Tax White Paper Task Force
The Treasury
Langton Crescent
PARKES ACT 2600

Freight & Trade Alliance and Hunt & Hunt Lawyers – Submission in response to the Re:Think – Tax discussion Paper

INDIRECT TAXES – CUSTOMS DUTY

We refer to the Re-Think – Tax Discussion Paper. We note that the timeframe for formal submissions to the discussion paper have closed but that you are willing to still receive input into how a better tax system can be achieved. This submission primarily deals with the taxation of imported good via the imposition of customs duties. We consider this input is relevant as it does not appear that published submissions have given significant attention to customs duty issues.

SUMMARY

In summary, it is submitted that:

- The liability for unpaid duty can fall on any party with a connection to the goods – this is unfair;
- The absence of a general right of refund makes the taxation of imported goods unfair and inefficient;
- The method of applying for refunds is inefficient and results in eligible importers not claiming a refund;
- The system of seeking Administrative Appeals Tribunal (AAT) or Federal Court review of the assessment of duty is inefficient;
- Options should be explored for the deferral and periodic payment of customs duty - this would produce a more efficient system;
- Accessing duty free rates under free trade agreements differs for each FTA and adds significant red tape.

Each of these are discussed below.

ABOUT FREIGHT & TRADE ALLIANCE (FTA)

Formed in September 2012, FTA is in a unique position being representative of a cross-section of Australia's international trade sector with diverse subscriber base of 177 international freight logistics and import / export trade entities (refer to the online directory at www.FTAlliance.com.au). FTA provides a range of support and advocacy services to industry dealing with increasing border security requirements, evolving global trade agreements, variations in international shipping practices and numerous domestic landside logistics issues.

ABOUT HUNT & HUNT

Hunt & Hunt Lawyers are a national law firm that has a long history of acting on behalf of customs brokers, freight forwarders, importers and exporters and industry bodies associated with international trade. Hunt & Hunt regularly advises clients on the application of free trade agreements, the availability of customs duty refunds, liability to pay customs duty and concessions available to reduce customs duty payable.

WHO IS LIABLE TO PAY CUSTOMS DUTY

GENERAL OBLIGATION TO PAY DUTY

The amount of customs duty payable is determined by the customs value of the goods multiplied by the duty rate. The general duty rate is determined by the tariff classification of the imported good. Concession may be applied to reduce the general duty rate.

The amount of duty payable is determined by information provided by the importer, usually by a customs broker, at the time of import of the goods. If duty is payable, that duty must be paid before the goods will be cleared by Customs.

The Customs Act 1901 (Customs Act) does not expressly set out which entity is required to pay that duty. The reality is that if the duty is not paid, the goods will not be released. because of this, it is usually the case that the importer of the goods will pay the relevant duty.

UNDERPAID DUTY

Duty may be underpaid for a variety of reasons such as a concession being incorrectly claim, the goods being incorrectly classified (producing the wrong duty rate) or the goods being incorrectly valued. Where duty is underpaid, section 165 of the Customs Act provides that an amount of underpaid duty is payable by the "owner" of the goods. The term "owner" is defined in section 4 of the Customs Act as

> "*in respect of goods includes any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.*"

The definition is so wide as to include not only the party that holds themselves out as the importer but any person who has had a connection to the importation of the goods, has ever possessed the goods or has ever owned the goods.

This can mean that a party who played no part in the underpayment of duty and had only a slight connection to the goods can be liable for any underpaid duty. A simple example is a customs broker that arranges for the clearance of the goods, but was provided fraudulent invoices showing a lower incorrect value of the goods. That broker is an "owner" under section 4 of the Customs Act and can be liable for the underpaid duty.

A recent AAT case dealt with the situation where duty was underpaid due to the fraudulent actions of the foreign supplier that acted as the importer. The Australian Customs and Border Protection Service (Customs) pursued duty recovery from the Australian consignee. Although the Australian consignee was innocent of any wrongdoing and had no control over, or involvement in, the importation of goods, the AAT held that the Australian consignee was an "owner" of the goods and liable for the underpaid duty.[1]

This is clearly an inequitable outcome and creates uncertainty for all involved in international trade. Consideration should be given to imposing liability to pay underpaid duty on the importer of the goods. Others directly involved in any underpayment of duty can be made liable via penalty provisions.

OBTAINING REFUNDS OF CUSTOMS DUTY

Customs duty can be overpaid for a variety of reasons, such as:

- The goods were incorrectly classified;
- The goods were incorrectly valued; or
- A concession was available and not claimed.

Unlike other areas of taxation, there is not a general right to a refund of customs duty on the basis that duty has been overpaid. The circumstances where a refund will be paid are set out in schedule 6 of the Customs Regulations 2015 (Customs Regulations). There are 20 different refund categories prescribed. A common ground for a refund used where a mistake of fact or law has led to an overpayment of duty is item 6 of schedule 6 of the Customs Regulations:

> "*duty has been paid on goods because of manifest error of fact or patent misconception of the law*"

[1] See the case of Studio Fashion (Australia) Pty Ltd v CEO of Customs [2015] AATA 366

There has been a number of AAT decisions that have considered what is a manifest error of fact or a patent misconception of law. Both the adjectives “manifest” and “patent” mean that not all errors of fact or misconceptions of law will result in a right to a duty refund.

This wording has created debate about whether there can be a patent misconception of law where there is a dispute as to the correct application of the law between Customs and the importer.

It is submitted that a right to refund should exist simply if duty is overpaid, regardless of whether that overpayment is due to an error of law or error of fact, or whether the error was patent or manifest.

Other areas of taxation do not impose a threshold of error or mistake that must be met before a refund will be paid. It is enough that the initial tax assessment was wrong.

Providing a general right for refund of duty where there has been an overpayment of duty will:

- Increase fairness by ensuring importers are only paying the correct amount of duty;
- Increase simplicity by providing a general and wide refund right.

METHOD OF APPLYING FOR REFUNDS

The method in which customs duty refund applications must be made are set out in the Customs Regulations. In almost all circumstances a refund application will be made by altering the original import declaration or lodging a paper refund application.

This causes few problems where there is only one entry that requires amendment. However, an issue that results in a right to refund, such as incorrect classification, could affect thousands of entries over the relevant refund period (4 years). It can sometimes be the case that the cost of amending each individual entry outweighs the amount of refund being sought. However, the collective value of the potential refund can still be significant.

For example, if the value of 10,000 imports in a year was overvalue by 5% by the overpaid duty may be $20,000. However, the cost of amending 10,000 imports would significantly exceed $20,000.

There needs to be an easy method to make a single refund application to cover multiple imports. Importers should not be required to overpay duty simply because the Government cannot offer a cost effective method of obtaining a refund.

We note that when an underpayment of duty is identified, Customs will generally allow a single payment of duty without amendment to each import declaration. The difference in approaches to refunds of duty versus the collection of underpaid duty creates the perception of unfairness.

AAT REVIEW OF CUSTOMS DUTY ASSESSMENTS

If a party wishes to obtain a merits review of a decision by Customs relating to the assessment of customs duty, the method set out in section 167 of the Customs Act is to make a payment of duty "under protest" and lodge an application for AAT or Federal Court review within 6 months of that payment under protest.

The payment under protest system and the timeframe for applications is inefficient and unfairly leads to the right to dispute duty assessments being lost. This will be the case if the payment is not in fact made under protest or an application for review is not made within 6 months of the payment.

The current system can also lead to the need for the one importer to commence multiple AAT proceedings regarding the same issue. This results from the fact that an application has to be made within 6 months of the payment under protest. If an application is not made in this time the right to dispute the assessment is lost. This timeframe, and the consequences of not lodging a review application, means action (filing a new application) needs to be periodically taken to preserve your right to a refund.

It is recommend that the payment under protest right of appeal be replaced simply with a right to review a decisions by Customs relating to the assessment of duty.

The timeframe for such a review should be 4 years from the payment of duty or the raising of the assessment. This will ensure a fair right of review.

DUTY DEFERRAL

Currently, the customs duty and GST assessed on a consignment must be paid before an authority to remove the goods from a customs controlled area will be provided. There are mechanisms for the any GST payable on the taxable importation to be deferred.

It is submitted that the tax system will be more efficient if deferral of customs duty was also permitted. The inability to defer customs duty has the following consequence:

- delays in the clearance of goods;
- A high number of individual payment having to be made to Customs either directly or by a customs broker;
- Increased administrative burden associated with effectively reporting and paying customs duty on a per transaction basis.

In assessing these consequences it should be remembered that the largest importers will have over 10,000 consignments annually.

In assessing the fairness of the tax system, it must be noted that importations of goods are one of the few events that require the immediate payment of tax. As you would be aware, GST on domestic transactions is collected and in many cases only paid quarterly. This also applies to income tax paid by way of PAYG instalments.

In these cases the risk to the revenue is much more significant than in the case of customs duty which constitutes a relatively small amount of revenue.

Measures could be taken to provide duty deferral to only those importers that agree to have duty automatically deducted from a nominated bank account, and or, provide a form of security. Deferral could also be limited to those entities at have an Australian presence and/or ABN. This would remove the difficulty of having to pursue deferred duty from a non-resident importer.

Duty deferral is currently being considered under the Australian Trusted Trader program. However, in our view, the benefit of duty deferral should not be limited to only participants in that program. it will make the collection and payment of customs duty more efficient if it is extended to all importers where there is not a material risk to the revenue.

FREE TRADE AGREEMENTS

Australia has signed free trade agreements with 9 out of the top 10 countries of origin of goods imported into Australia. This means that the majority of our imports (on implementation of the China free trade agreement) are potentially duty free under a free trade agreement.

However, goods are not automatically duty free under a free trade agreement, even where the goods were clearly produced in a country with whom Australia has a free trade agreement. There are relevant rules of origin that must be met and in most cases this involves documentary certification of the origin of the goods.

Australia's free trade agreements have origin documentation requirements ranging from Government issued certificates of origin, certifications of origin issued by certified bodies, declarations of origin prepared by a producer, exporter or importer (depending on the free trade agreement) or no certification requirement.

This creates a high level of administrative compliance to utilise a free trade agreement. This has led to both the underutilisation of free trade agreements and a disproportionate use of free trade agreements by well-resourced large importers.

Effectively, there is a situation where the customs duty payable on imported goods is determined by an importer's ability to manage the overlapping requirements under the different free trade agreements. The outcome of this is that:

- The system of assessing duty is inefficient and involves a large amount of red tape; and
- The distribution of duty liability is not fair.

These issues can be mitigated by either:

- Removing the requirement for origin documentation where Australia is permitted to do so under the relevant free trade agreement (by way of comparison New Zealand generally does not require origin documentation);
- Establish a standard approach to origin documentation and negotiating future free trade agreements in accordance with this standard;
- Where it is practicable, such as there being a scheduled review of a free trade agreement, attempt to re-negotiate the aforementioned standard approach into existing free trade agreements .

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We are happy to discuss these issues with you are your convenience.

Yours faithfully

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