DUTY MITIGATION STRATEGIES

A Review of Options to Eliminate, Reduce, or Recover Duties

Tariffs (duties) have been in the news a lot lately. Companies are taking a hard look at their costs and the potential impact that higher duties could have on their bottom lines. Every company should review its products, inputs, and processes to determine if there are ways to eliminate or reduce duties and mitigate risk. Under U.S. law, there are options a company can consider. While this paper is not exhaustive, nor it is legal advice, it is intended to provide a brief explanation and overview of the options available.

CONSIDERATIONS TO AVOID DUTIES

ATA Carnet

The ATA Carnet, also referred to as a "Merchandise Passport" or "Passport for Goods," is an international customs document that allows for temporary entry of goods on a duty-free and tax-free basis for up to one year, whether shipped or hand carried. In addition to simplified customs entry, the ATA Carnet eliminates duties and value-added taxes. It also eliminates the need for Temporary Importation under Bond. An ATA Carnet may be obtained from the two Carnet service providers authorized by the US Council for International Business: **Boomerang Carnets** and **Roanoke**.

Tariff Engineering

Every product is identified with a numeric code identified in the Harmonized Tariff Schedule (HTS). The HTS system is utilized by almost every country in the world. Each country posts its own import duty rate for each code. US Customs strictly enforces the requirement that products are assigned the correct code, and it is the legal obligation of importers and exporters to comply fully.

US Customs strictly enforces the proper classification of goods using the Harmonized Tariff System. Companies may not utilize an incorrect HTS code at any time. Small changes to a product sometimes change the HTS code, however. If utilized properly, this could result in significant duty savings as a product shifts from an HTS code with high tariffs to a code assess at a lower rate.

A classic example of legal tariff engineering is when a company like Converse modifies their shoes by adding a thin layer of felt to the sole, allowing them to be classified as slippers and pay a lower import duty compared to regular sneakers, essentially "engineering" the product to fall under a more favorable tariff category; this is considered legal as long as the modification is not purely cosmetic and does not deceive customs officials.

Special Classification Provisions

The United States HTS includes a list of goods subject to special duties in Chapter 98. These special duties apply to a wide range of goods in certain circumstances, such as duty waivers, goods subject to tariff rate quotas, and other considerations. Goods classified in Chapter 98 may have significantly lower duties, or no duties at all. The US HTS includes a footnote on every page when a corresponding Chapter 98 HTS code is available. Companies should consider if their goods meet the requirements to utilize the Chapter 98 code. Examples of Chapter 98 special duty provisions include articles donated for charity and U.S. goods exported and returned.

Country of Origin

In certain cases, the origin of a product can impact the duty rate. Shifting production of overseas products or components from one country to another can have a significant impact on duties. Generally, country of origin is determined using "substantial transformation," i.e. performing operations in a certain country that substantially change the product into something else. This results in a tariff shift of the product from one HTS code to another. For products with complex, multi-country production, this can sometimes be achieved by shifting certain production processes from one country to another. Country of origin rules are well defined and enforced, and companies need to understand these rules. The rules vary by product, so a companies must carefully assess their inputs and end products crossing borders to determine if this is a viable option.

Free Trade Agreement and Trade Preference Programs

The United States has 14 free trade agreements in effect that include 22 countries. Each agreement has specific rules that allow for duty free entry of qualifying goods among partners of the respective agreements. Rules of origin requirements vary by product based on factors like the value of originating inputs or a requirement that inputs in a product were made in a signatory country.

The United States also maintains several unilateral trade preference programs such as the African Growth and Opportunity Act, Qualifying Industry Zones in Egypt, Caribbean Basin Initiative, the Nepal Trade Preference Program, and the Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE). Each program allows for free or reduced duty entry for specific products meeting the unique rules of the program.

The General System of Preferences is approved periodically by Congress to reduce or remove duties on certain products from about 100 of the poorest countries around the world.

Miscellaneous Tariff Bill

Miscellaneous Tariff Bills (MTB) eliminate or reduce duties on specific products not available from U.S. producers. MTBs generally expire after 3 years. While Congress has let MTBs lapse, it is working on a package of renewed MTBs that would cover thousands of products. The MTB can help U.S. businesses save money and gain a competitive edge. For example, a North Carolina fabric manufacturer might use the MTB to import rayon fiber duty-free since rayon fiber is not manufactured in the United States.

De Minimis Shipments

De Minimis, or low-value shipments, are duty-free, informal entries for goods with a value of $800 or less. While these entries are allowed for most products, the landscape is changing rapidly. Congress is assessing the rules and how importers are utilizing the program. For most product categories, this provision in U.S. law does offer a way to ease shipping and avoid duties for small entries. Certain types of shipments are not eligible for *De Minimis* import, including those subject to antidumping or countervailing duties, absolute quotas, certain types of alcohol and tobacco products, and merchandise covered under Section 201, 232, or 301 tariffs.

China Exclusions

Since 2017, the U.S. has assessed higher duties on a wide range of products from China (Section 301 tariffs). However, there is an extensive exclusion list maintained by the U.S. Trade Representative. The U.S. assesses the list of products subject to these extra duties and the exclusion list on a regular basis, and companies are provided the opportunity to request new product exclusions and extensions of exclusions previously put into place.

CONSIDERATIONS TO MITIGATE DUTIES

First Sale Rule

First sale valuation is particularly important for industries subject to high tariffs. It allows duties to be assessed on the price a middleman pays to the manufacturer instead of the price the company pays to the middleman or a trading company handling the import. A company still pays tariffs, but they pay them on the lower value of the product rather than the price they actually paid. There are certain rules governing when a company can utilize first sale valuation, including that the sale is clearly destined for the U.S. and it must be conducted at arm's length. First sale valuation can be utilized for goods subject to the Section 301 tariffs on certain Chinese-made goods.

Foreign Trade Zones/Duty Deferral

Foreign Trade Zones (FTZ) are secure areas in the U.S. where companies can import and export goods with reduced or delayed tariffs. FTZs are governed by the U.S. Customs Bureau. The 6 FTZs in North Carolina cover a broad swath of counties. When companies are approved to use an FTZ, foreign and domestic merchandise can enter the zones (subject to governing rules) for things like storage, exhibition, assembly, manufacturing, and processing. When the finished product leaves the FTZ and is entered into the customs territory of the U.S., a company has the option to pay the duty on the finished product or the inputs (whichever is lower). That can result in significant savings. If the finished product is exported directly from the FTZ to another country, the company would pay no duties.

Another option is utilization of a Customs Bonded Warehouse. Based on the specific rules, goods can be entered duty free into the bonded warehouse for storage, repacking, manipulation, or even some manufacturing. Upon entry of the goods into the warehouse, the warehouse proprietor incurs liability for the goods under a warehouse bond. This liability is generally cancelled when the merchandise is exported, withdraw for supplies to a vessel or aircraft, destroyed under U.S. Customs supervision, or withdrawn for consumption within the U.S. after the payment of duties.

Product Valuation

When goods enter the U.S. duty is assess on the value of the product. Companies should assess whether certain costs typically included in the price can be excluded. These include buying commissions, shipping-related charges, inspection fees, and post-importation assembly charges. If these costs can be deducted from the declared value of the good (not the actual price), the results can be significant.

Also, see below on Transfer Pricing to recover duties paid.

CONSIDERATIONS TO RECOVER DUTIES PAID

Duty Drawback

Duty drawback allows a company to request a refund of certain fees, taxes, and duties paid on imported merchandise if it is later exported or destroyed.

Post-Summary Corrections

Post-summary corrections (made prior to entry liquidation) and protests (made after entry liquidation) can be utilized to secure refunds if an importer discovers opportunities after entry of the goods. Companies must provide proper legal arguments and any supporting information within the applicable timeframe.

Reconciliation

With this process, importers may file their entry summaries using the best available information they have on file and electronically "flag" estimated elements, with the mutual understanding that CBP will receive the actual information at a later date. Importers then provide the corrected information on a new type of entry called a Reconciliation. Reconciliation allows an importer to revise certain elements of an entry summary that were undeterminable at the time the merchandise was entered, such as, value, 9802, classification, and FTA. If the reconciliation entry shows a preferred classification, lower dutiable value, or FTA eligibility, the excess duties deposited at entry may be refunded.

Section 301 Refunds

In some cases, companies that paid duties on the China Section 301 tariffs in List 3 and 4A sued stating duties were wrongly imposed. The case is not yet resolved, but companies who believe they were impacted can preserve their rights to a possible refund by joining the case. There might also be the possibility to obtain refunds of duties on goods for which exclusions are in place.

Transfer Pricing

Multinational companies (MNCs) sometimes make periodic (including year-end) transfer-price adjustments to address target profit margins and to comply with global income tax requirements. Pricing between related entities be consistent with the arm's length principle—that is, reflecting the terms and conditions that would be agreed upon between independent entities. Downward adjustments may lead to lowered import values and thereby result in a duty refund.

CONCLUSION

The global international trade landscape is changing rapidly. Companies should assess their own positions and investigate strategies that mitigate risk by eliminating or reducing the tariffs they pay. If your company would like assistance or would like more information, please reach out to the International Trade Division at EDPNC.