
Simons & Wiskin

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Reasonable Care and Provisional Pricing

In two recent decisions assessing harsh penalties against Ford Motor Company, the U.S. Court of International Trade has set guidelines under the reasonable care standard for the use of provisional pricing, including a requirement of notifying Customs and Border Protection (“Customs”) that the prices used at entry are provisional. These decisions have a direct impact on the manner in which importers must handle value information that is not final and report such information to Customs officials at the time of entry.

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In the first case, *United States v. Ford Motor Company*, Slip Op. 05-86 dated July 20, 2005, the Court held that Ford’s conduct was grossly negligent and assessed a penalty of \$3,000,000 due to its failure to use reasonable care in the valuation of its imports at the time of entry. In a companion case, *United States v. Ford Motor Company*, Slip Op. 05-87 dated July 21, 2005, the Court held that Ford’s conduct was negligent and assessed a penalty of \$17,151,923.60 due to its failure to use reasonable care in reporting additional payments to its foreign suppliers for rebates and assists.

In both cases, a key fact leading to liability was that Ford knew at the time of entry that the prices its broker declared to Customs were provisional prices and not the final prices, but this information was not disclosed to Customs at the time of entry. In addition, Ford did not advise Customs of the final price “at once” after it knew the final price. In each case, the Court focused on whether Ford followed its internal procedures, or lack thereof, and on the information which it should have had its broker submit to Customs at the time of entry.

Under the Customs laws an importer must file at the time of entry appropriate documentation to enable Customs to properly assess duties.

The court held that Ford failed to declare on the entry documents that the values stated were not final, and also failed to report the final prices to Customs “at once” after these prices were established. In commenting on what it would consider reasonable, the Court stated:

“While it was reasonable for Ford to enter the merchandise with the transaction values known at the time of entry, the Court finds that Ford’s failure to place Customs on notice that such values were not final is unreasonable. If Ford had exercised reasonable care under the circumstances, then Ford would have followed its internal procedures and alerted Customs at entry that the transaction values were provisional.”

The Court further commented on Ford’s failure to advise Customs of the provisional pricing at entry and the reasons why it violated the penalty statute:

“Customs does not allege that Ford declared inaccurate values on its entry documents. Rather, Customs alleges that Ford failed to fulfill its statutory obligations to place Customs on notice that such prices were provisional. There was uncontroverted evidence that Ford failed to place Customs on notice that the transaction values set forth on the entry papers were subject to change, and, therefore, not final transaction values. ... Accordingly, the Court concludes that Ford’s omission of material facts from the entry documents was a result of its negligent conduct. The Court holds that [the applicable statute] required Ford to

indicate on the entry documents that transaction values were not final because under pre-existing contracts Ford had with its vendors, the price actually paid or payable was subject to change.”

In the first *Ford* case, the Court noted in addition that the repeated failure to advise Customs of price changes can be construed as a wanton disregard of its obligations under the customs laws:

“Ford failed to account for the value of the engineering changes when it entered its merchandise. On multiple occasions Ford failed to promptly notify Customs promptly of the value of the engineering purchase orders. This repeated failure constitutes a material omission [under the penalty statute] because the engineering charges had an impact on the dutiable value of the FN-36 dies. Consequently, Ford’s knowledge of and repeated indifference for the value of the engineering changes in its submissions to Customs constitutes a wanton disregard of its obligations.”

The Court concluded that:

“... Ford knew that prices declared at entry were not the final dutiable value and failed to notify Customs that such values were subject to change. Ford’s intentional indifference to the existence of the engineering purchase orders constitutes an utter lack of care and therefore, a violation of 19 U.S.C. §1592.”

Finally, Ford’s policy of maintaining a Customs compliance manual was not sufficient to avoid liability in the two cases. The Court ruled that Ford’s having a compliance manual in place does not by itself prevent Customs from establishing that the importer’s actions under the circumstances were grossly negligent:

“Customs may meet its burden by demonstrating that Ford disregarded or was indifferent to the internal compliance measures it put in place. Ford’s compliance measures relieve Ford from gross negligence liability only if (a) such mechanisms set forth procedures and guidelines that, if followed, ensured Ford’s fulfillment of its statutory duties, and (b) Ford made a good faith effort to follow its internal compliance measures.”

Ultimately, the Court found that Ford had failed to following its internal manual.

The *Ford* cases illustrate that if an importer uses provisional pricing, whether for valuing its merchandise, for assists, for licensing fees, or for other elements of value, it is imperative for the importer to adopt procedures to assure that such pricing information is communicated to Customs at the time of entry and when the price become final. The broker should be instructed to advise Customs that the price is a provisional price, usually by including as part of the entry package a ”provisional pricing” notice. Moreover, once the final price is established, the broker must be immediately advised and instructed to communicate this information to Customs.

For further information on procedures to comply with the *Ford* decisions, please contact our offices.

HMT Litigation to End

The U.S. Court of International Trade recently issued an Order which will effectively end the litigation challenging the validity of the HMT on both imports and exports based a petition by the Government which sought dismissal of all pending HMT cases.

Thus, all pending HMT cases will be dismissed after December 1, 2005, unless a party files a motion seeking a stay of dismissal by September 26, 2005, showing good cause why its case should not be dismissed. Plaintiffs whose pending cases raise HMT claims combined with other non-HMT claims also have until September 26, 2005, to file a motion to sever non-HMT claims.

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This newsletter is for informational purposes only and is not intended to set forth legal opinions. If the reader has any questions regarding the information contained herein, appropriate counsel should be consulted.

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