

Customs and Global Trade Update

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You may be responsible for customs duty and GST even if you're not the importer!

A recent Tribunal decision demonstrated that Australian Customs can, and will, pursue the Australian recipient of goods for underpaid duty even where the foreign supplier acted as the importer of record and was responsible for the underpaid duty.

This decision increases the risk of international trade in goods at all levels of the international supply chain.

In *Studio Fashion (Australia) Pty Ltd and CEO of Customs* the Administrative Appeals Tribunal had to consider the potential liability of an Australian customer for underpaid customs duty where:

- » The Australian customer purchased the goods on DDP terms, meaning the foreign supplier contractually had the responsibility for importing the goods and paying any relevant duty and GST

- » Duty and GST was underpaid as the foreign supplier created false commercial documents showing a lower value for the goods than the price paid by the Australian customer
- » The Australian customer had no knowledge of the fraud
- » Australian Customs had previously released written public guidance (Customs notice) stating that in DDP transactions it would pursue underpaid duty from whomever of the supplier or customer took responsibility for importing the goods.

WHY COULD CUSTOMS PURSUE A PARTY THAT DID NOT IMPORT THE GOODS?

The Customs Act allows Customs to pursue underpaid duty from a variety of people. Underpaid duty is payable by the "owner" of the goods, a term which under the Act includes any owner, importer, exporter, consignee, agent or any person in possession of the goods.

WHY DID CUSTOMS PURSUE THE AUSTRALIAN CUSTOMER AND NOT THE IMPORTER?

In justifying their pursuit of the Australian customer over the importer of goods, Australian Customs argued that parties' contractual arrangements regarding payment of duty did not alter a party's obligations to pay duty under the Customs Act. The Australian consignee of goods will be liable for underpaid duty regardless of its involvement in the underpayment, or the fraud of the importer.

Australian Customs pursued the Australian customer rather than the importer for the underpaid duty as there were poor prospects of recovery from the foreign supplier/importer. Further, the Australian customer was the only entity in Australia that had a legislative liability in respect of the all of the relevant imports and the Australian customer would have contractual rights against the foreign supplier for recovery of any duty the Australian customer was required to pay.

TRIBUNAL FINDINGS

In holding that the Australian Customer was liable for the underpaid duty and GST, the Tribunal made the following findings of interest:

- » The earlier Customs Notice did not bind Australian Customs to act in accordance with that notice. The Customs Notice was incorrect but could not change the application of the Customs Act
- » Customs duty is not imposed on a person, but on the goods. The persons against whom Customs can seek duty are not limited to only those who had possession or control of the goods at the time of import
- » Australian Customs has a discretion as to whether to recover underpaid duty. In exercising this discretion it should have regard to the circumstances of the variety of persons who are potentially liable
- » In entering into DDP transactions, an Australian customer is exposed to the risk that it cannot check whether the correct information was given to Customs, yet Customs can turn to the Australian customer for any duty shortfall
- » There was nothing about the circumstances of the Australian customer that outweighed Australian Customs interest in protecting the revenue.

IMPLICATIONS

- » The integrity of the Australian Customs Notice system must be questioned. While the system cannot bind Customs to act in a certain way, traders and their service providers might reasonably expect that Australian Customs would elect to act in accordance with their publically stated positions.
- » If the importer of record cannot be easily pursued, Australian Customs will pursue another party in the supply chain for underpaid duty – even if that party is entirely innocent.
- » Australian customers and foreign suppliers need to contractually protect themselves against potential duty liability. This should involve indemnities from the importer of record and the ability of the exposed party to review the information provided to Australian Customs by the importer.
- » Where someone other than the importer is pursued for underpaid GST, there will be a disconnect between the party paying the GST, and the party that can claim a credit for GST paid on a taxable importation. Only the importer can claim a GST credit and the GST Act is clear that there should only be one importer.

This decision is important for a variety of reasons. It demonstrates that in an appropriate case, Australian Customs will pursue underpaid duty from an innocent party and act against its public policy documents. This creates a risky and unpredictable environment for exporters, importers and the ultimate Australian recipient of the goods. Affected parties need to have this in mind when drafting contracts relating to international trade.

We recommend that international trade contracts be reviewed by lawyers experienced in customs and trade who are aware of the potential duty and GST liabilities of parties that are not the actual importers of the goods.

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