By Christine Martinez

On September 19, 2011, the Customs Law Committee welcomed Monika Brenner from U.S. Customs and Border Protection ("CBP") to discuss the status of the 2008 proposal to create uniform rules for determining the country of origin of goods imported into the United States and answer questions from the audience. For those who were unable to attend, below is a summary of what you missed.

Monika Brenner is the Chief of the Valuation & Special Programs Branch in the Office of International Trade, Regulations & Rulings, U.S. Customs & Border Protection (CBP). The branch is primarily responsible for the administration of valuation, duty preference programs, country of origin determinations, and Chapter 98 of the Harmonized Tariff Schedule.

Ms. Brenner shared with the Committee that the idea of harmonizing the rules for determining origin in the United States dates back to 1991. The most recent proposal to make the NAFTA marking rules (19 CFR Part 102) generally apply to imports from all countries was introduced within CBP in 2005 and was published in 2008. CBP received comments in strong opposition and withdrew the proposal on September 2, 2011.

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By Damon Pike

In connection with CBP's recent "pre-publication" of its intended change in policy regarding post-importation adjustments and request for comments, the Customs Law Committee’s Transfer Pricing Working Group convened a conference call on September 28th.

Support for the proposal was overwhelmingly positive, although several members expressed concern with some of the specific requirements that CBP is considering in connection with adoption of the new policy.

While "Technical Comments" could be submitted to CBP by the Oct. 22nd deadline on behalf of the ABA International Law Section, it was agreed that responding in detail to the proposal during this "pre-publication" phase was not warranted. Instead, members agreed to send in short letters of their own (and encourage their clients to do the same) expressing general support for the new policy, but reserving the submission of detailed comments until such time as CBP formally publishes the "1625 Notice."

Publication is expected before year-end.
September Brown Bag Lunch Update

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Ms. Brenner discussed the tests used to determine origin and reiterated CBP’s position that substantial transformation requires a new name, character, and use. CBP will perform a case-by-case evaluation in response to origin determination requests. She also discussed the changes that were implemented, including those to the NAFTA tariff shift rules used to determine origin for pipe fittings and flanges.

While the WTO continues efforts to harmonize origin rules evaluating both tariff-shift and value added proposals, progress to date has been slow, and Ms. Brenner does not anticipate that CBP will attempt to establish uniform rules in the U.S. again soon.

The following questions were also posed:

Q: What is on the agenda for the October meeting of the Technical Committee on Customs Valuation at the WTO?

A: The last meeting was in April, and CBP had limited representation due to budget issues. The recently published royalty paper (Commentary 25.1) was finalized at that meeting. That paper discusses the “condition of sale” requirement. The bottom line in the U.S. is that the Hasbro test is still good law. The agenda for the October meeting includes a transfer pricing case study that will discuss using transfer pricing studies adopted for tax purposes.

Q: Is CBP committed to the type of change to first sale pricing that was recently proposed and withdrawn?

A: Ms. Brenner is not aware of any consultations with Congress attempting to redefine or pull back first sale pricing. However, the Ports and auditors are still concerned about the application of first sale pricing by importers. Ideally, CBP recommends that importers interested in using first sale pricing obtain a ruling from Headquarters. A ruling would help alleviate concerns about arm’s length negotiations and help establish the required paper trail.

Q: You mentioned that Headquarters plans to provide training to the Ports in the next fiscal year. What types of topics are being covered?

A: HQ is focusing on training auditors and Import Specialists at the ports. Overall valuation is the focus for this year.

Q: How do the marking rules changes relate to the export of goods to Israel?

A: The short answer is that they don’t. Origin of goods under the U.S. Israel Free Trade Agreement follows the substantial transformation rules. The published changes intend to get NAFTA users the Midwood (substantial transformation) result for pipe fittings and flanges.

Q: Canada Border Services Agency issued a D-Memo last summer concerning “management fees.” Is CBP also looking at this?

A: There are some published rulings that discuss management fees; however, CBP has not received the question addressed in the D-Memo. Ms. Brenner also noted that this question is not on the agenda for Brussels.

Q: How often is CBP’s Valuation Encyclopedia updated?

A: CBP has an update planned for December. Customs published the most recent update in May 2011.

Country in the Spotlight: Canada

Customs news from around the globe: Perimeter Security Update from Canada


It can be found here: CBSA Report on Perimeter Security.
Spotlight on Committee Leadership

Co-Chair Damon Pike

Damon is a “recovering consultant,” having spent 13 years in a “Big 4” accounting firm as leader of the firm’s customs practice. He opened The Pike Law Firm, P.C. in 2006, which focuses on helping companies navigate the complex rules governing the cross-border movement of goods and services. With the goal of minimizing global duty, VAT, and excise tax payments while maximizing corporate trade compliance, the firm is especially noted for its pioneering use of income tax transfer pricing rules to support customs valuation structures, and has a well-established informal network of global customs and trade attorneys and advisors to address client needs no matter where issues surface.

Damon is a prolific writer; his articles can be viewed at http://www.thepikelawfirm.com/articles.php. Together with his fellow former CIT law clerk, Larry Friedman, he is also the author of “Customs Law” (to be published in November, 2011 by the Carolina Academic Press), the first textbook ever written in the United States on this subject for law school use. He is an Adjunct Professor of Law at Emory University, and when he’s not working, writing, or teaching, Damon supports the work of organizations like the Atlanta Humane Society and Pets Are Loving Support (PALS). He has adopted two “rescue dogs” of his own: Trigger the Chihuahua mutt, and the firm’s “official mascot:” Bella the beagle!

“I’m pleased to be stepping up to chair the Customs Law Committee for 2011-2012,” Damon said. “We have an incredibly talented group of attorneys in the ABA who specialize in customs and trade law, and with so many issues on the front-burner, it’s an ideal time for us to try and make a difference. Thanks to everyone for pitching in; let’s make this a year to remember!”

Vice-Chair Su Ross

Vice Chair Su Ross is International Trade Counsel at Mitchell Silberberg & Knupp practicing Customs, international trade, transportation, Food & Drug, export licensing, corporate compliance and governance and import/export law. She is Co-Chair of the Firm’s Homeland Security Practice and Chair of its International Trade Practice. She is a co-founder of www.tradetarningsblog.com and www.canadablog.com, as well as a member of the Industry Leadership Council, American Association of Exporters and Importers; Chair, National Security Committee and Vice-Chair Customs Law Committees, American Bar Association, International Law Section; and on the Southern California Regional District Export Council Executive Committee as Vice-Chair Legal and Chair Education Outreach Committee. She writes a regular monthly column for the Journal of Commerce. Her postings can be found on her blogs, as well as at MSK’s website which is www.msk.com.

“This should be another exciting year,” Su said, “as we have some terrific attorneys in leadership this year, as we in the past. We also have some significant issues on our plate with the expansion of FDA’s jurisdiction through the Food Safety Modernization Act, CBP’s entry simplification and other regulatory reforms, plus the uncertainty in leadership positions at various agencies. We are fortunate to have so many talented attorneys involved to help us follow these important issues and the ones yet to come about. 

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