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How Do You Prove That a Product Has Been Exported?

The question of when a product has been imported or exported is important because of the legal responsibilities that attach to, or that have moved away from, the importer or exporter or, as discussed below, to or from other parties as well, with the occurrence of the event. With regard to the filing of notice of exportations under the Automated Export System (AES), for example, there is no obligation unless there has been—or more properly, will be—a physical movement of the goods from the United States.[1]

With duty drawback[2] and also temporary importations under bond (TIB),[3] there is an obligation to prove the exportation of goods. Failure to do so results in denial of drawback refunds in the former and a liability for duty and liquidated damages in the latter.

T&E Entry

Closely related to a TIB entry is an entry for transport and exportation (T&E),[4] which differs from a normal consumption entry, as does a TIB entry, in the sense that duty is not paid.[5] Instead, the importer is stating that the goods are either (1) here only temporarily and will be reexported within a prescribed time frame (TIB); or (2) "just passing through," as they will be physically moved, under bond, from the port of entry to another customs port of entry, at which point they will be exported from the United States. Only when the importer meets all of the statutory and regulatory criteria will it receive the benefit of the exceptional, duty-free treatment that the two programs offer. As will be seen below, a failure to meet this standard may subject others besides the importer to the obligation to pay duties.

As already observed, one of the obligations of the T&E importer is to export the merchandise. A recent decision of the Court of International Trade, *C.H. Robinson*,[6] explains which standards will be applied in testing whether the importer—and other obligated persons—have met that obligation. Another important feature of that decision is the discussion on assigning the burden of proof in that effort.

C.H. Robinson

In this case, three entries of wearing apparel from China were entered at the port of Los Angeles, destined to be transported in bond for exportation through the port of Laredo, Texas. As a result, no customs duty was to be paid at entry by the importer. C.H. Robinson acted as the bonded carrier for the movement from Los Angeles to Laredo. C.H. Robinson was unable to show acceptable proof of exportation in the course of the CBP audit. Consequently, CBP demanded payment of duty of roughly $106,000 plus interest.

T&E regulatory scheme. The prescribed regulatory scheme places a burden of accountability on the carrier to deliver the merchandise at the customs port for exportation within 30 days of its receipt at the port of origin.[7] Failure to do so counts as an irregular delivery, and the carrier is subject to civil penalties.[8] The carrier's responsibility is not simply to deliver the merchandise at the port of exportation within 30 days. The carrier has a separate responsibility to submit the in-bond manifest (on form CF 7512) for the goods to Customs and Border Protection (CBP) within two working days of the arrival of the goods at the port of exportation.[9]

As for actual exportation of the merchandise, the regulations allow for flexibility at the discretion of the CBP port director, with supervised exportation as an option if the port director feels it is necessary or appropriate.[10] In the case of Laredo, at the time in

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question (2001-2002), the carrier was not obligated to report exportation separately or present the merchandise for supervised exportation. Instead, the merchandise that was reported as having arrived at the port was presumed exported. This presumption, however, was subject to verification by CBP.[11]

For the carrier that fails to fully discharge its bond obligations, the regulations authorize the sanction of liquidated damages as well as the obligation to pay the customs duties and any associated taxes.[12] This last point is worthy of attention. In addition to the well-worn path to the importer's door for duty, in this case, at least, CBP will divert its attention and look instead to a bonded carrier for the duty.

What is acceptable proof of exportation? The case turns on the level of proof necessary for a bonded carrier to present in satisfying its obligation under the statutory and regulatory scheme. To the carrier, its obligations were completely discharged when it presented a date-stamped CF 7512 showing that the goods had been delivered at the port of exportation. After all, it argued, the regulations themselves[13] state that "an acceptable proof of proper delivery" is a properly receipted copy of the in-bond document (the CF 7512). If the goods thereafter went missing, sorry, but the carrier was not responsible.

The court agreed but with a Catch-22 at play. While the carrier, with its stamped CF 7512s, had met its burden of proving delivery, it had not met its separate burden of accounting for missing merchandise under section 18.7 of the regulations. In the pre-trial orders, the court established that CBP would have to present evidence establishing the grounds for its assumption that the merchandise was "missing" and had not been exported. Once CBP presented sufficient evidence, the burden shifted to C.H. Robinson to rebut that proof and to establish by a preponderance of the evidence that the merchandise had indeed been exported.

The recitation of facts in the opinion shows that the broker at Laredo obtained copies of the CF 7512s—tantalizingly, there are no further details on the broker getting the documents. The broker took the CF 7512s to an unmonitored stamp machine in the CBP lobby and date-stamped them but the broker never took the merchandise to the CBP lot. In fact, the broker never took possession or even saw the merchandise. CBP never took possession or inspected the merchandise either.

With the commencement of a CBP audit into the circumstances, the carrier was able to present the date-stamped CF 7512s as well as three documents purported to be Mexican import certificates (*pedimentos*). Subsequent collaboration between CBP and Mexican customs officials led to analysis of the documents, which revealed discrepancies in a significant number of points. The conclusion was that the *pedimentos* were palpably fakes. A Mexican official's expert testimony was that they would have been revealed as false at the border and that the merchandise would have been seized. In short, the *pedimentos* were not valid Mexican import documents, and merchandise could not have been exported by virtue of these *pedimentos*. Because there was no record of the documents showing up in a Mexican government database or of a seizure by Mexican customs authorities, it was far more likely that the goods had been diverted into the U.S. market.

C.H. Robinson relied on the CF 7512s, driver hangtags, transport bills for the merchandise, and the Laredo broker log book. All of these might establish delivery at Laredo but none of them establish actual exportation from Laredo to Mexico. The carrier's efforts to produce records showing transport of the merchandise into and within Mexico of the merchandise came to naught. At the end of the exercise, there was no credible proof that the merchandise ever left the territory of the United States. The court greeted skeptically the carrier's attempt to argue that the goods might have been smuggled into Mexico, given the patently defective *pedimentos*. Critically, the carrier was unable to present any evidence whatever on the whereabouts of the merchandise.

The court had no difficulty in holding against the carrier and finding it liable for the payment of duties and liquidated damages. The court drew an important distinction between the responsibilities of a bonded carrier in an "immediate transportation" (IT) entry[14] without appraisement as distinguishable from a T&E entry. In an IT entry, the carrier's responsibilities are discharged on delivery at the second port. In a T&E entry, as here, the carrier is obligated to ensure the actual exportation of the merchandise. As a final shot, the court found that the carrier was responsible for pre-judgment interest.

Conclusion

The details matter. Here, the carrier was able to show delivery of the merchandise—or more correctly, to show documents (the CF 7512s) that purported to show delivery of the merchandise—at the port of exportation. But the carrier is obligated to prove exportation and not mere delivery at the port of exportation. Here, there was no proof that the broker at that port ever saw the goods. There was also no proof of the actual exportation of the merchandise from the United States or, conversely, of its importation into Mexico. Simply put, the slender reed of those CF 7512s could not support the carrier's case.[15] ●

1 See 15 C.F.R. section 30.1 *et seq.* On this regulatory environment, see Neville, Jr., "Customs and Border Protection—Guarding Both Doors," 22 JOIT 20 (March 2011).

2 19 U.S.C. section 1313; 19 C.F.R. section 191.0 *et seq.*

3 Item nos. 9813.00.05-9813.00.75, HTSUS; 19 C.F.R. sections 10.31-.40.

4 19 U.S.C. section 1553; 19 C.F.R. sections 18.1-10 and 18.20-24.

5 In a consumption entry, duty is liable on the entry of the merchandise. 19 U.S.C. section 1505.

6 Slip op. 12-134 (November 7, 2012) in 46 Cust. Bull. & Dec. No. 48 (November 21, 2012) at 15.

7 19 C.F.R. section 18.2(c)(2).

8 *Id.*

9 19 C.F.R. section18.7(a).

10 19 C.F.R. section18.7(b).

11 19 C.F.R. section18.7(c).

12 For the former, 19 C.F.R. sections 18.7 and 18.8 (b); for the latter, 19 C.F.R. section18.8 (c), which reads: "...the carrier shall pay any internal-revenue taxes, duties, or other taxes accruing to the United States on ... missing merchandise, together with all costs, charges, and expenses caused by [a] failure to make the required transportation, report, and delivery."

13 19 C.F.R. section 18.8(a).

14 19 U.S.C. section 1552; 19 C.F.R. sections 18.11-12.

15 Here, the carrier was stuck with the bill for duty plus interest but one wonders if the case might be applied to proof of export in duty drawback or TIB cases.