



CORPORATE COUNSELLOR

New and improved penalty scheme under the 2017 Customs Act

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Businesses involved with the Thai customs clearance process have been anxiously awaiting changes aimed at improving customs laws. These long-awaited changes come with the passage of the Customs Act BE 2560 (2017).

The new act, which will take effect from Nov 13, 2017, repeals the outdated and controversial Customs Act BE 2469 (1926) and its prior amendments and seeks to address many of its shortcomings. This article focuses on the substantial revisions to the Customs Act's penalty scheme, revisions that will have a direct impact on both businesses and individuals.

Previously, most criminal penalties relevant to business operators were prescribed under Section 27 of the Customs Act. For example, all customs offences, including smuggling and attempting to commit a customs offence, were classified together under Section 27. This offered little flexibility in terms of punishment and frequently failed to account for the considerable differences in the range of wrongdoing by an offender. The new Act seeks to deal with this classification problem by having penalties governed by three distinct sections: 242, 243 and 244.

Another key change is an amendment to the requirements of intent for claims of customs duty evasion. Under the previous act, Section 27 presumed strict liability for all included offences, even where violations may have been due to error rather than intentional or negligent misconduct.

Section 252 of the new Act, while still retaining some strict liability presumptions, now eliminates the highly controversial presumption of intent for customs duty evasion claims under Section 243. This is critical to supporting an accused party's presumption of innocence by shifting the burden back to the prosecution to show "wilful intent" or "negligence".

The new Act also revises the penalty scheme to distinguish between degrees of customs offences and prescribes new methods for calculating criminal fines. Previously, under Section 27, penalties were calculated at four times the combined price of goods plus the customs duty, and/or imprisonment for up to 10 years. While some discretion existed for claims settled before reaching court, once at the trial court stage the only penalties the court could impose were the four-times fine and/or imprisonment. Because these stringent penalties did not distinguish between types of offences and offered the courts no discretion in calculating fines, penalties were often out of proportion with the wrongdoing.

Under the new Act, penalties are set forth in Sections 242, 243 and 244. Section 243 applies to duty evasion and calculates criminal penalties using only the actual amount of duty evaded. The penalty multiplier is also limited to a range of one-half to four times the base amount. Penalties can still include imprisonment for up to 10 years, instead of or in addition to the fine.

The new Act also introduces different degrees of penalties for different levels of offences. For example, the penalty for smuggling is more severe than for duty evasion. Section 242 prohibits importing or exporting items that have "not duly passed through customs". The penalty is four times the price of the article including the duty, and/or imprisonment for up to 10 years. In addition, the item will be forfeited regardless of whether the person is punished.

Section 244 prohibits customs evasion (importing items for the purpose of evading "restrictions or prohibitions with respect to such article") and imposes a penalty of 500,000 baht, and/or up to 10 years in jail. The court may also order the article forfeited regardless of whether there is anyone to be punished.

It is important to note that, once the new Act becomes effective on Nov 13, it will apply retroactively to the benefit of any pending case, including claims that have not yet been subject to final settlement or judgement. This may provide a welcome opportunity for companies and individuals currently facing criminal customs claims.

The new Act substantially improves the customs clearance process by improving clarity and fairness. A priority for lawmakers was the overhaul of the penalty scheme, including the removal of strict liability, separate penalties for different types of offences, and reduced penalties compared with the previous scheme.

Ultimately, these improvements stand to benefit both the public and the private sectors. With supporting regulations expected to be announced in the near future, further clarity is also expected.

While there are still opportunities to improve the new law further and some existing challenges for companies seeking to ensure customs compliance, it goes a long way towards clarifying and correcting many of the shortcomings of its predecessor.

This article was prepared by Kasamesunt Teerasitsathaporn, partner, and Michael Ramirez, senior consultant, from the Dispute Resolution Department of Tilleke & Gibbins. The authors would also like to thank Mark Hsien for his valuable contribution. Please send any comments or questions to Andrew Stoutley at andrew.s@tilleke.com

About the author

Writer: Tilleke & Gibbins