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CRIMINAL LIABILITY AND THE THAI CUSTOMS ACT

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Thailand is a country in which violation of customs laws can create criminal liability. However, such criminal liability may not necessarily be easy to assign. One reason is that Thailand's 83 year-old customs law, the Customs Act B.E. 2469 (1926) (the "Act") contains several ambiguities. These ambiguities have provided a significant challenge for Thai authorities trying to enforce this criminal law. Nevertheless, the Thai government's efforts to tackle "customs evasion" and "customs avoidance" have become more high-profile in recent months. Pursuant to an August 2009 press release from the Thai Customs Department, customs revenues in July 2009 are thus far the highest of the year, despite the current global economic downturn. The press release also states that customs officers have been instructed to improve "efficiency" in customs collections. This raises public concern as to whether such stringent law enforcement is justified. The problem, however, lies not in enforcement of the law per se, but in the law itself. If change is desired, such change should come first with revisions to the Act.

The first problem involves definition of the terms "customs evasion" and "customs avoidance." According to some legal scholars from the Thai Customs Department, the terms "customs evasion" and "customs avoidance" are two different offenses under Section of 27 of the Act. While "customs evasion" refers to import and export without passing through customs (smuggling), "customs avoidance" refers to import and export with false declaration for goods passing through customs.

On the other hand, the Office of the Council of State (OCS) and the Anti-Money Laundering Office (AMLO) are of the opinion that "customs avoidance" is classified under "customs evasion". Therefore, as the Anti-Money Laundering Act includes "customs evasion" as a predicate offense, but does not include "customs avoidance" as a predicate offense. However, despite this absence, AMLO has requested that the Customs Department also report "customs avoidance" cases to it for further action. As a consequence, an alleged offender's assets may be subject to confiscation by AMLO for violation of acts of "customs avoidance". This has been a practice guideline although there is no Supreme Court precedent to support such exercise.

Besides the aforementioned definition confusion, application of strict liability under the Act has proven problematic. What distinguishes this law from other criminal laws is that the Act adopts the concept of strict liability where "intent" or "negligence" is not required. Further, one cannot be excused for violation for lack of "intent" and mere "negligence". What is unclear is whether strict liability under Section 16 of the Customs Act Number IX ("Act No. IX") applies to the offense of "customs avoidance" under Section 27 of the Act. Section 16 of the Act No. IX provides that "the execution of any act provided in Section 27 and Section 99 of the Customs Act B.E. 2469 shall be deemed to be an offense, irrespective of the existence or non-existence of any willful intent or negligence."

Such provision contradicts Section 27 of the Act, which defines "customs avoidance" as being "involved in any manner in carrying, removing or dealing with such goods in any manner to avoid or attempt to avoid the payment of customs tax or of any duties to avoid or attempt to avoid any provisions of law and restrictions relating to the importation, exportation, landing, warehousing, and delivery of goods 'with the intention' to defraud the government tax."

As above, the question is whether a "customs avoidance" offense requires "intent" as an element for a cause of action. Should a defendant be convicted because of mistakenly declaring the wrong number for customs clearance? Alarmingly, some Supreme Court decisions suggest that the offense does not require "intent" by reasoning that Section 16 of the Act No. IX clearly excludes "intent". However, many Supreme Court decisions guide otherwise by ruling that offenses under Section 27 of the Act do not require "intent", arguing that "customs avoidance" offenses, as specifically provided in the statute, must have been committed with the intention to defraud the tax. This is an example of the ambiguities and apparent inconsistencies that currently exist in the customs laws. One way to resolve this problem would be to separate all offenses in Section 27 into different sections under the Act and to explicitly identify whether "intent" is required.

Another problem in the Act that should be resolved is the ambiguity surrounding the provision on officer and director liability. Violations under the Act are offenses for which an officer or director can be presumed criminally liable under Section 115 quarter, which states that "in the cases where an offender liable . . . under the Act is a juristic person, a 'managing director,' a 'managing partner' or a 'person responsible for the operation of such juristic person,' [that person] shall be liable . . . for such offence unless it can be proven that such offence was committed without his knowledge or consent or [if] he has acted reasonably in preventing such offence."

The Act fails to clearly define the terms

(i) "managing director",
(ii) "managing partner", and
(iii) "person responsible for the operation of juristic person".

Without the definition of each term, one may question who should be the defendant if the company has a CEO and a chairman but no "managing director". Another question may be whether all staff of the company should be liable simply because each of them contributes to the company's operation. As a common practice for the Thai authorities, all directors listed in

the company registration would be named as defendants. However, the real solution is for these three terms to be clearly defined to minimise the confusion and reduce the number of unnecessary defendants.

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