Customs Update

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Customs policy of "unjustice" regarding transshipment is costly for textile traders

Under the guise of the Customs Modernization Act of 1993's theme of "informed compliance," and in an effort to ensure that importers exercise reasonable care, Customs has now apparently redoubled its efforts to identify and track textile and apparel imports transshipped in violation of Article 592A of the Tariff Act of 1930, as amended.

This is an interesting and timely development, in view of Customs' March 10, 1998, submission to Congress of its "Textile Transshipment Report." The report describes Customs' enforcement actions throughout 1997 that address illegal transshipment of textile and apparel products. It also highlights statistics that illustrate the success of various initiatives, including those derived from the anti-transshipment program.

592A list is register of penalized foreign firms

Semiannually, Customs releases the 592A list. The 592A list is a register of those foreign companies that have been issued transshipment-related penalty claims by the U.S. Customs Service, and for which all administrative remedies have been exhausted. (592A list entry is subject to notice and opportunity for hearings.)

Companies normally remain on the list for three years but can petition for removal.

In addition, Customs solicits information on the whereabouts of other foreign companies suspected of transshipment. It has also made available a list of names of Hong Kong companies convicted of transshipping textile products and Macau companies assessed penalties for transshipping textile products.

By statute, an importer is required to demonstrate that it has exercised reasonable care to ensure that textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported or transported by a party appearing on the list are accurately described as to origin.

They also are meant to give importers ideas for creating individual programs tailored to their own particular operations. The checklist serves as a guide for the trade community, and Customs will be referring to it in evaluating whether an importer has exercised reasonable care.

Notwithstanding this elaborate procedure focused on preventing transshipments from entering the United States, Customs has begun to detain merchandise where none of the parties appears on the 592A list or a related list, and where the importer has an impeccable record for compliance with Customs. Customs' new preference for detentions introduces numerous problems to the importing community.

By way of background, in its report to Congress, Customs indicated that its primary goal is to ensure that transshipped goods do not enter the commerce of the United States. To that end, it stated that "when there is a question as to the country of origin, Customs officers have to obtain more information regarding the origin of the goods and exclude merchandise for which the satisfactory level of proof is not available. This is translated by Customs into an extraordinary burden on the importer and its overseas counterparts (e.g., manufacturer, buying agent). In a typical detention, Customs has seen fit to require a host of documents relative to the production of the merchandise, including material transport documents, Customs clearance records, production records, employee timecards, subcontracting records and proofs of payment between contractor and subcontractor."

Due to the extreme difficulty the importer faces in compiling these documents, which often need to be translated into English (e.g., determining which Chinese employee is working on shirt sleeves on a Monday in February), Customs requires the documents within 15 days of the issuance of the request, allowing no additional time for mailing, weekends or holidays.

Agency may still say it can't render decision

Unfortunately, even after all of this information is submitted on time, Customs may still state that it is unable to render a decision as to the origin of the goods. Moreover, its policy (to date) has been to offer no specific reason for this inability, and it has proffered no standards for judging the weight of the submissions.

Rather, in such a case, the detainment statute simply states that Customs' failure to make a determination shall be treated as a decision to exclude the merchandise. Customs teams throughout the country can determine the fate of imported merchandise with any sense of uniformity or coherence to a standard policy, by, in effect, making no decision.

What will be amicable evidence in Los Angeles International Airport may be considered deficient and scanty at John F. Kennedy. This amounts to a complete abdication of responsibility, leaving in this vacuum arbitrary and capricious results.

This summary dispensation of "unjustice" stands to cost the importing textile and apparel community significant amounts of time and money, with no recourse but a protracted fight with an agency under pressure to demonstrate its aggressive anti-transshipment policy for textiles and apparel to the same Congress that is responsible for its funding.

In its 1998 report to Congress, Customs boasted of its $59 million worth of textile products detained as suspected transshipments. $20 million excluded from entry and $38 million seized due to illegal transshipment. Once such statistics have been submitted, there is an unwritten rule of expected performance that says they must be improved — if possible, by a large margin.

"Growth industry" for Customs

The detention and seizure of textiles and apparel suspected of being transshipped has now become a "growth industry" for Customs.

What is the diligent and honest importer to do? Should he or she videotape the production of every last garment and yard of piece goods?

The answer is that the reasonableness that governs the actions of the importer in ensuring that its goods are not transshipped should also govern the Customs Service. A useful and uniform standard of proof of origin should be published, and comments thereon should be solicited.

Once such a standard is finalized, perhaps uniform, consistent and reasonable actions on the part of Customs will result.

Customs Update is a weekly column examining critical aspects of the relationship between Customs agencies and importers. This column was prepared by Steven S. Weiser and Arthur W. Bodek, senior partner and senior associate, respectively, in the law firms of Siegel, Mandell & Davidson P.C., N.Y., and reflects the opinion of the writers. Arl L. Kaplan, Esq., contributed to this week's column. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, N.Y. 10048.