

European Customs & Trade Communique



Edition 21, December 2007

Welcome to the twenty-first edition of our Newsletter on Customs and Trade issues that hopefully will be of interest to you. In this edition we have identified some important changes which will come into effect from January 2008. As per previous editions, we have also included references to Trade Bulletins from our Customs & International Trade Network throughout the world.

We would like to wish all our contributors and readers Seasons Greetings and a prosperous New Year

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If any of the articles in this month's edition are of interest and you would like further details, please contact the author or your local PwC contact - their details are listed at the back of this Communique.

If you have any comments on these articles or would like a particular topic discussed in detail in the next edition, please contact the editor:
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Important changes coming into effect from 1 January 2008

Authorised Economic Operator (AEO)

- We have discussed Authorised Economic Operator (AEO) status in previous editions of this bulletin. It is an EC initiative whereby in exchange for maintaining high levels of security throughout their supply chain, companies can gain recognition from Customs that they are a secure trader and obtain the associated privileges. AEO will come into effect from 1 January 2008.

Duty Suspensions

- The Regulation detailing all suspensions available in the EU from 1 January 2008 will be published shortly. It should be noted that any current suspensions which are not contained in this regulation will no longer be available after 1 January.
- Applications for suspensions to come into effect on 1 January 2009 may now be lodged. Check your local administration for the close-off date.

Customs Tariff for 2008

- As discussed in the November edition of this bulletin, the amendment to Council Regulation on the tariff and statistical nomenclature and on the Common Customs Tariff will come into effect on 1 January 2008.

The amendments to the Combined Nomenclature (CN) will affect the classification of certain goods for import/export purposes. BTIs whose classification code has changed will need to be replaced.

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Taxation on Coal in the Netherlands

From January 1, 2008, the present Dutch Fuel Tax on coal will no longer apply as this is being replaced by the Coal Tax. The Coal Tax will be levied

and regulated similar to the present excise duties system. The Coal Tax will be levied on coal, cokes and lignite.

It is envisaged that the duty rate will be the same as the current duty rate of the Fuel Tax, i.e. € 12.76 per 1,000 Kg. The Coal Tax will in principle be levied at importation or upon release of coal from a (coal) tax warehouse. Thus the supply or use of the coal will no longer be the taxable events.

Since January 1, 2004, when the European Directive on Energy taxes came into force, the impact of the Fuel Tax was drastically reduced, as taxes on natural gas were transferred into the Energy Tax and the taxes on mineral oils were transferred partly into the Energy Tax and partly into the excise duties. However, the taxes on coal remained being levied as a Fuel Tax.

Since, practice has shown that a lack of clarity regarding the person who supplied the coal and more specifically whether that party would also qualify as the person who mined, produced or brought the coal into the Netherlands (i.e. the taxable person). As a consequence the tax authorities frequently concluded individual agreements with the relevant parties in which the basis of the tax assessment and the taxability were laid down. As the latter was regarded to be an uncomfortable situation, the Dutch Finance Ministry decided to introduce a new tax on coal.

While developing this new tax, the option of incorporating the tax on coals into the Energy Tax was explored, however practice has shown that this was not a feasible option.

The taxable event under the current Fuel Tax is "the supply or the use of the coal". The taxable person is "the one who supplies or uses the coal, provided that he has mined, produced or brought the coal into the Netherlands".

The new Coal Tax will follow the system that is applied for excise duties (on mineral oils), meaning that the taxable events will be:

- the importation of coal;
- the release of coal from a tax warehouse; and,
- the possession of coal for which the tax has not yet been paid.

Taxable persons are:

- concerning importation, the person who physically holds the coal at importation;
- concerning the release of coal from the tax warehouse, the holder of the tax warehouse authorisation;
- concerning the possession of coal, the person who holds the coal.

The definitions are similar to those mentioned in the Dutch Excise Duty Act and as such also a similar control and suspension system will apply (i.e. coal tax warehouse and accompanying documents).

PwC inquired about the Coal Tax at the Dutch Ministry of Finance and the Tax Authorities and learned that (despite the limited time left) they are still planning to introduce the Coal Tax as of January 2008 and that in principle they will leave it mainly to practical experience to decide whether and to what extent transitional measures will be required.

The new Coal Tax will impact on those companies that use, trade or store and/or ship coal, lignite or coke in the Netherlands, though some of these companies did not have any prior dealings with the Fuel Tax. In order to ascertain whether these companies can continue their activities in 2008 without additional charges of and/or pre-financing of Coal Tax, we advise performing an inventory as soon as possible in order to determine whether any actions in this respect are required.

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East African Community (EAC) Partner States Sign Interim Framework Agreement establishing an Economic Partnership Agreement (EPA) with the European Commission (EC)

The EAC partner states have concluded negotiations on an interim agreement that will establish an EPA in July 2009. The EPA will replace the trade provisions under the Africa Caribbean Pacific - EU Cotonou Partnership Agreement which expires on 31 December 2007. The agreement includes provisions on trade, fisheries and economic development cooperation.

The Framework Agreement shall apply in the interim period of one and a half years during which a comprehensive EPA will be negotiated by the EAC and EC. This interim agreement will ensure that trade in goods is not disrupted come 31 December 2007. Horticultural and fisheries exports to the EU were facing an imminent tariff hike if the EPA deal was not concluded.

Under the trade in goods component the EC has offered the EAC Partner States duty free, quota free market access for all products except rice and sugar, which are to be liberalized gradually. The framework has expanded product coverage beyond the scope of the current Cotonou trade regime. On textile and clothing the EC has agreed to provide the single transformation rule of origin; this means that clothing enterprises based in the EAC can now source fabrics from anywhere, transform them and export to the EU duty free and quota free.

The negotiations will continue on outstanding issues with a view to concluding a full EPA by 1 July 2009.

The EAC Secretariat has indicated that a formal text of the Framework Agreement shall be available to the public after all refinements and processes have been finalized by the EAC and EU parties.

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Packaging tax - the Hungarian experience

Packaging has been subject to environmental tax (the so-called product fee - which is also payable on other products, e.g., electrical and electronic equipment, batteries and tyres) for several years in Hungary.

During this period, we have identified particular issues in connection with the packaging product fee that have caused problems for companies. These include the following:

- The payment of the product fee does not exempt a company from its waste management obligations, which are based on the EU Packaging Directive (Directive 94/62). Many companies have paid the product fee but did not pay attention to the parallel waste management obligations, which can result in a waste management penalty.
- Calculating the tax amount can be difficult. It is common for companies not to have data in their ERP system about the quantity of the packaging materials they have used to package the products they manufacture and put on the market. It is even more difficult to measure the quantity of the packaging of products they purchase from abroad. However, if the quantity of packaging is calculated incorrectly, a tax shortfall may arise.

- Multiple payments on returnable packaging should be avoided. Many companies use various returnable packaging materials (pallets are the commonest) that are used many times as they circulate between them and their buyers. The Hungarian legislation requires companies to register their returnable packaging in advance and to keep a record of its movement to avoid having to pay the product fee each time the returnable packaging is used. As registration and record-keeping are administratively intensive, most companies do not do it and therefore are subject to multiple tax payment obligations.
- The possibilities provided by the legislation for avoiding tax payment on products that leave the country, or for allowing the tax that has been paid to be reclaimed, should be carefully analysed and used. It took several years in Hungary to achieve legislative amendments that allow all companies that sell products abroad to recover the product fee that was paid earlier in the sales chain.

The issues outlined above are not likely to be specific to Hungary, but may be present in other countries as well.

We would also like to draw your attention to the most important amendments to the Hungarian product fee legislation that will come into effect on 1 January 2008:

- The Customs authority will become responsible for the product fee returns and payments, and for the product fee inspections. This will probably result in a higher number of more intense inspections.
- The penalty regime will be similar to that used in the excise duty system. In cases of non or underpayment of the product fee, the penalty will be 100% of the shortfall.
- The Customs authority will register taxpayers by their VPID Customs and GLN (Global Location Number) environmental identification numbers. All companies have to obtain these to be able to submit product fee returns.

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Packaging Tax - Netherlands Update

In the Dutch Tax Plan 2008 (Belastingplan 2008), a new tax has been announced. It is an environmental tax and is called the Packaging tax (Verpakkingenbelasting) that will enter into effect as of January 2008.

At the moment, producers and importers are responsible for the costs caused by separating "consumer" packaging after use. This responsibility was laid down in the Packaging Decree. This responsibility could be fulfilled by paying a fee. That fee is currently a levy which is

determined by the companies themselves. The collection of this levy takes place within the framework of the collective organisation. This organisation ensures that the money is appropriately divided between the municipalities, which collect and separate household packaging.

Under the new State tax, the responsibility for collecting and paying this tax rests with the companies. Moreover, another penalty system for not meeting the obligations applies. An important goal of the new Packaging tax is to contribute to the decrease in the quantity of packaging and simultaneously encourage the use of packaging material with a less damaging impact on the environment.

The new Packaging tax has a wide basis so as to include as many types of packaging as possible. As a consequence, all types of companies and industries will be confronted with the Packaging tax. Contrary to the current regulation which applies up to 1 January 2008 (the Packaging decree), not only "consumer" packaging falls under the new Packaging tax, but "company" packaging as well.

In the proposed new Packaging tax, the following types of packaging have been defined:

- Sale or primary packaging
Packaging that forms a unit with the product to be sold, e.g., sugar bags, plastic bottles of washing powder, etc. This type of packaging has a marketing (branding) and/or an informative role.
- Collect or secondary packaging
This type of packaging is used when several packed products are collected in one box. For example, the box in which twelve packages of coffee has been packed.
- Dispatch or tertiary packaging
This type of packaging is used for the transport or loading of products for protection purposes, etc.

The new Packaging tax is designed in such a way that only 8,000-10,000 companies will qualify as taxable persons for the Packaging tax. To limit the number of taxable persons, an

exemption is introduced for companies that use less than 15,000 kilos of packaging. The taxable persons are defined as a Producer, Importer and (VAT) group.

In summary, one qualifies as "Producer" when the company qualifies as a taxable person within the meaning of the Dutch VAT Act and supplies packed products or sells so-called last minute packaging (e.g. plastic grocery bags). The "Importer" is the VAT taxable person who brings packed products from another country into the Netherlands and subsequently disposes of (mainly secondary or tertiary) packaging. Given the particulars of the new Packaging tax, a company can qualify as Producer, Importer, and as a combination of both.

With regard to the tax, the applicable rate depends on the type of packaging material and the type of packaging (sale, collect or dispatch packaging).

There is an annual filing period for a Packaging tax return. This return must be submitted within one calendar quarter following the previous calendar year (i.e., before the end of March of the next year). However, please note that this is the formal tax return. During the taxable period, provisional (quarterly) payments must be made based on estimated amounts. The basis for these estimated amounts is in principle the quantities of packaging of the preceding calendar year.

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Recent Judgments of the European Court of Justice (ECJ)

Tariff classification of deluxe "pick-up" trucks - application of the Explanatory Notes

Parties: BVBA van Landeghem ./.
Belgische Staat in Case C-486/06

Issue

The issue at question relates to the interpretation of the Combined Nomenclature (CN) of the European Union, especially the relationship between the objective characteristics of goods being classified, the wording of

the CN and the Explanatory Notes to the Harmonised System (HS) and the CN concerning the tariff classification of motor vehicles, so-called "pick-ups".

Facts

A Belgian Customs agent classified 96 very luxurious "pick-ups" under the tariff heading 8703 of the CN (duty rate 10%) and released the "pick-ups" for free circulation. Hereupon, the Belgian Customs Administration stated that the vehicles should have been classified under heading 8704 of the CN (duty rate is 22%) based solely on the fact that the vehicles had a load space separated from the passenger compartment within the meaning of the Explanatory Notes HS to headings 8703 and 8704.

The question is: What is the right classification for these "pick-ups". Are they vehicles intended for the transport of persons (8703) or vehicles for the transport of goods (8704)?

Findings of the Court

According to ECJ case-law, the Explanatory Notes have no legally binding effect. Rather, they are indicative and an important aid for the interpretation of the scope of the various tariff headings of the CN.

Settled case-law states that the decisive criterion for the classification of goods for Customs purposes is to be sought in their objective characteristics and properties as defined in the wording of the relevant tariff heading as well as on the circumstances of the intended use.

According to the Explanatory Notes of the HS and CN for the headings of the 8703 and 8704, the "pick-ups" at issue should be classified under heading 8704 as vehicles for the transport of goods. The ECJ has now ruled that the "pick-up" should be classified at 8703.

As stated above, the wording of the headings of the CN only have binding effect. Nevertheless, taking the characteristics and properties of the goods into account, it must be examined whether or not such "pick-ups", in the light of their general appearance and on the basis of their characteristics as a whole, are principally designed for the transport of persons or goods.

In the view of the ECJ, specific characteristics for a vehicle for the transport of persons are:

- the presence of seats with three-point safety belts behind the driver's seat;
- an enclosed cabin for use as a passenger compartment;
- luxurious interior like electrically adjustable leather seats, electrically operated mirrors and windows and a stereo with a CD player;
- petrol engine assembly;
- automatic gearbox;
- anti-lock braking system (ABS);
- four-wheel drive and/or
- deluxe (sports) rims

In this case, the "pick-ups" were equipped with the aforementioned luxury accessories. In conclusion, the ECJ decided that the primary use of these "pick-ups" is rather the transport of persons than of goods.

Implications

This judgment indicates that a classification under the correct tariff position depends only on the correct interpretation of the wording of the HS/CN. Even if the Explanatory Notes are crystal clear, classification cannot be based solely on them; rather, the specific classification and properties of the goods must be viewed in light of the tariff heading wording.

Therefore, should you be unsure of the classification procedure, do not solely rely on the Explanatory Notes of the CN/HS. They are just an aid to assist with tariff classification.

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Towards an electronic system for exchanging Customs information

The Institutions of the European Union are working to create an environment in the Customs system of the Member States in which documents would be exchanged electronically. As part of that task, the Commission drafted a decision on a paperless environment for Customs and trade which was subsequently adopted by the European Parliament and the Council.

As part of the system created by the said decision, the Customs administrations of the individual Member States will exchange data using means of electronic communication. This will help to improve:

- control over the movement of goods;
- competitiveness of European trade by reducing the accounting and administrative burdens imposed on enterprises;
- security of Community citizens as regards the movement of dangerous goods;



- protection of the financial interests of the Community and the Member States;
- security associated with international crime and terrorism

It should be added that individual Member States already have appropriate IT systems used for handling Customs procedures but they are not combined with one another. However, the decision in question contains guidelines in accordance with which individual systems should be made mutually compatible, as well as deadlines for implementing those guidelines.

The European Commission assumes that in 2011, enterprises will be able to file all documents required by Customs law electronically.

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Implementation of regulations concerning phytosanitary border control of packaging wood

The Decree of the Minister of Agriculture and Rural Development of 13 November 2007 concerning phytosanitary border control of packaging wood carried out at random was published in the Official Journal of 23 November 2007.

The Decree in question constitutes the execution of the delegation of powers contained in the Plant Protection Act of 18 December 2003.

On the basis of the Decree, wood packaging made of, among other things, coniferous wood and wood used for immobilizing or securing non-wood cargoes have been subject to border phytosanitary control. The Decree also specifies the frequency of phytosanitary border controls of parcels which contain packaging wood, imported into the territory of Poland from third countries in which specific coniferous tree pests can be found.

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Exports of patented pharmaceutical products from the country of manufacture

The Council of the European Union has decided to approve, on behalf of the Community, Protocol to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concluded as part of the World Trade Organization (WTO).

The TRIPS Agreement provides that products covered by a mandatory patent are, in principle, intended for sale in the country of manufacture. The Protocol waives that requirement for pharmaceutical products. The Protocol allows exports of patented pharmaceutical products to countries which do not have a sufficient manufacturing capacity to produce a given pharmaceutical product on their own.

The Protocol to the TRIPS Agreement, signed on 6 December 2005, constitutes inclusion of the temporary decision on the same issue, signed in August 2003, in the WTO General Agreement.

The Protocol will enter into force once two-thirds of WTO's 151 members have accepted it. Now that the Protocol has been approved by the European Community, the number of WTO's members who have accepted the Protocol is 40. The WTO General Council has extended the deadline for approving the Protocol till 31 December 2009.

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Summaries of other recent ECJ Cases

The following are brief overviews of each case. If you wish to obtain a detailed understanding of these cases, we would be happy to provide a full review.

Judgments:

- **Ikea v Commissioners of Customs & Excise**
Council Regulation 2398/97 is invalid as the Council, in determining the anti-dumping margin, applied the practice of



"zeroing" negative dumping margins for the products concerned. Any importer (of the product subject to the anti-dumping measures at issue) who has brought an action before a national court is, in principle, entitled to rely on the invalidity of Reg. 2398/97 to seek repayment of the anti-dumping duties.

References:

- Azlan v HMRC

Is the CN to be interpreted as classifying the products in question at heading 8471, or parts thereof at heading 8473? If not, is the CN to be interpreted as classifying the products at heading 8517 (or under the parts headings 8517 or 8548)?

Are the products capable of linking LANs always classifiable under Chapter 84 or do they perform a specific function under Note 5(E) to Chapter 84?

What is the position in relation to "chassis" products?

- Metherma v Hauptzollamt Dusseldorf

Can bars of tungsten or molybdenum obtained simply by sintering (CN codes 8101 94 00 and 8102 94 00 respectively) be processed into scrap under CN codes 8101 97 00 and 8102 97 00 respectively by being broken up or shattered?

- X v Staatssecretaris van Financien

Regarding the classification of an optical-electrical circuit contained in a plastic case with an LED, a plastic film, a photodetector and an amplifying circuit. It is intended for incorporation into communication and computer equipment and consumer electronics among other things.

- Veli Elshani v Hauptzollamt Linz

This relates to the interpretation of Article 233 of the Customs Code. Article 233 deals with extinction of a customs debt. Specifically, the reference asks two questions:

1. Article 233(d) provides that a customs debt shall be extinguished where goods, upon which a customs debt is incurred due to them being imported unlawfully (i.e. under Article 202), are seized upon their unlawful introduction and simultaneously or

subsequently confiscated.

Should "unlawful introduction" be interpreted as meaning that the "introduction" ends once the goods have left the border customs office and, as they have entered the customs territory of the Community, any subsequent seizure no longer results in the extinction of the customs debt? Or does the "unlawful introduction" continue (where the goods continue until the goods reach their first destination within the territory of the Community thus meaning that any seizure up to that time still results in extinction of the customs debt)?

2. If unlawful conduct is discovered upon introduction into the Community, as per Article 202, the customs debt is extinguished. On the other hand, if goods are seized on being unlawfully removed from customs supervision under Article 203, there is no immediate extinction of the customs debt. Is this restriction on extinction of the customs debt to Article 202 scenarios consistent with the principle of equal treatment?

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Anti-Dumping Updates

- Council Regulation imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in China and consigned from or originating in Taiwan and on imports of certain refillable pocket flint lighters originating in China and consigned from or originating in Taiwan
- Council Regulation amending Reg. 1858/2005 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating, inter alia, in South Africa
- Corrigendum to Commission Decision 2007/775 repealing Decision 1999/572 accepting undertakings offered in connection with the anti-dumping proceedings concerning imports of steel wire ropes and cables originating in China, Hungary, India, South Korea, Mexico, Poland, South Africa and Ukraine
- Council Regulation imposing a definitive anti-dumping duty on

imports of silico-manganese originating in China and Kazakhstan and terminating the proceeding on imports of silico-manganese originating in Ukraine

*Note: Anti-dumping duty on imports of silico-manganese originating in China and Kazakhstan subsequently suspended by Commission Decision for 9 months effective from 6 December 2007

- Council Regulation terminating the partial interim review of the anti-dumping measures applicable to imports of integrated electronic compact fluorescent lamps (CFL-i) originating in China
- Commission Regulation on initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Reg. 2074/2004 on imports of certain ring binder mechanisms originating in China by imports of certain ring binder mechanisms consigned from Thailand, whether or not slightly modified and whether declared as originating in Thailand or not, and by imports of certain slightly modified ring binder mechanisms originating in China, and making such imports subject to registration
- Commission Regulation on initiating a "new exporter" review of Reg. 130/2006 imposing a definitive anti-dumping duty on imports of tartaric acid originating in China, repealing the duty with regard to imports from one exporter in this country and making these imports subject to registration
- Commission Decision repealing Dec. 1999/572 accepting undertakings offered in connection with the anti-dumping proceedings concerning imports of steel wire ropes and cables originating in China, Hungary, India, South Korea, Mexico, Poland, South Africa and Ukraine
- Notice of expiry of certain anti-dumping and countervailing measures - the anti-dumping and countervailing measures in force on imports of polyester textured filament yarn (PTY) originating in India expired on 29 November 2007.

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Network News Bulletins

China Customs & Trade Alert - Special on Pearl River Delta, December 2007

- Self Disclosure - a new initiative by Shenzhen Customs
- New Outsourced Processing Rules - Huangpu Customs Pilot Program
- Further Processing - New procedures of Huangpu Customs

China Customs & Trade News, December 2007

- Updated company grading system (as expected in 2008)
- Updated Prohibition and Restricted Lists (as expected in 2008)
- Expanded EPZ Functions - implementation guidelines
- Foreign Investment Catalogue - implementation guidelines

Please email the editor if you require a copy of any of these bulletins.

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