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August 3, 2015

### **Justice in Customs Cases: It's Complicated**

Every Importer of goods into the United States is required to exercise *reasonable care* in the declaration of goods, their value, their origin, their quantity, their qualification for a special program or application of antidumping or countervailing duties. The obligation is no less serious even if there are no duty consequences from any error in any of these aspects.

If CBP disagrees with the Importer on one or more of these points, it could cause the goods to be refused entry or in differences in the duties assessed. If the Importer wants to contest the CBP decision, an administrative process allows the Importer to protest and present evidence to support the Importer's position.

The filing of a protest is nearly as routine for CBP as the filing of entry documentation itself. There is no retaliation against an importer who contests a decision by CBP, and the failure to protest when warranted can be devastating to a business.

#### **You Snooze--You Lose**

If a timely protest is NOT filed, the Importer cannot contest the issue in a collection action brought by the government, because the Importer would have *failed to exhaust administrative remedies* and a possibly valid defense to the collection of additional duties will be unavailable.

#### **Good News and Bad News and MORE Bad News**

First the good news: If you protest, you don't have to pay additional duties--right away. The bad news is that interest will accrue on the unpaid duties, so that the longer it takes for CBP to confirm an adverse decision, the more expensive it will get.

More bad news: If the protest is denied by CBP, and you want to get the U.S. Court of International Trade to examine your case, **all** of the duties, taxes, fees and interest as a *jurisdictional predicate*--under 28 USC 1581(a)--the court won't hear the case unless you've paid the cashier.

## **Tough Luck**

Suppose the decision the Importer wishes to contest resulted in an astronomical increase in duties. When the protest is denied, the Importer must pay the increase to get into court.

What about the residual jurisdiction of the U.S. Court of International Trade? There's a provision in 28 U.S.C. § 1581(i) which gives jurisdiction to the CIT when all of the other jurisdictional bases are "manifestly inadequate." It was the basis for the CIT to hear the Harbor Maintenance Tax cases in the 1990s. Sorry, but any time the Importer could have protested, the protest has to have been filed, denied and all of the astronomical increases must be paid. Jurisdiction under 1581(i) is as rare as hens' teeth.

## **The King Can Do No Wrong**

The doctrine of *sovereign immunity* follows the notion that the "King Can Do No Wrong," but if you want to sue the government ("the King"), you have to play by the government's rules. If CBP prevails in a suit brought by the Importer, the government is NOT going to have a hollow victory. The Importer must pony up what CBP says it should first.

A few years ago, we had a client who was forced to pay more than \$5 Million in a case where the entries had been duty-free but on liquidation were assessed 25% *ad valorem* duties. By its actions on other entries of the same merchandise, CBP demonstrated its awareness that the assessment of 25% was WRONG, yet could not correct the error without our having to file in the CIT. Ultimately, the Importer was able to recover \$6 Million in duties plus interest, but not without a fight.

## **Vindication**

The American System of justice generally requires the parties to a law suit to bear their own costs. It doesn't happen often, but under the Equal Access to Justice Act (EAJA), the Importer may be able to recover legal fees against the government. In a decision dated June 24, 2015, Judge Carman in the CIT awarded the Importer attorney's fees after the Importer prevailed in a case where CBP had tried to revoke a ruling without following proper procedures.

But don't plan on getting attorney's fees. If 1581(i) jurisdiction is rare as hens' teeth, EAJA awards are as rare as a dentist with a clientele that is made up exclusively of chickens.

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