

**U.S. CUSTOMS AND BORDER PROTECTION
Department of Homeland Security**

Memorandum

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663861 ACC
XR 548068 CC

September 8, 2003

TO: Port Director
Bureau of Customs & Border Protection
555 Battery Street, Room 319
San Francisco, California 94111

FROM: Chief, Penalties Branch

SUBJECT: Request for Internal Advice Regarding CIF Deductions by [REDACTED]
[REDACTED]

This is in response to your memorandum of June 17, 2003 requesting internal advice as to whether [REDACTED] exercised reasonable care when it made CIF deductions from transaction value on 1999 entries. Technically, the Penalties Branch of the Office of Regulations & Rulings does not entertain requests for Internal Advice; however, we will consider your memorandum under 19 C.F.R. § 171.14.

In the spring of 2001, The San Francisco Field Office of Regulatory Audit notified [REDACTED] that it had been selected for a compliance assessment audit of its importations during 1999. The audit review included an examination of [REDACTED] declarations and deductions for non-dutiable charges related to international freight and insurance. The audit determined that [REDACTED] had undervalued its imports by a total of [REDACTED], resulting in an actual loss of duties of [REDACTED] \$2,036,097 of this undervaluation, and \$175,881 of the duty underpayment, resulted from [REDACTED] improper deductions for freight and insurance.

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Specifically, [REDACTED] U.S. freight forwarder, for most shipments, [REDACTED] [REDACTED], did not arrange or bill for international shipment, but obtained these amounts from the foreign freight forwarder, its related party [REDACTED]. For a few shipments, the U.S. freight forwarder, [REDACTED], obtained these costs from its related party in China, [REDACTED]. The charge for international freight appeared in [REDACTED] [REDACTED] Arrival Notices/Invoices. In addition, [REDACTED] did not deduct actual insurance costs but instead took a standard deduction of 50¢ per \$100 of CIF invoice value for international cargo insurance. [REDACTED] claimed that this procedure was based on a conservative industry average and was common in the industry. Furthermore, [REDACTED] apportioned among its entry lines the deductions for international freight and insurance costs by value rather than by weight.

On November 14, 2001, you requested internal advice from this Office's Value Branch as to the acceptability of [REDACTED] deductions for international freight and insurance. In HQ 548068 CC, April 5, 2002, the OR&R Value Branch determined that [REDACTED] use of estimates, rather than actual costs, to deduct international cargo insurance was improper. Moreover, [REDACTED] deductions for freight costs were also improper, because the documentation provided by [REDACTED] to substantiate actual freight costs was not to or from the service provider. The internal advice explained that Customs had, in prior rulings, "e.g., Headquarters Ruling Letter (HRL) 544538, dated December 17, 1992, . . . always looked to documentation from the freight company, as opposed to the documentation between the buyer and the seller which often contains estimated transportation costs or charges." We also determined that [REDACTED] apportionment of the freight costs to the entry lines by value was not proper, but Customs had not previously provided guidance to importers as to how to apportion freight costs among the entry lines. Notwithstanding our determinations in HQ 548068, [REDACTED] argues that it is not liable for additional duties on entries where liquidation is final, because it acted with reasonable care by consulting with a licensed broker and relying on that broker to calculate the proper deductions.

As a general rule, the government cannot recover an underpayment of duties once liquidation has become final. 19 U.S.C. § 1514(a); see 19 U.S.C. § 1501. Nonetheless, "notwithstanding section 1514," 19 U.S.C. § 1592(d) allows the United States to recover duties on liquidated entries that were lost as a result of a violation of 19 U.S.C. § 1592(a). *United States v. Blum*, 858 F.2d, 1566 (Fed. Cir. 1988). In order to prevail in a claim for lost duties, the government's claim "need fairly preponderate, which simply means outweigh that which the defendant has offered in opposition." *United States v. Jac Natori Co., Inc.*, 19 C.I.T. 930, 941 (1995), *aff'd in part and rev'd in part on other grounds* 108 F.3d 295 (Fed. Cir. 1997). The government can recover duties under 19 U.S.C. § 1592(d) by establishing that the duties were lost as a result of

negligence, the least onerous of the three levels of culpability delineated in 19 U.S.C. § 1592. The government has the burden to prove the act or omission constituting the violation and its materiality, and the burden of proof then shifts to the alleged violator to prove that the act or omission did not occur as a result of negligence. 19 U.S.C. § 1592(e)(4). House Ways & Means Committee Report No. 103-361, 103d Congress, 1st Session, Section 621 of North American Free Trade Agreement Implementation Act, November 15, 1993, contains the following guidance to be used in determining whether an importer has used reasonable care, that is, has acted without negligence:

In meeting the 'reasonable care' standard, the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of proper compliance: . . . consulting with a Customs broker. . . . In using a qualified expert, the importer is also responsible for providing such expert with full and complete information sufficient for the expert to make entry or to provide advice as to how to make entry. If the above steps are taken, the importer will be presumed to have acted with 'reasonable care' in making entry. . . . [A]n honest, good-faith professional disagreement as to correct classification of a technical matter shall not be lack of reasonable care unless such disagreement has no reasonable basis (e.g. snow skis are entered as water skis).

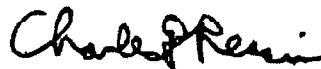
Mere employment of a broker to prepare and file the entry is not sufficient to constitute reasonable care. *United States v. Golden Ship Trading Company*, C.I.T. Slip Op. 01-7, January 24, 2001 at 14. "In *Golden Ship*, the importer provided the broker with entry documents which falsely stated the country of origin, and the broker used these documents to file the entries. The broker could not have known that the country of origin claims in the entry documents were false, or that it was unwittingly filing entries with false claims of origin.

In this case, however, it appears that [REDACTED] broker made the determination that [REDACTED] could deduct freight costs based on documents that were not to or from the freight provider, and that [REDACTED] could make a further deduction for insurance costs based on an industry average. As it was the broker, a qualified expert, and not [REDACTED] that made these determinations, we do not believe that [REDACTED] can be held liable for freight deductions based on secondary documents, and insurance deductions based on industry estimates, on entries where liquidation is final. Although the broker's actions contravened existing rulings that had been publicly posted, the importer had reasonably relied on the broker to insure that the deductions conformed with applicable statutes, regulations and rulings. The broker may have failed to exercise responsible supervision and control over the Customs business it conducts, in derogation of 19 U.S.C. § 1641(b)(4); however, the importer would not be liable for this failure if it made a full disclosure of the facts to the broker, and reasonably relied on the broker to make proper entry.

Nonetheless, we understand that in some instances the freight amount on the airway bills differed from the deduction. We also understand that in some instances [REDACTED] at the time of entry may have had documentation, to or from the freight provider, of the actual freight costs, but did not share this information with the broker. 19 U.S.C. § 1485(a)(3) requires importers to certify on each entry that "all other statements in the invoice or other documents filed with the entry, or in the entry itself, are true and correct." Subsection 1485(a)(4) requires importers "to produce at once to the appropriate customs officer any invoice, paper, letter, document, or information received showing that any such . . . statements are not true or correct." See *United States v. Hitachi America, Ltd.*, 21 C.I.T. 373, 389, 964 F. Supp. 344, 361 (1997), *rev'd in part and aff'd in part on other grounds*, 172 F.3d 1319 (Fed. Cir. 1999) (Importer violates 19 U.S.C. §§ 1485 and 1592 for failing to correct entry declaration after making post-entry payments in excess of amount declared at entry). The importer has a legal responsibility to provide its broker with the full and complete information necessary for the broker to make the proper determinations as to what amounts can be deducted from the dutiable value. Moreover, the importer has the legal responsibility to check the accuracy of the entries prepared by its broker, and to notify Customs, directly or through its broker, if there are factual errors.

Accordingly, we do not believe that [REDACTED] can be held liable under 19 U.S.C. § 1592(d) for additional duties on entries finally liquidated, based on the broker's decision to deduct non-dutiable freight costs appearing on documents that were not to or from the freight provider, or to deduct insurance costs based on an industry average. Nonetheless, [REDACTED] can be held liable for such duties for failing to provide its broker with documentation to or from the freight provider, where [REDACTED] either had or could have readily obtained such documentation, at the time of entry. Moreover, [REDACTED] can be held liable for such duties where the deduction for freight does not conform to the amount stated in the air waybill or other secondary document, or does not conform to the actual freight costs stated in documentation to or from the freight provider that [REDACTED] either possessed or could have readily obtained at the time of entry.

Please provide [REDACTED] with a copy of this advice. Also, please contact [REDACTED], if you have any questions.



Charles D. Ressin