

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT LLP
COUNSELORS AT LAW
399 Park Avenue
25th Floor
New York, New York 10022-4877
(212) 557-4000
Fax: (212) 557-4415

CUSTOMS VERIFICATIONS OF DUTY-FREE PROGRAMS –
RECENT COURT DECISION

By: Peter W. Klestadt (pklestadt@gdlsk.com)
Arthur W. Bodek (abodek@gdlsk.com)

August 10, 2009

The U.S. Court of International Trade has issued a decision addressing an importer's responsibility to produce records to substantiate claims under duty preference programs. The case confirms that an importer must be vigilant in exercising reasonable care over its producers to ensure that proper production records are maintained and available upon request by Customs to verify origin and eligibility under duty preference programs. While the case involved the program covering imports from Africa (the AGOA), it has implications for all duty preference programs.

In Polly U.S.A., Inc. et al v. United States,¹ Customs issued a Request for Information relating to a shipment of apparel from Swaziland that was entered under a duty-free provision under AGOA. Specifically, Customs requested production records including cutting and sewing records, information about production processes and timelines, and worker documentation and records. The importer provided some production records but they were rejected by Customs due to a number of perceived deficiencies including: a problem in the production chronology (sewing records predating fabric cutting dates), worker time cards not matching work reports (a production report referencing work performed by a worker not clocked-in on the day in question) and a difficulty in reconciling daily production because only summary records were submitted. Customs rejected the duty free claim on the grounds that the production records failed to establish a traceable production timeline that could demonstrate that the imported goods were fully manufactured in the beneficiary country.

The Court rejected the importer's arguments that recordkeeping to Customs high standard in a small developing country was both impractical and impossible. The importer argued that it should be given the benefit of the doubt despite the inconsistencies and gaps in its documents. The Court agreed with Customs' decision based on the evidentiary burden placed on importers by the Customs regulations that require an importer to maintain records that explain how the

¹ Slip Op. 09-80 (Ct. Int'l Trade August 6, 2009).

importer came to the conclusion that the article qualifies for duty free treatment, have records that demonstrate qualification and implement internal controls which provide for periodic review of the accuracy of the origin declaration. Simple reliance on a Certificate of Origin was not enough. The Court ruled that Customs has the discretion to reject a duty free preference claim if an importer is unable to verify the origin to Customs' satisfaction.

This decision reinforces the importance of establishing and verifying that adequate production records are being maintained by overseas suppliers that enable an importer to substantiate duty preference claims. This includes entries filed under unilateral trade preferences (such as the GSP, CBI and the AGOA) as well as a host of Free Trade Agreements (such as the NAFTA, CAFTA, Israel FTA, etc.).

Moreover, U.S. Customs and Border Protection ("Customs") has designated the collection of revenue (*i.e.*, duties) as a Priority Trade Issue. A major component of the Customs initiative in this area is the active enforcement of claims under duty-free programs. We have witnessed a significant increase of Requests for Information being issued to the importing community requesting records to verify claims of eligibility under duty preference programs.

In light of the recent court decision and Customs' ongoing enforcement efforts in the area, it is imperative that importers evaluate their internal controls and ensure that appropriate procedures are in place to sustain their duty-free claims (both in terms of understanding the often complex eligibility rules and being able to timely provide the necessary supporting documentation).

Please contact our office if we can be of assistance in connection with the eligibility and documentary requirements of any of the preference programs under which your company is operating. We are available to assist with training or in responding to Customs enforcement actions taken in connection with claims made under such programs.