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CUSTOMS REFUND – REG 126(1)(e) – WHAT IS A MANIFEST ERROR OF FACT OR PATENT MISCONCEPTION OF THE LAW?

The ability to obtain a refund of Customs duty is provided for by Section 163 of the *Customs Act 1901*. That section reads

> *"163(1) Refunds, rebates and remissions of duty may be made –*
> *(a) in respect of goods generally or in respect of the goods included in a class of goods; and*
> *(b) in such circumstances, and subject to such conditions and restrictions (if any), as are prescribed, being circumstances, and conditions and restrictions, that relate to goods generally or to the goods included in the class of goods."*

In turn, Customs Regulation 126 sets out the circumstances under which refunds, rebates and remissions are made. There are a number of such circumstances set out pursuant to Regulation 126, but this note will deal only with Regulation 126(1)(e), the relevant part of which reads:

> *"(e) duty has been paid through manifest error of fact or patent misconception of the law;"*

The issue as to the correct interpretation of Regulation 126(1)(e) came up for our office in the context of a very long standing tariff classification dispute.

Facts

The importer in this case, had been, for some years, entering its goods pursuant to classification A, which was the classification that Customs claimed was the correct classification. In reviewing the situation, the importer's Customs broker came to the view that the correct classification was classification B. It then arranged for the importer to make Payments Under Protest in respect of ongoing importations. We were instructed to take the matter to the Administrative Appeals Tribunal (**AAT**).

We felt that the importers case was a very strong one and we made various representations and submissions to Customs to try and avoid the need to go to a hearing on the matter. Customs indicated that they wanted to see an outline of the importers evidence. Accordingly, a detailed Statement of Facts and Contentions and Witness Statements were prepared and lodged with the AAT and served on Customs. Customs then requested some further information, which was supplied.

At that point (i.e. prior to the hearing), Customs agreed that the correct classification was as had been suggested by the Customs broker i.e. classification B.

Customs Initial Position

In consequence of the fact that some of the earlier shipments made by the importer were approaching the four year statutory time limit for refunds, (and these earlier importations had not been Paid Under Protest), the Customs broker had lodged refund applications in respect of those particular importations. Customs refused to pay those refunds and a further AAT case was issued and joined with the substantive issue of the tariff classification matter.

In communicating their agreement with tariff classification B, Customs indicated that they would accept that in respect of the payments made under protest and in respect of any future importations. They said, however, that they would not agree to pay any refunds because they claimed that the duty paid at that time had not been paid under a manifest error of fact or patent misconception of the law. Their basis for claiming this was due to the fact that the matter had been strongly disputed between the parties. In other words, the assertion from Customs was that because the matter had been so strongly disputed it could not be said to be an obvious error.

Effect of Toyota Tsusho Case

At this point, we referred Customs to an earlier case in which the writer had been involved, being the case of *Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd and Collector of Customs,* an AAT decision of the 18th of December 1992.

The facts of that case were somewhat unusual. That matter had also started off as a tariff classification dispute, but in fact, the AAT at the initial hearing had nominated a third classification over the two classifications that had been in dispute between the importer and Customs. That third classification had a higher rate of duty than what Customs had sought.

Toyota Tsusho then appealed that decision to the Federal Court which upheld the AAT decision. The matter was then taken further on appeal by Toyota Tsusho to the Full Federal Court. The Full Federal Court overturned the decision of the single Federal Court Judge and the AAT and held that the classification sought by Toyota Tsusho was in fact the correct classification.

Toyota Tsusho then made an application for refunds of duty, which were rejected by Customs on the grounds that the refund application did not meet the terms of Regulation 126(1)(e) that dispute then was taken to the AAT.

Customs tried to argue that at the time the importer had made its original entry and paid the duty, it could not be said that the importer had paid the duty under a patent misconception of the law as at that time it was not clear what the correct classification was. That clarity, according to Customs, did not arise until the Full Federal Court had made its decision. This argument was rejected. The AAT referred to an unreported High Court case of *Besley, Comptroller – General of Customs, Ex parte V.W. Automotive Industries – 24th of February 1977*. The High Court in that case concluded that the duty in question had been paid under a misconception of law, namely, that in accordance with law, the amount of duty that was payable as demanded by the collector was incorrect. In other words, that conception of law was in fact a misconception.

The AAT in Toyota Tsusho therefore concluded that when a point of law has been decided by a Court, the law has been clarified in respect of it and any previous misconceptions of the law in respect of it then become patent misconceptions. The AAT said

> *"I am satisfied further that its effect is also that, when a point of law has been decided by any Court having jurisdiction to decide it, the law has been clarified in respect of it by that decision at least until, if ever, a Court of superior jurisdiction decides it differently, so that any previous misconception of the law similarly become patent misconceptions. I agree with Mr Gross that the fact that the point has been decided differently at various stages on the way through the appeals system is irrelevant."*

Conclusion

In other words, the fact that a tariff classification may have been hotly disputed over a period of time does not take away from the fact that once a Court decides what the correct classification is, then that tariff classification has in effect always been the correct tariff classification. Any variation from that correct interpretation is to be considered a patent misconception of the law.

It is therefore important to remember that when in a dispute with Customs on a tariff classification issue, refund applications should be lodged to protect earlier importations where these have not been paid under protest. Once a decision is made as to the correct tariff classification then that is deemed to have always been the correct classification. Any deviation from it will give rise to the ability to claim a refund.

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