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customs is again getting overly creative

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In late October 2014, Customs and Border Protection (CBP) issued a guidance message in which it laid down new rules regarding post-importation/post-entry claims for duty preference and duty reduction programs – see CSMS re PEA/1520(d) Claims for the exact text. Specifically, CBP decided unless the program under which the duty free claim is being made specifically contains a post-entry claim process, the importer is barred from raising his claim for the first time by way of a protest. This positon may well get overturned by the courts, but in the meantime, importers need to be careful how they proceed. On the one hand, reasonable care mandates an importer not make claims he cannot support. At the same time, not all the duty deferral programs contain provisions for post-entry claims.

In its message, CBP stated the free trade agreements with the Caribbean countries (CAFTA-DR), Chile, Colombia, Korea, Mexico/Canada (NAFTA), Oman, Panama and Peru contain provisions allowing for post-entry claims. Therefore, those duty free claims must be raised by way of a 1520(d) claim, and not for the first time when filing a protest. For all the others, you must make the claim before the entry is liquidated by way of a Post-Entry Amendment (PEA) or Post-Summary Correction (PSC), or you are out of luck. Those stated by CBP to require the PEA/PSC process are AGOA, CBERA, CBTPA, Civil Aircraft Agreements, GSP, Insular Possessions, Intermediate Chemicals for Dyes and the Uruguay Round of Concession, the Pharmaceutical Products Agreement, and the free trade agreements with Australia, Bahrain, Israel, Jordan, Morocco and Singapore.

To justify its decision, CBP reached back to a case decided in 2005, *Xerox Corp. v. U.S.*, 423 F.3d 1356 (Fed. Cir. 2005). There, Xerox filed protests seeking reliquidation of its goods as NAFTA eligible, in circumstances where the original entries contained no such claims. The trial court found Xerox's protests were timely filed, but their claims were raised too late. NAFTA requires duty refund claims to be made within a year of entry, and Xerox's claims were raised much later. There is admittedly language stating CBP's decision to liquidate as entered is not a protestable decision, but the context of that discussion was on the fact the NAFTA claims were not raised in the original entry or timely thereafter. As a

result, CBP could not make a decision about NAFTA when it liquidated the entries, and so no protestable decision occurred to resurrect those claims when filed after the one year deadline.

Interestingly, CBP listed Civil Aircraft Agreement claims in its CSMS memo. When those may be filed has already been addressed by the courts. In *Aviall of Texas, Inc. v. U.S.*, 70 F.3d 1248 (1995), Aviall filed its post-entry claims in accord with 19 U.S.C. 1520(c) (the clerical error provision then in effect, since superseded by the current protest framework, and effective for an amount of time beyond the then permitted protest period). Both the Court of International Trade and the Court of Appeals for the Federal Circuit held Availl's claims valid, despite CBP's attempt to enforce a regulation which mandated the required certification be filed only at time of entry, and the regulation which CBP enacted was invalidated as a result. Also in accord is *Gulfstream Aerospace Corp. v U.S.*, 981 F.Supp. 654 (1997). Having lost the argument once, CBP stuck to its guns, invoked the discredited regulation and again tried to assert Gulfstream could not file the needed certifications at time of protest - CBP lost again!

The judgment in *Gulfstream*, supra at 668, well makes the point about why CBP is dead wrong with the position it has taken in its recent message:

Customs has explicitly held that § 10.112 allows duty-free documentation to be submitted with a protest, even where the documentation was required at time of entry: [A]lthough the proper documentation ... establishing protestant's GSP claim, was not filed at the time of entry, as long as failure to file it was not due to willful negligence or fraudulent intent, the documentation may be filed at any time before liquidation or ... before liquidation became final.... [I]f liquidation was timely protested, the protestant should be afforded an opportunity to submit documentation establishing free or reduced duty entry.
HQ 544455 (Mar. 14, 1995) (citing HQ 555269 (Dec. 20, 1990)) (emphasis added).
The protestant was required to file, in *connection with its entries*, documents that would have established the eligibility of its merchandise for a duty reduction.... [T]he protestant did not file the necessary documents *at time of entry*, but submitted them [five months after liquidation].... 19 CFR 10.112[sic][ ] provides that if the importer fails to file the documents [ ] *at the time of entry* ... but failure to file was not due to willful negligence or fraudulent intent, then they may be filed at any time prior to [final] liquidation....
HQ 221603 (April 30, 1991) (emphasis added).
19 CFR 10.112 [sic] provides ... that a free entry document required *in connection with entry* ... may be filed before liquidation becomes final, if lack of presentation *at time of entry* was not willful or negligent. This section is applicable because [the regulation requiring reduced duty documentation] requires [the documentation] *at the time of entry*.

The relevant portions of current 19 C.F.R. 10.112 read: "Whenever a free entry or a reduced duty document, form, or statement required to be filed in connection with the entry is not filed at the time of the entry or within the period for which a bond was filed for its production, but failure to file it was not due to willful negligence or fraudulent intent, such document, form, or statement may be filed at any time prior to liquidation of the entry or, if the entry was liquidated, before the liquidation becomes final..." In other words, the importer may file the document(s) with the post-entry claim or protest before the liquidation becomes final! Either method is permitted.

Similarly, 19 C.F.R. 10.172 authorizes a GSP claim to be made post-entry: "A claim for an exemption from duty on the ground that the Generalized System of Preferences applies shall be allowed by the port director … If duty free treatment is claimed at the time of entry, a written claim shall be filed on the entry document by placing the symbol "A" as a prefix to the subheading of the Harmonized Tariff Schedule of the United States for each article for which such treatment is claimed [emphasis added]." Here again, if the importer does not make the claim at time of entry, he is permitted to make it as either a post-entry claim or a protest.

In its October CSMS message, CBP cites H193959, a ruling dealing with a Singapore-US free trade agreement claim. In this case, the goods were imported without benefit of the claim. The entry was liquidated and a timely protest filed. CBP simply said no to the claim being made for the first time by way of a protest. While citing the *Xerox* case mentioned above, CBP also relied on *Corrpro Companies, Inc. v U.S.*, 433 F.3d 1360 (2006). In that decision, the court found at Point 16: "… We observed, "[i]n the absence of a proper claim for NAFTA treatment, either at entry or within a year of entry … Customs cannot make a protestable decision to deny an importer preferential NAFTA treatment. Id. at 1365…" The court's decision is not surprising – if the law requires a claim to be made within a given time frame and the importer is too late, his request is denied. With its current position, CBP has turned that holding on its ear in order to bar duty free claims in as many ways as possible.

When it comes to duty reduction or preference claims, as illustrated above, CBP's own regulations typically contain language making clear the claim may be made at time of entry, by a post-entry claim, but also later – before liquidation is final - by protesting. What CBP is doing with this October CSMS is forcing importer's into an impossible situation – fail to exercise reasonable care and make the claim in the face of a lack of documentation, not make the claim and hope to get the needed documentation prior to liquidation, or waive the claim altogether if you are in doubt about your ability to get the needed documentation before liquidation. You have to wonder whether CBP considered the additional work this guidance might well create for its own staff. How many pre-liquidation claims will now be filed as close to the deadline as possible because the importer had doubt about obtaining the needed documentation earlier? Filed close to the liquidation date, CBP will not have time to consider the claim, but the letter of the October CSMS will have been met – the claim was filed prior to liquidation. Is CBP's next step to challenge the importer for having filed his claim too close to the liquidation date and deny his protest on that ground alone?

One also has to wonder how the courts will view CBP's position, in the face of the very clear language in so many regulations and court decisions authorizing the right to protest, especially in view of the fact of the October CSMS was issued as a guidance document and not the result of a proposed regulatory change which subjects CBP's position to notice and comment?

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