

Long Awaited Changes to the Thai Customs Act Signed Into Law

Written by: Michael Ramirez

On Wednesday, May 17, 2017, Thailand published its new Customs Act B.E. 2560 (2017) in the Royal Gazette, the official journal in which new laws are announced. The Act, effective 180 days from publication, repeals the outdated and controversial Customs Act B.E. 2469 (1926) and its prior amendments.

The historic new Act represents the culmination of many years of drafts, consultations, and sometimes contentious debate. Throughout the process, the government collaborated closely with private sector partners to ensure an improved customs process. The new Customs Act joins twenty-four tax laws that the government has rewritten or amended to meet international standards in order to better support trade and investment and to improve Thailand's transparency and competitive advantages. Ultimately, the new law is a significant step forward adding clarity and improving fairness for all parties involved in the customs clearance process.

The previous Customs Act of 1926 included a number of ambiguities, creating difficulties for corporations to ensure compliance. For example, the Customs Department defined "customs evasion" and "customs avoidance" as different offenses under Section 27 of the Act; however, the Office of the Council of State (OCS) and the Anti-Money Laundering Office (AMLO) considered "customs avoidance" a sub-offense of "customs evasion." Similarly, the previous Act was ambiguous on officer and director liability, especially as the Act failed to define "managing director," "managing partner," and "person responsible for the operation of a juristic person."

The previous Act also allowed a customs reward-sharing regime that distorted incentives during enforcement. The Director-General of the Customs Depart-

ment possesses the authority to "reward" customs officials and third-party whistleblowers for reporting or otherwise successfully pursuing instances of customs evasion (smuggling) and customs avoidance (false declarations).

The reward system is in stark contrast to those practiced in many other countries such as Britain, India, and Pakistan, where rewards have strict limitations. Although a reward system can help identify customs avoidance and evasion, overly generous rewards can create incentives to pursue or facilitate wrongdoing, or introduce bias during audits and investigations.

Other troubling aspects of the previous Act included shifted burdens of proof, penalties significantly out of proportion to the alleged wrongdoing, strict liability even in cases where under-declaration of customs duty was a mistake, and an opaque post-clearance audit and appeal process.

The new Act addresses several of these substantive issues and offers relief to importers subject to the historically difficult customs environment. In enacting the new law, the Thai National Legislative Assembly acknowledged these well-known challenges and indicated the desire to resolve outdated or inconsistent provisions. The government noted that the ambiguity created difficulties not only for the private sector, but hampered law enforcement. In addition, the government noted the growth of international trade requiring improved "customs formality and other relevant procedures in order to be efficient and consistent with international standards, which will increase [Thailand's] competitiveness."

A number of the changes are expected to vastly improve the customs clearance process. The new Act eliminates strict liability presumptions for customs duty

evasion and now requires "willful intent" or "negligence." Presumed liability for officers, directors, and other authorized persons is also eliminated.

The rewards regime will be revised dramatically, particularly with caps on the amounts for rewards. For example, whistleblowers will now only receive a maximum of Baht 5 million.

The new Act also standardizes and sets clear timelines for post-clearance audits and Board of Appeal reviews. Under the current regime, appeals can take years to resolve. Similarly, the new Act imposes clear deadlines for the return of duty guarantees.

Another critical change includes revisions to the method for calculating criminal fines. Previously, penalties were determined using four times the combined price of goods plus the customs duty. The new calculation will be based solely on the amount of duty evaded and will be limited to a multiplier between 0.5 and four times the base amount. Courts will now have discretion in calculating criminal fines.

The new Act also introduces different degrees of penalties for different offense levels. For example, the penalty for smuggling is more severe than for duty evasion. The Act also relinquishes jurisdiction of offenses relating to restricted goods.

The new Customs Act of 2017 represents a significant improvement in fairness and clarity that will benefit not only the private sector, but the Thai government itself. Around 80 sub-regulations are expected to be announced before the new Act becomes effective in mid-November 2017. ■

Michael Ramirez is Senior Consultant at Tilleke & Gibbins. He can be contacted at michael.r@tilleke.com