



DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

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Teresa A. Gleason, Esq.
Susan L. Renton, Esq.
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4078

MAR 25 1999

Dear Ms. Gleason and Ms. Renton:

This is in response to your letter of January 21, 1999 with respect to certain issues involving recordkeeping and certain issues involving 19 U.S.C. 1592.

This letter is an "information letter," as that term is defined in 19 CFR 177.1(d)(2).

Recordkeeping Issues

You describe the basic factual situation as follows:

B & M represents a number of importers of a variety of goods [hereinafter referred to as the "Company" or "Companies"].

Many of the Companies import small packages (i.e., packages containing merchandise valued at \$2,000 or less) of products, samples and returned goods. When doing so, the Companies use the services of an express air courier to transport the goods and to file the necessary Customs import paperwork.

Where the value of the package is de minimis (i.e., \$200 or less), the courier files a manifest with Customs and clears the goods consistent with Section 321 of the Tariff Act of 1930, as amended (19 U.S.C. § 1321). Where the value of the package is over \$200, the courier usually includes the package with similar low-value imports of other consignees and files a consolidated informal entry with Customs. We understand that the courier or its agent appears as the importer of record on consolidated informal entries.

On occasion, however, the courier will file a single informal entry for the Company's merchandise. When this occurs, the courier or its agent usually acts as the importer of record. From time to time, however, the



courier will designate the Companies as the importer of record.

Once the goods have cleared Customs, the courier sends the Companies a bill which lists the courier's charge and any government duties, fees or taxes paid on the imported merchandise. The bill does not include copies of the Customs entry documents. Certain of the Companies have tried in the past to obtain copies of the Customs entry documents from the couriers and have generally not been successful. [Emphasis in original.]

You ask concerning the Companies' recordkeeping responsibilities under 19 U.S.C. 1508 and 1509 with respect to informal entry documents where they are consignees or parties who cause the importation, but are not the importers of record. In this situation you state that the Companies are unable to obtain the informal entry documents from the parties filing such documents with Customs, i.e., couriers or brokers.

You also ask with respect to the Companies' recordkeeping responsibilities when they are the importers of record.

19 U.S.C. 1508(a) provides:

§ 1508. Recordkeeping

(a) Requirements

Any-

(1) owner, importer, consignee, importer of record, entry filer, or other party who-

(A) imports merchandise into the customs territory of the United States, files a drawback claim, or transports or stores merchandise carried or held under bond, or

(B) knowingly causes the importation or transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States;

(2) agent of any party described in paragraph (1); or

(3) person whose activities require the filing of a declaration or entry, or both;

shall make, keep, and render for examination and inspection records (which for purposes of this section include, but are not limited to, statements, declarations, documents and electronically generated or machine readable data) which-

(A) pertain to any such activity, or to the information contained in the records required by this chapter in connection with any such activity; and

(B) are normally kept in the ordinary course of business.

Where the Companies Are Not the Importers of Record

In this situation, the Companies are consignees or parties who cause the importation, but they are not the importers of record. Further, the Companies are unable to obtain the informal entry documents from the parties filing such documents with Customs, i.e., couriers or brokers.

The Companies are parties within the scope of 19 U.S.C. 1508(a)(1) in that they are consignees or other parties who knowingly cause the importation of merchandise into the customs territory of the U.S.

It is our view, however, that where the Companies are not the importers of record of the subject merchandise (i.e., as described above, they are consignees, or addressees of the merchandise), and where they are unable to obtain the informal entry documents from the parties who have those documents, the Companies do not keep those records in the ordinary course of their business. In such a situation (i.e., where the Companies do not normally keep records in the ordinary course of business), the Companies are not required to make, keep, and render for examination and inspection such records. See 19 U.S.C. 1508(a).

If documents are not within the scope of 19 U.S.C. 1508(a), there is no production responsibility under 19 U.S.C. 1509(a)(1)(A). In T.D. 98-56 (63 FR 32916, 32930), Customs stated:

Central to the operation of section 509 is the assumption that the records to be produced under that section have been made and maintained in accordance with section 508(a) (in other words, if a record, including an (a)(1)(A) record, is not required to be made and maintained, there can be no requirement to produce it under section 509). Thus, whereas not all section 508(a) records are (a)(1)(A) records, all (a)(1)(A) records are covered by section 508(a).

Our view is different with respect to records which the Companies create or receive in the course of the subject commercial transactions, e.g., purchase orders, invoices, packing lists, and the like. These are documents which should normally be kept in the ordinary course of business. Accordingly, these documents are within the scope of 19 U.S.C. 1508(a), and the Companies are required to make, keep, and render for examination and inspection such records. Further, if the Companies do receive the informal entry documents, they are required to keep and render for examination and inspection such documents, i.e., the documents are within the scope of 19 U.S.C. 1508(a).

Entry documents are within the scope of 19 U.S.C. 1509(a)(1)(A), i.e., they are records required by law or regulation for the entry of merchandise. Further, certain of the documents which the Companies are required to retain under 19 U.S.C. 1508(a) which are not part of the actual "entry package" may be within the scope of 19 U.S.C. 1509(a)(1)(A). See the (a)(1)(A) List.

Where the Companies Are the Importers of Record

In this situation, the Companies are the importers of record.

The Companies are parties within the scope of 19 U.S.C. 1508(a) in that they are importers of record who import merchandise or cause the importation of merchandise.

It is our view that the Companies, as importers of record, have a responsibility to keep the informal entry documents in the ordinary course of their business. It follows that the Companies must obtain such documents from the parties creating or filing them. Accordingly, the Companies would be required to keep and render for examination and inspection such documents, i.e., the documents are within the scope of 19 U.S.C. 1508(a).

Entry documents are within the scope of 19 U.S.C. 1509(a)(1)(A), i.e., they are records required by law or regulation for the entry of merchandise.

We note that if a licensed customs broker is unable to produce copies of entry documents filed with Customs for either formal entries or informal entries, the broker may be subject to a penalty under 19 U.S.C. 1641 for the failure to exercise responsible supervision and control over the customs business that it conducts. See 19 U.S.C. 1641(b)(4).

19 U.S.C. 1592 Issues

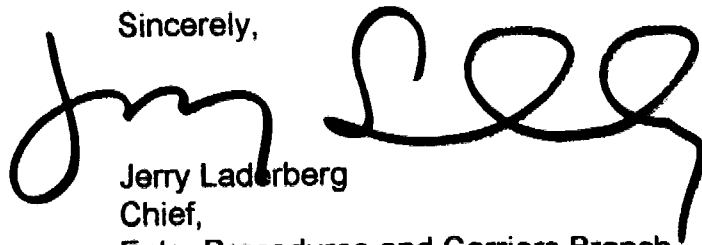
The issue that you have asked us to address can be stated as follows: If a

broker acts as importer of record on behalf of a courier and files the applicable entries, what liability does the ultimate consignee have?

Since the enactment of the Customs Modernization Act, the importer of record or its agent has been required to use "reasonable care" in "filing with the Customs Service the . . . classification and rate of duty applicable to the merchandise," 19 U.S.C. 1484(a)(1), so that the Customs Service can "fix the final classification and rate of duty applicable to such merchandise." 19 U.S.C. 1500(b). An importer may exercise reasonable care in classifying merchandise by consulting a qualified expert such as an attorney or Customs broker, and by "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." 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.

In order to be liable for any penalty under 19 U.S.C. 1592, Customs must first establish that the consignee is culpable for the alleged violation. If there is no culpability on the part of the consignee, then Customs cannot assess any penalty against the consignee pursuant to 19 U.S.C. 1592. If Customs can establish that the consignee had actual knowledge that the broker was undervaluing its merchandise (i.e., the consignee received copies of the invoices and Entry Summary) or aided and abetted the broker in the violation, the consignee may be liable for a penalty under 19 U.S.C. 1592. In either case, the consignee may make a complete disclosure of the circumstances to Customs. If the evidence shows that the consignee was, in fact, culpable for the undervaluation, then Customs will consider the information presented as a prior disclosure, provided that all of the requirements for a valid prior disclosure have been satisfied. Even if Customs cannot establish that the consignee was culpable for the alleged violation, Customs may commence an investigation against the broker with a view toward possible penalty action under 19 U.S.C. 1641.

Sincerely,

A handwritten signature in black ink, appearing to read "Jerry Laderberg". The signature is stylized with a large initial "J" and a long, sweeping underline.

Jerry Laderberg
Chief,
Entry Procedures and Carriers Branch