

Customs Settlements: Guidelines for Waiver of Prosecution

Published: 22/08/2014 at 06:00 AM

Newspaper section: [Business](#)

Every year, numerous companies and individuals face criminal prosecution for violating Thai customs law. The penalties include significant fines and even incarceration. This can have a profound effect on both a company and its employees and agents, and even those who may have unintentionally violated customs laws.

In some circumstances, however, reaching a settlement with Thai customs authorities may be a cost-effective solution that provides closure for companies and targeted individuals and also results in a full waiver of liability for wrongdoing. This article explores the customs settlement process and the internal customs guidelines for waiver of prosecution.

The Customs Department has the power to review and investigate all customs transactions it believes may not be in compliance with Thai customs law. The Department of Special Investigation (DSI) has similar authority to conduct customs investigations that fall within its jurisdictional reach.

In cases where the Customs Department concludes through investigation that the applicable customs law has been violated, it has the authority to levy substantial taxes, duties and fines against an accused company and individuals. The DSI and law enforcement agencies also have the power to recommend criminal prosecution for alleged wrongdoing.

The Customs Department also has specific authority to settle claims by waiver of prosecution. Section 102 of the Customs Act gives the director-general of the department the authority to waive prosecution where an accused consents to settlement by a fine. Such a waiver also acts as an indemnification of the accused against further prosecution for the alleged wrongdoing.

The same provision gives the director-general the authority to prosecute a claim irrespective of the accused party's willingness to settle if the director-general believes settlement is not proper under the circumstances.

There is an additional authorisation step that must be considered internally for settlements and waivers of prosecution at the Customs Department for claims that are of high value and considered "serious". This includes, but is not limited to, claims of intentional under-declaration of customs duties and related offences.

Specifically, Section 102 bis of the Customs Act provides that certain delineated offences with value in excess of 400,000 baht must be brought before a designated Customs Department settlement committee for authorisation before settlement and a waiver of prosecution can proceed. The committee consists of representatives of the Customs Department, the Finance Ministry and the Office of the National Police, all of which have an interest in the decision on settlement and waiver of prosecution and can provide additional oversight of the settlement process.

In recognition of customs claims settlements being a viable solution for those charged as well as a cost-effective means for the Customs Department to obtain revenue without prosecution, the department issued order No.10/2554, which provides internal guidelines for settling by fine in return for a waiver of prosecution.

Notably, there are various levels of wrongdoing that may determine whether settlement is viable and involves a waiver of criminal prosecution under the applicable guidelines. For example, misstatements as to quality, which do not affect duty, may be settled under the guidelines with a modest fine in most cases.

More serious criminal charges such as those for intentional under-declaration of customs duties are considered on a case-by-case basis, typically requiring substantial settlement in return for waiver of prosecution. However, if the alleged wrongdoing involves violations of non-customs laws such as a case of forgery, then the Customs Department has no authority to waive prosecution.

The foregoing highlights the settlement options that may be available to parties facing criminal customs inquiries. While opportunities exist that could encourage settlement, end ongoing investigations and waive prosecution, settlement should not be considered lightly. Once made, settlement is irreversible and could have long-standing financial, legal and practical implications for those concerned.

For example, a settlement may involve admissions on the part of an accused that could affect future business decisions for the company or individuals accused of wrongdoing. Furthermore, there is the prospect, however slight, that a prior settlement could have some effect on future inquiries and investigations.

It is therefore critically important that a company has in place systems and protocols to respond to customs inquiries. Of equal importance, the company and its counsel should review and assess the legal allegations carefully before making the significant decision on whether to settle claims in return for waivers of prosecution.

In many cases, settlement makes legal and financial sense, but in others settlement may not be in the best interests of the accused.