Agents and Employees May Be Liable for Customs Violations

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A recent decision of the Court of Appeals for the Federal Circuit (CAFC) has caused a great deal of concern in the importing community because of its broad interpretation of Section 592 of the Tariff Act of 1930, as amended, which is the most commonly used Customs penalty statute (19 U.S.C. § 1592). In *United States v. Trek Leather, Inc.*, the CAFC held that Section 592 of the Tariff Act of 1930, as amended, allows U.S. Customs and Border Protection (Customs) to impose civil penalties on corporate employees, officers, and agents when these individuals make material misrepresentations or omissions in import transactions. *United States v. Trek Leather, Inc.,* No. 09-CV-0041 (Fed. Cir. Sept. 16, 2014) (en banc). Customs penalties under Section 592 are tied to the level of culpable conduct as determined by Customs. In cases of fraud, the maximum penalty is the domestic value of the goods. For gross negligence, the maximum penalty is four times the loss of revenue and simple negligence carries a maximum penalty of two times the loss of revenue.

In *Trek Leather*, the importer failed to declare the value of fabric which it had supplied free of charge to the manufacturer of its imported suits. Customs law and regulations require that the value of the fabric be added to the value of the goods as an "assist." The importer of record of the suits at issue, Trek Leather, Inc. (Trek), would clearly be liable for the failure to declare the dutiable "assist" at the time of entry. The murkier legal issue, however—and the issue which has caught the attention of the importing community—is whether the president and owner of Trek, Mr. Harish Shadadpuri, could himself be personally liable for the failure to declare the correct value of the merchandise. The CAFC held that Mr. Shadadpuri could be held personally liable.

Mr. Shadadpuri imported men's suits through several companies which he wholly or partially owned, including Trek. In 2002, his company had been investigated by Customs and Customs found that the company had consistently undervalued imported goods by failing to include in dutiable value the cost of fabric provided to the manufacturer free of charge. During this investigation, Customs explained to Mr. Shadadpuri that fabric provided free of charge to the maker was a statutory addition to value (an "assist") which must be included in the dutiable value of the goods. The company admitted the undervaluation and paid Customs the additional duties due.

In 2004, in the transactions giving rise to the recent CAFC decision, Mr. Shadadpuri again imported men's suits. In this instance, Trek was the "importer of record", i.e., the company that formally imported the suits and declared their value to Customs. The declared value was based on the manufacturer's invoices; however, those invoices again did not include the value of the fabric assist that had been provided. Mr. Shadadpuri examined all documents related to the importations and forwarded them to Trek's customs broker, which entered the suits based on the value stated on the manufacturer's invoices. Not only did Mr. Shadadpuri know of the requirement to declare the assists through knowledge gained in Customs' prior investigation, he admitted this to Customs. Customs filed suit in the Court of International Trade (CIT) for the underpaid duties resulting from the failure to declare assists and for penalties under Section 592.

The CIT found that both Trek Leather and Mr. Shadadpuri were guilty of gross negligence and imposed a penalty of four times the loss of revenue. In finding Mr. Shadadpuri personally liable for the increased duties and penalties, the CIT noted that Mr. Shadadpuri had been responsible for reviewing and submitting the import documentation to Customs and had knowledge of the proper dutiable value due to his involvement in the prior 2002 investigation. The Court noted that Section 592 provides that no "person" shall by fraud, gross negligence, or negligence "enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States" or "aid and abet" any person in doing so. Finding that the word "person" is not limited to the actual importer and does not exclude corporate officers, the Court held Mr. Shadadpuri personally liable for the remaining unpaid duties and for civil penalties in the amount of $534,420.32. *United States v. Trek Leather, Inc.*, 781 F.Supp. 2d 1306 (Ct. Int'l Trade 2011).

Mr. Shadadpuri appealed and the CAFC reversed the CIT's decision. The CAFC held that Mr. Shadadpuri was not personally liable, emphasizing that he only acted in his capacity as a corporate officer when "entering" the goods. The Court noted that although Mr. Shadadpuri played an active role with regard to the entry, it was Trek Leather that formally entered the goods. The CAFC then concluded that Mr. Shadadpuri could not be held personally liable under Section 592 for unlawful "entry" of the goods in the absence of demonstrated personal fraud, personal aiding and abetting of corporate fraud, or piercing the corporate veil. *United States v. Trek Leather, Inc.*, 724 F.3d 1330 (Fed. Cir. 2013).

At the Government's request, the CAFC then vacated this decision, and granted an en banc rehearing. On rehearing, the CAFC reversed its earlier decision and held that Mr. Shadadpuri was in fact personally liable for the penalty. The CAFC stated that only two issues had to be decided: 1) whether Mr. Shadadpuri was a "person" covered by the penalty provision; and 2) whether his actions came within the "enter, introduce, or attempt to enter or introduce" language of this provision. The CAFC held that the answer to the first question was straightforward: Mr. Shadadpuri was a "person," based on the term's plain meaning and the legislative history of the statutory language. The CAFC then held that Shadadpuri had indeed "entered, introduced, or attempted to enter or introduce" merchandise in violation of the law. Unlike its earlier decision, the full Court focused on the term "introduce" instead of the more technical term "enter", and pointed to a 1913 Supreme Court decision in deciding that "controlling precedent has long established that 'introduce' gives the statute a breadth that does not depend on resolving the issues that 'enter' raises." See *United States v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913). The CAFC concluded that Mr. Shadadpuri's actions were readily covered by the term "introduce" because he brought the goods to the threshold of the entry process by moving them into Customs' custody in the United States and providing documents that falsely stated their value for use in introducing them into United States commerce. In sum, the Court found that when Mr. Shadadpuri did everything short of the final step of filing the Customs entry form, he "introduced" the suits into United States commerce. The Court further explained that Mr. Shadadpuri's liability under Section 592 was based on the longstanding agency principle that an agent who commits a tort is generally liable for the tort along with the principal. Significantly, the Court explained that Mr. Shadadpuri's liability under Section 592 did not require piercing the corporate veil and was not based on the fact that he was an officer or owner of the corporation.

The *Trek Leather* decision overturns the generally accepted concept that the importer of record is the only entity which normally is liable for Customs law violations and raises the possibility that anyone who is involved in the import process, including corporate officers, employees, and agents, can be held personally liable for Customs law violations. This underscores the need for importers to have in place good compliance programs that cover all significant risk areas. In our

experience, for any compliance program to be successful, it must be tailored to the importer's specific processes and must be monitored to ensure it is being followed.

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