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Customs and Global Trade Update

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5 recent customs developments impacting importers

Below we set out five recent developments relating to duty liability, classification, dumping duties and free trade agreements that importers need to proactively manage.

1. DDP TRANSACTIONS – WHO IS LIABLE FOR UNDERPAID DUTY?

Parties to international trade can contractually agree who will be liable to pay customs duty. Usually it is the Australian importer. However, where an importer wants certainty regarding its landed cost, it may agree on an all-inclusive price whereby the supplier must deliver the goods at its doorstep and pay all associated costs (Incoterm DDP).

The Australian Customs and Border Protection Service has issued a notice stipulating that even where this is the case; it is likely to pursue the Australian owner or recipient of the goods for any underpaid duty, even though the foreign supplier was responsible for importing the goods. The legislation permits Customs to seek underpaid duty from the "owner" which is defined to include the legal owner, consignee, exporter, importer or any person having any control over the goods.

This approach removes certainty from international transactions. It is harder to predict who will be liable to pay underpaid duty where that liability is linked to Customs' ability to pursue recovery of the duty rather than by who had the closer connection to the import, who held themselves out to Customs as responsible for the duty or who caused the underpayment of duty.

Given this, Australian purchasers entering into a transaction where the supplier is liable to pay duty should obtain a contractual indemnity from the supplier regarding any claim by Customs, and reserve the right to audit the information submitted by the supplier to Customs.

2. CUSTOMS WINS ANOTHER CLASSIFICATION CASE

Customs ended 2014 with another win in the Administrative Appeals Tribunal (AAT) regarding the classification of goods. In the final Customs decision of 2014 (*Iljin Australia Pty Ltd v CEO of Customs*) the Tribunal had to consider whether a motor vehicle wheel hub unit containing ball bearings should be classified as ball bearings, and potentially be subject to duty free entry, or be classified more generally as a motor vehicle part and subject to duty.

In making its decision the AAT considered whether the hub was one combined unit, or rather should be viewed as a collection of individual elements and in that case, classified according to the dominant element (the ball bearing). The AAT found that while individual elements of the hub had discrete functions, those functions combined were directed at the same purpose and the individual elements were subordinate to the identity of the combined unit. When the good was viewed this way it could not be classified as a ball bearing.

The case demonstrates that as manufactured goods evolve over time it is important to continually review classifications. A decision that may have been correct when the good was first imported may, following the incremental development of the good, now be incorrect.

Given the hard line Customs is taking on classification, tariff concessions and duty recovery importers should be vigilant in their internal reviews of all decisions leading to the calculation of duty.

3. MOVES TO INCREASE DUMPING PROTECTION

Recent years have seen a growing tension between liberalising trade via free trade agreements and protecting Australian manufacturers through measures such as dumping duties. It should therefore come as no surprise that as the dust settled on the China FTA announcement a toughening of Australia's anti-dumping measures was announced.

The measures are aimed at making life harder for importers involved in anti-dumping investigations. Examples of the reforms are the Anti-Dumping Commission (ADC) being stricter on when submissions can be provided, making the ADC justify not imposing interim security measures and making clearer when an exporter should be treated as being uncooperative.

These measures will have a significant impact on foreign exporters/Australian importers as they will mean dumping duties (even if interim) are imposed earlier an exporter who does not comply strictly with the investigation timeframes may be treated as uncooperative and subject to punitive duty rates, or at the very least, the ADC will not consider its submission. This position seems slightly unbalanced given the ADC invariably seeks, and obtains, extensions to all of its relevant timeframes.

Relief to Australian industry will most likely come from a falling dollar and stronger global demand. However, in the meantime, exporters must ensure they meet all relevant timeframes and cannot be said in any way to not be cooperating fully with relevant investigations.

4. DUMPING DUTIES ON PVC FLAT ELECTRICAL CABLES

As if to make clear that proposed China FTA will not protect Chinese imports from dumping duties, the ADC on 19 January 2015 imposed interim anti-dumping duties on Chinese exports of PVC flat electrical cables (building wire). The interim duty is set at 6.4% plus the difference between the actual export price and the ascertained export price (a fixed and variable approach).

In finding there were reasonable grounds for protection, the ADC based its findings on unverified exporter reports. This highlights the importance of ensuring exporter reports are completed in a timely and accurate manner.

Affected parties need to review their contracts to determine who is liable for the interim duty, whether Australian domestic prices are sufficient to cover the possible increased landed cost and whether this issue is sufficiently material as to warrant a submission to the ADC. The decision is only preliminary and past investigations have shown that factors considered by the ADC after the initial stage can result in interim duties being withdrawn or not reflected in the final decision.

5. JAPAN FREE TRADE AGREEMENT COMMENCEMENT – ARE YOU PREPARED TO CERTIFY WHERE THE GOODS WERE FROM

The Japan FTA came into operation from 15 January 2015. Like all FTAs there are complicated rules for determining whether goods qualify for preferential rates. Also, like other FTAs, the origin of the goods must be certified by way of a certification document. This can be a certificate of origin issued by a relevant authority or a certification document created by the manufacturer, exporter or importer.

The form of the certification document required under the FTA is very basic. However, importers should not be lulled into believing that the assessment of origin will always be simple. Caution should be exercised before an importer prepares a certification document. It should only do so based on information from the manufacturer, where there is a high degree of confidence regarding that information and preferably with an indemnity from the manufacturer. The preference should always be to obtain either a certificate of origin from an approved authority or a certification document from the manufacturer. If any doubt remains, or the duty saving is significant, obtain an origin ruling from Customs.

With the trade facilitation announcements of 2014 behind us, now is the time to actively manage customs risks and best position yourself to take advantage of the new opportunities. The above developments each present different issues which will impact importers in a variety of ways. Once you have considered the extent to which you are impacted by these developments, please contact us to discuss how we may assist you.

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