

Power to Amend a Customs Declaration after Release of Goods ECJ AGO Overland Footwear (C-468/03)

Overland Footwear (OF) imports footwear from the Far East through a buying agent, Wolverine Far East (WFE). The agent was paid a buying commission of 4% of the selling price paid by OF to the manufacturer. Unusually the manufacturer paid the commission to WFE.

Before 1998, OF made import entries with the value based on the selling price to the manufacturer including buying commission payable to WFE. Therefore duty was paid on the buying commission element.

Under article 33 of the Community Customs Code (CCC) buying commission can be legitimately excluded from the customs' value provided it is separately identifiable at the time of import. OF eventually changed its invoicing practice and separated the value of the buying commission and duty was no longer charged on this element. OF then submitted duty reclaims for the duty paid on the buying commission prior to 1998. It is assumed that Customs was satisfied that despite the unusual payment arrangement, WFE was indeed a legitimate buying agent.

Questions of the Court

The court has been asked, among other things, to decide the following:

- Must buying commission which is included in the customs value be considered dutiable?
- Can customs revisit an import entry where buying commission has been included in the dutiable value?
- Are they obliged to do so?

AG's Opinion

1 Buying Commission in the dutiable value

Buying commission which is included in the customs value declared, but which is not shown separately from the selling price of goods, must be considered as part of the dutiable value. Customs cannot be expected to determine the buying commission element and exclude it from the customs value, unless they are informed by the declarant.

2 Can/Should customs revisit an entry after release of goods?

The AG's opinion was that the customs declaration should be "immutable" (as laid down in article 62 CCC) i.e., it is imperative that Customs are able to rely on the information on the customs declaration if the declarant is to be liable for its contents. However, the principle of immutability carries certain limitations (?) in line with article 65 CCC. This article states that the declaration can be amended at the request of the declarant unless:

- Customs are already inspecting the goods
- Customs have already established there are mistakes with the entry
- Customs have released goods.

Therefore any changes to the entry after release of the goods must be made under article 78 CCC. This states that Customs "may on their own initiative or at the request of the declarant amend the declaration after the release of the goods".

The AG's opinion is that customs are not required to make amendments under article 78 but that the article provided the authorities with discretion to amend within certain limits. The AG thought

that a compromise must be struck between reducing the risk of fraud and allowing the declarant to correct inadvertent errors. Therefore, these limits centre around the ease with which the authorities can verify that the revision is true and correct and the error being corrected is not the result of the deliberate action by the declarant.

Summary

The AG's opinion states that OF should have requested repayment of duties pursuant to article 78 CCC, then Customs would be obliged to regularise the situation (within the meaning of article 78) if a request is submitted within 3 years from the date of import.

However, repayment is only possible where the facts which led to the initial error are verifiable and are not the result of a deliberate action but rather inadvertent error.

Practical Implications

Given that any revision of import entries must be verifiable this opinion would seem to make it easier to amend entries which hinge on a valuation issue, such as buying commissions (in OF's case) and transfer pricing adjustments (although only where it can be argued under article 236 CCC that any duties were not legally owed). However, it would not seem to support reclaims based on classification issues where the goods in question have long since been released and sold and an importer cannot prove that the goods actually imported were those it might now purport them to be.