

Bypass Entries Not Accorded “Treatment”

Under 19 U.S.C. §1625, But Entries by Other Importers DO Qualify

By George R. Tuttle

In order to properly classify their products for entry into the U.S., importers need to be able to rely upon prior Customs rulings and “treatment” given those products for tariff purposes. Two recent Federal Circuit court cases discuss whether changes in treatment by Customs require publication of notice under Section 1625.

No Customs “Treatment” for Bypass Entries

The first case, *Motorola, Inc. v. U.S.*, held that entries liquidated by way of the bypass procedures have not been accorded “treatment” by Customs, and thus notice and public comment under Section 1625 may not be required in this situation.

Between 1995-97, Motorola filed more than 900 entries of circuits used in battery packs for cell phones, duty free under subheading 8542.40.00. Although the products had historically been examined by Customs, the entries during this time period were bypassed. After reviewing 92 of the bypassed entries, Customs rejected Motorola’s classification and liquidated at a 3.2% rate under subheading 8536.30.80. Motorola protested, Customs denied the protest, and the importer filed an action in Court of International Trade (CIT).

On appeal, the Circuit Court concluded that because it was not clear whether the word “treatment” in Section 1625 covered bypass entries, it was necessary to look to Customs’ interpretation of that term in the regulations. The Court noted that the current regulations at Section 177.12(c)(1)(ii) provide that Customs will give “no weight” to transactions it processes expeditiously (such as bypass entries) without examination or Customs officer review.

The Court deferred to the language in the new Customs regulation even though it was not issued by Customs until after the transactions in this case took place. The full Court opinion in the *Motorola* case may be accessed at <http://www.fedcir.gov/opinions/05-1025.pdf>.

Since bypass entries are not accorded treatment, importers should seek rulings from Customs to resolve classification issues rather than rely on prior treatment in this situation.

“Treatment” Can Include Other Importers’ Transactions

The second case regarding treatment, *U.S. v. California Industrial Products*, appears to benefit importers because the Court broadly interpreted the term “treatment” under Section 1625 to include substantially identical transactions involving parties other than the subject importer.

In this case, CIP, a domestic manufacturer of steel sheet products, filed drawback claims for steel scrap, which Customs denied. Prior to the denials, Customs had liquidated 145 entries of steel scrap filed by five companies other than CIP. CIP then filed a protest, also denied by Customs, and the company sought relief in the CIT

On appeal, the Circuit Court ruled in favor of CIP, stating that because Customs failed to engage in a notice and comment process before rejecting CIP’s drawback claims (contrary to Section 1625), it is bound by its earlier treatment of other importers’ steel scrap eligible for drawback. The Court concluded that Congress clearly intended that “substantially identical transactions” in Section 1625(c) include transactions of parties other than the person claiming entitlement to the statute’s notice and comment process.

The Court reached this conclusion in spite of the language in the newly enacted Customs regulation stating that treatment arises only as a result of transactions involving the same person claiming the benefits of the statute. Rather, because the language of Section 1625 itself provides that interested parties be given notice, treatment includes transactions other than those of just the one person claiming the right to notice and comment. The Court also cited legislative history and the language of the prior regulation in concluding that treatment of other parties' entries could be considered in the analysis. The *CIP* case may be accessed at <http://www.fedcir.gov/opinions/05-1087.pdf>.

The case is significant because it establishes that importers can rely upon rulings pertaining to other parties to establish a treatment, and any changes by Customs would need to be published with an opportunity for comment.

If you have any questions regarding the recent federal cases discussed above, please feel free to contact Gary L. Graff at (415) 986-8780 or glg@tuttlelaw.com or George R. Tuttle at (415) 288-0425 or grt@tuttlelaw.com.

George R. Tuttle, George R. Tuttle, III and Gary L. Graff are attorneys with the Law Offices of George R. Tuttle in San Francisco. The information in this article is general in nature, and is not intended to constitute legal advice or to create an attorney-client relationship with respect to any event or occurrence, and may not be considered as such.

PAEI Presented “Export Technology Controls” Event on April 25th

By Jo-Anne Daniels, PAEI Director

April 25th PAEI presented the “Export Technology Controls” event featuring international trade professionals and trade attorneys. The presenters were experts in their fields who shared their knowledge with the PAEI attendees. Adobe Systems, Incorporated graciously offered their conference room. Lydia Bostillo, of Adobe and a long-term PAEI member assisted with the program execution.

Olga King, Export Compliance Manager and Empowered Official from Jet Propulsion Laboratory (JPL) was the first speaker and she presented “Export Compliance Management.” She outlined the export compliance best practices and compared them with best practice realities. She related her experiences building a support structure, identifying and assessing compliance exposures and costs, and creating an export compliance plan strategy to mitigate corporate exposure.

Ron Oliver, Senior Export Control Officer from Jet Propulsion Laboratory (JPL) was the second speaker and his topic was “Control of Technology Transfer.” Ron discussed how technology is released and how to build processes and a team to control the release of technology. Ron’s background is in engineering and he applies his knowledge in managing technology transfer and export control at JPL.

Dan Fisher-Owens is an attorney from Berliner, Corcoran & Rowe, LLP and presented “Software Classification and Commodity Jurisdiction in the Context of EAR and ITAR Deemed Export Compliance.” Dan gave an overview of the jurisdiction and classification determinations for setting appropriate controls on software. He discussed the difference in classification approach between ITAR and EAR software. Dan concluded his program advising that re-

cent ITAR enforcement action was based on mere “access” of controlled technical data to foreign nationals, but so far Commerce has not decided if they will follow this aggressive interpretation. Consequently, Dan recommended a best practice to treat server access as both an export and a deemed export.

Richard J. Pettler, Partner, Fragomen, Del Rey, Bernsen & Loewy, LLP presented “Deemed Export Life Cycle Case Study.” Richard gave an account of a deemed export case study which included recruitment, hiring and deployment of foreign persons. He discussed the importance of licensing decision analysis, and implementing a Technology Control Plan when a company hires foreign nationals. Other important elements he addressed were how to manage physical and systems accesses, evaluate organizational changes and to remain vigilant regarding third-party contractors/collaborators when a company employs foreign persons.

The concluding program was George R. Tuttle, III who presented “The New ‘China Catch-All Rule.’ ‘Will it Catch You?’” There was a proposed rule in the fall of 2005 to amend the EAR (part 744) and impose special end-user controls on export, re-exports and in-country transfer for items when it is known that articles are intended for “military end-uses” to specific countries including China. George reviewed who is covered by the rule and when it applies. In addition, he discussed the products, the type of activities and entities covered in the proposed rule. His final note was to question what is the exporter’s responsibility regarding how far down the distribution chain exporters should continue the compliance due diligence review.

The program concluded after the PAEI board gave speaker gifts to the presenters and distributed thank you gifts to the attendees who participated.

An additional article on **Exporting Technology and Software, Particularly Encryption** written by Benjamin H. Flowe, Jr. of Berliner, Corcoran & Rowe, LLP can be found at:

www.paei.org/EXPORTINGTECHNOLOGYANDSOFTWAREMAR2006.PDF.

Pictures from “Export Technology Controls” Event on April 25th



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Professional Association of Exporters and Importers

“Leaders and Partners in Worldwide Regulatory Compliance”

and

The Office of Nonproliferation and International Security

Presents

Dual-Use Items: Civilian Products, Military Applications

...What they are, who wants them, what licensing officers need from Industry!

DATE: Wednesday, May 17, 2006

SPEAKERS: Mr. Toli Welihozkiy, Deputy Director, Department of Energy Technical Staff

TIME: 8a.m. Networking and Executive Breakfast, 9a.m. – 12 noon conference

LOCATION: [National Semiconductor Corporation](http://www.nsc.com/), 955 Kifer Road (off Lawrence Expressway) Building 31, Sunnyvale, CA. 94086-5208. Phone 408-721-5000 <http://www.nsc.com/>

Join P.A.E.I. members for a half-day seminar on EAR99 and lower level (XX991/XX992) EAR controlled commodities and their applications as dual-use items. You've read the regulations, you know you have a reason to know, now come hear the experts discuss how can wireless LAN be used to detonate bombs, the uses commercial semiconductors have in military applications, how a EAR99 video game card be used for military surveillance, etc.! Planned topics also include:

- Department of Energy's stance on the catch-all provisions
- Types of 'red flags' the Department of Energy is looking for on export license applications
- Overview of the current non-proliferation threats (what foreign militaries are buying right now, and what to look for to protect your company)
- The role of intelligence in reviewing applications
- Meet the Department of Energy and Office of Non-Proliferation technical and licensing staff

Speakers will provide practical and useful informational handouts to allow attendees to understand the issues and bring them back to their companies.

Price: **FREE for PAEI members only.** This event is free to corporate and individual members.

If you would like to become a member and attend this event please go to

<http://www.paei.org/join.htm> and join now.

Registration: You must register in advance for this seminar. Please send your completed reservation form to Karen Hebert by email: khebertdms@aol.com or by fax: 408-274-7611. **You must RSVP by May 12, 2006.**

For further information about seminar content, please contact PAEI Director, Tansie Iwafuchi, email: exportgeek@yahoo.com, phone 408-721-5001. To become a PAEI member, visit <http://www.paei.org/>

Please complete one registration form for each attendee. Please print clearly.

Please be sure to fill out the form completely. Registration information and further notices about the guest speakers will be sent by email prior to the day of the event.

PAEI Membership No. _____ (required)

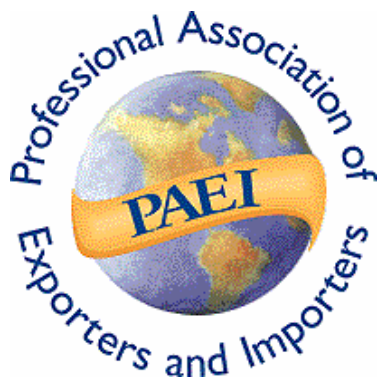
Name

Company

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E-mail address



WATCH US GROW!

March 2006

New

John Burgess	Omnnicell, inc
Maryann Moreno	Maxtor Corp.

Renew

Jennifer Toralba	Telogy, Inc
Nicole Halaby	Telogy, Inc
Laura Lyons	Palm, Inc
Joseph Smith	SDV (USA)
John Ramirez	CPI
Toni Paytas	Thomsen and Burke LLP
DJ Garner	Logitech
Ron Parham	Logitech
Johanna Avery	KLA Tencor
Many Litonjua	KLA Tencor
Anne van de Heetkamp	TradeBeam
Yvette Powell	TradeBeam

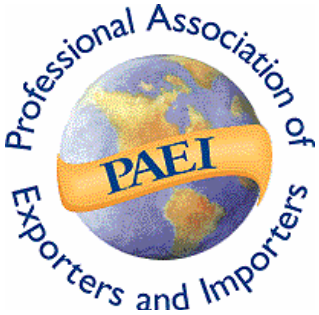
April 2006

New

Jeff Hopkins	Altera Corp.
Emerson Erazo	Emerson Trade Partners, Inc
Diana Krenning	Silicon Graphics
Thai Le	International Market Link
Christel Vilogron	Solectron USA, Inc
Kevin Pouya	Solectron USA, Inc
Jackie Kojian	PerkinElmer Optoelectronics
John Kim	PerkinElmer Optoelectronics
Eleanor Alderette	Trend Micro
Amber Jarzombek	RFMW, Ltd.
MaryAnn Omerod	VisionSafe Corp.

Renew

Brian Clark	Eudyna Devices USA
David Castro	Eudyna Devices USA
Nancy Heider	Rackable Systems, Inc
Angela Colvin	Altera Corp.
William Carter	Varian Medical Systems, Inc
Eva Nash	Varian Medical Systems, Inc
Aaron Hardy	Expeditors International
Ken Hashimoto	Expeditors International
Karon Giovannoni	Matheson Tri-Gas
Rafi M. Sekandar	Scientific Technologies, Inc
Russell Y. Thomas	Scientific Technologies, Inc
Cindy Shull	MKdenial.com



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Cont'd...

May 2006

New

Adriana Rivas	PerkinElmer Optoelectronics
Melissa Irmen	Integration Point
William P. Conroy	Tyler Search Consultants
Kristi Purcell	Tyler Search Consultants

Renew

Martina de la Torre	Symantec Corp.
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PAEI Members Get Involved!

The P.A.E.I. Newsletter is a publication that is written by its many members. If you have an article you have written, or have any web site that you would like to share with your fellow PAEI members in the next newsletter, please contact:

Dan Kromat at dan.kromat@ksicorp.com or
Peter Miller at peterjmillier@comcast.net

The PAEI Board of Directors would like to hear from our members about the subject of C-TPAT Certification. We value your opinion.



Customs-Trade Partnership Against Terrorism - a voluntary partnership between Customs & Border Protection (CBP) and industry to secure the international supply chain.

Has your company:

- Thought about obtaining certification but did not
- Or did it follow through and obtain C-TPAT certification

You may also send PAEI further comments on any experiences you might have had dealing with the C-TPAT certification process.

Our members are listening and waiting for your comments. Please send your comments to:

khebertdms@aol.com or tra3332003@yahoo.com.

**Upcoming P.A.E.I./BIS Events Mark
Your Calendars!**

- **May 17, 2006**
“Dual-Use Items”
- **September 28 - 29, 2006**
“Complying with U.S. Export Controls”
- **January 17 - 18, 2007**
“Complying with U.S. Export Controls”
- **May 23 - 24, 2007**
“Complying with U.S. Export Controls”
- **September 26 - 27, 2007**
“Complying with U.S. Export Controls”

PAEI is always interested in offering the education that our members need. If you want to suggest a topic for a future course, please call one of the PAEI Board Members.

Watch the PAEI Web site for these and other events, <http://www.paei.org>



P.A.E.I. Membership Information

The Professional Association of Exporters and Importers is an organization of professionals involved in import/export activities. Objectives of the association include promoting and fostering the role of the import/export professional, providing on-going education relative to regulatory issues, exchanging information and enhancing industry's participation in import/export control issues and policies.

P.A.E. I. sponsors quarterly luncheon meetings with featured guest speakers, a bimonthly newsletter, networking and job placement opportunities.

P.A.E.I. membership represents both large and small companies in the high-technology community. Membership is open to all persons interested in personal and professional growth in the international arena. Two types of memberships are available and are valid for one year from date of payment. For more information call the PAEI Message Center at telephone (800) 930-PAEI.

Complete this application and return it along with your check. Make checks payable to: Professional Association of Exporters & Importers, P.O. Box 612743, San Jose, CA 95161-2743. PAEI's TAX ID NO: 680117035. You may also pay online for your membership at the PAEI web site <http://www.paei.org/>.

Check Membership Choice:

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