When the Whole is Greater than the Sum of its Parts: The Risks of “do-it-yourself” Tariff Classification

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In today's rapidly shifting trade climate, it is more important than ever for importers to have confidence in the tariff classification of their imported goods and be able to react quickly to classification disputes with the Canada Border Services Agency (CBSA), because an adverse decision can significantly impact a company's supply chain and its profitability.

It is often said that tariff classification is more art than science. To find an example of this, one need look no further than recent decisions in RBP Imports Inc v. President of the Canada Border Services Agency[1] This was an appeal by RBP Imports Inc. (RBP) of a re-determination made by the CBSA as the result of an audit. The goods in question were individually packaged components of aluminum railings (top and bottom bars, posts, pickets, gates, brackets, spacers, and bracers) that, when combined, form railings to be attached to both residential and commercial buildings, either by contractors or by "do-it-yourself" consumers.

CBSA classification audits and their impact on duty liability

RBP imported the goods under heading 76.04 of the Schedule to the Customs Tariff as "Aluminum bars, rods and profiles". In the course of an audit, the CBSA found that the goods had been incorrectly classified and should have been imported under heading 76.10 as "Aluminum structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges and bridge-sections, towers, lattice masts, roots, roofing frameworks, doors and windows and their frames and thresholds for doors, balustrades, pillars and columns); aluminum plates, rods, profiles, tubes and the like, prepared for use in structures".

The tariff item used by RBP to import the goods is MFN duty free, while the tariff item believed by the CBSA to be correct attracts an MFN duty rate of 6.5%. As a result of the audit decision, RBP would have been required by the Customs Act to correct its customs declarations for all imports of affected goods retroactively for four years from

the date of the CBSA's decision, and pay an additional 6.5% duty (and interest and GST) on the customs value of those imports.

Because the goods in question are aluminum products, consideration must also be given to the United States Surtax Order (Steel and Aluminum), [2] which applies to certain goods originating in the United States and imported after July 1, 2018. In the circumstances, a 10% surtax applies equally to both tariff items in question, so RBP would have no reprieve from the surtax by virtue of using one tariff item over another.[3] If, however, the surtax had applied to the tariff item determined by the CBSA to be correct, but did not apply to the tariff item used by RBP to import the goods, RBP would have been required to pay (or, if available, claim remission of) the 10% surtax in addition to the 6.5% duty already assessed by the CBSA.

The importance of Explanatory Notes

The Canadian International Trade Tribunal (the Tribunal) found in favour of RBP in a decision that was based partly on the interpretation of the Explanatory Notes to the Harmonized Commodity Description and Coding System (the ENs)[4] applicable to heading 76.10. First, the Tribunal found that heading 76.10 has three distinct categories: (i) structures; (ii) parts of structures; and (iii) parts prepared for use in structures. The applicable EN states in part that:

"Apart from the structures and parts of structures mentioned in the heading, the heading also includes such products as: […] assembled railings and fencing […]"

The Tribunal found in a May 2, 2017 decision that the list of products that included "assembled railings" was cited as being "apart from" all three categories of heading 76.10. It did not address the fact that the excerpt above states on its face that the list of products is cited as being "apart from" (i) structures and (ii) parts of structures only. The Tribunal found that by using the word "assembled" to qualify the term "railings", the drafters intended to exclude parts of railings (i.e., disassembled railings) from classification in heading 76.10. Finally, the Tribunal dismissed (as not dispositive of the appeal) the CBSA's argument that the goods are parts of assembled railings and therefore should be viewed as parts "prepared for use in structures" in the third category in heading 76.10.

The CBSA then appealed to the Federal Court of Appeal (FCA). At the FCA level, the standard of review applicable to Tribunal decisions is reasonableness – a standard confirmed by the Supreme Court of Canada as an appropriate reflection of the Tribunal's expertise and the technical, complex nature of tariff classification.[5] On September 20, 2018, the FCA found that the Tribunal's reading of the ENs was unreasonable because it in effect "rewrote the explanatory note".[7] The result of that interpretation was that the Tribunal "never addressed, other than by describing the submissions on point as "of limited value" and "not dispositive", the application of the third category in heading 76.10". The decision was remanded to the Tribunal to consider the potential application of the third category in heading 76.10.

The Tribunal reconsidered RBP's appeal and in a decision dated February 11, 2019,[7] concluded that for the goods to fall within the third category of heading 76.10, they must be for use in a structure; it would not be enough if the goods are for use in part of a structure. While the goods in question are parts of assembled railings, the Tribunal

determined that assembled railings are not structures in and of themselves but rather are parts of structures. The goods, therefore, could not be classified in heading 76.10 as parts "prepared for use in structures". The Tribunal overturned the CBSA's re-determination as to the classification of the goods and RBP was ultimately successful in its appeal.

What does this mean for importers?

Because RBP was successful in its appeal, it will be refunded the additional duties and taxes assessed by the CBSA as a result of the audit, plus interest. It will also now have certainty going forward that the classification of its imported goods is correct.

One way for importers to obtain certainty without engaging in drawn-out trade litigation is to seek a binding tariff classification ruling from the CBSA. The CBSA will issue classification rulings if certain criteria are met and if the importer can successfully establish reasons why the requested classification is the correct one.

Having noted that, CBSA tariff classification rulings may be appealed if the CBSA ruling is not satisfactory to the requesting importer. The first level of appeal is to the President of the CBSA through the CBSA Recourse Directorate, which will conduct an independent review of the decision of the rulings officer. If the decision of the President is not satisfactory, further appeal rights exist to the Tribunal, which will hold an oral hearing. Tribunal decisions can be further appealed to the FCA on a question of law.

Companies involved in the international sale of goods, particularly those with complex supply chains with numerous suppliers, should implement detailed customs compliance procedures (if they have not already done so) and/or conduct internal classification reviews on a regular basis to determine where uncertainty may exist. Only then can appropriate measures be taken to address customs compliance issues.

1 AP-2016-017.

2 SOR/2018-152.

3 Remission from the amount of the surtax may be available, but is dependent on the description of the goods and not the tariff classification.

4 The ENs are published by the World Customs Organization and are incorporated by reference into the *Customs Tariff*.

5 Igloo Vikski Inc., 2016 SCC 38.

6 *Canada (Attorney General) v. RBP Imports Inc.*, 2018 FCA 167.

7 AP-2016-017R.

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