

Bringing Fairness and Transparency to Importing

International trade is critical to Canada's economy and important to our businesses participation in global supply chains. Important to Canadian businesses including manufacturers and importers, is having the confidence that the rules to import goods into Canada are fair, clear and transparent.

The following two policies of the Canada Border Services Agency (CBSA) need to be addressed by the Government of Canada.

- The CBSA's policy with respect to an importers' "reason to believe" that its import declarations are in error; and
- The CBSA's re-assessment policy with respect to importers being allowed to enjoy the preferential tariff treatment accorded under the North American Free Trade Agreement (NAFTA).

"Reason to believe"

Under Section 32.2 of the Customs Act, importers have a four year legal obligation to correct errors contained in past import transactions/entries filed with the CBSA. The provision requires an importer to make a correction within 90 days of having "reason to believe" there is an error in a prior import transaction(s). There is no legal definition of "reason to believe" in the Customs Act. While the CBSA has an administrative policy (Memorandum D11-6-6), it has no legal basis, and the CBSA staff are free to determine whatever definition they see fit in order to levy monetary penalties to the importer. The specific provision within Memo D11-6-6 is found in paragraph 22(a) and reads as follows:

- legislative provisions that are evident (obvious, apparent) and transparent (clear, self-explanatory), such as specific tariff provision, specific valuation provision, specific origin provision, etc.;

Penalties associated with the application of paragraph 22(a) of Memo D11-6-6 are often substantial and administrative appeals are often denied. Further, legal costs associated with appeals of these administrative decisions are often too costly to warrant perusing any further.

Since all tariff provisions are evident (obvious, apparent) and transparent (clear, self-explanatory) this paragraph should be restricted in use by the CBSA to instances where descriptions on invoices used for customs clearance purposes contained sufficient descriptive information to allow assigning the correct tariff item.

CBSA's Reassessment Policy and NAFTA

Article 502 of the NAFTA allows importers to apply for a "refund of any excess duties paid" where an importer paid duties at time of importation into Canada. The time limit to apply for the refund is within one year after the date on which the good was imported.

It is now the practice of the CBSA to audit importers and identify situations where the importer imported a product(s) under a tariff item with a "Most Favoured Nation" (MFN) duty rate of "free". The CBSA reclassifies that product(s) under section 59 of the Customs Act to a dutiable tariff item and reassesses duties going back four years while denying the duty free NAFTA rate for a bona fide NAFTA eligible product by invoking the one year time limit to apply for a refund under Article 502 of the NAFTA.

Instead, the CBSA should allow the importer to produce a NAFTA Certificate of Origin to benefit from the duty free rates accorded under the NAFTA for the entire period covered by the change in tariff classification rather than wrongly manipulating a provision in the NAFTA to the detriment of Canadian importers. A read of appeals before the Canadian International Trade Tribunal involving Editions Gallery (AP-2005-017) and Wolseley Engineered Pipe Group (AP-2009-010) and an appeal before the Federal

Court involving C.B. Powell (T-1376-08 and A-245-09) illustrates the lack of transparency Canadian manufacturers/importers are confronted with in the application of Article 502 of the NAFTA.

More recently and subsequent to an appeal before the Federal Court involving C.B. Powell (T-1376-08 and A-245-09), the CITT issued a decision (AP-2010-007 and AP-2010-008 dated August 11, 2010) where it distinguished why they allowed the Editions Gallery appeal and decided to disallow the C.B. Powell appeal. While both cases are almost identical, in the Editions Gallery appeal the CBSA stated it had issued a decision with respect to tariff classification and origin (i.e. "were subject to an MFN duty rate of 6.5 percent") where in the C.B. Powell appeal the CBSA stated it had issued a decision with respect to tariff classification. Thus a simple insertion of the words "and origin" by the CBSA allows the importer to retain the "duty free" NAFTA rate.

In summary, the CBSA may be acting in ways that increase costs for Canadian manufacturers/importers. In light of this, the Canadian Chamber offers the following recommendations.

Recommendations

That the federal government:

1. Through the CBSA, amend the application of the "reason to believe" provision in paragraph 22(a) of Memorandum D11-6-6 to limit its application to instances where there is evidence of deliberate intent to evade compliance.
2. Provide that where the CBSA (or an importer) is changing the tariff classification of a product that was imported into Canada under a "duty free" Most Favoured Nation (MFN) duty rate, that the CBSA acknowledge that when the CBSA makes a re-determination of "tariff classification" by definition the CBSA is also making a "decision on origin" or a "decision on tariff treatment", so as to permit the importer the right to request a further re-determination of either or both "tariff classification" as well as "origin/tariff treatment".