

EU Update.

Customs Classification Chipping away at the ITA

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This week should see the next instalment in the European Commission's systematic campaign to severely curtail the scope of application of the Information Technology Agreement.

This 1996 agreement – entered into by many but not all WTO Members – requires signatories to offer tariff free access to covered products.

The EU Commission has for some time been arguing that the commitments must be read on a static basis covering only products which existed in 1996 and that all technological improvements and new products are not covered.

In May 2008 the Commission adopted an Explanatory Note which in effect re-classifies Set Top Boxes with a Hard Disk Drive into a non ITA tariff free heading (13.9%). The questionable logic of the Commission being that the presence of a HDD makes it a product other than a Set Top Box for the purposes of the ITA.

Japan, the United States of America and Taiwan all consider this to be legal nonsense and have initiated the WTO Dispute Settlement procedure by requesting consultations. A panel will now likely be formed this month to consider this further.

Far from backing down on its approach the Commission has now set its sights on mobile phones – or to be more specific mobile phones incorporating GPS or television functions. At a meeting in Brussels later this week (21.09.08) the European Commission is likely to seek to classify them as either radio navigation equipment (3.7%) or televisions (14%).

If the Commission follows its practice in STBs it would seek to amend classification not by formal legislation but through the adoption of an Explanatory Note. This has a number of commercially significant implications:

- first - being guidance rather than legislation it is virtually impossible to challenge such measures directly in the European Courts of Justice
- second - being a guidance note which states what the correct classification has been for these products all along, national customs administrations are in effect required to recover additional duties going back for up to three years prior to the date of adoption of the Explanatory Note
- thirdly - companies who relied on the relatively clear provisions of the ITA may well have considered it unnecessary to obtain BTIs for products

within the ITA free of duty headings. A BTI protects only the named importer from the application of retroactive duties.

Of course importers may well wish to contest the new classification. However in addition, and although it is late in the day, importers should also be thinking about what actions they can still take to reduce the risks of retroactive application.

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