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Fundamentals Of Customs Declaration And Valuation

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Customs laws are administered by the Royal Malaysian Customs Department (RMCD) which falls under the purview of the Ministry of Finance. The principal customs legislation in Malaysia is the Customs Act 1967 (Act) which is supplemented by various subordinate legislations including the Customs Regulation 1977 and the Customs (Rules of Valuation) Regulations 1999.

As a result of the development of more sophisticated business models and growing reliance on electronic processes and online transactions, basic regulations and prescribed procedures (some introduced 40 or so years ago) are often complemented with a number of administrative procedures or “guidelines”. However, some of these procedures or modifications to import and export rules are not always reflected in the legislations. Therefore, in practice, consultations are initiated by taxpayers with the RMCD for administrative rulings or concessions especially in relation to tax and duty exemptions.

Recent trends have shown that there has been increased focus on post-import audit resulting in retrospective duty being imposed as a result of non-compliance with declaration and valuation rules. This alert seeks to briefly describe and highlight the laws and offences relating to the Customs declarations and valuation methods.

Duty To Make Declaration

The Act requires declarations to be made on dutiable as well as non-dutiable goods which are imported or exported in accordance with the Customs Forms as prescribed in the Second Schedule to the Customs Regulation 1977. These declarations may be made by the importer or exporter personally or by their agent. Until these declarations are made, the goods cannot be delivered inwards or shipped outwards. Generally, goods can only be imported or exported at places prescribed by the RMCD (i.e. goods imported or exported by sea must be done at designated ports and goods

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imported or exported by air must be done by at designated airports).

Declaration On Import And Export Of Goods

For goods that are kept in warehouse, the declaration must be made at the warehouse before their removal from Customs control, and in any case, within one month from the date of landing. However, the RMCD can, by notice in writing, require that the declaration be made within 3 days of such notice. Goods imported by road must be declared at the place of import upon the arrival of the goods. In the case of *PP v Chang Sin Chan and Another* [1994] 3 AMR 1975 evidence showed that the goods were initially left on a clearing on a hill on the Sarawak side of the border at 2.15 pm. The lorry driver could not produce any documents to show that the goods were legally imported. The owner of the goods explained that he intended to declare them after he had checked the quantity of the goods, but the High Court was not convinced by the explanation. The High Court held that the explanation was contrary to the proviso to Section 75 of the Act. The High Court held that “*The proviso stipulates that declaration should be made on arrival of the goods at the place of import*”, a clear indication that the court adopted a strict reading of the law.

With regard to exports, goods must be declared “immediately before export” at a clearance depot, Customs station or Customs port where they are loaded or at the place of export and any such export duty or other leviable charges are to be paid then. The exporter must personally or through his agent make the declaration in the prescribed form to a proper Customs office and produce the goods to the Customs officer at any place so directed.

The declaration in connection to imported or exported goods must give a full and true account of the number and description of packages, of the description, weight, measure or quantity and value of all such dutiable good, and of the country of origin of such imported goods or the country of destination of such exported goods. Failing to make correct declaration of import and export is an offence under the Act, and it does not matter if he subsequently admits possession or makes a declaration before being searched by the RMCD.

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It will then be too late as the offence has already been committed.

Valuation For Customs Duty

As mentioned, import and export declaration will need to include information on the value of the goods since customs duty is payable as a percentage of “value” often called “assessable value” or “customs value”. According to Section 12 of the Act, the power to fix the value of any dutiable goods lies in the Minister of Finance by way of a notification in the *gazette*.

Section 2 of the Act defines “value” in the following manner:

- “(a) *in relation to imported goods, means customs value as determined under the regulations made under subsection 142(35B); and*
- (b) *in relation to goods to be exported, means the price which an exporter would receive for the goods calculated to the stage where such goods are released by Customs at the place of export”*

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Basic principles with regards to valuation of imported goods can be found in the Customs (Rules of Valuation) Regulation 1999 whereby the primary basis for valuation of imported goods is based on the transaction value. In addition, regulation 5 provides for further adjustment to be made to the transaction price based on various factors listed such as the incorporation of packing costs, royalty costs, transportation and insurance costs, and deductions may be made for costs associated with transportation within Malaysia and assembly costs after the goods are imported.

In *Levi Strauss (Malaysia) Sdn Bhd v Ketua Pegarah Kastam* [2012] 2 CLJ 476, the High Court held that the RMCD has no basis in law to add the royalty to the transaction value of imported goods as the elements of Regulation 5(1)(a)(iv) of the Customs (Rules of Valuation) Regulations 1999 were not satisfied. The High Court held that the license agreement did not contain any provision requiring the taxpayer to source for

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the products from any related parties. It did not make any reference or condition in relation to purchase of the products by the taxpayer. In fact, the taxpayer held the option to determine how it intended to source its products. The decision to choose the source was for pure commercial reasons such as to achieve better costing through economics of scale, price, commercial friendliness, quality and consistent quality of products. Thus, the RMCD's contention that the royalty was a condition of the sale of the goods for export to Malaysia because royalty was paid to the foreign brand owner company by the taxpayer did not hold water.

The High Court also observed that the royalty payment was based on the net sale price of the post-importation sales and not the purchase price paid for the import of the product. The royalty was also payable for all products sold irrespective of whether these products were sourced locally or imported from overseas. This was different from the RMCD's calculation of products which was based on the purchase price paid at the point of importation. In fact, the royalty was also paid for the right to reproduce the products in Malaysia and this was expressly excluded under Regulation 5(1)(a)(iv). The High Court held that the royalty and the purchase price of the products purchased by the taxpayer were separate and independent transactions and this decision was subsequently affirmed by the Court of Appeal.

Effects Of Non-Compliance

To verify the accuracy of declarations made, RMCD may on demand, require the importer or exporter or his agent, to produce documents like invoices, bills of lading or certificates of origin. Section 133(1)(a) of the Act makes it an offence to make any untrue or incorrect declaration. As stated above, the Act makes it a duty to give "a full and true account" of the goods. In *PP v Yong Nam Seng* [1964] 30 MLJ 85, the accused was charged and convicted for signing an incorrect declaration where the number of dutiable goods were understated. In *Tan Khoon Eng v PP* [1992] 2 MLJ 132, the accused was convicted because the declaration stated 21 tons of goods when it should be 29.7 tons. In the case of *Ahmad Abdul Rashid v PP* [1982] CLJ Rep 383, the accused declared that they had some fresh fruits on entering the Federation from Singapore when in fact there was 5 cartons

of Kodak photographic processing papers in the said car. In essence, the offence is committed upon proof of the particulars being incorrectly declared.

Not only that, the absolute nature of the offence in Section 133(1)(a) is made clear by Section 133(2) which expressly nullifies defences based on inadvertent use or making of declarations, certificates or documents, or absence of criminal or fraudulent intent or lack of understanding or misinterpretation of incomplete interpretation. Essentially, Section 133(2) dispenses with the need for *mens rea* as held in *Yong Nam Seng* (supra).

Conclusion

Navigating the legal framework and procedural rules in relation to administration of customs matters is often not a straightforward process and can be frustrating for companies engaging in import and export business. However, it is trite that ignorance of the law is not a defence and taxpayers must take precautionary stance in maintaining Customs compliance by actively clearing up any doubts and seeking clarification on the laws. In this regard, companies may want to outsource their Customs declaration matters to a trusted and fully vetted third-party (i.e. authorised Customs agent, consultant or tax solicitors) which can significantly reduce costs and time associated with Customs compliance.

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