

# Legal Update: 2012

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American Petroleum Institute

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## Topics and Rules

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- > Not covering FTZ and HTSUS updates
- > But, those were the big items this year
- > Will cover court cases of note
- > Not all will refer to petroleum, but they make an important point
- > There are prizes

## Ford NAFTA Cases (Mar. 21, 2011)

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- > NAFTA post-entry claim
- > Ford failed to provide certificates of origin in connection with the claim
- > CIT ruled there was no valid claim and, therefore, no basis for jurisdiction to review
- > CAFC reversed, finding CIT had jurisdiction to review the denial

## Dell Products LP (CAFC April 29, 2011)

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- > Products configured in an FTZ per order
- > Here, customer ordered a spare battery
- > Dell entered the laptop and batteries as a Retail Set
- > CBP says it was not “put up for retail sale”
- > Court agrees that the consumer cannot create the set

## CBB Group (CIT June 2011)

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- > Merchandise not released by CBP due to IPR concerns
- > At point of exclusion, CBB filed a protest and then a timely summons
- > Then CBP seized, claiming CIT had no further role to play
- > CIT disagreed and said protest can be reviewed.

## Kairali Decan, Inc. (CIT Aug. 2011)

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- > Third party used plaintiff's information to import food
- > FDA wants the food back and issued notice to redeliver to plaintiff
- > Plaintiff paid liq. damages, to avoid sanctions.
- > Sought refund in the CIT
- > CIT held plaintiff should have filed a protest as the importer shown on the paper

## Isaac Industries (CIT Aug. 2011)

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- > Drawback claim during transition from Miami to Los Angeles drawback center
- > Claim filed in Miami, Denied in LA
- > Notice of denial posted in Miami
- > Protest filed in Miami
- > CBP says no timely protest because it should have been filed in LA
- > CIT agrees, finding Federal Register Notice clear

## Airflow remand (CIT Oct. 31, 2011)

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- > Classification of non-woven filter media
- > Federal Circuit previously held that “straining cloth” was only for filtering liquid, not gas
- > CIT methodically reviews 5911

## Airflow

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- > CBP puts most media filter in 5911 as textile products for a technical use
- > But, the text requires that the textile product specified in Chapter 59, Note 7 be for a technical use

## Airflow, Note 7(a)

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- (i) Textile fabrics, felt and felt-lined woven fabrics, coated, covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes, including narrow fabrics made of velvet impregnated with rubber, for covering weaving spindles (weaving beams);
- (ii) Bolting cloth;
- (iii) Straining cloth of a kind used in oil presses or the like, of textile material or of human hair;
- (iv) Flat woven textile fabrics with multiple warp or weft, whether or not felted, impregnated or coated, of a kind used in machinery or for other technical purposes;
- (v) Textile fabric reinforced with metal, of a kind used for technical purposes;
- (vi) Cords, braids and the like, whether or not coated, impregnated or reinforced with metal, of a kind used in industry as packing or lubricating materials;

## Airflow, Note 7(b)

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Textile articles (other than those of headings 5908 to 5910) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

## Airflow

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- > Since the material is not 7(a) and is not 7(b)
- > It cannot be 5911
- > Goes in 5603

## Hitachi (CAFC Oct. 31, 2011)

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19 CFR 174.21

Except [for protests relating to exclusions], the port director shall review and act on a protest filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514 ), within 2 years from the date the protest was filed.

## Hitachi (CAFC Oct. 31, 2011)

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- > How long does CBP have to decide a protest?
- > What happens after that time?
- > Currently subject to a hotly contested motion for rehearing

## The Return of Ford (CIT Nov. 29, 2011)

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- > CIT can review the post-entry NAFTA claims
- > Ford failed to provide NAFTA CO at time of claim
- > Thus, claim is incomplete and CBP properly denied
- > CBP need not ask the importer to perfect the claim
- > And, CR 10.112 does not help

## Aromont (CAFC Feb. 21, 2012)

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- > “Flavoring products” from France
- > CBP classified as “soups and broths and preparations therefor . . . .”
- > Aromont proposed “food preparations n.e.s.o.i.”
- > CIT found products not principally used for soups and broths

# Aromont

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- > Principal use is use:
  - > In the United States
  - > At, or immediately prior to, the date of importation
  - > Of goods of the class or kind to which the imports belong
- > Use which exceeds any other single use

# Aromont

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- > Class or kind = the group of goods that are commercially fungible with the imports
- > *Carborundum* factors provide guidance
  - > Use in the same manner as the class
  - > General physical characteristics
  - > The economic practicality “of so using the import”
  - > Expectation of the ultimate purchaser
  - > Channels of trade
  - > Recognition in the trade

## Aromont: Why am I dwelling on this?

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- > CBP argued Actual Use is not relevant
- > CAFC disagreed
  - > First *Carborundum* factor involves actual use
  - > Actual use is relevant but not sufficient
  - > Reviewed other factors and Affirmed
- > Important point is that CBP may not ignore actual use

# Transfer Pricing

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- > September Notice
- > Reconsidering application of transaction value where there are post-entry adjustments
- > Currently not permitting transaction value
- > Contemplating revoking rulings

## Proposed Position

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- > Written transfer price policy or APA
- > Applicable to the goods
- > Sets the pricing formula
- > Adjustments must be clearly explained
- > No contrary indications that price is not arm's length

## But, there is a gap

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- > Must still satisfy CBP statute
  - > Circumstances of sale or
  - > Test value
- > Would require ACS Reconciliation
- > Up side: Permits refunds

# Thank you & Questions?

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