Why you should apply for a tariff advice when obtaining a tariff concession order

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When you apply for a tariff concession order (TCO) you have to nominate the appropriate tariff classification. Customs may not dispute the nominated classification at the time of application, but this doesn't mean that many years after the TCO is made you can assume that your nominated tariff classification is correct. A recent case shows how disastrous a change in view as to classification can be for the TCO applicant. It also highlights the protection that can be afforded by proactively obtaining a tariff advice.

What happens if the initial tariff classification is wrong?

When a TCO is made it is attached to a particular tariff classification. For a good to receive duty free entry under the TCO, the good must first be classified to the tariff classification to which the TCO is keyed. The good must then also come within the description of goods contained within that TCO. It can happen that a TCO is attached to particular tariff classification, and then at a later point in time it is determined that the TCO should have been classified to another tariff classification. This can occur in a number of ways, for example, if a party seeks a refund from Customs based on the application of TCO and the refund department denies the refund as it believes that the goods are not classified to the same classification as the TCO – despite being the very goods described in the TCO.

In such circumstances, Customs has the power under the Customs Act to revoke the original TCO and issue a new TCO under the alternative, correct tariff classification. While this may seem to fix the problem, usually Customs only re-issues the TCO with a prospective operation. The old TCO remains attached to the incorrect tariff classification.

Why is this a problem? Because goods entered prior to the re-issue of the new TCO must be correctly classified and the old TCO is still attached to the incorrect classification.

The case

In National Oilwell Pty Ltd and Comptroller-General of Customs [2017] the Administrative Appeals Tribunal (AAT) had to consider a scenario where both the importer and Customs realised a TCO was originally keyed to the wrong tariff classification. Customs corrected the error by revoking the original TCO and reissuing a new TCO to the correct classification.

The original TCO had an operative date of 17 April 2009. It was revoked on 14 April 2014. The new TCO was given an operative date of 15 April 2014. The importer sought to use the old TCO for goods imported prior to 14 April 2014 (when the old TCO was in force). Customs denied the use of the TCO as the relevant goods were not correctly classified to the heading which contained the old TCO. While there was a new TCO with the correct classification, this was only operative from 15 April 2014.

The importer claimed that the old imports should be classified to the same tariff heading as the old TCO to reflect the "classification practice at the time of entry". The AAT took little time in dismissing this argument. It found that there was no dispute that the correct classification of the goods was the classification belonging to the new TCO. Once this was established there was no way that the goods could fit within the terms of the old TCO, despite the previous approach by Customs.

What is the solution?

Two options can be considered to address this problem. The first is to always apply for a tariff advice when applying for a TCO (and renewing that TA when it expires). This will mean that even if Customs changes its mind as to classification, it will be bound by the old classification when looking back over the past entries. It can insist on a new classification for future imports, but equally the importer can have the TCO classification prospectively updated.

Another alternative is to seek that the old TCO be revoked and reissued against the correct classification, but that the new TCO apply from the date the original TCO was made. The result of this is that there will be no mismatch between the correct classification of the goods and the classification to which the new TCO is attached. However, Customs is inconsistent in its approach to the operative date of reissued TCOs.

There are methods to dispute an approach by Customs under which it only applies the new TCO prospectively. We are happy to assist importers with such problems. However, our advice remains that the best approach is to be proactive and avoid the problem by obtaining a tariff advice with your TCO.

Undoubtedly, for many importers, obtaining a tariff advice will seem unnecessary at the time of applying for the TCO. You will, at that time, very likely be in agreement with Customs as to the tariff classification of the proposed TCO goods. However, the view of the Customs team making a TCO and the Customs team (maybe many years later) reviewing refund applications or conducting an audit can differ greatly. The only way to protect yourself again those differing views is to hold a tariff advice that binds Customs.

Please contact one of our team if you would like to discuss this further or for assistance.

Customs and Global Trade Contacts

Russell Wiese

Principal

T +61 3 8602 9231

E RWiese@huntvic.com.au

Lynne Grant

Special Counsel

T +61 3 8602 9246

E lgrant@huntvic.com.au