20 April 2020

Indirect Tax Alert

US announces limited policy for 90-day deferral of payment on certain imports due to COVID-19 hardships

Executive summary

The United States (US), in response to impacts to US importers triggered by the ongoing COVID-19 crisis, provided a mechanism for deferral of duty deposits in late March. However, the mechanism only lasted a few days before being revoked on 27 March 2020.

As the crisis has unfolded, many importers and trade associations have been pressuring the Trump Administration for relief, while others have asserted the need to retain protective measures in place as supporting the fragile US manufacturing industry against foreign competition.

The Administration announced on 19 April 2020 that it will provide import payment deferral on certain imports to importers meeting criteria of suffering significant financial hardship from the pandemic's supply chain disruption.

Detailed discussion

Background

US President Donald Trump signed an Executive Order on 18 April 2020 providing the Secretary of the Treasury with the ability to issue an extension of estimated payments for importers facing a significant financial hardship due to COVID-19.[1] Coinciding with this Executive Order, US Customs and Border

Protection (CBP) delivered an announcement via the Cargo Systems Messaging Service (CSMS) on 19 April, which further outlined the scope of this Executive Order.[2]

Importantly, the CSMS announcement noted that the 90-day extension for payments of duties, taxes, and fees is not available to all entries. Specifically, deferment relief is not granted for entries impacted by any of the following:

- Antidumping duties
- Countervailing duties
- Section 232 of the *Trade Expansion Act of 1962* duties (Section 232)
- Section 201 of the *Trade Act of 1974 duties* (Section 201)
- Section 301 of the *Trade Act of 1974 duties* (Section 301)

CBP's previous approach to payment deferral

CBP provided an initial announcement, delivered on 20 March 2020 via the CSMS, that indicated that CBP would be accepting importer's requests to delay payments of duties, taxes, and fees on a case-by-case basis.[3] On 26 March, in addressing the subject of payment deferral of duties, taxes, and fees, CBP had noted via the CSMS that CBP would no longer be accepting new requests to delay payments of duties, taxes, or fees, while reserving the ability to allot additional days for payments in certain situations.[4] On 27 March, CBP, in clarifying the announcement made the previous day, announced via the CSMS that payments of duties, taxes, and fees that should have been paid from 20 March 2020 through 26 March 2020, must have been initiated on 27 March 2020.[5] Additionally, in this announcement, CBP stated that payments owed to CBP on or after 27 March should be paid pursuant to standard business practices.[6]

President Trump's Executive Order regarding certain estimated payments

At the behest of many companies, and counter to the previous approach taken by CBP regarding payments of duties, taxes, and fees within the COVID-19 context, President Trump signed an executive order on 18 April 2020 providing the Secretary of the Treasury with the ability to issue an extension of estimated payments for importers facing a significant financial hardship due to COVID-19.[7]

The CSMS announcement on 19 April from CBP outlined the scope and operational details of this Executive Order. These are summarized below:

- The 90-day extension for the payment of duties, taxes, and fees applies to formal entries entered or withdrawn from a warehouse for consumption in March 2020 or April 2020. No interest will accrue on delayed payments within the 90-day period.
- The 90-day extension for the payment of duties, taxes, and fees does not apply to entries impacted by antidumping duties, countervailing duties, Section 232 duties, Section 201 duties, and Section 301 duties. If an entry includes merchandise that is subject to one of these duties as well as merchandise not subject to one of these duties, the entire entry is disqualified for the 90-day extension.
- The 90-day extension does not apply to other debt payment deadlines, such as duties, taxes, fees, and interest to be paid on liquidation or reliquidation.
- Significant financial hardship is defined in the CSMS as the operations of the relevant importer being partially or fully suspended in March 2020 or April 2020 resulting from a government authority order, and as a result, the gross receipts of the relevant importer from 13-31 March 2020 or April 2020 are less than 60% of the gross receipts for the same period from 2019. While the CSMS did not define gross receipts, a later issued FAQ page has confirmed CBP is using the definition found at 26 CFR 1.993-6.[8] While an importer need not file financial documents to support their claim, they must retain supporting documentation.

It is unclear from this CSMS announcement what would occur (e.g., penalties assessed) should an importer mistakenly take advantage of this 90-day extension. As such, importers should be careful in ensuring that relevant requirements are satisfied prior to taking advantage of this 90-day extension.

Finally, CBP issued a second CSMS announcement discussing payment instructions relating to the 90-day extension.[9] Importers are encouraged to review this CSMS for payment instructions applicable to particular methods of payment.

Actions for businesses

Companies importing goods into the US should follow the guidance promulgated within this Executive Order and associated CSMS announcements. In doing so, companies should identify whether their imports are affected by trade actions and whether the significant financial hardship requirement is met. Companies should then decide whether deferral of payments of duties, taxes, and fees would be beneficial for company operations. If so, specific actions include:

- If importers import items subject to the remedies noted (e.g., Section 301 duties) as well as those which are not subject to the remedies, they should consider filing separate entries for these items as not to taint an otherwise eligible entry.
- As the deferral applies to March and April entries, companies need to act quickly.
- Those companies actively filing drawback claims should take note of CBP guidance that filers delaying duty payment during the 90-day postponement period due to financial hardships, should not file drawback claims until payments have been properly made on the import entry(s).

Since merchandise subject to duties, taxes, and fees owed as a result of trade actions are not within the purview of this Executive Order and associated CSMS announcements, impacted companies should continue to review and explore potential duty mitigation or duty deferral strategies for goods subject to trade actions. Immediate steps companies can consider are:

- Mapping their complete, end–to–end supply chain to fully understand the extent of products impacted, potential costs, alternative sourcing options, and to assess any opportunities to mitigate the impact, such as tariff engineering to address potential increases in tariffs.
- Identifying strategies to defer, eliminate, or recover the excess duties paid such as bonded warehouses, Foreign Trade Zones, substitution drawback and Chapter 98.
- Where goods are sourced and/or manufactured in multiple countries, conducting comprehensive origin determinations to facilitate compliance as well as to consider opportunities for mitigation.
- Exploring strategies to minimize the customs value of imported products potentially subject to the additional duties such as First Sale for Export, unbundling non-product related costs from product pricing, and reevaluating current transfer pricing of imported products, being careful to align the income tax transfer price with the customs value to avoid inventory basis limitations under Internal Revenue Code Section 1059A.

Additionally, US distributors who purchase from related parties will almost certainly have transfer prices impacted by the imposition of trade action duties. Along with the strategic importance of mitigating duty impact while aligning the income tax and customs approaches, mechanics for reporting any transfer pricing adjustments to US Customs should also be reviewed. This process may be particularly complex when duties are present for only a portion of the year, and in many cases, actions need to be taken in advance of importations. US Customs has very specific rules for reporting adjustments to prices made after importation, such as transfer pricing adjustments. These rules require that the importer take specific actions before importation of goods for which prices may be adjusted, including adding customs specific language to transfer pricing policies.

In the event that downward transfer pricing adjustments are made to the prices of imported merchandise post-import, the importer may be entitled to duty refunds from CBP for the overpayment of duties, assuming all requirements are met. In similar regard, in the event that upward transfer pricing adjustments are made to the prices of imported merchandise post-import, the importer may owe CBP duties or the underpayment of duties upon previous import.

Endnotes

1. See Executive Order on National Emergency Authority to Temporarily Extend Deadlines for Certain Estimated Payments.
2. See CSMS #42423171 – COVID-19 – 90 Day Postponement of Payment for the Deposit of Certain Estimated Duties, Taxes, and Fees.
3. See CSMS #42097586 – Additional Days for Payments due to COVID-19.
4. See CSMS #42161666 – Additional Guidance for Entry Summary Payments Impacted by COVID-19.
5. See CSMS #42179313 – Additional Guidance for Entry Summary Payments Impacted by COVID-19, 27 March 2020.
6. Ibid.
7. See Executive Order on National Emergency Authority to Temporarily Extend Deadlines for Certain Estimated Payments.
8. 26 CFR 1.003-6 defines gross receipts of a person for a taxable year as: (1) The total amounts received or accrued by the person from the sale or lease of property held primarily for sale or lease in the ordinary course of a trade or business, and (2) Gross income recognized from all other sources, such as, for example, from – (i) The furnishing of services (whether or not related to the sale or lease of property described in subparagraph (1) of this paragraph), (ii) Dividends and interest, (iii) The sale at a gain of any property not described in subparagraph (1) of this paragraph, and (iv) Commission transactions as and to the extent described in paragraph (e) of this section.
9. Ibid.

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