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Customs and Global Trade Update

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Zero Duty does not equal zero risk

While most attention is given to the imports that attract duty, a recent Australian Tribunal decision demonstrates the need to review imports even where it seems obvious that a duty free concession applies.

DUTY FREE GOODS – WHAT'S THE RISK?

It is common and understandable that if a good seems to clearly fit within the terms of a concession that it gets little attention during any internal customs review. In a cost saving environment attention naturally turns to the imports resulting in duty payments with hopes of reducing that duty.

However, in the context of an audit by Australian Customs, the focus will be those imports that are only duty free by reason of the use of a concession, such as goods entered as duty free under the terms of a Tariff Concession Order (**TCO**).

Where TCOs apply, they reduce the duty payable on goods to zero. TCOs attach to a specific tariff classification. For a TCO to apply to goods they must firstly be classified to the same tariff classification as the TCO and secondly, the goods must fall within the terms of the TCO.

The consequences of incorrectly applying a TCO can include:

- The obligation to repay the underpaid duty
- Breach of the Customs Act which may result in fines (regardless of intent) or prosecution
- Damage to the importer's status as a compliant importer
- The Australian re-sale price of the goods being based on an incorrectly calculated landed cost of the goods

CLASSIFICATION AND THE CONCESSION

In the recent Administrative Appeals Tribunal case of *Becker Vale Pty Ltd and CEO of Customs,* the Tribunal had to consider whether a TCO covering certain electrical systems applied to the importation of a particular good. The importer argued that the TCO so closely described the relevant goods, that the goods must be classified under the same tariff classification to which the TCO was attached.

Customs argued, and the Tribunal accepted, that this was the reverse way of approaching the issue. Fitting within the TCO cannot determine the classification of a good. Rather, the description of the good must be determined and the good classified according to that description. If there is a TCO within that classification, a decision can be made as to whether the good fits within the terms of the TCO.

The approach adopted by the above applicant is common. This is especially so where the importer originally applied for the relevant TCO. Importers could be forgiven for assuming that if Customs attached a TCO to a particular classification, then the goods Customs knew were intended to be imported pursuant to that TCO would fall under the same classification.

In making this assumption importers should remember:

- The keying of a TCO to a particular classification is not a binding tariff advice covering goods intended to be imported under the TCO
- The level of attention given by Customs to the correct tariff heading for a particular TCO may be different to the level of attention given by a Customs auditor reviewing the duty free entry of goods
- Multiple TCOs with the same wording could be made and attached to different classifications, but the one good, even if it has multiple potential tariff classifications, can only have one correct classification
- It is common for goods to change over time and a subtle change may result in a change in classification and its eligibility for duty free entry.

WHAT TO DO

Find out which TCOs are used to save a material amount of duty and review whether:

- The goods are correctly classified to the same tariff heading as the TCO; and
- The TCO wording covers the goods.

If there is any doubt, Customs can provide a binding ruling as to both the classification of goods and the application of TCOs.

If the goods and the TCO are not within the same classification, consider whether a new TCO could be obtained under the correct classification.

In any event, it is important that the use of all concessions is periodically reviewed and where the potential duty exposure is material, no assumptions should be made as to the application of a concession. Simply because a company does not pay significant duty does not mean that it is a low risk importer.

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