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Something Old: Customs Treatment of Antiques

One of the most interesting aspects of doing these columns is that I get to choose what to write about. Outside the notion that it should touch on trade and customs matters, it is a tabula rasa. The time-honored criterion of goods crossing borders does not even apply, because the trade laws also govern the provision of services and investments. In the case of "deemed exports," there is even a legal fiction at play that treats access to foreign nationals to goods and services that come within the Export Administration Regulations (EAR) as if they were actual physical exports.

Sometimes the most difficult part of the process is choosing the topic in the first place. Sometimes the press of events—or my own reaction to them— is so strong that the topic almost chooses itself. The World Trade Organization decision on the "dolphin-safe" label program for canned tuna[1] was one such topic. That one was easy to choose and, once started, my own passion propelled the column to nearly write itself.[2] Other times, it is a more difficult process because there are too many (or too few) suitable topics. The almost endless array of possible topics means that I sometimes write about very sophisticated strategies and sometimes about the basics, such as tariff classification or country of origin. I sometimes write about the very latest technological developments, articles that are as new as tomorrow. Or not. Sometimes I get to write about old articles, those that have been around for a very long time or, as in this presentation, for at least for 100 years. The discussion this month is on the tariff classification of such articles.

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Antiques

The significance of the 100-year mark is that the Harmonized Tariff System (HTS) defines an antique as an article that is at least 100 years old. At the international level, the four-digit HTS heading for antiques is 9706, defined as antiques of an age exceeding 100 years. In the United States, the applicable tariff item number is 9706.00.00, with further breakdowns for silverware (.20), furniture (.40), and the ubiquitous "other" (.60).[3]

The Chapter Notes make it clear that articles classified as original works of art or collectors' articles in heading 9701 through 9705 remain in those headings. Thus, a gold coin that is more than 100 years old could be classified under *eo nomine* principles[4] as a gold coin (subheading 9705.00) or as an antique (9706.00). Similarly, an original Van Gogh oil or a Rembrandt portrait in oil might be considered an original painting (subheading 9701.10) or an antique. Chapter Note 4 (b) cautions that "Heading 9706 does not apply to articles of the preceding headings of this chapter."

The Explanatory Notes (ENs), published by the World Customs Organization's Harmonized System Committee, offer additional guidance. The ENs are an officially recognized authoritative resource to assist both customs authorities and importers.[5] They frequently clarify which articles are to be included within a given tariff provision or, the reverse, which articles are to be specifically excluded from such coverage. The ENs for heading 9706 state: "This heading covers all antiques of an age exceeding one hundred years, provided they are not included in headings 97.01 to 97.05. The interest of these articles derives from their age and, as a general consequence, their resulting rarity." By its repetition, this EN reinforces the limiting effect of Chapter Note 4 (b) on heading 9706. The ENs provide another exclusionary effect: "The heading does not cover, irre-

spective of their age, pearls, natural or cultured, or precious or semi-precious stones of headings 71.01 to 71.03."

While it is naturally important to understand what the ENs take out of heading 9706—pearls and unset diamonds and other gems and semi-precious stones, all of which are classified within headings 7101 through 7103—it is equally important to note what the ENs leave in heading 9706. Under the principle *expressio unius est exclusio alterius* (loosely, the express naming of only one thing is the exclusion of another, unnamed thing), jewelry and other articles made from the pearls and stones of heading 7101 through 7103, and classified for customs tariff purposes in headings 7113 to 7116, are eligible for tariff treatment in heading 9706. Of course, the practical effect of exclusion is minimal, for the pearls and stones are unconditionally duty free. Because there are no additional requirements, such as being able to prove that the articles are more than 100 years old, there would be no reason to try to import the goods under heading 9706. The same duty-free status will apply to those imported articles that are classified in headings 9701 through 9705, so there is no disadvantage in an imported article being excluded from classification within heading 9706.[6]

Penalty

The notion just introduced above—having to prove to Customs and Border Protection (CBP) that the goods indeed are more than 100 years old—raises the next obvious question. What if the importer who has claimed antique status cannot prove that the imported article is more than 100 years old?

Before answering that question, a prefatory note is required here. The status of the imported articles as bona fide antiques might turn on the results of a "battle of the experts." In ruling nos. 961414 and 961415 (July 9, 1998), CBP countered the importer's appraisals report by saying that the expert that CBP had hired to do an appraisal of a smaller number of article had taken over 40 hours, far longer than the time spent by the importer's appraiser. The CBP expert's sample of a subset of the imported lot of jewelry showed only 10% of the samples to be genuine antiques. The importer's protest for further review was denied. It is also clear that an unsupported assertion by the importer will not support tariff classification in heading 9706.[7] For claimants who fail, in the United States, Additional US Note 2 imposes an additional ad valorem duty of 6.6% on the imported article if the origin is a country that has normal trade relations (NTR) status (formerly referred to as "most favored nation" (MFN) status) with the United States. There is exceptional treatment for Canadian articles, with no additional duty being levied. For imported goods from "column 2" countries, i.e., countries that have not been accorded NTR status, additional duties of 25% will be assessed.[8]

Other Trade Laws

The other trade laws of the United States apply with equal vigor to imports. Thus, an importer seeking to import artifacts from the Persian Empire (present-day Iran) will find that the trade embargo laws enforced by the Office of Foreign Assets Control (OFAC) of the Treasury Department must be respected. That advice was included in ruling no. B85786 (May 30, 1997), issued to an importer seeking to import coins from Iran that were between 200 and 2,500 years old. What appeared to trigger the sanctions law is that the coins would be sent from Iran. Curiously, the tariff classification assigned to the coins was heading 9706, despite the strictures of Note 4 (b). The sanctions laws were also invoked in the case of antique articles being sent to the United States for an exhibit from Russia and other European lenders because the Persian bowls, swords, mirror cases, and penboxes were determined to be Iranian (ruling no. D82127 (September 4, 1998)). There was no discussion, so the question is open whether the Iranian sanctions regulations would apply to the importation of Persian Empire antiquity artifacts merely because that Empire comprised modern-day Iran.

Are There Old and "Really Old" Articles?

There is no gradation beyond 100 years. As with much of the debate on increased income taxes for the "wealthy," where for many there is no distinction made between an adjusted gross income of $250,000 and $250 million—all are equally "wealthy"—here too there may be a single line. An article that is 101 years old and one that is 5,000 years old are each over 100 years and, thus, have equal rights to "antique" status.

Of course, articles that are "really old" may constitute part of the cultural patrimony of another country. Therefore, an attempt to import such an article should raise the cultur-

1 See Neville, "WTO Issues Seriously Flawed Panel Report on 'Dolphin-Safe' Tuna Products," 23 JOIT 19 (February 2012).

2 In the same way, chapter 3 in the forthcoming treatise *International Trade Laws of the United States: Statutes and Strategies* (Thomson Reuters/WG&L), which reports on the intersection of trade laws and such social policy laws as wildlife and environmental protections, carried me as the author along with it.

3 Canada's breakouts within heading 9706 are similar (furniture (.10), tableware (.20), and other (.90)), while the EU does not provide for any further breakouts.

4 On tariff classification principles, see Neville, "Customs & Trade," 17 JOIT 19 (December 2006).

5 U.S. Customs and Border Protection (CBP) relies extensively on the ENs and has encouraged importers to always consult the ENs when classifying imported merchandise. On the WCO in the ever-changing tariff classification rules, see Neville, "The WCO as Lawmaker," 23 JOIT 20 (January 2012).

6 With some exceptions for reproductions that are classifiable in 9701, the result will be the same when works of art are imported into Canada.

7 See, e.g., CBP ruling no. 087730 (September 5, 1990) (claims of heading 9706 or, alternatively, heading 9705 tariff treatment denied).

8 Normally quite few, these countries at the present time include only Cuba and North Korea. Ordinary duties are assessed on imports from these countries at the levels in column 2 of the Harmonized Tariff Schedule of the United States (HTSUS) as prescribed by the Tariff Act of 1930, without benefit of any of the GATT/WTO multilateral trade negotiations.

9 See Neville, "Customs and Border Protection as Cultural Guardians," 22 JOIT 23 (February 2011).

10 See, e.g., CBP ruling no. 966030 (January 28, 2003) (Egyptian 18th dynasty stone carving). Curiously, there was no discussion of admissibility. This ruling was affirmed by CBP ruling no. W968392 (February 9, 2007) and the importer's argument that heading 9706 was a more fitting tariff classification was rejected.

11 CBP ruling no. L87716 (September 26, 2005).

12 19 C.F.R. section 10.53(b).

13 19 C.F.R. section 12.26.

al protection laws that we have previously discussed.[9] As would be expected, CBP has addressed these issues of admissibility in its rulings on these "really old" antiques. In ruling no. I89448 (December 19, 2002), CBP held that certain articles of pre-Columbia art from Mexico, Colombia, Peru, and Chile were antiques and were admissible:

> The merchandise to be imported consists of a collection of pre-Columbian cultural patrimony to be sold at auction. You have submitted an inventory with the countries of origin and a declaration that all of the items were obtained prior to the 1973 UNESCO Treaty relating to Pre-Columbian exportation regulations currently in effect. As a result, the collection is permitted to be imported into the United States.

In another example, CBP issued ruling no. 813422 (August 18, 1995) on the antique status of a carving from the Niger River valley of Mali:

> The antique item is a Equestian [sic] Group wood figure, from the Djenne Culture, circa 10-12 century. It stands 28-3/4 inches and is from the Niger River Valley area of Mali, Africa. The antique figure was acquired by the Minneapolis Institute of Art in 1984. It will be loaned to the Royal Academy for an exhibition of African Art this fall. It will then be reimported at the conclusion of the exhibition. There is an import restriction on antiques from the Niger River Valley area of Mali effective September 23, 1993. Since this figure has been in the possession of the Minneapolis Institute of Art since 1984, this restriction is not applicable.

The admirable feature of the ruling is that it was sought before the goods ever left the United States, in anticipation of the return of the item after the loan to the London museum was concluded. The Minneapolis museum was well advised here, as re-entry of the carving would be very smooth, its admissibility having been established in the ruling.

In ruling no. 877224 (August 20, 1992), the Brooklyn Museum had done the same thing earlier, establishing admissibility for two pre-Colombian objects that were to be lent to a museum in Brussels and then returned to the United States. In ruling no. A86961 (August 26, 1996), CBP dealt with the tariff status of some "home-grown" antiques, articles that had been excavated in New York City. The South Street Seaport and Columbia University were looking to send the articles for exhibition in Japan and then reimport them. Tariff status under heading 9706, as well as item no. 9801.00.60, HTSUS, was found.

To address the question directly, there is a separate provision for the "really old" imported articles, as well as articles that are of interest regardless of their age. This is heading 9705, which provides for collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archeological, paleontological, ethnographic, or numismatic interest. Thus, many of these museum pieces will be more correctly classified in heading 9705 than 9706.[10] However, CBP classified a 7th-9th century Burmese bronze statuette in heading 9706, although heading 9705 does not appear to have been raised as an alternative.[11] Naturally, the previous cultural property discussion will apply to entries of such articles regardless of whether they are classified in heading 9705 or 9706.

Allowable Repairs/ Restorations or Disqualifying Alterations?

The ENs establish that if the antique articles retain their original character, repairs or restorations will not oust imported antique from heading 9706 treatment. CBP regulations also speak to this issue, stating in relevant part:

> (b) Antiques of the age prescribed by subheading 9706.00.00, HTSUS, or admitted under the provisions of paragraph (e) of this section, shall be admitted free of duty though repaired or renovated. If, however, an antique has been repaired with a substantial amount of additional material, without changing the original form or shape, the original and added portions shall be appraised and reported as separate entities and the basis for such report shall be plainly indicated on the invoice by the appraiser. In such cases duty shall be assessed on the portion added. If the repairs consist of an addition to an article of a feature which changes it substantially from the article originally produced, or if the antique portion has otherwise been so changed as to lose its identity as the article which was in existence prior to the time prescribed in subheading 9706.00.00, HTSUS, the entire article shall be excluded from free entry under subheading 9706.00.00, HTSUS.[12]

CBP has had an opportunity to apply these regulations and has issued rulings to importers, which now serve as guidance on where the line may be drawn. In ruling no. L89460 (December 21, 2005), CBP held that the electrification of a chandelier was an impermissible alteration. This precedent was followed in ruling no. H016036 (April 1, 2008), also on imported lighting fixtures. CBP determined that the electrification changed the way that the imported lamps (originally designed for use with gas, candle, or kerosene) work and are used. CBP found that although the electricity had been kept to a low power level and the lamps did not produce a large body of light, they had been manufactured beyond restoration. In short, the seven lamps did not retain their original character in their condition as imported. The lesson: do the electrification, or other alterations in the United States, if at all possible, to preserve antique status.

One way for CBP to control the process is to make sure that only certain ports are used to clear goods when antique status is claimed. The regulations list these ports.[13]

Conclusion

This tariff treatment of antiques serves a useful lesson, as it shows that all goods crossing borders must meet all of the customs formalities, and that the other trade laws, for example those dealing with sanctions, will apply in full measure. Also, some of the advance rulings, those issued before the articles even left the United States, show that high-performing companies anticipate the future processes to which their product movements will be subjected and take the initiative to protect their interests. These are lessons that transcend the narrow confines of antiques dealers' stalls and apply with equal strength to all product sectors. ●