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US Customs Ruling of Importance to Logistics and Transportation Service Providers

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In recent years, the roles and responsibilities of freight forwarders, transportation service providers, third-party logistics companies (3PLs), and customs brokers have become increasingly blurred. In many cases, transportation and logistics service providers have offered to perform customs-related tasks for clients or customers, including acting as the "importer of record." Many freight forwarders and 3PLs have acquired or established their own customs brokerages.

On January 23, 2024, US Customs and Border Protection (CBP) released a headquarters ruling (HQ Ruling H324098) holding that a logistics provider did not meet the criteria to qualify as the importer of record on a shipment because of insufficient financial interest in the imported goods at the time of entry. This ruling should serve as a warning to the broader transportation and logistics services sector of the importance of the regulatory requirements for providing certain services and performing particular activities. There are very clear regulatory guidelines as to who can perform certain customs related functions and activities, and how.

Importer of Record

As a general matter, the importer of record (IOR) is the party responsible for ensuring that imported goods comply with all customs and legal requirements of the country of import. This is usually the owner of the goods but may also be a designated individual or customs broker. Under the US customs laws[1] and regulations, an importer of record may be the owner, purchaser or consignee of the merchandise, or a person appropriately designated, such as a licensed broker. A specific CBP directive, Customs Directive 2530-002A, sets out the rules for individuals or entities that have the "right to make entry" (i.e., to act as importer of record) and specifies that the owner and purchaser must have a financial interest, rather than just a custodial interest, to qualify as importer of record. A 2005 CBP ruling further clarified that there is sufficient financial interest when the seller has a security interest in the goods and the risk of loss is passed to the buyer at delivery.

Security Interest

In the specific case considered in the most recent CBP ruling, a logistics provider named YSDS was acting as an agent of the seller and the importer of record. YSDS never held title, ownership, or risk of loss and did not have any post-entry responsibilities in the transaction. However, it is not uncommon for a logistics service provider to tender payment for the goods to the seller and then seek payment or reimbursement from the buyer. If the buyer fails to pay, then the logistics provider would seek payment through a lien on the goods. Here, YSDS had an underlying security interest in the goods contingent on the buyer's failure to perform, as provided for in purchase agreements between the seller and buyer, and separate agreements between the seller and YSDS.

CBP ruled that YSDS was not eligible to serve as the importer of record, and incorrectly acted as IOR, because it did not have sufficient financial interest in the goods to be importer of record, and because it only had possessory or custodial interest through a lien. While it is common for 3PLs, warehousing services companies and some transportation providers to rely on liens to secure payment for services rendered, this recent ruling distinguishes a security interest such as a lien from a sufficient financial interest as required to act as importer of record. Logistics and transportation services providers who have been acting as importers of record need to take heed and consider the implications of offering this particular "service" to customers.

Right to Act as Importer of Record

To act as importer of record, there must a "significant nexus" between the importer's financial interest and the goods. The importer should have more than a custodial interest in the goods, such as holding title to the goods or bearing the risk of loss.

Most 3PLs like YSDS, freight forwarders, and other transportation services providers, cannot serve as importer of record despite having a lien on goods because these parties have only a custodial interest in the goods. In addition, most 3PLs and transportation providers will not have the required "significant nexus" between their financial interest and the goods to qualify as importer of record because their financial interest is in the services surrounding the goods rather than the goods themselves, and their responsibility for the goods ceases at delivery.

A 3PL can, however, designate a customs broker to serve as importer of record. Customs brokers are included under the phrase "a person having valid license" as stated in the law defining importer of record.[2] Customs Directive 3530-002A further clarifies that an importer of record is a licensed customs broker designated by the owner, purchaser or consignee.[3]

1 Section 484 of the Tariff Act of 1930, as amended; 19 U.S.C. §1484.

2 See 19 USC § 1484(a)(1)-(2); see also Customs Directive 3530-002A, §5.

3 See Customs Directive 3530-002A, §5.

Key Takeaways for Logistics and Transportation Service Providers

Logistics and transportation service providers must ensure they have the proper qualifications before accepting designation as importer of record. Most providers will not qualify to act as importer of record because of insufficient financial interest in the goods being imported.

Even if a freight forwarder or other transportation service provider is not serving as importer of record, these parties still have other general compliance responsibilities. There is an increasing focus in recent months by US government regulatory agencies involved in international trade and transportation. In this most recent CBP ruling, the focus by the agency on a logistics company and use of that case to define which parties can and cannot act as importers of record is not coincidental. Logistics and transportation companies are under increasing scrutiny.

For example, just last month, five separate agencies issued compliance guidance specifically focusing on the activities of freight forwarders, logistics companies and transportation service providers. The guidance was aptly titled "Know Your Cargo: Reinforcing Best Practices to Ensure the Safe and Compliant Transport of Goods in Maritime and Other Forms of Transportation," and was jointly issued by the US Departments of Treasury, Commerce, State, Justice and Homeland Security.

The guidance highlights common regulatory evasion tactics used by bad actors and suggests that involved entities assess their risk profile and implement internal compliance programs to identify evasion efforts. It is specifically suggested that transportation industries:

- Institutionalize sanctions and export control compliance programs
- Establish location monitoring best practices and contractual requirements
- Know their customer by conducting appropriate risk-based due diligence
- Exercise supply chain due diligence
- Share information across industries and supply chains as appropriate

The guidance demonstrates how government agencies are stepping up their enforcement activities and cooperation, particularly as it relates to transportation and logistics companies, with enforcement activities focused on customs, economic sanctions and export control matters. These agencies expect manufacturers, exporters and any other party involved in international trade to read and implement this and prior US guidance to detect and avoid evasion.

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