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CLIENT ALERT

DDTC's Failure to Disclose Publicly That Particular Riflescope Was "Manufactured to Military Specifications" Results in Arms Export Control Act Conviction Misfire

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Acknowledging that it may be a "fool's errand" for the Directorate of Defense Trade Controls (DDTC) to attempt to list each riflescope that is made to a military specification and thus covered by the U.S. Munitions List, the Seventh Circuit nonetheless reversed a conviction under the Arms Export Control Act (AECA) because the United States failed to prove that the defendant knew this Leopold Mark 4 CQ/T riflescope had been "manufactured to military specifications" captured by USML Category I(f). *United States v. Pulungan*, 569 F.3d 326, (7th Cir. 2009). In doing so, it may well have opened the door a crack to judicial review of DDTC's unpublished commodity jurisdiction determinations.

Pulungan involved the defendant's 2007 attempt to transship, through Saudi Arabia, 100 riflescopes to Indonesia, apparently in an effort to hide the ultimate destination because of his mistaken belief that there remained an arms embargo of Indonesia. The United States introduced testimony that DDTC had concluded the Leopold Mark 4 CQ/T riflescope was a defense article but its witness failed to identify the applicable military specifications or why DDTC believed the item was manufactured to such specifications. Nor did the government introduce a copy of the DDTC decision.

While ultimately concluding that it need not decide whether the Leopold Mark riflescope was a "defense article," the court cast doubt on DDTC's practice of not publishing its commodity jurisdiction decisions. Rejecting the government's argument that AECA § 2778(h) precluded any inquiry into whether the riflescope was a defense article, the court noted that provision only applied to designations "*in regulations*," and the Directorate's conclusion that this riflescope was "manufactured to military specifications" was not contained in a regulation. Furthermore, in words that may be music to any export control practitioner's ears, the court noted:

> The Directorate's claim of authority to classify any item as a "defense article," without revealing the basis of the decision and without allowing any inquiry by the jury, would create serious constitutional problems. It would allow the sort of secret law that *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) condemned. . . . A regulation is published for all to see. People can adjust their conduct to avoid liability. A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian régimes.

The court also rejected the government's various efforts to infer specific intent to violate the export control laws. First, it rejected the argument that the distributor's website notice stating the riflescopes were only "available to certain countries" and could not be exported "outside the U.S." established an inference that defendant knew an export license was required. The site did not elaborate and such a limitation is equally consistent with having a restricted sales territory. Nor did the court accept the argument that defendant's conscious efforts to avoid a non-existent arms embargo raised an inference that defendant intended to ship without a license, finding "[i]t would be a stretch to treat 'intent to transship lawfully exported riflescopes' as equivalent to 'intent to export riflescopes without a license.'" As both offenses are *malum prohibitum*, it was incumbent on the government

to show knowledge of the actual rule violated and could not rely on the doctrine of transferred intent; *i.e.*, that he thought he was violating one rule was insufficient to show intent to violate what the court considered a different rule.

In any event, the court concluded that even if the government could establish intent its case foundered on the inability to prove defendant knew that this specific riflescope was "manufactured to military specifications" such as to be covered by the USML. While recognizing the "fools errand" in listing every possible model of riflescope, the court suggested the problem could be avoided by publishing in the text of the regulation those that had been specifically determined to be "manufactured to military specifications" (although also suggesting that incorporating "including but not limited to . . ." language might extend the notice even to some unlisted items).

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