

CUSTOMS-NOTES

Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

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COURT OF APPEALS AFFIRMS LIABILITY OF IMPORTER FOR FAILURE TO EXERCISE REASONABLE WHEN MAKING ENTRY OF MERCHANDISE

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The United States Court of Appeals for the Federal Circuit has recently affirmed the liability of an importer for negligence under 19 U.S.C. § 1592 for not disclosing, or inaccurately disclosing required information at the time of entry. *United States v. Hitachi America, Ltd., and Hitachi Ltd.*, 172 F.3r^d 1319 (1999).¹

In originally finding the importer negligent, the trial court reviewed the statutory obligation imposed by 19 U.S.C. § 1484 on importers to provide Customs at the time of entry with all documents and information necessary to assess proper duties, and the obligation imposed by 19 U.S.C. § 1485 to update Customs in a timely manner with any new information showing that the prices originally declared at the time of entry are incorrect.

“An importer is responsible for the contents of the invoice under the statute and it may not dodge its obligations ...” R.Musgrave, Judge, CIT Slip Op. 97-46 (April 15, 1997).

¹ While upholding the finding of negligence for *Hitachi America*, the appellate court concluded that the trial court erred in finding the basis of valuation to be the U.S. domestic value of the transaction, as opposed to the transaction value between the foreign seller and the U.S. importer, and remanded the case back to the CIT for reconsideration of the penalty amount.

In *United States v. Hitachi America Ltd., and Hitachi Ltd.*, Slip Op. 97-46, the Court of International Trade found *Hitachi America* negligent when it identified US dollars on the entry as the currency of purchase rather than Japanese yen. The court also rejected the argument of *Hitachi* that preparation of the commercial invoices was the responsibility of the foreign exporter. The court stated that an importer is responsible for the contents of the invoice and “it may not dodge its obligations by pleading impotence.” The court further said the obligation of the importer “was to declare the true currency of purchase It did not declare the true currency of purchase and failed to show that it **exercised reasonable care** in ascertaining the relevant facts about the transaction.”

The court also found *Hitachi* negligent for not complying with the requirements of 19 U.S.C. §1485 by not reporting additional, post-importation payments related to price adjustments required under the sales contract.

“Section 1485 of the Customs laws obligates importers to report “at once” any receipts showing that the price declared on the invoice was incorrect. “If the importer wishes to avoid this [obligation] ...” said the court, “it may arrange to hold open the liquidation under ... §1504(b),” or “deposit estimated duties ... and when the merchandise is liquidated ... ” seek refunds

or make any additional payments found due.
CIT Slip Op. 97-46

The trial court also found that *Hitachi* was unreasonable in waiting to advise Customs of the existence of the additional payments until completion of the project.

“... importers **must** deliver corrected invoices or, if that is not possible, provide some other notification to Customs when the amount of the adjustment to the entry becomes known.” CIT Slip Op. 97-46.

“Absent depositing estimated duties or arranging for suspended liquidation,” the court noted that an importer has an affirmative “duty to report [price changes] at once.”

Foreign Parent Found Not Liable For Aiding And Abetting Importer’s Negligence

While the trial court found the foreign parent *Hitachi Ltd.* liable for **aiding and abetting** the importer’s violation because it was aware of, but did nothing to encourage its subsidiary to report the under valuation in a timely fashion, this was rejected by the appellate court.

In reversing the trial court’s finding that the foreign parent was liable under 19 U.S.C. § 1592, for aiding and abetting a violation of law, the appellate court said, by law, a third party may not be held liable for **negligently** aiding and abetting a negligent act committed by an importer.

What To Do To Avoid Penalties For Not Declaring The Correct Customs Value And Classification

The court’s decision in the *Hitachi America* case serves as a potent reminder about the importance of knowing one’s legal obligations under the customs laws, and for ascertaining and disclosing all facts that impact the customs transaction in a timely manner.

Under the Customs Mod Act, importers are legally obligated to exercise **reasonable care**

when determining the declared value, classification, and rate of duty applicable to imported merchandise.

Under the reasonable care standard, importers are expected to know the statutory and regulatory requirements of importing, and to correctly apply the relevant legal and administrative interpretations when determining the customs value, tariff classification, and duty rate applicable to imported merchandise.

As illustrated by the *Hitachi* case, ***an importer does not exercise reasonable care if it simply assumes that the information on the commercial invoice is correct.*** Rather, ***an importer has an affirmative obligation to verify the correctness of the facts as reported.*** The failure to exercise this obligation is negligence under the standard of care expected of importers as imposed by law.

Additionally, the *Hitachi* decision illustrates that where there is doubt as to the proper application or interpretation of a legal requirement, the importer is at risk if it does not adopt a conservative course of action and seek the advice of a Customs expert.

Under the Mod Act, Congress intended that whenever an importer seeks the advice of a knowledgeable expert, such as a licensed customs broker, or attorney who specializes in customs matters, evidence of **reasonable care** is established, so long as there is full disclosure of the relevant facts.

How Importers Can Exercise Reasonable Care

The first step in exercising reasonable care is for importers to become familiar with the legal requirements associated with the proper importation, valuation and classification of merchandise.

Employees with import responsibilities should review with their accounting and/or finance departments the legal elements of value found in 19 U.S.C. 1401a and section 151 of the Customs regulations. Areas most often overlooked by importers pertaining to customs valuation include

post-import price adjustments, components or equipment consigned to an assembler, and supplemental payments for components, materials and foreign design, or for engineering expenses not included in the contract price.

Importers should, on a regular basis, reconcile invoice information submitted to Customs with information contained in the company's books and records. If discrepancies are found, appropriate procedures need to be taken to promptly, and the discrepancy properly reported to Customs. Typically, this involves utilization of the prior disclosure provisions found in section 162.74 of the Customs Regulations, or by taking advantage of new entry reconciliation procedures offered by Customs.

Importers should also not overlook how their merchandise is classified at the time of entry. Mistakes in tariff classification account for over half the errors found by Customs during recent compliance examinations.

In most cases, errors in classification are attributable to incomplete or inaccurate information about the composition or use of the article, or the improper application of the rules relating to the classification of the product. Proper tariff classification often requires a two-person approach: someone familiar with the composition and/ or use of the article, and someone familiar with the rules of classification, explanatory tools, and administrative decisions. All too often, Customs brokers are left with the task of classifying merchandise with insufficient factual information about the product in question.

A Word about Records

No discussion about Customs is complete without mentioning the importance of maintaining complete and accurate import records. Very often, importers are asked by Customs to produce technical or financial information about a product months, or years after importation. By law, Customs has up to five years from the date of entry to request documents for the verification of value or to determine the correct classification. Yet, many companies have a difficult, if not impossible time

locating the pertinent information when requested. The failure to produce (A)(1)(a) list records upon demand can result in the assessment of fines of up to \$10,000 per violation.

Furthermore, Customs has up to one year to review and liquidate an entry. During this period, Customs is free to request information and change the entered classification or value based on the information provided. If no information is available, or incomplete information is provided, Customs will use the best information available to it, which is not always favorable to the importer.

Reduce Risks by Creating Written Procedures

It is not enough for an importer to rely on its Customs broker, or have just one or two people in the company familiar with the import process. Rather, the risk of errors can be significantly reduced by the preparation of simple, yet thorough company procedures covering the key areas of:

- Classification
- Valuation
- Invoicing
- Marking
- Quantity reporting, and
- Record-keeping

The presence of written internal controls also demonstrates to Customs your company's intent to exercise reasonable care, and are considered by Customs to a significant mitigating factor when considering a penalty in the event an error occurs.

For more information about assistance in the preparation of internal controls and how they can help your company maintain compliance with Customs' requirements, please contact us.

George R. Tuttle is a San Francisco based law firm with a practice that focuses on compliance with Customs and International trade law. For additional information on this subject or for additional copies of this publication contact:

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