



WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

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HARMONIZED SYSTEM
COMMITTEE

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O. Eng.

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POLICY ISSUES RELATING TO THE HARMONIZED SYSTEM

Binding status of HSC decisions

(Item III.3 on Agenda)

Reference documents :

99NL724E- LP/MR – letter to all Contracting Parties to the HS
NC0100E1(HSC/24)

I. BACKGROUND

1. In response to its letter 99NL724E - LP/MR on the issue of making the HSC classification decisions binding on Contracting Parties to the HS Convention, the Secretariat received comments from India and Pakistan. These comments are reproduced in Annexes I and II of this Document for consideration by the Working Group.

II. CONCLUSION

2. The Committee is invited to take note of the comments from India and Pakistan as set out in Annexes I and II to this document.

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File No. 2669

ANNEX I

Comments from India

General Comments :

The issue of making the classification opinions binding on the Contracting Parties to the HS Convention has been examined in some detail. But further consultations with the Ministry of Legal Affairs are considered necessary before our final view could be placed before the HSC Working Party.

As has been the practice in many countries, the Indian Customs Tariff based on HS Nomenclature has been enacted by the Parliament by a separate Tariff Act. This Tariff includes the nomenclature up to 6 digits, the Section, Chapter and Subheading Notes as also the rules for interpretation. These provisions are legally binding on the importers/exporters and the Customs Administrations and the appellate authorities including courts, except that the interpretation thereof as also their constitutionality can be raised up to the Supreme Court of India, which is the final arbiter in the matter. Further, to ensure uniformity in assessment practice, the Central Board of Excise and Customs has been empowered to issue "directions" which are required to be followed by the assessing officers; such directions are not, however, binding on appellate authorities including the quasi-judicial Tribunal set up to decide on the disputes under the Customs Act (and also the Central Excise Act) as well as the courts.

The Explanatory Notes and Classification Opinions of the HSC are no doubt given due weight and consideration by all authorities including the Courts. However, such Notes and Opinions have generally been held to be of "persuasive value" by the courts, including the Supreme Court, who take into account other aspects such as common trade understanding, relative merits of technical arguments and the constitutionality of the provisions. Thus in deciding matters arising within their writ jurisdiction the courts, generally, have been exercising their own independent judgement. The courts also generally hold any decision to be applicable to a particular individual import (for identical thereto), but have been open to review their decisions. It must also be stated that courts have been invariably upholding the tariff entries, Notes, etc., if they have been duly enacted by the Parliament and the same are enshrined in the Customs or the Tariff Acts.

Reply to the Questionnaire

Question 1

By the expression "making HSC decisions binding", the widest possible meaning that can be given is that such decisions should be accepted and implemented by all authorities including the courts in the country/territory of the contracting parties. This would be made possible only if these decisions are formulated into "Notes" and incorporated into the relevant (tariff) enactment duly approved by the Parliament. In such an event, except where the constitutionality of the provision is in doubt, uniformity in classification can be ensured to a substantial extent and the basic objective of making such decision binding can be achieved. The variant at the other end of the scale could be to give such a meaning as to make the decision binding only on the assessing officer of the Customs administrations, excluding its "binding" nature on all appellate authorities including courts. In respect of the latter, such

decisions would be “opinion” having only persuasive value. The degree of uniformity achieved would be naturally less if this course is adopted.

Question 2

- (1) If the HSC decisions are to be made legally binding, having a Protocol could be a “quick method” to achieve the objective. But such a Protocol would be binding only on the Contracting Parties who sign the Protocol. While this may be looked upon as an advantage by some Contracting Parties who are not yet ready or not in agreement with the Protocol approach, the basic objective of achieving uniformity may not be achieved. Perhaps a Protocol can be agreed to as an “interim” or “transitional” measure for a period of say 6 years within which the working of the “system” can be reviewed and the issue of according the Convention can be considered.
- (2) If a Protocol is considered appropriate, at least 2/3rd of the Contracting Parties would require to be signatories to the Protocol to allow the Protocol to enter into force. The rationale behind this is that this would indicate that there is a majority support among Contracting Parties to follow the approach of the HSC decisions binding on Contracting Parties.
- (3) As mentioned earlier, the Classification Opinions/decisions can be made “fully” binding only if the same are given effect to on Notes incorporated in the legal text of the Tariff. Considering the long drawn procedure and legal requirements incident in the enactment by the Parliament, incorporating these Opinions in the legal texts as and when the same are given by the HSC, is not a feasible and practical proposition. But these opinions could be considered for incorporation in the HCDS (i.e. HS Nomenclature) by way of a Note as part of the normal 4-year review of the Nomenclature itself. This could be limited to key classification issues where there is an apparent ambiguity in the Nomenclature, while simple issues of the interpretation which are otherwise clear can be dealt with through Opinion/advice.

If, on the other hand, these opinions/decisions are not given legal status, the same can have only persuasive value. If the Contracting Party has accepted the binding nature by signing the Protocol, these Opinions/decisions can be made binding only on the Customs administration and not on the appellate authority or courts. This would mean only limited application of the “binding” character of the opinion/decisions.

The possible transfer of sovereignty from national courts to the HSC would not be acceptable in the Indian context, particularly since the Constitution guarantees certain rights and provides judicial (e.g. writ) remedies to the public at large. The courts can strike down even Parliament enacted provisions as “ultra vires” of the Constitution on grounds of discrimination and violation of the fundamental rights guaranteed in the Constitution.

- (4) The only way to get over the difficulty caused by a court decision which is not in conformity with a HSC decision is to make suitable amendments in the law by a specific legal provision or by incorporating Note in the Nomenclature.
- (5) The issue of a classification decision/opinion would be independent of a case, which is sub-judice. Classification being a matter based on the facts of the case and the

technical issues involved therein should be viewed *de hors* the pendency of the case, or its implication in revenue terms. In any case the Opinion/decision can be given only prospective effect, provided the law is amended as stated in respect of (4) above.

Question 3

- (1) The binding nature of HSC decisions should be limited to individual classification decisions (the proposed Protocol would need to address the existing provisions of paragraph 4 of Article 10 – the requirement of an agreement in advance to treat the decision of the Committee or the Council as binding would need to be given up).
- (2) The binding nature of the decision should apply to the specific article or the same class or kind of articles as are decided by the Committee. If the Committee has discussed the classification of a specific article, the decision of the Committee shall be binding only in respect of the said article. If, however, the Committee has considered and decided the classification of a specific article as also the same class of articles, decisions would be binding accordingly. The decisions of the Committee should not be extrapolated to extend the scope to other articles on which the Committee has not specifically deliberated and decided.
- (3) The decisions of the Committee should be taken by consensus.
- (4) Apart from exerting moral pressure, measures such as barring technical assistance, withdrawing voting rights within WCO bodies and denying staff positions in WCO could be considered.
- (5) The time frame required for implementing Committee decisions may be as follows :
 - (a) where the decisions have to be implemented through administrative circulars/instructions/directions : 6 months;
 - (b) where the decisions are required to be implemented through legislation : 12 months.
- (6) The usual methods of communication can only be adopted for improvement of transparency in respect of national procedures. These may include departmental publications, circulars and instructions (both for the assessing officers and the trade), display of HSC rulings on the website, etc.
- (7) All HSC decisions could be incorporated in the Chapter Notes/Heading Notes at the time of review after every four years.
- (8) Yes. It should not be left to the importer alone to claim a classification on the basis of HSC decisions. The assessing officers should *suo moto* implement such decisions without a claim being made by the importer.
- (9) This would depend on the provision in the national legislation. It would depend on the “relevant date” to be adopted for determining the rate of duty. The relevant date could be the date of filing of the import declaration, the date of arrival of the goods or the date of payment of duty. The situation described in this question can be addressed on the basis of the legal provisions in the national legislation.

- (10) Here again it will basically depend on the provisions in the national legislation. Any decision of the Committee would be on the interpretation of an existing entry in the Nomenclature. Since there is no legal amendment being made in the text of the Nomenclature, the inference to be drawn is that as if the interpretation given by the Committee existed at all times including in the past. Therefore, in the normal course subject to the provisions in the national legislation, all previous assessment should be reviewed to bring them into conformity with the decision given by the Committee.
- (11) In case the decision of the Committee is different from the binding classification information issued previously by administrations, such classification information ought to be repealed in view of the Committee decision.

A general remark would require to be made in the context of the questions at serial nos. (9), (10) and (11). Generally the courts have taken a view in India that any change of classification as aforesaid should be prospective in nature and not retroactive. While debating on the aforesaid issue whether the opinions of the Committee should be made binding or not, a view can be taken consciously that all such decisions of the Committee would apply only prospectively.

Another provision that should be considered is the review of the Committee's decisions. It is always possible that certain facts may not have come to the Committee's notice while originally a decision is made. It should be open to the Committee to revisit the issue for a review if proper justification thereof is adduced by any Contracting Parties.

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Annex II

Comments from Pakistan

Question 1

It is understood that once the HSC takes a decision regarding a classification ruling, all signatories to the HS Convention may take the following one or both actions :

- (a) make appropriate amendments (if so required) in their respective national Customs tariffs through legislation;
- (b) issue a classification ruling through respective Customs Administrations Head Office.

Question 2

- (1) Yes.
- (2) Precedents of earlier protocols of amendments to the HS Convention may be followed.
- (3) In Pakistan the Customs Tariff's legal status is that of a permanently attached Schedule of the Customs Act, 1969 (IV of 1969), which is a major over-ruling legal statute. Once the HSC decisions are implemented through amendment in the national tariff as part of the annual Finance Bill passed by the Parliament every year, same would automatically become part of the aforesaid main statute. All the quasi-judicial forums, departmental bodies and national/superior courts implement/interpret the provisions of the Customs Act, 1969 (IV of 1969) (including the Schedule) in its existing/amended forum. The alternative arrangement can be to incorporate amendments in the main body of the Customs Act, 1969 making the HSC decisions as re-issued by the Head Office of the national Customs Administration binding.
- (4) In Pakistan the superior courts normally follow the classifications as given in the national tariff which is a schedule of main statute. In order to further strengthen this position, as suggested above, legal amendments in the main body of the statute can be considered. In case of a conflict a review or an appeal to the Supreme Court/Judicial forum can be considered.
- (5) The HSC decisions once re-issued by the national administration or incorporated in the national tariff through a legislative amendment would be legally binding. Same shall have profound repercussions on all pending cases in quasi-judicial forums and courts.

Question 3

- (1) The individual classification questions.
- (2) The HSC's binding decisions should apply only to the specific article. The general application of this decision on the same class or kind of articles should be left to the Member administrations. This question of general application shall then be tackled in the light of general literature, Chapter Notes, Explanatory Notes and the internal classification rulings issued by the Head Offices of various Customs administrations. The expression "specific article" may mean the article classifiable under an original or

national sub-heading. The expression "same class or kind of articles" may mean the articles sharing common properties, characteristics and uses.

- (3) A simple majority is preferable. It would quicken the pace of HSC decision making. The requirement of two third majorities is suitable only for more serious business of amending the HS System.
 - (4) Implementation in Pakistan would be possible by way of two of the following methods, i.e., re-issuance of the HSC decisions if no amendment in tariff is required or amendment of tariff through the Finance Bill presented before Parliament in May/June every year. Repercussion may be as per the practice in case of most conventions. However, coercive repercussions are not favoured.
 - (5) One year.
 - (6) Existing system in Pakistan is quite transparent. However, WCO or the HSC may suggest guidelines by way of a working paper.
 - (7) A document be drawn and circulated containing the procedures/methods of implementation prevalent in Member States.
 - (8) Binding HSC decision once adopted through amendment of statute or otherwise implemented would become part of the relevant legal statute and shall have to be treated as such and not separately.
 - (9) Section 21A of the Pakistan Customs Act, 1969 (IV of 1969) covering the issue/practice of deferred payment has since been omitted through Customs Amendment Act, 1999 (II of 1999). Even otherwise, in case of Pakistan, the crucial date would be that of filing of Customs declaration. All such declarations filed after implementation of HSC decision would be treated accordingly. However, in case of provisional release of goods pending classification decision application is with retrospective effect.
 - (10) In Pakistan the classification rulings are not applied retrospectively. The crucial date is that of filing of Customs declaration.
 - (11) Yes. However, a system of issuance of a binding classification is as yet under evolution in Pakistan.
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