
❖ SPC&B Update ❖

A Newsletter for Clients of Sharretts, Paley, Carter & Blauvelt, P.C.

April 8, 2013

A Clause in Purchase Order Making Seller Responsible for Air Freight in the Event of Late Shipment May Not Be Sufficient to Allow for Deduction of International Freight Charges at Time of Customs Clearance



In a very recent court case (Slip Op. 13-45, April 3, 2013), Judge Goldberg of the U.S. Court of International Trade held that certain international freight charges paid by the seller were not deductible from the price paid by the importer, notwithstanding that a clause within the purchase order shifted freight responsibility from the purchaser to the seller in the event of late shipment. The operative clause read:

LATE SHIPMENT OF CONTRACT: Unless prior approval by ... is obtained, the results of late shipment of each contract due to factory error or cause ... are:

1. 15-21 days from the agreed purchase order ship date vendor pays air charge ground freight. (This means the goods are altered and buyer only pays the ocean portion of the total air freight bill.)
2. 22-28 days late- Vendor pays 100% [of] all freight via air using a freight company/forwarder of buyer's choice.
3. 29-34 days late- Point 2 above and the F.O.B. price paid per item will be reduced 10% ...

The Court concluded that the presence of such clause in the purchase order did not in and of itself establish that the terms of sale were amended prior to shipment, even though the vendor actually paid the international freight charges. The Court stated that additional evidence was required to establish that the actual price paid or payable had been amended to include the costs of international freight that were to be paid by the vendor.

In view of this court decision, we strongly recommend that, in addition to having an applicable standard late shipment clause in your purchase orders, when the circumstances arise to invoke such clause, the importer should also, prior to shipment, actually amend each relevant purchase order to show the revised terms of sale by expressly stating that the price includes international freight charges and that the terms of delivery have been changed to C&F or CFR. Furthermore, the commercial invoice should also expressly reflect the amended terms of sale.

If you have any questions, please contact Gail Cumins at gcumins@spcblaw.com or Donna Shira at dshira@spcblaw.com or call us at 212-425-0055.

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