Barnes/Richardson
Global Trade Law

June 2, 2008
Sandra Liss Friedman
sfriedman@barnesrichardson.com
Helena Sullivan
Hsullivan@barnesrichardson.com
1.212.725.0200

News

CIT Decision Finds Importer Negligent For Failing To Exercise Reasonable Care By Not Following Advice

The U.S. Court of International Trade has issued an opinion in *United States v. Optrex America, Inc.*, Slip Op. 08-63(June 9, 2008) that is likely to have a direct impact on how importers are assessed with respect to their obligation to exercise reasonable care in Customs transactions. The *Optrex* case was brought to collect penalties for alleged negligent misclassification of liquid crystal displays (LCD's) and LCD display modules. In an earlier decision, rendered in 2004, the CIT had ruled that attorneys' advice to Optrex on this issue was discoverable, since a mistake will rise to the level of negligence if it results from a lack of reasonable care, and if Optrex, as it asserted, had consulted counsel, a failure to follow the attorneys' advise would be evidence of a lack of reasonable care. In the 2004 decision, the CIT held that, since negligence on the part of Optrex would be disproved if it could show that it had exercised reasonable care by relying on its attorney's advice, the government should be able to see the advice to assess the reasonableness of defendant's reliance upon it. The Court made this finding even though Optrex had not raised the attorneys' advice as an affirmative defense. *United States v. Optrex America*, Slip Op. No. 04-79, 2004 Ct. Intl. Trade LEXIS 74 (CIT July 1, 2004).

In another decision related to this case, the Court of Appeals for the Federal Circuit confirmed that the LCD glass panels imported by Optrex had been misclassified under heading 8531 and properly fell under heading 9013 (*see Optrex America, Inc. v. United States*, 475 F.3d 1367 (Fed.Cir. 2007)).

Once the classification issue was decided, the CIT was able to turn its attention to the question of whether in misclassifying the LCD glass panels, Optrex had acted negligently and should be subject to penalties. Before Optrex made its alleged misclassifications, there had been an earlier decision from the Federal Circuit on LCD's in *Sharp Microelecs. Tech, Inc. v. United States*, 122 F.3d 1446 (Fed. Cir. 1997). The CIT held that because of the *Sharp* decision, Optrex was on notice that its LCD's could fall within heading 9013. Most interestingly, in finding negligence the Court relied heavily on a letter from Optrex's counsel, which while it expressed a tentative opinion that the *Sharp* decision may not apply to some of the Optrex product line, clearly urged Optrex to seek a binding ruling from Customs on some products. The attorney advice letter also advised Optrex that some of its product line should be classified in accordance with the *Sharp* decision. The CIT held that there was no justification for Optrex's failure to act in accordance with the well-informed advice of its attorneys. The Court emphasized that Optrex made no attempt to comply with its attorneys' letter, and that once the advice was

sought and rendered the company assumed an obligation to follow the advice or explain why it disagreed.

The Court also found it significant that Optrex produced no witness with formal training in customs classification; that the engineer whom it produced to address questions regarding their classification process was unfamiliar with the Harmonized Tariff Schedules. The Court further cited the testimony of another witness which indicated that so-called 'borderline' classification decisions were made by the sales manager and the president of the company, neither of whom were competent in this area.

The Court in deciding on the amount of the penalty, examined the fourteen *Complex Machine Works* (*United States v. Complex Machine Works Co.,* 23 CIT 942 (1999)) factors that may be considered in determining civil penalties under 19 U.S.C. 1592(c), and held that Optrex had not acted in good faith and had been uncooperative, especially since the only witness they had provided was unqualified to answer questions about classification. The one factor that worked in Optrex's favor was that it had no history of previous violations. Taking this into account, the CIT imposed a penalty of one-and one-half times the lawful duties, taxes and fees of which the government had been deprived, in addition to the lost revenue, for the period after Optrex had received the attorneys' advice letter.

This decision is a timely reminder that the burden is on the importer to demonstrate that the process which it follows to arrive at a tariff classification must be transparent and supported by conduct that will pass the test of reasonable care. Therefore, if advice of counsel is sought, it must be followed; if an importer is unsure of a classification they must seek expert advice or request a binding ruling from Customs; if a classification is challenged by Customs the importer must be able to explain the process followed to arrive at the declared classification and demonstrate that it has the necessary internal competence or access to expert advice that supports the reasonableness of its decision process.