

## Director liability in criminal customs claims court ruling signals change

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Companies dealing with customs disputes in Thailand face a number of significant decisions in determining how they should respond.

One possible option is to consider settlement with the Customs Department at a pre-litigation stage or even after claims have been filed. Specifically, a company facing a customs dispute has the right to enter into a settlement agreement with the Customs Department under sections 102 and 102 bis of the Customs Act of 1926.

When considering a settlement, the Customs director-general or a person appointed by the director-general will be in charge of settlement negotiations and has the legal authority to settle any customs offence in accordance with prescribed customs regulations.

Alternatively, a company may have the option of filing a claim against the Customs Department directly if it disagrees with a Customs Board of Appeals determination or wishes to defend charges filed by the relevant authorities under the Customs Act.

One factor that should be evaluated carefully before a company decides to settle, file or defend customs claims is whether there are any criminal charges pending against the company and its authorised directors. In fact, it is possible for a customs dispute to involve the concurrent filing of both civil and criminal customs claims. This can have significant criminal implications for a company's authorised directors – persons who may not have any history of criminal or civil wrongdoing.

The Customs Act provides a mechanism by which criminal wrongdoing of a director can be presumed. For example, under the Act, if a company is charged with a criminal customs offence, its directors can be named as individual accused parties.

Under section 115 quarter of the Customs Act, an offender who is a juristic person, a managing partner or other person responsible for the operation of the juristic person shall be presumed liable for the criminal wrongdoing unless he or she can prove the offence was committed without his or her knowledge or consent or that he or she acted reasonably in the circumstances in preventing the offence from occurring. As written, this section essentially presumes strict liability for a company director, shifting the burden on the director to prove his or her innocence.

Needless to say, the presumption of liability can have a significant impact on a company's strategic approach in choosing whether to settle or defend a criminal customs claim.

In fact, the historic impact of section 115 quarter has been to place company management in a position whereby they are more likely to settle than defend.

On March 28, 2012, a groundbreaking Constitution Court decision in a direct-sales case (Decision 12/2555) directly addressed the controversial issue of presumed liability in criminal claims.

It affects the applicability of a number of Thai laws presuming officer and director liability including section 115 quarter of the Customs Act.

In its decision, the Constitution Court ruled section 54 of the Direct Sales and Direct Marketing Act, with language nearly identical to that contained in section 115 quarter of the Customs Act, was contrary to the fundamental right of an accused, as protected by the constitution, to the presumption of innocence when charged with a criminal offence. For that predominant reason, the court ruled that section 54, in applying a presumption of guilt to an accused, is unenforceable.

Applying the same standards as considered by the Constitution Court in its review of section 54 of the Direct Sales and Direct Marketing Act, section 115 quarter of the Customs Act, which contains a presumption of guilt for those deemed to control a juristic entity charged with a customs offence, shall be similarly unenforceable and is, in fact, unconstitutional. This is supported further by the fact that section 211 of the constitution provides that decisions of the Constitution Court shall apply to all cases not already determined as final judgements by the courts of Thailand.

The decision of the Constitution Court reasserts the constitutional mandate not only provided by the constitution but also recognised widely in the practice of criminal law worldwide. As such, those responsible for filing criminal claims under the Customs Act should not consider charging a company director via section 115 quarter without first ensuring there is sufficient evidence to prove that the director committed the alleged offence.

The requirement for such an assessment will now place more pressure on prosecutors to consider and rely upon the direct actions of the accused directors rather than presuming liability based solely on the directors' authority or responsibility.

It is hoped the support offered by the Constitution Court decision will provide companies and their management with a fair opportunity to consider all approaches to resolving customs disputes without fear of the implications for those responsible for leading the companies.