

Trade & Customs e-Alert

3 OCTOBER 2019

Ownership Of Goods Detained By Customs

The transshipment process can be abused by irresponsible businesses that may attempt to evade paying Customs duty by claiming that the imported goods are in transshipment when that is not the case. The imported goods would then be smuggled into the country instead of being exported. Customs routinely examines the declaration forms of goods imported into the country to prevent such abuses and will immediately seize any items that it suspects have been imported without any duty payment.

Seriborneo Capital Sdn Bhd is a recent High Court decision in respect of such goods in transshipment and also examined the powers of Customs to seize such goods.

Background Facts

The taxpayer's main business was the transshipment of goods including rice and sugar. It ordered 20,800 bags of rice (**Goods**) from a company in Thailand (**Consignor**) and arranged for the Goods to be delivered to the Sandakan Port for the purposes of transshipment to the consignee (i.e. the buyer of the Goods). However, the Consignor inadvertently delivered the Goods to the Kota Kinabalu Port instead. Upon arrival in Kota Kinabalu, the Goods were detained by Customs on the suspicion that the transshipment papers were not in compliance with the Customs Act 1967 (**CA**). The Goods were then forfeited for further investigation.

The taxpayer proceeded to file a civil suit against Customs to claim ownership over the Goods and damages for the losses suffered as a result of the wrongful detention and seizure.

Taxpayer's Contentions

The taxpayer argued that Customs had wrongly detained the Goods for these reasons:

- The Consignor not only made a mistake in delivering the Goods to the Kota Kinabalu Port, but also in declaring the

Contact persons:



Datuk D. P. Naban
Senior Partner
Tax, SST & Customs Practice
T: +603 6208 5858
E: dpn@lh-ag.com



S. Saravana Kumar
Partner
Tax, SST & Customs Practice
T: +603 6208 5813
E: sks@lh-ag.com

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Goods for import instead of transshipment in the Bill of Lading.

- The taxpayer had obtained the Transshipment Permit to tranship rice and sugar to the ports in Kota Kinabalu, Tawau and Sandakan.

Customs' Response

The response from Customs can be summarised as follows:

- The detention and seizure of the Goods were carried out in accordance with Section 135(1)(a) of the CA, which makes it an offence for the importation of any uncustomed goods without an import permit.
- The taxpayer had contravened the terms of the Transshipment Permit by failing to furnish Customs with a Transshipment Manifest, thereby rendering the Transshipment Permit inoperative.
- The taxpayer made no move to rectify the mistake made by the Consignor until three weeks after the Goods were unloaded at the Kota Kinabalu Port.

Decision

Upon hearing the witnesses and examining the evidence tendered by both parties, the High Court was satisfied that the Goods were shipped for import, and not transshipment, purposes as claimed by the taxpayer. Accordingly, the taxpayer had committed an offence under the CA by carrying out importation without an import permit and, as such, Customs had rightly detained and seized the Goods. The High Court's grounds can be summarised as follows:

- The taxpayer could not rely on the Transshipment Permit to contend that the shipment of the Goods was for transshipment purposes, as it had contravened the terms and conditions of the Transshipment Permit.
- The JKED No 4 form received by Customs clearly showed that the taxpayer intended the Goods for Inward Manifest.

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Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122
Email: tax@lh-ag.com

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- If there was indeed a mistake by the Consignor, the taxpayer should have taken corrective measures as soon as possible, and not three weeks after the Goods were unloaded. The taxpayer's conduct was regarded as an afterthought by the High Court.

The High Court also disallowed the taxpayer's claim for ownership over the Goods on the grounds that the taxpayer had failed to make a valid claim within the one-month period as prescribed under the CA. It was held that in the absence of any valid claim within the one-month period, the Goods may be deemed as forfeited under the CA.

The High Court, in arriving at its decision, emphasised the credibility of the Customs' and the taxpayer's witnesses and their respective testimony in court. For instance, the taxpayer's witness testified that he was not aware that the Transshipment Permit was subject to terms and conditions. However, this statement was found by the High Court as inconceivable, given that the permit was issued to the taxpayer, where the witness was a director and a shareholder. Such finding by the High Court had adversely affected the credibility of the taxpayer's witness which caused his testimony to be unreliable. Further, the High Court also commented that the taxpayer's counsel had failed to dispute any of the evidence provided by the officers from Customs.

Additionally, the High Court held that the taxpayer had failed to provide any evidence to support its contention and rebut the contentions raised by Customs during the course of the hearing. The taxpayer failed to call the Consignor as a witness to testify on the alleged mistake made in delivering the Goods to the Kota Kinabalu Port and the error in the Bill of Lading. The taxpayer also failed to provide any explanation for the delay in taking the corrective measures to rectify the mistake made by the Consignor. As a result, the contentions by the taxpayer were regarded as a bare denial which does not carry any weight towards proving the taxpayer's case.

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Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122
Email: tax@lh-ag.com

Conclusion

The *Seriborneo Capital* case demonstrated the importance of taking immediate action to address any genuine mistake in the importation process. The case also demonstrates the importance for taxpayers to maintain a proper record of documents. A bare assertion which is unsupported by any documents or evidence will not be given much consideration by the court. On a similar note, taxpayers must respond to all the allegations raised by Customs as failure to do so will jeopardise their case.

In respect of claiming ownership over goods which have been seized by Customs, reference is made to the *Tay Swee Teck* case, in which the Court of Appeal held that the one-month period to file a claim against the seizure will be construed strictly and that the seized goods will automatically be deemed as forfeited if no claim is made within the period.

If you have any queries pertaining to customs duty and importation or transshipment of goods into Malaysia, please contact our Tax, SST & Customs partners, **Datuk D P Naban** and **S Saravana Kumar**, at tax@lh-ag.com

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Contact persons:

Datuk D. P. Naban

Senior Partner
Tax, SST & Customs Practice
T: +603 6208 5858
E: dpn@lh-ag.com

S. Saravana Kumar

Partner
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T: +603 6208 5813
E: sks@lh-ag.com

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