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Customs and Global Trade Update

September 2015

5 recent customs developments including Trusted Trader, dumping duty refunds and AAT decisions

September has highlighted the wide variety of issues that customs professionals must consider in the areas of classification, the Trusted Trader Programme, anti-dumping duties, the process for appealing decisions by the Department of Immigration and Border Protection and broker licensing. Our update considers each of this issues and the impact for customs professionals.

1. TRUSTED TRADER RULES – ANOTHER PIECE OF THE PUZZLE FALLS INTO PLACE

The Trusted Trader Rules have been introduced and provide some of the missing detail in respect of the Trusted Trader Programme. The rules are important as unlike the previously enacted legislation, the rules provide the detail of the programme.

A perfect example of this is the core requirement that a Trusted Trader demonstrate low levels of international supply chain risk. This is a wide overarching requirement, but it takes the detail in the rules to understand what this means.

An example is looking at the preliminary issue of when the international supply chain starts and ends. Under the rules, the international supply chain for an importer who is a Trusted Trader could cover all activities from the first significant process in the production of the import until the time the Trusted Trader receives the goods in Australia. Entities that want to be involved in the Trusted Trader Programme will need to consider how they manage the various supply chain risks that arise from the moment of first production of the goods until they arrive in their Australian distribution centre.

This includes taking reasonable measures to ensure that any person doing anything for the purpose of an activity that forms part of the entity's international supply chain manages general security risks together with specific risks associated with interference with the goods, security of containers, movement of goods and physical security of the relevant premises.

The steps to be taken depend on what is adequate to address the relevant risk.

Another important element of Trusted Trader accreditation is trade compliance. What is satisfactory compliance? Well it depends on factors such as:

a) What action is taken to ensure compliance
b) What activities you perform
c) The extent of any non-compliance
d) Any disclosure of non-compliance
e) Whether any non-compliance was beyond the entity's reasonable control
f) Where there has been non-compliance, what action has been taken to ensure future compliance.

Importantly, there is no set criteria as to what is appropriate action to ensure trade compliance. For instance, there is no prescribed annual internal audit or data analytic review. Each entity will be different. A single entity purely importing motor vehicles duty free under the Japan FTA will need to focus more on its origin rule procedures, while tariff classification and tariff concession order (TCO) use may be a bigger issue for a broker handling chemical imports from 100 different suppliers. In both cases, a qualitative review is more likely to ensure compliance, or identify non-compliance, than exception testing data review.

Many importers, exporters and service providers already achieve very high standards of trade compliance. Meeting the criteria set out in the rules may not involve adopting new procedures, but rather articulating and documenting the existing processes that are resulting in high levels of compliance.

2. DUMPING DUTY REFUNDS – ALUMINIUM ROAD WHEELS

The motor industry was impacted in 2012 by the imposition of significant dumping duties on certain aluminium road wheels exported from China. Hunt & Hunt assisted GM Holden with a Federal Court review partly in relation to a decision by the Anti-Dumping Commission to treat 112 exporters as "selected non-cooperating exporters" (which effectively resulted in a penalty level dumping margin). Following the Federal Court review, 111 of the exporters were required to be treated as "residual exporters" with a much lower dumping margin.

The end result is that the dumping margin retrospectively falls from 29.3% to 9.13%, with similar falls for the interim dumping margins. This represents a potential refund opportunity equal to approximately 20% of the FOB value of the goods. The opportunity applies to exports from June 2012 onwards but does not impact exports by YHI Manufacturing Co., Ltd and exporters that received an individual interim or final dumping margin. The decision does not impact the rate of countervailing duty.

3. BEATEN BY A TECHNICALITY

An archaic feature of our Customs Act is that the only way to obtain an Administrative Appeals Tribunal (AAT) review of classification, applicability of concession or a valuation decision is by making a payment of duty under protest and seeking a review of the decisions leading up to that payment. This carries with it technical requirements as to how payments under protest should be made, the timeframe for review and the scope of the review.

It would be much easier if there was simply a right to review of decision as to the classification, valuation or application of any concession, regardless of whether there was a payment under protest.

The difficulty with the payment under protest system was highlighted in a recent AAT case concerning the classification of solar panel kits. The importer sought to classify the goods under a heading that would not attract dumping duty. However, following an audit, Customs (as they then were) sought to classify the goods to a heading that would attract dumping duty. Both classifications had a 5% general customs duty rate.

Changing the classification of goods that had already been imported had a significant dumping duty impact, but did not result in a demand for any extra customs duty payment. As the payment under protest system does not apply to dumping duties, there was no payment under protest that could form the basis of an AAT appeal.

A payment under protest was made in respect of a future import, but the importer sought to use that payment to enliven the AAT's jurisdiction to review the earlier audit decision. The AAT held that the audit decision sought to be reviewed and the payment under protest were not sufficiently connected to allow the appeal.

Issues that arise from this case:

» The payment under protest provisions are complicated and specialist legal advice should be sought to ensure the importer has a right to AAT review.
» The AAT review system would benefit from amendment and simplification. Classification can have an impact even where the customs duty outcome is neutral. For instance, classification may determine dumping or countervailing duties, rule of origin under an FTA and restrictions applying to the import or export of the good.
» The AAT would have been prepared to review the payment under protest for which an application was made – the problem was that the applicant had not technically linked the original classification decision to the later payment – this can be done with careful drafting of the AAT application.

In an era of few pre-clearance interventions the payment under protest system plays too big a role in our AAT review process. We have previously, via Freight & Trade Alliance, submitted to the National Trade Facilitation Committee that the right to review should exist independently of a payment under protest. This recent case demonstrates why reform in this area is necessary.

But pending legislative change, this case is a reminder that legal advice is critical when reviewing decisions through the AAT.

4. SHEETS OF PLASTIC CLASSIFIED AS A TEXTILE

In the recent AAT decision, Fletcher Insulation Pty Ltd and CEO of Customs, the Tribunal had to consider whether a product that was essentially plastic sheeting on rolls should be classified as a plastic or a textile. The product was described by the Tribunal as a bonded article made up of two integral pieces of material (polyethylene film), with the bonded layers arranged at right angles to each other.

If classified as a plastic, a TCO potentially applied.

Customs argued that the goods fell within the textiles section either as a woven fabric of synthetic filament yarn or a nonwoven. The importer argued the goods fell within a broad plastics heading that covered sheets and film or plastic. If both the plastics and the textiles headings were available, the plastics chapter notes provided that the textiles heading applied.

The Tribunal rejected the argument by Customs that the product could be treated as woven as there were no fibres, strands or yarns used in its production. However, the Tribunal did find that the product was a nonwoven fabric. This was despite the fact that the product was entirely made of plastic! Further, the Tribunal dismissed the fact that the section notes provided that nonwovens that were impregnated, coated or covered with plastics were to be classified as a plastic.

The importer also argued that classification as a nonwoven was inappropriate as the product was not a textile. The Tribunal responded that whether or not the product was a textile was irrelevant. Although the section heading refers to textiles, section headings are not a factor to be considered when classifying the good.

Important points from this case are:

- The classification of a TCO has no relevance to the classification of the goods potentially covered by that TCO - even where a TCO is very specific. TCOs are not tariff advices
- Section headings are irrelevant to the classification of goods
- Given that it is possible for an item that is 2 bonded sheets of plastic to be classified as a textile, importers should always be advised to seek a tariff advice.

5. BROKER LICENSING – SOME INTERESTING INSIGHTS INTO THE LICENSING PROCESS

A recent AAT case considered whether a refusal of an application for a nominee broker's license was reasonable. The decision itself is non-contentious as the required level of experience was not shown. However, in reaching its decision the Tribunal gave the following interesting insights into the accreditation process.

- The completion of a national examination or assessment is not a necessary step to proving acquired experience, nor is it determinative – it is simply a factor to be considered
- The Committee did not contact the applicant's referees. It seems the item of most importance was the applicant's performance in the interview
- The Committee noted that it is rare that there are any issues as to whether a person is a fit and proper person
- In 2014, 53 applications for a nominee customs broker license were referred to NCBLAC. Of those, only 2 were granted a license without the need for an interview
- Of the 48 interviews conducted in 2014, 26 applicants were granted a license and 22 were not
- Generally most people who are not granted a license on first application will be on the second, after having gained further relevant experience
- The AAT held that the decision to interview the applicant was correct, particularly as the applicant's referees had not elaborated on the depth and extent of the applicant's experience
- The focus of the NCBLAC interview will be on the applicant being able to identify relevant issues, rather than precise provisions of the customs legislation.

Above all, the case demonstrates that almost all applicants will be interviewed and that this will be the crucial factor in obtaining a license. For referees, the case also demonstrates the importance of setting out in detail the relevant experience of the applicant. Don't merely list areas of work of the applicant, but give real examples of the work undertaken. Also, don't assume the committee will contact you for further information.

Please contact a member of our team if you would like to discuss any of the above issues.

Authors: Russell Wiese, Partner | Lynne Grant, Special Counsel