

## Thailand Modernises Customs Act

The new Customs Act B.E 2560 (2017) was published in the Royal Gazette on 17 May 2017 and will take effect on 13 November 2017. It is the culmination of eight years of negotiations and deliberations, against the backdrop of massive political changes. The implementation and enforcement of the new Act will be the biggest development in Thailand's customs environment since the first customs law was introduced in B.E. 2469 (1926).

Despite having undergone several updates, certain aspects of the current Act of 1926 have posed difficulties for importers, exporters, business operators and even the Customs authority. For example, many of the criminal provisions are onerous, create prosecution incentives and shift the burden of proof to the accused. Penalties are significantly out of proportion to the alleged wrongdoing. The current Act also lacks transparency, for example, there is little clarity in respect to the post-clearance audit and appeal process.

The new Act of 2017 contains some welcomed changes for the business community.

### Incentives and Rewards

A common complaint of the business community relates to the incentive and reward payments (or "commission") that customs officers are entitled to. Under the current Act of 1926, the commission amounts are quite high, which is the oft-suspected reason why there are often many officers involved in a case, why cases drag on, and why non-existent issues were raised. Businesses have thus been drawn into long, frustrating defences, often costing thousands of dollars, simply because of the reward incentives.

The new Act of 2017 seeks to address this concern by reducing the incentive and reward amounts. In general, depending on the circumstances, the commission could range from 10 – 20 percent, which

will be determined based on different methodologies.

- The commission for a customs audit differs, depending on the type of non-compliance by the taxpayer (such as smuggling, false declarations, etc).
- The commission amount for voluntary audits remains the same.
- The commission paid to a customs officer and a whistleblower will be limited to 5 million baht per case.

### Presumed Liability

The current Act of 1926 imposes strict liability on directors and officers, unless they are able to prove that they are not involved in the offense, have not admitted to the offense, or have acted reasonably to prevent the offense. The new Act changes this principle.

Under the new Act of 2017, if the offender is a juristic person, and if the offense had occurred due to an order or act of any director, manager, or person responsible for business operations, that person will face the same criminal penalties as the juristic person. Moreover, if the director, manager, or responsible person has neglected their duty, which thus caused the juristic person to carry out an offense, the director or manager will also face the same criminal penalties as the juristic person.

This change reflects the changes made under the Act Amending the Law on the Criminal Liability of Representatives of Juristic Persons B.E. 2560 (2017) which was published on 11 February 2017 and became effective the next day. It provides legal consistency with the decisions of the Constitutional Court, which had invalidated the legal presumption on the joint criminal liability for managing directors, directors, managers or any persons responsible for the operation of the juristic persons.

## Penalties

Under the current Act of 1926, some offenses — such as importing or exporting goods with the intent to avoid paying duty — can result in a maximum term of imprisonment of 10 years, and a fine of one-half to four times the amount of the duty evaded, or both. The court can also seize the goods even if no person is found liable.

The penalties under the new Act of 2017 for various offences appear to be generally lower than those under the current Act:

- **Smuggling** - subject to (1) a penalty equal to four times the price of the goods (which includes the duty); (2) imprisonment not exceeding 10 years; or (3) both. In addition, the smuggled goods shall be forfeited.
- **Duty evasion** - subject to (1) a penalty of 0.5 to four times the amount of duty shortfall; (2) imprisonment not exceeding 10 years; or (3) both. In addition, the goods may be forfeited.
- **Non-compliance in respect of restricted or prohibited goods** - subject to (1) a penalty not exceeding 500,000 baht; (2) imprisonment not exceeding 10 years; or (3) both. In addition, the goods may be forfeited.
- **False document declaration** - subject to a penalty not exceeding 500,000 baht.
- **Provision of false information** - subject to (1) a penalty not exceeding 500,000 baht; (2) imprisonment not exceeding six months; or (3) both.
- **Making or using fake or counterfeit customs documents, stamps, signatures and labels** - subject to (1) a penalty not exceeding 500,000 baht; (2) imprisonment not exceeding six months; or (3) both.

## Surcharge

Under the new Act of 2017, a monthly surcharge can be collected, based on one percent of the duty payable or duty shortfall amount, but capped at the amount of duty payable or additional duty payable. The surcharge may be reduced as prescribed by the Ministerial Regulation or Director-General Regulation.

## Seizure Authority of the Director-General

In regard to a person who has failed to pay duty, the Director-General is authorised to seize or sell the

said person's property by way of an auction without requiring a court order. This will smoothen the enforcement process although it is not clear how it will be policed in reality.

## Timeframe for Customs Post Clearance Audit

The new Act of 2017 introduces a 5-year time limit for the Customs authority to carry out a post clearance audit. This time limit is aligned with the record retention requirements under the Customs Act, and is in line with such practices in other Asian countries.

## Time Limits for Duty Evaluation

Pursuant to the new Act of 2017 and the Customs tariff law, Customs officers are authorised to evaluate duty within three years from the date of submission of an import or export entry clearance form. In situations where the Customs officer cannot make an evaluation within the allotted time period, the Director-General of the Customs Department can extend the deadline by a maximum of two years. If the Director-General has evidence that the duty payer intended to avoid paying duty, the Customs officer has an additional five years to evaluate the duty.

In the past, companies had problems when Customs officers sought to evaluate duties on entries going back very much farther in time. In many of such cases, companies would often not possess the required documents which would have been either lost or destroyed. The new time limits for duty evaluation would provide greater certainty in regards to Customs' actions. On their part, importers and exporters should ensure that the relevant documents are maintained for the required time period and as part of an ongoing compliance program.

## Appeal Consideration Period

A big step forward under the new Act of 2017 is the stipulation of a specific timeframe (180 days) for the Appeal Commission to conclude on a matter brought before it. In the past, companies did not have clarity on the appeal process or having lodged an appeal, were made to wait indefinitely for the result.

Under the new Act, the 180-day timeframe will run from the date of receipt by the Appeal Commission of an appeal application complete with all required documents and evidence. An extension not exceeding 90 days may be granted.

The Appeal Commission is an internal appellate review panel within the Customs Department. If necessary, the Finance Minister has the authority to appoint an additional Board of Appeal or several Boards of Appeal.

### Duty Refund

Under the new Act of 2017, the duty refund period is extended from two years to three years. In other words, a taxpayer can claim a duty refund within three years from the date of importation or exportation, as the case may be.

### Goods Under Customs Custody

Under the new Act of 2017, imported goods will be deemed “overtime goods” if they have been in the custody of the Customs authority for more than 30 days (plus 15 days for clearance), and are subject to seizure. Owners who have goods in transit or being transhipped through Thailand will need to tightly control the goods’ movement to ensure their smooth onward transportation. Owners should also carefully monitor the transit time of a shipment while awaiting a sale.

### Import Licenses

The current Act requires that an importer must have their import license at the time of import which is at the time when the vessel on which it is being transported, enters a port. The new Act changes the time of import for restricted goods to the time just prior to taking the goods out of Customs Control.

The changes are in general, very positive although we have yet to see the supporting sub-legislation, regulations and guidelines. It will also depend on just how much consideration has been providing the customs officers with suitable training to assist in changing their mindset from an operational perspective.

Companies should start familiarising themselves with the changes in the customs law and consider how the changes and additional requirements in the new Act may affect their business operations. They should be prepared when the changes are implemented on the effective date.

Companies should also be aware that just last year Thailand’s Customs and Revenue Departments started sharing their taxpayer database information with each other. So each department can now access the other’s database. That, from a Customs perspective will be very advantageous with the ongoing increase in information required to be filed under the Thai Revenue Departments transfer pricing documentation requirements. Also Customs will have access to information on companies who may be paying withholding tax on royalty or other payments to overseas entities but which may not have been reported to customs by the importer. Customs would therefore be in a position to seek the inclusion of that payment in the value of any imports and the importer will need to build their case for its exclusion.

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