No. 18-534

In the Supreme Court of the United States

WELL LUCK COMPANY, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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Pursuant to Supreme Court Rule 15.6, petitioner Well Luck, Co. ("Well Luck") hereby replies to new points raised in the Brief for the United States in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

ARGUMENT

Well Luck asks this Court to grant certiorari in order to determine whether a panel of the Federal Circuit disregarded legislative intent and prior statutory construction to improperly use the General Rules of Interpretation (GRI) and the Explanatory Notes (ENs) to justify its classification of Well Luck's snacking sunflower seeds under Harmonized Tariff Schedule of the United States (HTSUS) Heading 2008, despite the Heading's "not elsewhere specified or included" (NESOI) language. Pet., at i.

In its Brief in Opposition, the Government now agrees with Well Luck that the panel improperly relied on GRI 3(a), while asserting that the Federal Circuit's analysis of the case under GRI 3(a) "provides no sound basis for this Court's review" and that "the petitioner's imported goods are properly classified in HTSUS Heading 2008." Br. in Opp. 11.

The analysis by the Federal Circuit has cast doubt on the Harmonized Tariff System. Doubt that should be "resolved in the favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretations.'" *Hartranft v. Wiegmann*, 121 U.S. 609, 616 (1887), quoting *Powers v. Barney*, 5 Blatchf. 202. This Court has reviewed tariff classification issues since its inception but has yet to review tariff classification under the Harmonized System and its

controlling rules. Review of the panel's analysis will provide this Court an opportunity to clarify the application of the GRIs, Additional U.S. Rules of Interpretation, and tariff classification therein.

I. Sound Basis Exists for this Court's Review Because the Federal Circuit Panel's Improper Analysis Under GRI 3(a) and Subsequent Classification is a Final Reviewable Judgement.

In its Brief in Opposition, the Government states that the fact that the Federal Circuit analyzed this case under GRI 3(a) "provides no sound basis for this Court's review." Br. in Opp. 11 citing to *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgements, not statements in opinions"). In *Rooney*, this Court held that a previously granted writ of certiorari was improperly granted because review of the question presented would be premature in that it had never been the subject of an actual state-court judgement. *Rooney* at 313.

The Government attempts to draw a comparison between *Rooney* and the instant case to state that the Federal Circuit's analysis under GRI 3(a) instead of a GRI 1 analysis is akin to the California Court of Appeal reaching the ultimate issue of the case through a different analysis than the State wished. *Rooney* at 311. However, in the instant case, the application of GRI 3(a) instead of GRI 1 is neither a strategic issue, nor an issue that even needed to be reached. The panel's analysis of the issue under GRI 3(a) is not similar to the issue in *Rooney* because a court does not analyze GRI 1 *or* GRI 3(a); a court must determine that the classification cannot be decided by GRI 1 alone

before even reaching GRI 3(a).[1] By misapplying GRI 1 and proceeding to GRI 3(a), the panel has removed any other avenue for relief for Well Luck.

In classification matters, a "decision and a judgement order are required…each is a judicial determination, conclusive upon the parties, unless appealed from, in accordance with law." *Veolay Inc., J.E. Bernard & Co., Inc. v. United States*, 21 C.C.P.A. 268, 273 (1933). Special customs rules affecting the construction of expressions used in tariff laws are not mere "statements in opinions." Rather, cases involving interpretation of specific customs rules are "the very cases which are especially fit for judicial enquiry and decision. If such questions of law were permitted to be finally determined by administrative fiat, without the sanctions and protections of a full and complete independent judicial review, due process of law in customs taxation, in effect, would be completely lacking." Brown, Judicial Review in Customs Taxation, 26 Law. & Banker & Cent. L.J. 263 (1933).

Because the application of the GRIs to a final classification is a decision and a judgement made by a court, Well Luck contends that this Court's holding in *Rooney* is not applicable to the instant case, and sound basis exists for this Court's review.

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[1] The General Rules of Interpretation ("GRI") and Additional U.S. Rules of Interpretation govern the classification of merchandise under the HTSUS and are applied in numerical order. *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013).

II. GRI 1 is the Applicable Statutory Rule, Which the Government Now Concedes.

After agreeing with the Federal Circuit that GRI 3(a) was correct in its Response to the Combined Petition for Panel Rehearing and Rehearing En Banc (*Well Luck Co. v. United States*, 887 F.3d 1106 (2018), Dkt. 48, at 4, 5, 11), the Government now agrees with Well Luck that the panel's reliance on GRI 3(a) was inappropriate. Br. in Opp. 6, 7, 11. Well Luck agrees that the court's reliance on GRI 3(a) was improper, and that GRI 1 is the applicable rule. Because both parties now agree that GRI 1 is the applicable rule, the holding of the Federal Circuit is not confined to the instant merchandise in this case. Rather, this case raises a question of exceptional importance because it applies to all NESOI provisions in the HTSUS.

A. Because GRI 1 is the Applicable Rule, HTSUS Heading 2008 Cannot Be Reached.

In its Brief in Opposition, the Government now "agrees [with Petitioner] that the court's reliance on GRI 3(a) was inappropriate" and that "Petitioner is correct that, under GRI 1, particular merchandise cannot be *prima facie* classifiable in two or more tariff provisions if one of the provisions includes the limiting language 'not elsewhere specified or included.'" Br. in Opp. 6, 7. Furthermore, the Government concedes that "because Heading 2008 is limited by its terms to products 'not elsewhere specified or included,' it would necessarily be inapplicable if petitioner's merchandise were covered by Heading 1206." *Id*. Well Luck agrees.

The panel below concluded that "the subject merchandise [Well Luck's snacking sunflower seeds] is

prima facie classifiable under HTSUS Heading 1206." Pet. App 12. The panel further held that "[N]either the HTSUS, nor legislative history, nor Chapter Notes inform our construction of 'sunflower seeds' as used in HTSUS Heading 1206. Therefore, 'we look to the dictionary to understand its common meaning.'" Pet. App 10, citing *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1164 (Fed. Cir. 2017). After looking to the common commercial meaning of the term "sunflower seeds" the panel determined that "there is no reasonable dispute that this broad definition covers the subject merchandise." Pet. App 11. Well Luck agrees.

However, despite now agreeing with Well Luck as to the application of the GRIs to the subject merchandise, the Government in its Brief in Opposition states that the subject merchandise cannot be classified in HTSUS Heading 1206 as evidenced by certain peanuts, Brazil nuts, and other nuts and fruits, as well as the application of the Explanatory Notes to Chapter 12.

i. The Government's Example of Peanuts, Brazil Nuts, and other Nuts and Fruits is Not Applicable to a GRI 1 Analysis Because They Are Elsewhere Specified (i.e. Not NESOI).

In its Brief in Opposition, the Government argues that Well Luck's goods are described in their entirety only by HTSUS Heading 2008 under a "proper GRI 1 analysis." Br. in Opp. 9. In support of this assertion, the Government uses peanuts, Brazil nuts, and other nuts and fruits. Br. in Opp. 9-10. These products are not comparable to the instant sunflower seeds because

peanuts, Brazil nuts, cashews, coconuts, and the other products asserted by the Government *are* elsewhere specified or provided.

The language of Heading 1206, HTSUS, is unambiguous and without limitation, and provides for "*Sunflower seeds, whether or not broken*." *Eo nomine* designations, however, can be limited by "a shown contrary legislative intent, judicial decision, or administrative practice to the contrary." *Nootka Packing Co.*, 22 C.C.P.A. 464, 470 (1934). There is no clear legislative intent, judicial decision, or administrative practice that excludes snacking sunflower seeds from subheading 1206.00.00, HTSUS.

Conversely, the headings and subheadings for the peanuts, Brazil nuts, and other nuts and fruits proffered by the Government all contain some form of limiting language. For example, HTSUS Heading 1202 covers peanuts, but specifically excludes peanuts that are "roasted or otherwise cooked," placing these peanuts in HTSUS Heading 2008.

This Court has held that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). Applying that principle, Congress' exclusion of "roasted or otherwise cooked" peanuts only has meaning if these peanuts would otherwise be included in HTSUS Heading 1202. Similarly, the same applies to the Brazil nuts, cashews, coconuts, and the other

products asserted by the Government based on their explicit inclusion in HTSUS Subheading 2008.19.[2]

Therefore, raw and prepared peanuts, Brazil nuts, and other nuts and fruits are *eo nomine* provided for in the HTSUS, are properly classified, and not comparable to the instant snacking sunflower seeds. Congress' election not to limit HTSUS Heading 1206 in any form or manner, leads to the conclusion that all "roasted and otherwise cooked" sunflower seeds – snacking seeds – are included HTSUS Heading 1206 and thus cannot be included under HTSUS Heading 2008 because they are elsewhere specified or provided.

ii. The Government's use of the ENs is Contrary to Well Established Precedent.

By relying on the "narrower interpretation" provided by the ENs to determine that HTSUS Heading 1206 does not cover the subject merchandise, the Government makes the same mistake as the Court of International Trade, which, as the panel below stated "ran afoul of [the Federal Circuit's] instruction that a court 'shall not employ [the ENs'] limiting characteristics, to the extent there are any, to narrow the language of the classification heading itself.'" Pet. App 12, citing *Sigma-Tau HealthSci., Inc. v. United States*, 838 F.3d 1272, 1281 (Fed. Cir. 2016) (quoting *Rubie's Costume Co. v. United States*, 337 F.3d 1350, 1359 (Fed. Cir. 2003)); *cf. Archer Daniels Midland Co. v. United States*, 561 F.3d 1308, 1315 (Fed. Cir. 2009)

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[2] HTSUS Subheading 2008.19 provides in part, *eo nomine*, "other, including mixtures: Brazil nuts and Cashews, Coconuts, Filberts, Pecans, Pignolia and pistachios, Almonds, Watermelon Seeds," while HTSUS 0801 and/or 0802 provide for the raw forms.

(declining to afford ENs "any weight" when inconsistent with a tariff provision's plain meaning (internal quotation marks and citation omitted)).

B. Because GRI 1 is the Applicable Rule, the Decision Below Broadly Applies to All NESOI Provisions.

The Government asserts that the decision below applies only to sunflower seeds and "implicates no legal issue of broad importance" and that there is "no sound reason to believe that the decision below will unsettle prior understandings of the legal significance that should be given to such language." Br. in Opp. 7, 12 (Referring to the NESOI language). However, this is incorrect.

Using a GRI 1 analysis, a classification shall be determined "according to the terms of the headings." GRI 1. In the decision below, the panel did not cite to any precedent, nor did it provide any analysis as to why the NESOI language was not considered in their application of GRI 1. The language was simply ignored. In its Brief in Opposition, the Government seems to acknowledge that this holding is "inconsistent with prior Federal Circuit decisions constructing 'not elsewhere specified or included' language in other HTSUS provisions," yet seems to imply that the Federal Circuit's decision "cannot deprive the earlier rulings of their precedential effect." Br. in Opp. 12. This appears to go against the core principle of *stare decisis*.

This Court has held that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions,

and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In classification cases, the "construction of a Customs classification provision by a panel of [the Federal Circuit] is binding upon both the Court of International Trade and subsequent panels of this court in later protest cases." *Deckers Corp. v. United States*, 752 F.3d 949, 966 (2014). Only through "an en banc opinion, intervening Supreme Court precedent, or a change in the underlying statute by Congress" can a court deviate from a panel decision. *Id.*

As such, unless this Court overturns the decision below, it would create a precedent that is inconsistent with other decisions and create unpredictability in the HTSUS. Well Luck reiterates that the panel's decision below is contrary to *stare decisis* and throws the HTSUS into disarray by invalidating all NESOI provisions.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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