

KPMG Trade Matters 2009 Summer Edition

TAX

Customs Fact: Duty Surprise for Importers of Goods from Related Companies

Canadian companies that import goods from related companies in other countries and also pays fees to those non-resident companies for services, such as management or administration, may be required to include these fees in the value of their imported goods for duty purposes, unless they can provide evidence that the fees should not be included.

The Canada Border Services Agency (CBSA) recently issued new information on its policy concerning the treatment for customs duty purposes of certain payments or fees made by a Canadian purchaser to a related vendor after the goods have been imported into Canada. The CBSA says that many types of these “post-importation payments or fees” and “subsequent proceeds” may have to be included in the value of the imported goods declared for duty.

Post-importation payments or fees

According to the CBSA, post-importation payments or fees may include:

- Any payment based on the resale of the goods that cannot be related by the importer to services received
- Management or administration fees
- Contributions to research and development
- Contributions to worldwide marketing or promotion

- Overhead expenses related to the manufacturing of the goods but not captured in the selling price and recovered after importation
- Interest on deferred payments
- Other payments made after importation.

Subsequent proceeds

Under customs law, subsequent proceeds, a type of post-importation payment, must be added to the price of the goods for duty purposes.

Subsequent proceeds are subject to the following two conditions:

- The payments accrue directly or indirectly to the vendor of the goods
- The payments are based on, or a result of, the resale, disposal, or use of the goods in Canada.

These subsequent proceeds do not have to be a condition of sale of the goods or be directly related to goods being imported.

As such, importers should examine any payments they make to the vendor separately from the payment for the goods to determine whether they have to include these payments when determining the value of the goods for duty purposes.

When are fees excluded from duty?

In particular, importers should carefully examine any management and administrative fees they pay to a related company from which they import goods.

In This Issue

Customs Fact: Duty Surprise for Importers of Goods from Related Companies	1
Failure to Report Exports Among Top Five Reasons for Penalties	3
Importers of Bluetooth-Enabled Devices — Are You Using the Correct Tariff Classification?	4
Canada-Peru Free Trade Agreement Takes Effect	4
In Brief	5

To determine whether these fees can be excluded from the price of the goods for duty purposes, importers should consider the following three elements:

- The services must have been rendered for the operation of the business in Canada
- The amount of the charge must be in accordance with an arm's length charge
- The services provided are justified for the operation of the business in Canada.

The onus is on the importer to prove the nature of the services provided and that the fees paid are truly for the operation of the business in Canada. The CBSA says it will presume that service fees are subject to duty, unless the importer can provide evidence that the fees are in accordance with the arm's-length principle, and that they relate to justifiable services that were actually rendered for the Canadian operation.

Importers must be able to provide the CBSA with documents that verify:

- The nature of the services for which payment is made
- The basis on which the payment is made
- That actual services are provided.

Documentation must include commercial invoices, agreements, or other proof of payment, depending on the circumstances.

If the CBSA determines that such fees are subject to duty and have not been included in the declared value of the goods, the importer may risk costly assessments, penalties, and lengthy appeals.

Importers may want to undertake a valuation review to determine whether they are affected by this new policy. For more information, please contact your KPMG adviser or one of our Trade and Customs professionals.

Failure to Report Exports among Top Five Reasons for Penalties

Companies that export goods from Canada generally must report those goods to the Canada Border Services Agency (CBSA). Exporters are responsible for ensuring that they accurately report their exports in writing within the required time, but it seems that many companies are not meeting these requirements. In fact, the CBSA recently reported that export infractions are among the top five reasons that it levies penalties.

This article briefly summarizes the reporting requirements for Canadian exporters.

Background

The Canadian government's three main objectives for export reporting are to:

- Control the export of strategic and dangerous goods, as well as other controlled goods
- Collect accurate information on Canadian exports
- Control the outbound movement of goods in transit through Canada.

Submitting an export declaration

In general, the exporter is the person or company, including a non-resident exporter, who holds a Business Number and who exports commercial goods. Although the exporter may hire a third party to prepare and submit export documents, the exporter is ultimately responsible for ensuring the reporting is accurate and is completed within the required time.

Exporters must submit an export declaration to report exports from Canada, depending on the type of goods exported and the destination country. There are four ways to submit an export declaration:

- A manually completed form B13A, Export Declaration
- An electronic submission via the Canadian Automated Export Declaration (CAED)
- A G7 Electronic Data Interchange (EDI) Export Reporting
- A Summary Report.

Potential penalties for incorrect reporting

Incomplete and inaccurate documentation can be costly for exporters. The CBSA has reported that export infractions rank in the top five reasons for levying penalties under the Administrative Monetary Penalty System (AMPS).

While Canadian exporters focus their attention on the significant challenges they face in competitive international markets, they often overlook export reporting requirements. Some of the possible infractions include the following:

- Incorrect reporting of value on the export declaration
- Incorrect tariff classification of the product being reported on the export declaration
- Export declarations not filed prior to the export of the goods
- The exporter did not notify the CBSA that goods were not exported after filing an export declaration
- Permits not being filed or other government department requirements not being met prior to the export of the goods.

What must be reported?

Exports to the United States

Export declarations are not required for any non-controlled goods that are exported to the United States, Puerto Rico, or the US Virgin Islands.

Controlled goods, which include goods covered under the General Export Permits (GEPs), exported to the US for

consumption must be reported, regardless of their value. Some exceptions apply when exporting to the US.

Exports to countries other than the United States

All goods controlled, regulated, or prohibited by any Act of Parliament that are exported to countries other than the US must be reported on an export declaration. Some exceptions to these reporting requirements are:

- Commercial goods valued at less than CAD\$2,000
- Foreign goods entering Canada in transit to another country
- Goods exported from Canada temporarily
- Goods brought into Canada temporarily for repairs. This includes goods leaving Canada after having been brought in for repair, an addition, or processing, where the repair, addition, or processing is valued at **less** than CAD\$2,000.

We can help

To reduce the risk of exposure to penalties under AMPS, KPMG recommends that exporters review their current export processes to assess their compliance with export reporting requirements. To facilitate this review, KPMG has developed a thorough questionnaire for export compliance and risk assessment. For more information, please contact your KPMG adviser or one of our Trade and Customs professionals.

Importers of Bluetooth®-Enabled Devices – Are You Using the Correct Tariff Classification?

Importers of items that use Bluetooth® technology will need to ensure they comply with the Canada Border Services Agency's (CBSA) administrative policy for the tariff classification of these articles.

The CBSA recently issued a memorandum that outlines its administrative policy for the tariff classification of certain articles using Bluetooth® technology. This memorandum provides the five core protocols that apply to Bluetooth® devices, outlines the five principal ways to correctly classify Bluetooth®-enabled devices, and includes several examples of devices and their tariff classifications.

Suppliers of this type of technology describe it as follows: "Bluetooth® is a wireless communications protocol primarily designed to replace cables that connect devices. It features low power consumption, a range of up to 100 meters, and low-cost transceiver microchips in each device. Bluetooth® technology enables devices to communicate with each other when they are in range."

Some common Bluetooth®-enabled devices are: adapters for Bluetooth®, audio speakers, cameras, compact disc players, headsets, global positioning system terminals, home theatre systems, data keyboards, computer mice, personal computers, printers, telephones, video games, video monitors, and video projectors.

Importers of articles using Bluetooth® technology should review this new Customs Memorandum D10-14-57, "Tariff Classification of Certain Articles Using Bluetooth® Technology," carefully to ensure they comply with these regulations and to avoid penalties under the Administrative Monetary Penalty System.

For more information, please contact your KPMG adviser or one of our Trade and Customs professionals.

Canada-Peru Free Trade Agreement Takes Effect

The Canada-Peru Free Trade Agreement (CPFTA) went into effect on August 1, 2009. This agreement eliminates duties on all goods originating in Peru, except for a few agricultural goods, either through the implementation of the agreement or through tariff phase-out.

A new preferential tariff treatment has also been introduced—the Peru Tariff. Entitlement to the Peru Tariff is based on the CPFTA rules of origin.

Proof of origin is a requirement under this trade agreement in the form of a Canada-Peru Certificate of Origin. The certificate must be completed by the exporter in Peru and must be in the importer's possession when the preferential duty rate is claimed.

For more information, please contact your KPMG adviser or one of our Trade and Customs professionals.

In Brief

CBSA Reviews Export Reporting Regulations

The Canada Border Services Agency (CBSA) has announced that it is reviewing the regulations on the reporting of exported goods. The requirement that exports be reported electronically has been identified as a priority of the review. This review is expected to be completed by the summer of 2010.

The CBSA is of the view that exports reported electronically are less likely to contain inaccurate and/or incomplete export information than exports reported manually. According to the CBSA, electronic reporting also ensures that the right information reaches the right people at the right time, thereby reducing the risk of delays, seizures, and fines being issued to the exporter.

Tariff Classification Rulings Now Posted on Customs Website

The Canada Border Services Agency (CBSA) has begun posting a sampling of advance rulings on its Web site in an effort to provide importers with more information about their obligations under the *Customs Act*. Due to Canadian privacy laws, not all rulings can be made public and only summaries of rulings are being posted.

The summaries posted do not comprise a complete set of the CBSA's advance ruling; however, they do cover a wide range of products. For example, some of the rulings posted to date cover global positioning system receivers, heater hoses, satellite meters, and waterproof winter boots.

The information provided includes Product Name, Technical Reference System Number, Description, Analysis and Justification, and Decision.

"Purchaser in Canada" Policy Updated

The Canada Border Services Agency has revised its policy on the meaning of "purchaser in Canada" to reflect the court's interpretation of this term.

The value of imported goods for duty purposes is the transaction value of the goods (i.e., the price paid or payable) if the goods are sold for export to Canada to a "purchaser in Canada," among other requirements.

As a reminder to importers, "purchaser in Canada" means:

1. a resident;
2. a person who is not a resident in Canada but who has a permanent establishment in Canada;
3. or a person who neither is a resident nor has a permanent establishment in Canada, and who imports the goods, for which the value for duty is being determined,
 - i. for consumption, use or enjoyment by the person in Canada, but not for sale, or
 - ii. for sale by the person in Canada, if, before the purchase of the goods, the person has not entered into an agreement to sell the goods to a resident.

For details on the CBSA's revised policy, see Customs Memorandum D13-1-3, "Customs Valuation – Purchaser in Canada Regulations."

For more information, please contact your KPMG adviser or one of our Trade and Customs professionals.



We Can Help

Contact one of our KPMG professionals for help with these or any other customs-related matters that may affect your business. We can help you manage your customs compliance obligations and ensure you are not missing any refund opportunities.

For more information on any of these subjects, or any other trade or customs issues, please contact one of KPMG's Trade and Customs professionals:

Joseph Brick
National Practice Leader
(416) 777-8413

John Pajek
Senior Manager
(416) 777-8329

Angelos Xilinas
Senior Manager
(604) 691-3479