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Customs and Global Trade Update

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Australian Customs' narrow approach to tariff concessions continues

Finding it hard to work out whether a tariff concession order (TCO) applies? A recent case suggests that Australian Customs are in the same position. While the case involves fishing line, it has relevance for all importers that use TCOs.

THE ISSUES

In JM Gillies Agencies Pty Ltd v CEO of Customs the Administrative Appeals Tribunal (AAT) had to consider whether nylon fishing line wound onto plastic spools was covered by a TCO worded "Yarns, Nylon". In reaching its decision the AAT had to consider firstly the classification of the good and then secondly, whether the TCO applied.

COMPETING CLASSIFICATIONS

The competing classifications were 9507 which included fishing tackle and 5404 which included monofilament (fishing line is a type of monofilament). Ultimately the Tribunal found that the fishing line was not covered by heading 9507. While the notes to heading 9507 indicated the heading covered monofilament made up into fishing line, the AAT considered this involved attaching items of tackle to the fishing line.

What is relevant to all importers is the extent to which the AAT relied on the explanatory notes to both chapters to determine the breadth of each heading. While it is usual to refer to explanatory notes, in this case what the notes said, and what they didn't say, seemed to greatly influence the Tribunal.

The case is a lesson to closely examine all chapter and heading notes. When examining notes do not simply focus on what is expressly stated but also consider what is implied by the wording used.

TCO WORDING CONSIDERED

Having found that the goods were classified to heading 5404 the Tribunal had to consider whether the TCO wording, "yarns, nylon", applied. The only issue in this respect was whether fishing line was covered by the word "yarn". In finding that yarn did not cover fishing line on spools the Tribunal made a number of comments that users of TCOs should note:

- The Tribunal member approved a statement that any doubt in the TCO wording should be resolved in favour of the importer
- The 'stated use' description in the TCO application assists in understanding the meaning of the words used in the TCO
- You must consider the characterisation or identification of the goods as imported when trying to establish the correct construction of the TCO
- The word "yarn" must be given the same meaning in the TCO as in chapter 54 (the chapter in which the TCO fell)
- The Tribunal member was not concerned with whether the TCO was attached to the correct heading (the heading did not refer to yarn at all).

It seems inconsistent that the AAT consider the uses of the goods provided by the TCO applicant to be relevant, but the nominated tariff heading as irrelevant.

If the TCO applicant, and Customs, considered the 5404 was the correct heading for the goods, and that heading did not cover "yarn", arguably the word "yarn" in the TCO must have been intended to have a wider meaning.

The fact that the nominated heading did not cover the ordinary meaning of the word "yarn" should have created some doubt as to the meaning of the word "yarn". Consistent with the Tribunal's earlier comments, that inconsistency should have been resolved in favour of the taxpayer/importer.

It also seems irreconcilable that the meaning of the word "yarn" should be influenced by the meaning of the word in chapter 54, but not the wording of the relevant heading.

While there are inconsistencies in the Tribunal's reasoning, it is clear that the stated use in the TCO application will influence the Tribunal. At a time where Customs is taking a strict approach on TCO use, it is prudent to know what the stated use in the application for the relevant TCO is. If that stated use indicates that the TCO was intended to cover goods different to your imports, there is a risk that the TCO does not in fact cover your goods.

CUSTOMS CHANGE OF POSITION

The most interesting aspect of the case, and another element that impacts any importer that uses a TCO, is that right up until the day of trial Customs accepted that if the goods were classified to heading 5404, they were covered by the TCO. This must have been an issue that Customs closely examined during the making of the initial decision, the internal review and preparing for the AAT hearing.

That Customs reversed its position on the applicability of the TCO after such repeated and detailed consideration demonstrates the state of uncertainty that must exist within Customs.

WHAT SHOULD IMPORTERS DO?

Given the lack of certainty, importers cannot assume that simply because they have used a TCO for years without issue, that the use of the TCO is correct. This is the case even where they applied for the TCO for the specific goods being imported.

Certainty can be obtained by applying for a tariff advice. Each importer will make a decision based on their appetite for risk and clearness of the application of the TCO. The key is to actually assess the risk – how much duty has been saved over the past 4 years through the use of TCOs and what is the level of confidence that the TCOs apply? If either a large amount of duty has been saved, or the application of the TCO is not clear, we recommend obtaining the certainty offered by a tariff advice.

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