



Law Council
OF AUSTRALIA

Business Law Section

Import/Export Policy
Department of Immigration and Border Protection
P O Box 25
Belconnen ACT 2616.
Attention: Ms. Lenna Nuski
Via email: importexportpolicy@border.gov.au

27 May 2016

Dear Ms Nuski,

Definition of “owner” – Customs Act 1901 - Draft Department of Immigration and Border Protection (DIBP) Notices (DIBPN) 2016/12 and 2016/13

Thank you for the opportunity to comment on the draft DIPBN’s.

The follow submission has been prepared by the Customs and International Transactions Committee of the Business Law Section of the Law Council of Australia.

The submission briefly reviews the legislation, previous Australian Customs Notice guidance (ACN’s) from the Australian Customs Service and the implications of the 2015 Studio Fashions case (*Studio Fashion (Australia) Pty Ltd v The CEO of Customs* [2015] AATA366). Some points regarding the need to narrow the scope of the liabilities described in the DIBPN’s are made in conclusion. These are to take account of uncertainty in the application of Studio Fashions regarding the extent to which “owner” and the provisions of section 165 are consistent with GST legislation.

1. “Owner” and the Customs Act 1901

Both draft DIBPN’s rely on goods being imported and entered and an inclusive definition of “owner”. “Owner” as a general meaning is set out in section 4 of the Customs Act 1901 (C.A):

“**Owner**” 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.”

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

Wollaston (Customs Law and Regulations, 1904) in his commentary on “owner” says that “the entity which passes the entry thereby holding itself out as ‘owner’, is responsible for the goods, and if this entity is not the true owner (i.e. consignee), it is liable to the true owner.”

For the purpose of entering goods that have been imported, subsection 68 (2) and (3) state that the “owner” of goods must enter them for home consumption or warehousing. Furthermore, section 165 (C.A) states that unpaid duty will be collected by the Comptroller General of Customs:

“(1) an amount of duty that is due and payable in respect of goods:

(a) Is a debt due to the Commonwealth; and

(b) Is payable by the owner of the goods.”

In short the person or entity exhibiting any of the categories of interest in the imported goods can present as “owner” and assume the responsibility for entering and paying the correct duty.

2. ACN's

In terms of departmental guidance on the payment of a duty liability, ACN 2000/30 provides a commentary on section 165 – Owner responsible to pay duty short paid or erroneously refunded.

“Where post entry action is necessary, the owner shown on the entry is the person on whom any section 165 demand will be made. Should this person deny liability as not being the legitimate owner (i.e. not having legal title to the goods and not having held themselves out to be the owner in terms of Customs Act section 4), the owner’s agent is considered, for the purposes of Customs Act sections 4, 165 and 183(1), to be the person on whom the demand should be made.”

ACBPN 2014/50 defines a Delivered Duty Paid (DDP) transaction as where the overseas supplier (seller) is contractually responsible for carrying out all customs formalities and for paying customs duty and GST. However, this division of rights and responsibilities between seller and buyer relates to contractual arrangements and does not of itself establish a limitation on the operation of the C.A. It should be noted that under any incoterm other than DDP, the “owner” for import entry purposes is likely to be an Australian domiciled entity or person.

S165 of the C.A establishes the power to pursue any person who could be classified as ‘owner’ of the goods as per s4 of the Customs Act for the payment of import duty. However the facility of being able to select an “owner” from a range of participants in the import supply chain as an administrative discretion has not

previously been highlighted and is not generally contemplated in importing community.

3. Studio Fashions

DIBP's statutory right to pursue duty from any of a range of interested parties involved in the importation of goods has also underpinned by a recent decision in the AAT. In *Studio Fashion (Australia) Pty Ltd v The CEO of Customs* [2015] AATA366, DIBP was able to seek full payment of duties owed for imported goods delivered to Studio Fashions, despite the company's DDP goods contract which stated that the supplier Sheng Fa was responsible for the goods until delivered (duty and GST paid). However, Sheng Fa in its capacity as the "owner" entering goods for home consumption in accordance with section 68 C.A was purposefully under-declaring the value of 47 imports to reduce its Customs payments. Studio Fashions who also satisfied the definition of an "owner" was then pursued for the under paid duty and GST, despite the fact that it had not entered the goods.

4. Taxable Importations and "owner"

As previously described, "owner" is broadly defined (s.4 C.A) as 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 good. Given that Studio Fashion was the consignee of the goods being imported, and was therefore captured by the definition of 'owner', the DIBP was able to pursue the duty. It is unclear why GST was also demanded.

In contrast to the definition of "owner", the Goods and Services Tax Act (1999) states at section 13 that the entity which lodges the import declaration (typically the importer/"owner") is responsible for the payment of the GST for a taxable importation.

13.5 (1) a and b assists in defining the entity liable to pay GST when a taxable importation occurs.

(1) You make a **taxable importation** if:

(a) goods are imported; and

(b) you enter the goods for home consumption (within the meaning of the Customs Act 1901).

At points 14 and 22, GSTR 2003/15 provides further support to section 13 and makes a telling assumption regarding the application of "owner".

“14. The entity that makes the taxable importation must pay the GST payable on the taxable importation.

22. The Customs Act defines ‘owner’ very broadly to ensure that whichever entity is named as owner on the import declaration is responsible for payment of duty, retention of records, and other responsibilities under the Customs Act.”

Section 13 of the GSTA and the 2003 ruling clearly limits the application of liability to the specific act of making an import declaration for customs purposes.

5. Concluding comments and recommendations.

Putting aside the issue of joint and several liability under the C.A, the draft DIBPN’s are consistent with the view that a category of entities or persons (as per the section 4 definition) may be held liable for duty payments for imported goods. In particular DIBPN 2016/12 restates a long held position in this matter regarding DDP incoterms contracts.

However, it is our opinion that the discretion to demand short-paid duty from any owner after the entry into home consumption of the imported goods cannot be applied to the recovery of GST. Under the GST legislation, only the entity or person who makes the entry for home consumption, make a taxable importation. That entity is responsible for acquitting the GST. As such, we recommend that the DIBPN’s provide some comment on GST, clarifying DIBP’s position in circumstances where duty has been short-paid.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Bill Cole, on 03-8603 6043 or via email: bill.cole@au.pwc.com.

Yours sincerely,



Rebecca Maslen-Stannage, Acting Chair

Business Law Section