

To: Our Clients and Friends

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Totes-Isotoner Petitions U.S. Supreme Court to Review Apparel Duties Gender and Age Discrimination Case

On May 6, 2010, Totes-Isotoner Corporation (“Totes”) filed a writ of certiorari requesting the United States Supreme Court to review whether different Customs duty rates for men’s and women’s gloves, as well as men’s and children’s gloves, constitute gender and age discrimination, thereby violating the Equal Protection Clause of the U.S. Constitution. This request for review follows the decision by the Court of Appeals for the Federal Circuit (“CAFC”) on February 5, 2010, to uphold the Court of International Trade’s (“CIT”) dismissal of the case.

In January 2007, Totes filed a complaint at the CIT against the U.S. Customs and Border Protection challenging the different duty rates for men’s gloves and gloves of “other persons” as discrimination based on gender or age. The CIT dismissed the case on the ground that Totes did not show that the different duty rates disadvantaged or had a disproportionate impact on one sex.

On appeal, the CAFC upheld the dismissal, but on different reasoning. The CAFC held that because the Harmonized Tariff Schedule is not facially discriminatory, Totes must allege facts that show a government purpose to discriminate. The court concluded that Totes did not allege sufficient facts to infer such a government purpose existed in this case.

The reasons cited by Totes for the appeal to the Supreme Court are: (1) the CAFC erred when it held that the challenged tariff provision was not facially discriminatory on the basis of gender or age; (2) the CAFC erred when it held that government intent to discriminate cannot be inferred from disparate impact in the areas of tariff and tax law; and (3) the U.S. Supreme Court should decide whether a corporate taxpayer can have first-party standing to bring equal protection challenges based on classifications involving natural persons.

This case has been closely watched by the trade community because of its potential ramifications on a large number of tariff provisions that contain different duty rates for men’s and women’s apparel, as well as adult and children’s apparel. In the petition, Totes cites the over 100 similar cases filed in the CIT challenging the constitutionality of the tariff provisions and the more than \$1 billion in claims for recovery of excess duty assessments.

The Government will have until June 9, 2010, to respond to the petition (should it choose to do so). It is not clear at this point whether the Supreme Court will grant a review of the case.

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