

Customs Compliance – now is the time to be more vigilant than ever

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Generally, Australia's customs duty rates of 0-5% are not sufficient to motivate deliberate evasion of duty. In an environment of low duty rates, most non-compliance tends to be accidental, rather than deliberate. However, the tables are turned when dumping duties are imposed. Dumping duties often exceed 30% and can even be over 100%. Where the rewards for non-compliance are this high, there will undoubtedly be greater motivation to engage in duty avoidance.



Over the past few months we have heard increasing instances of suppliers seeking to work with importers to lower or avoid dumping duties. At the same time, the Australian Border Force (ABF) is engaging in greater levels of targeted compliance activity. In this environment there is a risk that importers will find themselves on the receiving end of massive fines and the requirement to back pay duty and GST. Purchasers need to be aware of the risks and realise that regardless of the promises made by the exporter, if there is deliberate non-compliance and underpayment of duty, it is the Australian consignee that can be liable, even if the principal architect of the evasion was the foreign exporter.

When is dumping duty payable

Dumping duties are payable where the Anti-Dumping Commission finds that goods are exported from a foreign country at a price that is less than their normal value and that dumping is causing loss to an Australian industry. "Normal Value" is usually a reference to the domestic selling price in the country of export. Countervailing duties are payable where it is found that exporters from a third country are benefiting from specific government subsidies.

It is important to understand that the imposition of dumping duties does not only occur when goods are sold to Australia at a loss. Australia can be a very profitable export market and still dumping duties will be imposed.

What are the problems industries

The Anti-Dumping Commission keeps a record of all goods subject to dumping duties on the importation into Australia. Whether dumping duties are payable depends on the type of goods, the country of export and, to a lesser extent, the identity of the exporter. The most common goods subject to dumping duties are steel and aluminium products

out of China. We are seeing a notable amount of compliance activities around aluminium extrusions (solar panel mounting kits, construction material, fencing) and steel hollow structural sections (pipes and construction material).

What are the tactics adopted?

We are receiving reports of some exporters of Chinese steel and aluminium adopting a variety of methods to avoid or lower the dumping duty payable at the Australian border. Here are some tactics for Australian customers to look out for.

The shelf company

Under this tactic, goods subject to dumping duty are deliberately reported as a different kind of good and imported by a \$1 shelf company. The tactic isn't clever, the plan simply being that if the deliberate non-compliance is detected, the liable party will be a shelf company that can be wound up at little cost.

There are some basic problems with this approach. Firstly, the individuals that act to facilitate the non-compliance can be charged with aiding and abetting the shelf-company in its non-compliance. If that person is a director, deliberately engaging in tax avoidance may amount to a breach of his or her director's duties.

If the shelf-company on-sells the goods to a related company, that related company may be deemed to be in possession of the goods and liable to pay the underpaid duty by this reason alone.

Transshipment

Under this approach goods made in China are ordered by an Australian company and rather than being shipped direct from China, the goods are transhipped to a third country and then disguised as the goods of that country. This includes new commercial documents and even Government issued certificates of origin.



The ABF is aware of this tactic and will investigate whether the supposed third country manufacturer exists. It is not unheard of for the investigators to find a vacant block at the location of a supposed factory.

Transshipment does not prevent goods being categorised as having been exported from China to Australia. It just makes the export harder to detect. To facilitate the deception the importer needs to falsely declare the country of origin and the identity of the supplier. In doing so, the importer exposes themselves to strict liability for making a false statement resulting in an underpayment of duty and obtaining a financial advantage by deception.

Again, the underpayment of duty will follow the goods. As the ultimate purchaser of the goods, there is no way to wash your hands of the duty consequences.

Invoice splitting

Often it is only one part of the consignment that attracts dumping duty. For instance, where the goods are used to mount solar panels on roof, the component that attracts dumping duty may be the rails, but associated clamps may be duty free.

A supplier will be tempted to produce invoices for customs purposes that greatly inflate the value of the clamps and has a corresponding reduction in the value of the rails.

The ABF audits many legitimate importers and has a lot of intelligence as to the value of common imports. Income splitting will be easy to detect if the relevant imports are the subject of an audit. Where the invoices have been manipulated, the ABF can disregard the invoice value in determining the customs value of the goods. The ABF can determine the value by reference to the price of similar goods, or by the Australian sale price of the goods (less certain post importation costs).

Test imports

We have heard reports of exporters offering to sell the goods on the basis that liability for dumping duty will not be declared and if the import is detected by the ABF, the import will be abandoned with the exporter paying the costs of export to a third country.

There is nothing illegal in agreeing that a supplier will pay the costs of re-exporting goods if the importer no longer wants to import them. The problem exists

from what happens if the goods are not detected at the time of import. In this scenario the goods will be imported with dumping duty being deliberately underpaid. The underpayment will have resulted from falsely describing the goods or incorrectly claiming that they are subject to an exemption.

Unless the importer is upfront about the potential dumping duty (such as via an amber line entry), this approach is no different than simply making false statements. Agreeing to not import the goods if you are caught will not be much of a defence if you appear before a Court.

Supplier as the importer

Under this approach, the supply of the goods occurs as a domestic sale in Australia. The overseas supplier is both the exporter and the importer. It the overseas supplier that makes the relevant declarations to the ABF it will be the entity that would be subject to any fines that are payable.

The overseas supplier will also be first in the ABF's firing line if there is any underpayment of duty. However, first in line is not the same as being the only one in line. Australian case law shows that if



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there is an underpayment of duty, the ABF can pursue that duty from the Australian customer, even if that customer had no involvement in the import and was unaware of the duty avoidance.

When the choices are between an Australian resident company and a foreign supplier, it's easy to guess who the ABF debt collection team would prefer to pursue.

What are the risks?

The risks start at liability for the underpaid duty and GST and go up from there. In respect of underpaid duty, the ABF can base its demand on the past 4 years of imports. It can go back further if there is evidence of deliberate avoidance of duty. We have seen multi-million dollar demands made by the ABF.

Where the ABF can prove deliberate duty avoidance, the minimum penalty a Court can hand down is 2 times the underpaid duty, the maximum is 5 times the underpaid duty.

Even if the offence is merely a non-deliberate false statement, the maximum penalty is an amount equal to the underpaid duty.

However, the ABF does not have to trouble the Director of Public Prosecutions and take the importer to Court. Rather, the ABF can issue infringement notices of an amount equal to 75% of the underpaid duty without needing to prove a single allegation.

Put simply, if caught, you can expect to pay the underpaid duty plus at least 75% extra.

This is just the financial penalties, it does not take into account the impact on your supply chain of increased levels of compliance activity.

While all of the above is scary, if there is deliberate avoidance of a large amount of duty, the Commonwealth may choose a criminal, rather than customs, prosecution. This means that a penalty option is a jail sentence.

What to do

This issue is not going away, if anything, we can expect both ABF compliance activity and dumping duty rates to increase. Where the action is deliberate avoidance of dumping duty, there is no way to pass the risk onto a third party. If nothing else, the duty liability will follow the goods.

There are ways to legitimately manage increasing dumping duties. This can include dealing with suppliers who have secured individual favourable rates or legitimately gaining exemptions from the duty. In some cases, it will also be possible to have the duty rate reassessed.

While these options can involve an investment of resources, these options should all be investigated. What importers shouldn't do is believe in an offer that is too good to be true. These offers all rely on non-compliance not being detected and leave the importer greatly exposed when the inevitable happens.

If you believe that you may have been involved in past non-compliance, there are significant benefits associated with voluntary disclosure. For a start, the ABF will not be able to issue infringement notices. More importantly, the ABF mindset is very different for importers who are voluntarily seeking to improve compliance. If non-compliance is detected in an audit, it is very hard to have the ABF, or a Court, see you in a positive light.

Please contact Russell Wiese (rwiese@huntvic.com.au) for assistance with managing customs compliance and rising rates of dumping duty.



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