Trusted Trader Origin Waiver Benefit - Making free trade agreements easier (and riskier)

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The first thing you need to know about the Trusted Trader origin waiver benefit, is that it does not involve the waiver of the need to satisfy the rules of origin under free trade agreements. Rather, the effect of the benefit is to remove the need for importers to hold a certificate of origin (CoO) or declaration or origin (DoO) when claiming the reduced rate under a free trade agreement. This reduces the paperwork required on a per consignment basis and should make the use of free trade agreements more attractive.

The benefit is currently available in respect of free trade agreements with Thailand, Malaysia, Japan, Korea, Singapore and Chile. It can be used to reduce duty payable at the time or import and to justify a refund. It applies to goods imported from 28 June 2019.

However, using a free trade agreement without a CoO or DoO is inherently risky. The risk is apparent when you ask yourself "what is the purpose of a certificate of origin?". The document is a declaration, usually by a government authority, that the relevant goods satisfy the rules of origin under the relevant free trade agreement. The document sets out a description of the goods, the tariff classification and the rule of origin that is claimed to have applied.

If a customs broker handling the import of goods into Australia holds a CoO, he or she can rely on that document as a reasonable basis for applying the free trade agreement. Unless there is an obvious inconsistency, the customs broker does not need to look behind the CoO.

The origin waiver benefit removes this document from the supply chain. In doing so, it removes the strongest evidence a customs broker could hold to prove the goods meet the terms of the free trade agreement. This makes life easier for the exporter who now has less red tape but increases the risk and difficulty of the customs broker's job.

Trade facilitation often means less regulation by government authorities and less interference in the supply chain. However, usually that interference is to ensure compliance with the law. If the government is not ensuring compliance with law, someone else will need to. In this case it is either the importer, or more likely, the customs broker. It creates somewhat of a mismatch, the exporter is enjoying the benefit of trade facilitation, but it is the importer, and their service provider, that is incurring the extra risk and/or cost.

Before jumping to use this benefit, importers need to ask:

1. why does the exporter not want to provide a CoO or DoO; and

2. if audited in 4 years' time, how will I prove the origin of the goods?

Reasons for not providing a CoO or DoO

There are good and bad reasons for not providing a CoO or DoO. Reasons that should not cause concern are where obtaining the document is costly or time consuming. CoOs issued by third parties usually come at a cost. This may make the process of obtaining a document uneconomical for low value consignments.

Speed in the supply chain is paramount. If the process of completing a CoO or DoO on a per consignment basis adds time to the supply chain, logistics managers will waste no time cutting the document.

CoOs and DoOs can also be inefficient for consignments made up of a great variety of small value goods. Each good must be detailed and on its own, an individual good may not attract enough duty to warrant the paperwork.

CoOs and DoOs are usually required to be completed on a per consignment basis. This is easy where there is a direct shipment from the manufacturer to Australia. However, it can become difficult where the manufacturer delivers goods to a distribution centre in a third country. At the time when the manufacturer exports the goods to the DC, and has to complete the CoO or

DoO, it may have no idea which of those goods are going to Australia.

While the above reasons are legitimate justifications for doing away with a CoO, there any some reasons that should set off alarm bells. The origin waiver benefit should not be used where the exporter is having difficulty assessing whether the goods meet the rules of origin. Difficulty in applying rules of origin are the number one reasons for underutilisation of free trade agreements. The origin waiver benefit is not the solution to this problem. Rather, it would simply be a way of concealing and magnifying the problem.

The origin waiver benefit should not be used where the exporter sees issuing a DoO as a compliance risk. If the exporter is not prepared to declare that the goods meet the rules of origin, an importer should not be prepared to claim the lower rate of duty.

An exporter may complain that an issuing body will not issue a CoO for the goods. This may be the case especially if that issuing body has concerns about whether the goods satisfy the rules of origin. Importers need to fully understand the reason why a CoO has not been issued. It will be rare that the reason can be ignored.

A similar concern may be that the issuing authority will not provide a CoO with the correct manufacturer or goods details, such as a HS code. Again, it needs to be determined if there is a legitimate difference in opinion between the exporter and the issuing authority or whether the exporter is requesting a CoO that does not match the goods. If so, ask why.

Until you know the reason why a CoO or DoO will not be provided, you should not be using the origin waiver benefit.

Evidence of origin

Once the CoO or DoO is gone the importer has lost the easiest way to prove to the Australian Border Force (ABF) that the goods qualify for the free trade agreement. How will the importer in Australia at some random point in the future prove to an ABF auditor that the goods meet the rules of origin under a particular free trade agreement?

It will be easier with related parties where it can be presumed that there will a sharing of confidential information. There will also be goods where origin is easier to prove by their very nature. For example, horticultural goods accompanied by origin document issued by a quarantine authority.

Manufactured goods with inputs from multiple countries pose a significant risk. To assess origin you will need to know the rule of origin applied, what imported goods were used in the manufacture of the finished product, the origin and value of those products and possibly, detailed confidential information regarding the costs of production.

It is unlikely that a third party will provide you with this information. As an alternative, you could request:

1. a DoO stating what rule of origin has been applied and that the goods satisfied that rule. This could be sought periodically for each different product or when there is some change to the product or the supply chain;

2. a contractual warranty that the goods are manufactured in a certain country;

3. a contractual right to have origin claims audited (possibility by a third party);

4. a commitment by the supplier to comply with any reasonable request by the ABF or the importer in respect of proving the origin of the goods.

Naturally, you should also retain all commercial documents relating to the consignment.

Risks if the goods do not satisfy the rules of origin

If the goods do not satisfy the relevant rule of origin, it will mean that there was a false statement made regarding the application of a free trade agreement that resulted in an underpayment of duty. In other words, a breach of the Customs Act 1901. This could have the following impact:

1. an obligation to pay the underpaid duty going back up to 4 years;

2. the issuing of fines. An infringement notice equal to 75% of the underpaid duty can be issued without the ABF needing to prove intent or that an offence was actually committed;

3. if the ABF believes it is warranted, Court prosecution. We believe that this would be reserved for cases of deliberate misconduct or extreme carelessness;

4. loss of Trusted Trader status.

All of these potential risks are significant.

The benefits of being a Trusted Trader are only provided to those organisations that have demonstrated a commitment to high levels of trade compliance. This commitment does not end once Trusted Trader status is obtained. The origin waiver benefit should only be used by those entities that are willing, and able, to verify the origin of the goods. A Trusted Trader that is willing to obtain this benefit, without accepting the increased obligation, is pursuing a risky path.

Trusted Traders that wish to use this benefit need to work closely with their suppliers and customs brokers to understand what is required to assess origin and put in place appropriate processes and contractual provisions. Those that can do this will achieve increase trade facilitation, reduced supply chain costs with minimal added risk.

Please contact
Russell Wiese on 03 8602 9231 or rwiese@huntvic.com.au if you would like to discuss any issues concerning the Trusted Trader Programme or free trade agreements.

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