



Freight Forwarder Liability

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By Peter A. Quinter

pquinter@becker-poliakoff.com

TEL 954.985.4101

FAX 954.985.4176



A prominent freight forwarder recently agreed to settle export violation allegations by the U.S. Department of Commerce's Bureau of Industry and Security (BIS) by paying a \$250,000 penalty. Export control regulations typically are within the jurisdiction of the Bureau of Industry and Security in Title 15 of the Code of Federal Regulations (CFR). The BIS alleged that the forwarder had knowingly misrepresented the value of exports on the Shippers Export Declarations (SED). Forwarders typically complete and file the SED on-line through the Bureau of the Census' Automated Export System (AES) on behalf of the exporter, technically referred to as the "United States Principal Party in Interest" (USPPI). Any errors on the form, whether completed by the USPPI or the forwarder, may result in: (1) denial of the export, (2) penalties, and (3) seized merchandise that was to be exported.

Often, a freight forwarder will be requested by an exporter to undervalue the export shipment. Typically, the reason is that the exported merchandise, when it has to be declared to the customs administration in the country of importation, will pay customs duties and taxes based on a percentage of the value of the importer merchandise. So, the lower the value of the exports, then the lower the value of the imports, and the less customs duties and taxes the importer must pay to clear the merchandise. If the freight forwarder has knowledge that the real value is not being declared by the exporter to the forwarder, yet the forwarder completes the AES, the forwarder has just conspired with the exporter to break the law. It may not seem to be wrong since the U.S. Government does not lose any money because exports are not taxed, but the false statement on the export document is a violation of

law enforced by the BIS. For example, a false statement on the AES is a violation of 15 CFR 764.2.

The AES system is the most important means by which the U.S. Government knows in advance what merchandise will be exported from the United States. The AES system information includes, among other things, a description of the merchandise, the country of destination, a description of any export licenses, the ultimate consignee, the date of departure, the name of the carrier, and, of course, the value of each type of the exported items. As of 2003, filing of the Shippers Export Declaration on the Automated Export System for all items on the Commerce Control List (CCL) and the United States Munitions List (USML) was mandatory as required by the Bureau of the Census regulations at 15 CFR Part 30. Previously it could have been done by paper.

On the old paper SEDs, there was a little noticed CERTIFICATION which read:

I certify that all statements made and all information contained herein are true and correct and that I have read and understand the instructions for preparation of this document, set forth in the "Correct Way to Fill Out the Shipper's Export Declaration." I understand that civil and criminal penalties, including forfeiture and sale, may be imposed for making false or fraudulent statements herein, failing to provide the requested information, or for violation of U.S. laws on exportation.

Exporters, and forwarders who conspire with them, were always subject to civil penalties, and the former Bureau of Export Administration (BXA) did pursue penalties against both for \$11,000 per violation. With the change of name from BXA to BIS, the Federal agency also is more aggressive in enforcing the law (i.e. issuing more penalties). Importantly, not only more penalties, but the monetary penalty for each violation has been increased to \$50,000 from the former \$11,000. The forwarder who settled the export allegations with the BIS was lucky that the violations occurred in 2001 and 2002 when the monetary penalties were much lower, otherwise it would have been millions of dollars in penalties to BIS, which would probably not have settled for just \$250,000. Now, the "Power of Attorney" form that now must be provided to freight forwarders who complete the SED through AES includes the statement:

The U.S. Principal Party in Interest hereby certifies that all statements and information contained in the documentation provided to the Authorized Agent [i.e. freight forwarder] relating to exportation will be true and correct. Furthermore, the U.S. Principal Party in Interest understands that civil and criminal penalties may be imposed for making false

or fraudulent statements or for the violation of any United States laws or regulations on exportation.

The recent Settlement Agreement between the forwarder and the BIS is a good example of the punishment of the forwarders who attempt to make false statements on export documents.

Moreover, criminal violations may result in a \$1,000,000 fine and 5 (years) imprisonment. Finally, export violators may be subject to criminal prosecution and civil penalties five years after the export occurred.

The next time you, the freight forwarder, are asked to falsely lower the value of an exported shipment, think twice. If, on the other hand, the exporter or freight forwarder had already participated in a fraud on any information regarding the SED or AES transmission, it is not too late. Rather than wait for BIS or U.S. Customs and Border Protection (CBP) to discover the false statement, it may be corrected using the voluntary self-disclosure procedures set forth in the BIS regulations at 15 CFR 764.5. It is prudent to consult with your international trade attorney before filing any such disclosure or when responding to any inquiry by BIS or CBP officers. ■

Peter Quinter is the Shareholder in charge of the Customs & Trade Law Department at the law firm of Becker & Poliakoff, P.A., located in Ft. Lauderdale, Florida. Mr. Quinter may be contacted for any questions or comments at (954) 985-4101, or by email at pquinter@becker-poliakoff.com.
