1456E
11. Corrigendum to Doc. NG0154B1 - the Recommendation of 26 June 2009 of the Customs Co-operation Council concerning the Admendment of Nomenclature	NG0159B NC1489E
12. Other	
 III <u>GENERAL QUESTIONS</u>	
1. Customs in the 21st Century	NC1383E (HSC/43) NC1457E NC1458E
2. Possible amendments to the Rules of Procedure of the Harmonized System Committee (Proposals by the Secretariat)	
3. Possible amendments to the Terms of Reference of the Harmonized System Committee (Proposals by the Secretariat)	NC1459E
4. Importance of pre-entry classification programmes and possible implementation of the WCO Advance Tariff Ruling Service	NC1460E
5. Scope of the Fifth Harmonized System Review Cycle	NC1483E
 IV. <u>REPORT OF THE PRESESSIONAL WORKING PARTY</u>	
1. Amendments to the Compendium of Classification Opinions to reflect the classification of peginterferons in subheading 3002.10	NC1461E Annex A
2. Amendments to the Compendium of Classification Opinions to reflect the classification of certain jojoba products in subheading 3404.90	NC1461E Annex B
3. Amendments to the Compendium of Classification Opinions to reflect the classification of a milk protein preparation in subheading 3504.00	NC1461E Annex C
4. Amendments to the Compendium of Classification Opinions to reflect the classification of the “ ATON ZN ” in subheading 3824.90	NC1461E NC1445E1b Annex D
5. Amendments to the Compendium of Classification Opinions to reflect the classification of tubular plastic containers with cap in subheading 3923.90 ..	NC1461E Annex E
6. Amendments to the Compendium of Classification Opinions to reflect the classification of graduated dropper tubes in subheading 4014.90	NC1461E Annex F

- | | | |
|--|---|--|
| 7. | Amendments to the Compendium of Classification
Opinions to reflect the classification of rubber brake
cups in subheading 4016.93 | NC1461E
Annex G |
| 8. | Possible amendment of the Explanatory Note to
heading 84.15 to clarify the classification of
separately presented units of split-system air
conditioning machines in subheading 8415.90 | NC1461E
Annex H |
| 9. | Amendments to the Explanatory Note to heading
95.04 | NC1461E
Annex IJ |
|
 | | |
| V. <u>REQUESTS FOR RE-EXAMINATION (RESERVATIONS)</u> | | |
| 1. | Re-examination of the classification of “ice hockey
pants Nike Bauer Supreme 10” in heading 95.06
(Request by the EC) | NC1462E
NC1487E |
| 2. | Re-examination of the classification of products
containing more than 99.2 % of sodium sulphate
and more than 98.5 % of sodium sulphate,
respectively (Request by the Russian Federation) | NC1463E
NC1490E |
|
 | | |
| VI. <u>FURTHER STUDIES</u> | | |
| 1. | Classification of milk proteins (Product # 1) | NC1464E |
| 2. | Scope of headings 22.06 and 22.08 | NC1339E
(HSC/42)
NC1410E
(HSC/43)
NC1465E |
| 3. | Classification of three kinds of apparatus for
television transmission (Request by Korea (Rep. of)) | NC1367E
(HSC/42)
NC1414E
(HSC/43) |
| 4. | Classification of certain types of monitors (Request
by Norway) | NC1466E
NC1363E
(HSC/42)
NC1436E
(HSC/43)
NC1467E |
| 5. | Classification of a dumper (“6x4 Tipper K5DEF”)
(Request by Korea (Rep. of)) | NC1366E
(HSC/42)
NC1416E
(HSC/43)
NC1468E |

6. Classification of network analyzers (Request by the U.S.)	NC1371E (HSC/42) NC1439E (HSC/43) NC1469E NC1488E
7. Classification of lamp posts (Request from Madagascar)	NC1417E (HSC/43) NC1470E NC1471E
8. Amendments to the Compendium of Classification Opinions to reflect the classification of octagonal steel columns for lamp posts in subheading 7308.90	
9. Possible amendments to Classification Opinions 9503.00/8 and 9503.00/9	NC1352E (HSC/42) NC1418E (HSC/43) NC1472E NC1473E
10. Possible amendment of the Explanatory Note to heading 90.28	
11. Possible new Subheading Explanatory Note to subheading 1901.10 to define the scope of the term “infant” (Proposal by the EC)	NC1474E
12. Classification of “a set of wireless microphones” (Request by Thailand)	NC1475E
13. Classification of certain “motorcycle parts” (Request by Peru)	NC1429E (HSC/43)
14. Classification of a cellular phone with TV receiver (Request by Korea (Rep. of))	NC1430E (HSC/43)
15. Classification of two kinds of multichip integrated circuits (Request by Korea (Rep. of))	NC1432E (HSC/43) NC1445E1b NC1476E
16. Classification of the product named “DISCOVER©” sampler for fine fragrance (Request by Brazil)	NC1433E (HSC/43)
17. Classification of bio-fuel blends (Request by Japan)	NC1435E (HSC/43) NC1477E

VII. NEW QUESTIONS

1. Classification of new INN products (List 100)	NC1478E
2. Possible amendment of the Explanatory Notes in respect of certain silicone products (Proposal by the EC)	NC1479E
3. Classification of a walker-rollator	NC1480E

- | | | |
|----|---|---------|
| 4. | Possible amendment of the English version of the Explanatory Note to heading 85.36 (Proposal by Korea (Rep. of)) | NC1481E |
| 5. | Possible amendment of the English version of the Explanatory Note to heading 84.33 (Proposal by the Secretariat) | NC1482E |
| 6. | Possible amendment of the Explanatory Notes with respect to articles of furniture fitted with wheels (Proposal by Canada) | NC1485E |

VIII. ADDITIONAL LIST

- | | | |
|----|--|---------|
| 1. | Application of General Interpretative Rule 2 (a) in respect of the classification of car-assembly sets (Request by the Russian Federation) | NC1486E |
| 2. | Possible amendment to Article 16 of the Harmonized System Convention with respect to date of entry into force of accepted amendments (Proposal by Australia) | NC1491E |

IX. OTHER BUSINESS

- | | | |
|----|---|---------|
| 1. | List of questions which might be examined at a future session | NC1484E |
|----|---|---------|

X. DATES OF NEXT SESSIONS

