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Customs, Trade & Transport Ealert

EPBS to be the subject of close attention by Customs

The release yesterday of Australian Customs Notice No. 2009/25 ("ACN") by the Australian Customs and Border Protection Service ("Customs") is a clear warning to those in industry who use the Enhanced Project By-Law Scheme ("EPBS"), that they are to be the subject of close compliance attention.

As many would be aware, the EPBS (administered through Item 71 to Schedule 4 to the *Customs Tariff Act 1995*) provides for the duty free entry of eligible capital goods for major investment projects in a variety of industries, including mining, resource processing, agriculture, food processing, food packing, manufacturing, gas supply and power supply.

For goods to be eligible under the EPBS scheme, the goods must not only satisfy the terms of Item 71 but they must all be specified in an AusIndustry Determination granted for the relevant project. According to the current EPBS guidelines, to qualify for the concession, the relevant project must have a total project expenditure on capital goods of \$10 million or more. Most importantly, only goods that are not produced in Australia, or are technically superior to those made in Australia, are eligible for EPBS treatment.

The ACN sets out the basic elements required to secure the benefit of the EPBS. Importantly, the ACN also sets out what items do not satisfy the relevant requirements. Given Australia's mining boom, there has been significant use of the EPBS for past imports. There is also likely to be heavy use of the EPBS given the proposed significant investment in infrastructure projects in Australia, which will presumably require significant imports of relevant equipment from overseas.

However, what is potentially most significant is that the ACN refers to the use of post-clearance audits to determine whether the EPBS has been properly claimed. The ACN goes on to suggest:

"Importers and customs brokers should review their past importations under Item 71 to ensure compliance with the terms of the item and of the relevant AusIndustry determinations".

Increased compliance activities by Customs

These comments and the release of the ACN point to increased compliance activities by Customs. Importers, customs brokers and the consultants who regularly advise on the use of the EPBS should take heed of this warning. Customs brokers and consultants would also be well served to advise their clients of this development. The benefits of an early audit and review are self-evident given that voluntary disclosure of errors in Import Declarations (for example arising from the misuse of the EPBS scheme) will significantly reduce the possibility of penalties being payable to Customs in addition to repayment of any underpaid customs duty.

The apparent concerns regarding the use of the EPBS are not surprising given the focus of the Federal Government to maximise revenue recovery and eliminate "leakage", which may arise from such items as misuse of concessional entry schemes. This approach is also consistent with the sentiment that Australian industry should not be disadvantaged by overseas importers improperly using the EPBS or other means of concessional entry. Over recent years there has been a series of reviews of the use of such concessional items, including significant audit activity relating to the use of the Tradex Scheme, the controversy regarding the use of the former Item 50A and the current close attention by Customs to the operation of the Tariff Concession Order system.

The release of the ACN is interesting given that the use of the EPBS has not been the subject of any of the recent announcements from Customs as to its current compliance focus.

Finally, the ACN also raises legal issues as to use of the EPBS and management of any exposure to Customs. As always, we would be delighted to help as we have with other related issues.

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