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HQ H003868

March 22, 2007

Ent-1-03-RR: CTF: ER-H003868

George R. Tuttle, III

Law Offices of George R. Tuttle

Three Embarcadero Center, Suite 1160

San Francisco, California 94111

RE: Ruling Request for a determination as to Importer-Of-Record

Dear Mr. Tuttle:

This is in response to your ruling request dated November 29, 2006, on behalf of Advanced Energy Industries, Inc. regarding the matter of importer-of-record.

FACTS:

AEI is a producer and importer of power conversion, control systems, and related products. These products are used primarily with industrial manufacturing equipment that utilizes gaseous plasmas to deposit or etch thin-film layers on materials or substrates such as silicon, glass and metals.

AEI manufactures goods through a subsidiary company in Shenzhen, China ("AEI Shenzhen"). This subsidiary sells finished goods to AEI in Ft. Collins (AEI Ft. Collins or "AEI FC"). AEI Shenzhen is a separate legal entity from AEI FC; however, the subsidiary only ships to AEI FC. This is due to the subsidiary having a business license that allows the subsidiary to act only as a contract manufacturer for the parent entity, and, as such, the subsidiary is restricted

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from executing a sale to any party other than the parent company. The goods are manufactured by the subsidiary in Shenzhen, China, and then stored by AEI FC in Hong Kong. From the Hong Kong location, AEI FC ships product to itself or to customers throughout the world, including the United States.

In a typical transaction AEI FC acts as the importer of record for the shipments, unless the goods are being shipped directly from Hong Kong to the U.S. customer, and ownership and risk of loss of the goods transfers to the customer at the time of export from Hong Kong. However AEI FC has customers that would like to purchase goods and to be able to import those goods into the United States as the importer of record. Under the terms of this agreement, AEI FC agrees to hold title and bear the risk of loss until the goods are delivered to the customer's warehouse and the customer accepts delivery of the goods; however, under the terms of the purchase agreement, the customer wishes to be responsible for all costs other than insurance incurred to transport the goods from the international carrier's Hong Kong dock to the warehouse location, including import duties and brokerage fees. The relevant terms of the contract are as follows:

Under the contract the supplier shall clear all Items for export from China and shall be responsible for delivery of Items from AEI Shenzhen facility to the International Carrier's Hong Kong dock. The supplier shall ensure that the quantities of the ordered Items that are delivered to such carrier are appropriate to support the customer's forecasted needs. The International Carrier shall pick up the items at the International Carrier's Hong Kong dock, the customer is responsible for all costs other than insurance incurred to transport the Items from the International Carrier's Hong Kong dock to the Location within the United States, including import duties and brokerage fees. These expenses are to be paid by the customer directly. The ordered items will not be considered delivered to the customer for any purpose under the contract until delivery is made to the customer. The supplier shall bear all risk of loss until the Items are delivered to and accepted by the customer in accordance with the contract.

ISSUE:

Whether a party to a purchase contract can act as the importer of record when title or ownership has not passed to that party at the time of importation?

LAW & ANALYSIS:

Under 19 U.S.C. 1484 only an owner, purchaser of the imported merchandise or licensed broker acting for the owner, purchaser or consignee of the imported merchandise has the

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right to make entry. Customs Directive CD 3530-002A, of June 27, 2001, defines "owner" and "purchaser" to include any party with a financial interest in a transaction, including the actual purchaser of the goods or a person who imports on consignment. The terms "owner" or "purchaser" would not include a "nominal consignee" who effectively possesses no other right, title, or interest in the goods except as he possessed under a bill of lading, air waybill, or other shipping document.

In the present case the customer wishes to be listed as the "Importer of record" for the above-described transaction. The issue here is whether the customer has shown that it has a "financial interest" in the transaction to be considered the "Importer of record".

The question as to the ownership of the imported items can be answered by looking at the sales agreement between the contracting parties. The pertinent language of the sale agreement reads as follows: "Title to an Item will transfer to [customer] upon acceptance of an Item, which shall occur in the event that: i) [customer] or its designee has received the Item at the specified destination point; and ii) either 1) [customer] or its designee has entered the Item into [customer]'s internal systems, or 2) a period of twenty four hours from the delivery of the Item has elapsed, whichever period of time is shorter." From the excerpt of the sale agreement it is clear that the customer does not receive title or ownership until the items have been delivered, and or the customer has accepted the items. In this case, ownership is not established by the customer until delivery and acceptance has occurred, both these events do not occur until the items have already been entered in to the United States. Considering the facts and the chronological order of events as well as the language of the sales agreement the Customer cannot be the owner for the purpose of establishing the proper identity of the "Importer of record".

The question then turns to, if the Customer can be considered the purchaser, or if the customer has a financial interest in the transaction, for the purpose of determining if the customer can be the "Importer of record". When establishing what relationship parties have to one another in a transaction "The Relationship is to be ascertained by an overall view of the entire situation, with the result in each case governed by the facts and circumstances of the

Case itself". *Dorf International, Inc. v. United States*, 61 Cust. Ct. 604, A.R.D. 245 (1968).

The first factor that should be recognized in this situation is the fact that both parties have entered into a valid and enforceable contract. The terms of the sales agreement defines the specific roles of each of the parties to the contract. The agreement between the parties can be consulted to see what rights and responsibilities each party has to one another. In the described transaction if AEI FC were not to deliver the goods as agreed, the customer would have a potential claim for breach of contract. Likewise, if AEI FC delivers the goods in

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accordance with the agreement and the customer refuses to pay, AEI FC would also have a cause of action for breach of contract. Moreover, once the order is placed, and the goods are delivered to the foreign port for shipment to the United States, the actual purchase by the customer is inevitable, if not already complete, since under the terms of the contract, the customer does not have a unilateral right of refusal of the goods, once they are delivered to the customer. Further, the contract states that the Customer "may reject and return any Item that does not conform to the applicable Specifications and incur no liability or obligation related to such Item. As to Items that are rejected and returned, the customer may recover and offset or adjust payments in respect of such Items, including any costs or fees related to shipping and insuring such Items".

The above language of the contract further supports the notion that a purchase has occurred prior to the goods entering the United States, in respect to the customer's obligation to make payment, without exception, unless the delivered goods do not conform to the applicable Specifications of the contract. This in combination with the customer having an additional financial interest in the transaction based in part on the Customer being responsible for all costs other than insurance incurred to transport the Items from the International Carrier's Hong Kong dock to the customers Location. This financial interest also is based on the customer being responsible for the import duties and brokerage fees related to the importation of the goods.

HOLDING:

In the listed transaction and within the described conditions of the contract, the customer has a financial interest in the transaction as the purchaser of the imported goods and therefore has the right to make entry.

Sincerely,

William G. Rosoff, Chief

Entry Process and Duty Refunds Branch