MARITIME REPORTER AND ENGINEERING NEWS

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September 2005

Harbor Maintenance Tax – continuation or termination

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From the founding of the nation, the cost of dredging and related harbor maintenance was funded by the General Treasury of the federal government. This was considered a natural concomitant of the Commerce Clause. Initially, dredging was seldom done and was a relatively low-cost activity. As ships grew in size and harbors became busier, dredging became more frequent and more expensive.

Citing higher dredging costs and a general budget deficit, Congress included the first Harbor Maintenance Tax in the Water Resources Development Act of 1986. The tax was initially set at 0.04 percent of the value of the cargo. In 1990, the tax rate was raised to 0.125 percent of the value. The initial tax rate had been a nuisance. The higher tax rate quickly became a burden and resulted in a scramble for ways to avoid or lessen the bite.

Who Pays

As originally enacted, the HMT applied to many (but not all) imports, exports, intercoastal shipments through most U.S. seaports. For domestic shipments, the shipper is liable for the HMT at the time the cargo is unloaded. The shipper for purposes of domestic shipments is defined as the person or corporation who pays the freight. For export vessel movements, the exporter was (until the 1998 Supreme Court decision) liable for the HMT when cargo was loaded on a commercial vessel for export in a U.S. port. The exporter for this purpose was defined as the person or corporation whose name appeared on the Shipper's Export Declaration. For import vessel movements, the importer is liable for the HMT when imported cargo is unloaded from a commercial vessel at a U.S. port. The importer for this purpose is defined as the person or corporation responsible for bringing the cargo into the U.S. For passengers, the operator of the vessel is liable for the HMT when a passenger boards or disembarks a commercial vessel at a U.S. port.

Who Doesn't Pay

For a variety of reasons, mostly political, numerous exceptions were established to the obligation to pay the harbor maintenance tax. No assertion has been made with regard to any of

these exceptions that the impact on the harbor or waterway is in any manner less through these uses than through the uses on which the tax is imposed. The exceptions are based solely upon a variety of public policy and political grounds.

How Much Is Paid

For fiscal year 1998, the federal government collected approximately $650 million under the HMT program. In its latest report to Congress on the status of the Harbor Maintenance Trust Fund, the Corps of Engineers stated that revenues into the fund during FY 2002 amounted to $710,790,000, while expenditures totaled $656,214,000. The balance of the fund at the end of FY 2002 was $1,873,417,000.

What Is Paid For

When the HMT was established in 1986, the monies (then estimated to be $140 million annually) were used to fund 40% of the federal share of the "eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States." With minimal discussion in Congress, the assessment rate provided for in the HMT was more than tripled in 1990 and the fund into which these monies were deposited began to pay for 100% of the federal share of those commercial navigation projects. In fact though, the federal government was collecting through the HMT monies well in excess of what it was spending on harbor maintenance projects. In fiscal year 1996, for instance, the Harbor Maintenance Trust Fund collected approximately $740 million while expenditures totaled approximately $495 million. The excess was being used in a futile attempt to stem the then ever-increasing federal budget deficit.

In addition to actual harbor maintenance and related administrative expenses, monies for the Trust Fund are used to cover the entire budget of the Saint Lawrence Seaway Development Corporation. A substantial sum also is devoted to shallow draft navigation projects not subject to the Inland Waterways Fuel Tax. In fiscal year 1995, in excess of $64.7 million was expended from the Trust Fund on this type of project in harbors and waterways utilized almost exclusively by commercial fishing and recreational vessels. This expenditure rose to $72.4 million in fiscal year 1996.

Challenge based on Export Clause

United States Shoe Corporation and similarly situated companies contended that the HMT violated the constitutional prohibition against taxes being assessed against exports. The various courts that heard the matter agreed. In a unanimous decision, the U.S. Supreme Court held in 1998 that, although the Export Clause categorically bars Congress from imposing any tax on exports, it does not rule out a user fee. The user fee, though, must lack attributes of a

generally applicable tax or duty. It may only be a charge designed as compensation for a government-supplied service, facility, or benefit. As the HMT lacks the indicia of a user fee, it was found to be violative of the Export Clause.

Other Challenges

Other challenges to assessment of the HMT have been largely unsuccessful. These challenges have included: (1) the tax on passenger transportation; (2) the tax on interstate shipments; (3) the tax on imports; and (4) the tax on goods unloaded at a covered port for admission into a foreign trade zone.

Claims for Rebates

Even before the ink was dry on the 1998 Supreme Court decision, exporters started filing claims for rebates of previously paid HMT assessments. Customs resisted payments on the rebates as best it could, but various issues ended up back in the courtroom. The drawback procedure whereby duties on imported goods were credited for exports of commercially interchangeable goods was held to be an inappropriate mechanism for obtaining a rebate of HMT payments on exports. The statute of limitations for refund claims was held to be two years. Application of the HMT to exports was held to not be a taking in violation of the Fifth Amendment and exporters who had made HMT payments were not entitled to prejudgment interest. While exporters were entitled to recovery of certain HMT payments, the government was not required to pay interest on those amounts for the period between payment and rebate. A narrow victory was afforded to those exporters which had filed protests when making HMT payments – they were allowed the benefit of the principle of laches rather than being constrained by the two-year statute of limitations.

On July 27, 2005, the Chief Judge of the U.S. Court of International Trade issued an Order that may bring to a close the many years of dispute over the Harbor Maintenance Tax (HMT). Then again, maybe it won't.

The Order directed the dismissal of all HMT actions pending before the court after December 1, 2005. Any plaintiff who believes that its action should not be dismissed must file a motion for a stay not later than September 26, 2005. The Order notes that the Bureau of Customs and Border Protection (CBP), which moved for the Order, contends that all HMT issues have been resolved and all allowable HMT claims have been paid.

GATT – the unresolved issue

Based on the above, it would appear that the HMT issue can soon be relegated to a footnote in history. Such an assumption may be premature. There is one remaining issue that could overthrow the remaining HMT regime.

The United States, along with almost every other nation, is party to the General Agreement on Tariffs and Trade (GATT). In addition to establishing ceilings on tariffs that may be imposed on importation of numerous goods, GATT includes some binding general principles. One of those general principles provides: "All fees and charges of whatever character imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes."

The legislative history of the HMT reveals that Congress was well aware of this GATT provision and made the HMT assessment broad in an attempt to avoid this proscription. Several court challenges to the HMT assessment on imports raised the GATT provision as evidence that the assessment was improper. The courts uniformly denied relief, holding that any conflict between the HMT statute and the GATT provision must be resolved by Congress. Bills were introduced in the House of Representatives to reduce the HMT. The sponsors stated that the growing HMT trust fund surplus may violate GATT. The European Union has contended in negotiations with the United States that the HMT assessments against imports violates the GATT provision and has even threatened to lodge a formal complaint with the World Trade Organization (WTO). Persons who have considered the matter are of the opinion that such a complaint by the European Union would prevail. It is unclear when, or if, a formal complaint will be filed. If, though, the Congress is required to repeal the HMT assessment with regard to imports, it seems clear that it will also repeal the assessments related to domestic shipments and to passengers.

Only time will tell when, or if, the GATT shoe will drop.