The end of the Canadian “iPod Tax” saga

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Authors

Claudia Feldkamp
Toronto

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A 16-month advocacy campaign has achieved a $27-million victory for importers of televisions, television monitors and other assorted electronic devices, including MP3 players, Walkmans and iPods. The *Certain Televisions Remission Order* (SOR/2014-0088) ("9948 Remission Order") under section 115 of the *Customs Tariff,* published in the Canada Gazette, directs the repayment of $27 million in duties collected in 2012 and 2013. And with the 9948 Remission Order, the federal government is confirming that, in fact, there is not now, and never actually was, "tax" on "iPod" imports to Canada.

The 9948 Remission Order is the culmination of an extensive campaign by the **Canadian Importers 9948 Fair Treatment Coalition** ("9948 Fair Treatment Coalition") an unincorporated business coalition of leading Canadian importers, retailers and international manufacturers, created by Fasken Martineau on behalf of Dominion Customs Consultants Inc. for the single purpose of redressing the unfair effects of a verification audit initiative by the Canada Border Services Agency ("CBSA").

Despite its cryptic title, the 9948 Remission Order has potentially broad implications for importers of electronic devices and, more generally, for any importer of goods relying on the tariff relief provisions in Chapter 99 of the *Customs Tariff*.

What is a Remission Order?

Section 115 of the *Customs Tariff* allows a political, discretionary decision to be made to grant importer(s) relief. It may be of use where it is determined that the conduct of officials in interpreting the *Customs Tariff* creates serious unfairness to the importer. It is also an avenue available to the importer to seek equitable relief.

Specifically, section 115 of the *Customs Tariff* provides as follows:

> "The Governor in Council may, on the recommendation of the Minister [of Finance] or the Minister of Public Safety and Emergency Preparedness, by order, remit duties."

Importers rely on CBSA officials every day for assistance to ensure proper compliance with the *Customs Tariff*, a highly technical and complex code. Canada's reputation as a stable, predictable and fair place to do business is enhanced by the availability of section 115 as a means of seeking equitable relief in cases of detrimental reliance on the CBSA.

Why Was a Remission Order Sought?

In summary, the CBSA retroactively imposed significant duties on certain electronic devices that long had been imported duty-free into Canada under tariff item 9948.00.00. ("Tariff 9948"). Many of these electronic imports were reviewed and approved under the CBSA's Advance Rulings system. In 2012, for the first time, the CBSA invoked certain record-keeping requirements under the *Imported Goods Regulations* (the "Regulations") as the basis for denying these products duty-free status retroactively. According to the CBSA, importers were required to produce "end-use" certification from the end-consumer confirming the electronic devices were, in fact, being used in a manner consistent with the conditions of Tariff 9948. Any importer unable to produce this certification would be assessed duties with retroactive effect. As no importer or retailer in Canada could certify the actual use of these products, typically sold to individual Canadian consumers for personal use, all importers were required to pay the retroactive duties and to refrain from further use of Tariff 9948 for future imports. After many months of active engagement by the 9948 Fair Treatment Coalition with federal politicians, Ministers and officials at the Department of Finance and the CBSA, the federal Ministers of Public Safety and Finance were persuaded that these record keeping requirements were never intended to require end-use certification from or otherwise implicate Canadian retail consumers.

Customs Notice CN 13-015 "Clarification of the *Imported Goods Records Regulations*" ("9948 Customs Notice") was published on June 28, 2013 to provide guidance to importers on the application of the Regulations to consumer products imported using Tariff 9948. The 9948 Customs Notice specifically confirmed that end-use certificates for Tariff 9948 were not required at the consumer level. Instead importers would be now required to 'attest' to the intended use to be made of the goods. While the Customs Notice was issued by the CBSA to "clarify" the record keeping obligations on importers using Tariff 9948, importers continue to await further guidance on this clarification as to the required form and content of this new "attestation" for imported goods to be eligible for the tariff relief of Tariff 9948.

Almost ten months after issuing the 9948 Customs Notice, the federal government's Treasury Board approved the remission of duties in the amount of $26,965,456 to 23 importers, many who participated in the 9948 Fair Treatment Coalition.

Implications of the 9948 Remission Order for Canadian importers

On the "end-use program"

The 9948 Remission Order and associated policy statements on the application of the record keeping requirements provided for in the Regulations have potentially significant implications for the future of the CBSA's "end-use" program, and the record keeping obligations associated with importation of goods into Canada.

Chapter 99 of the *Customs Tariff* contains a number of tariff items, including 9948.00.00, which have been characterized by the CBSA as "end-use" tariff items. "End-use" tariff items contain conditional language such as "for use in"; "for use by"; "for use on", etc. CBSA has interpreted this "use" condition as an administrative requirement for the application of Chapter 99 duty relief, which requirement must be met on a continuous "actual use" basis for four years after importation. There is no legislative source for this administrative requirement and, in the case of goods sold to individual consumers, no feasible way to administer an "end-use program". It is unclear whether or how the CBSA can continue to require a four-year continuous actual use requirement for goods imported under "end-use" tariff provisions in Chapter 99 of the Customs Tariff, or what the specific "attestation" record-keeping requirements will look like for products imported

for sale to retail consumers.

On the CBSA's Administration of the Customs Tariff
The availability (and exercise) of ministerial discretion to overrule CBSA administrative decisions, confirms that the CBSA must act within its authority. Recourse to the Canadian International Trade Tribunal is readily available for the appeal of administrative decisions by the CBSA, but it is not the only remedy available to aggrieved importers. Government Ministers and other elected officials care about the administration of Canada's borders, and can and will act to protect Canadians when they deem necessary.

Coalitions and Campaigns
The 9948 example illustrates that some trade and corporate challenges are best tackled through a multi-member campaign, which can leverage the power of a collective to advance effectively an issue within government. In some cases, the strength of businesses united in a common cause is more potent than the effort of one company. To discuss the nature of the campaign that is right for your needs, contact: Claudia Feldkamp, +1 416 868 3534, cfeldkamp@fasken.com or Dan Brock, +1 416 865 4513, dbrock@fasken.com.