
Simons & Wiskin

Trade Talk

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HMT IMPORTS LITIGATION UPDATE

In an August 18, 2003 decision, the U.S. Court of Appeals for the Federal Circuit may have driven the final nail into the coffin of the HMT import litigation. In two cases consolidated for purposes of appeal, *Thomson Multimedia Inc. v. United States* and *CF Indus., Inc. v. United States*, a unanimous three-judge panel upheld the trial court's determination that the HMT on imports was not violative of either the Uniformity or Ports Preference clauses of the U.S. CONSTITUTION.

The court, relying on past precedent, first held that the HMT on imports is severable from the balance of the statute and the fact

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that the HMT has been held unconstitutional as applied to exports did not compel a finding that the HMT on imports was also unconstitutional. Because the statute exempts (1) domestic shipments unladen in Alaska or Hawaii, (2) inland waterways by excluding them from the definition of port, as (3) a portion of the Columbia River, Thomson argued that the statute was violative of the Uniformity clause which provides that "...all duties Imposts and Excises shall be uniform throughout the United States." The appellate court disagreed and reasoned that the HMT on imports as to these categories of shipments is a user fee rather than a tax. This approach conflicts with the holding in *U.S Shoe* that the HMT on exports was a tax rather than a use fee. Since the HMT on imports was determined by the appellate court to be a valid user fee, it was outside the ambit of the prohibitions of the Uniformity Clause.

The Port Preference Clause of the CONSTITUTION provides that: "No preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another."

The appellant importers argued that this clause was violated by the exemptions created by the statute. Not so, held the CAFC, which held that the "exemptions here at issue are not the sort of preference prohibited by the Clause. Instead, Congress crafted a narrow exemption to

alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping." Since only "intentional, effectual preference of the ports of one state over ports of another" was prohibited, the court concluded that this Clause was not violated by the HMT on imports.

An appeal to the U.S. Supreme Court is likely.

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Drug Enforcement Administration Proposes Amendment of Regulations Pertaining to Exemption for Controlled Substance Imported or Exported For Personal Medical Use

The Drug Enforcement Administration (DEA) has proposed a change in its regulations which, if adopted, will limit the amount of controlled substances an individual may import for personal use. The regulation proposed is made pursuant to authority granted the DEA in The Controlled Substances Import and Export Act.

U.S. citizens who enter or depart from the U.S. who have a legitimate medical need to controlled substances during their journey are exempted from the general application of requirements imposed under the statute for the importation or exportation of controlled substances. The medication must have been legally obtained, be for the traveler's

personal use, and must be declared to Customs. In 1998, Congress amended the law and limited a returning U.S. resident through a land border (*i.e.*, Canada or Mexico) to no more than 50 dosage units of the controlled substance.

The proposed amendment of the DEA regulations would extend the rule to all U.S. residents who return to the U.S. at any location and by any means. Additionally, the 50 unit dosage limitation would now be applied to the combined total of all controlled substances in the traveler’s possession rather than up to 50 dosage units of each of a variety of controlled substances. All medications covered by this exemption must still meet the following requirements: (1) the controlled substances is in the original container in which it was dispensed to the individual; and (2) the individual makes a declaration to Customs indicating that: (i) the controlled substances in his possession is for his personal use or for an animal accompanying him; and (ii) the trade or chemical name and the symbol designating the schedule of the controlled substance if it appears on the label, or if it does not appear on the label, the name and address of the pharmacy or practitioner who dispensed the substance and the prescription number, if any; and (iii) the importation if the controlled substance for personal medical use is authorized or permitted under other Federal laws and state law.

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**Deadlock at WTO’s
Cancún Ministerial Meeting**

The Ministerial Meeting of the World Trade Organization in Cancún, Mexico, collapsed on September 14. The meeting was supposed to mark the half-way point of the Doha Round of trade negotiations initiated in 2001. But it ended with the talks deadlocked and the WTO membership polarized between developed countries (the North) and developing countries (the South).

Trade barriers in agriculture dominated the meeting. Developing countries sought commitments from Northern countries, particularly the US and EU, to eliminate export subsidies, reduce trade-distorting domestic supports, and reduce tariffs. In the weeks before Cancún, the US and EU proposed a framework for reducing agricultural trade barriers to some degree. Developing countries concluded that the US-EU position did not go anywhere near far enough.

The final breakdown of the talks stemmed from an impasse over a set of four issues: investment, competition policy, trade facilitation, and transparency in government procurement (often called the “Singapore issues” because talks on these issues were first proposed at a WTO meeting in Singapore). Most developing countries opposed negotiations on the “Singapore issues.” They see these issues as an attempt by the North, particularly the EU, to divert the WTO’s attention from agriculture and other issues of importance to developing countries.

In effect, developing countries were unwilling to accept negotiations on the “Singapore issues” because the deemed the commitments from the North on agricultural issues insufficient. The US and some other

Northern countries criticized the development countries for unrealistic posturing and rhetoric.

The WTO members agreed to meet at WTO headquarters in Geneva by December 15 try to restart the negotiations. But it will be virtually impossible for the talks to be completed by the current deadline of December 31, 2004. Some observers are pessimistic whether the impasse can be resolved at all, although optimists note that the 1986-1994 Uruguay Round overcame apparent midterm deadlocks.

An immediate result of the deadlock at the WTO is that the United States may well focus attention on its pending negotiations of bilateral trade agreements with a number of countries. At the same time, the failure at Cancún may also foretell problems in creating a Free Trade Agreement of the Americas (FTAA), since the FTAA talks involve many of the same issues that caused the WTO talks to break down.

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This newsletter is for informational purposes only and is not intended to set forth legal opinions. If the reader has any questions regarding the information contained herein, appropriate counsel should be consulted

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