

Customs Communiqué Switzerland 2-09

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We are pleased to send you the second Customs Communiqué Switzerland. In this issue, we report on the most recent developments in customs law, in particular regarding the Free Trade Agreement between Switzerland and Canada. In the last part of the communiqué – in the guest contribution authored by Linda Graff Brakemeier – we will explain the effects of the self-assessment principle in customs law.

Authorised Economic Operator (AEO) in Switzerland Update

With its decision of 13 May 2009, the Federal Council approved the agreement between Switzerland and the EU regarding simplifications in the controls and formalities in goods traffic and customs security measures. The agreement is to be signed on 25 June 2009 in Brussels and will become effective as of 1 July 2009. With the status of an Authorised Economic Operator (AEO), which Switzerland will introduce in this context, AEO certified enterprises can claim the benefit of the simplifications for security relevant controls. The corresponding legal basis and the certification procedure are currently being drawn up in Switzerland. As delays have occurred in preparing the relevant provisions, it will not be possible to grant the status as per 1 July 2009 as originally planned, and most probably not before **1 September or 1 October 2009**.

E-dec Export: the electronic assessment authorisation

When electronic export processing is implemented, enterprises will have to inquire into what measures have to be taken to fulfill all the legal requirements when issuing electronic assessment authorisations (henceforth eVV). It is to be noted that, according to Customs Administration publications, electronic processing of exports will become obligatory in 2010 – the target date. To enable exports to be processed electronically in any case, registration with the Customs Administration is required (can be done at www.edec.ch). The TIN (Trader Identification Number) issued must be quoted in the customs registration. The actual eVV will be made available for collection as an XML file, packed in a SOAP message (Simple Object Access Protocol). The eVV can be obtained from the Customs Administration within the prescribed period, which is 10 years (it can be obtained more than once). The eVV can be collected through either a mail or a web service. The Customs Administration provides no archiving

services. Once the exporter has the eVV it should be checked (changes are possible only within 30 or 60 days) and access to the eVV and the audit trail (including link to the accounts) should be guaranteed at all times (traceability??). Based on art. 8, para 1 of the Federal Department of Finance's Ordinance governing electronic data and information, all business transactions should be traceable from a single invoice, through the accounts and to the VAT return and vice versa **without unreasonable delay and significant cost**. Exporters are therefore obliged to strictly observe all regulations. Finally, the exporter must be able to provide reliable documentation for any tax reducing events, such as a claim for supplies abroad.

EORI: standard customs numbering system for all EU member states

Master data deposited with EU member states' customs authorities under a customs number will also be stored in a European database as of **1 November 2009**. The European Economic Operators' Registration and Identification system will be introduced and the corresponding data stored under the EORI identification number. This EORI customs numbering system replaces the previous national customs numbers. Only those Swiss enterprises that undertake customs clearance on their own behalf and possess a corresponding customs number in an EU state are affected by this new arrangement. As of 1 November 2009 companies without an EORI identification number may in principle no longer pursue customs activities in the European Union. Further, a writ-



ten authorisation issued by the AEO is required for such activities since on introduction of this system the data will also be forwarded to the EU database and the master data will be forwarded to the Commission of the European Union.

Free Trade Agreement with Canada

The Free Trade Agreement between the EFTA States and Canada and the Bilateral Agriculture Agreement between Switzerland and Canada enter into force on **1 July 2009**. The main purpose of these Agreements is the elimination or reduction of duties on industrial goods and processed agricultural products. The most important special items / simplifications worth mentioning are as follows: In future a preferential declaration of origin on the invoice or other trade document will be sufficient, list rules will tend to be less restrictive than the traditional European rules and cumulation with – and for the other party – partially processed or treated primary materials and split deliveries to third party states will be made possible in the future. The agreements are of **great importance** for Switzerland, as when the two agreements come into force Swiss enterprises will have better market access and become more competitive locally ((in Canada)).

EU customs clearance – update

In the last Customs Communiqué, we reported a potential change in EU customs clearance proposed for 2010. This change is based on the action plan for the effective combating of VAT fraud, which has meanwhile been discussed in the European Parliament by the Economic and Currency Affairs Committee. The objective of the measures is to change two existing articles in the VAT Directive. Firstly, stricter conditions for claiming tax exemption by importers are to be introduced on imports of goods that are subsequently delivered within the Union and secondly, the supplier is to be made liable for VAT losses on turnover within the Union in another member state. These provisions may be definitely adopted in the VAT Directive in **the near future**. It will in principle be possible in future for a fiscal representative to obtain EU customs clearance. Based on present knowledge, however, it can be said that, given the future enhanced duty of care regulations incorporating liability for the entire debt, EU customs clearance through a fiscal representative is a task fraught with uncertainty and will become a **high risk venture for the fiscal representative**.

Rules for customs registration in Germany

The German Federal Ministry of Finance stated in a publication dated 26 May 2009 in connection with customs registration of persons resident in Switzerland and the Principality of Lichtenstein that according to art. 64, para. 2 sentence 1 of the Customs Code, a person registering for customs must in principle be resident in the EU. This principle may be diverged from, only if the imports of goods are occasional (less than 10 imports of goods per year) and the customs authority considers it reasonable or there is a customary right in the sense of art. 64, para. 2 Customs Code. In the past, these exceptions for Swiss enterprises were applied very liberally. To prevent these exception rules being avoided in future, they have been more closely defined. The exception rule under customary right **applies only for persons resident in Switzerland or the Principality of Lichtenstein**, who undertake to ensure **access by the German Customs Administration** to documents and accounting data that are necessary for an ex post control. In addition, such registrations are possible for customs offices close to the border (border zone 10 km.) in the districts of the main customs offices, Ulm, Singen and Lörrach.

The self-assessment principle in Customs Law

Although the duty to be paid is assessed, i. e. is definitely fixed by the competent customs office, the self-assessment principle also applies in Customs Law – in some cases with far-reaching consequences for the person liable for the duty. This is because the customs assessment is based on the customs declaration (see art. 18 Customs Code), which must be submitted to the customs office by the person who brings, or has brought, the goods into the customs territory or who then takes over the goods (see art. 26 in connection with art. 21, para 1 Customs Code). The person responsible for making the declaration is solely responsible for the correctness of the information provided in the customs declaration. In particular, that person cannot assume that any rights are imputed because of simply possessing the declaration in cases where a customs office has not detected an error and therefore accepted the declaration. Once again this is because the customs office only checks the customs declaration for formal correctness, completeness and agreement with the accompanying documents (see art. 32, para 1 and 3 Customs Code). In particular, once the customs declaration has been accepted by the customs office it is binding on the person making the declaration (see art. 33 Customs Code).



In a number of recent judgements issued by the Federal Administrative Court it has been clearly demonstrated that the self-assessment principle can have far-reaching consequences when applied to the customs declaration.

For example, in its judgement of 30 March 2009, the Federal Administrative Court considered the question of to what extent a customs office can be held responsible by the importer if an import quota (in this case poultry) is exceeded. The appellant, assuming that his quota had not yet been exhausted, declared and imported further imports at the rate of duty for the quota. The Customs Department imposed an additional charge to make up the difference between the reduced rate of duty on the quota and the higher rate of duty on imports exceeding the quota. In this case the appellant argued that he usually received the customs documents from the customs office quickly and efficiently, but in this case the customs documents had been sent to him only after a delay of three weeks so that he was unaware of the fact that he had already exceeded his import quota. The appellant pleaded that it was never his intention to exceed the import quota. However, the Court held that the principle of self responsibility applies without exception for imports within or above the allotted quota; the Court decided that the appellant was responsible for observing the quotas rather than the Federal Customs Administration. With respect to the additional liability, the Court held that this was not conditional on guilt or criminal conduct. Therefore the person liable for the additional charge is liable even if he knew nothing about the false declaration. The additional charge was not a sanction, said the Court, but merely correction of a benefit improperly attained (judgement of the Federal Administrative Court of 30 March 2009, A-1 765/2006).

In the decision A-6623/2008 of 9 March 2009, which deals with the question of the correct classification for solar glass, the Court held that customs assessment procedures are based on the self-declaration principle. It is therefore the responsibility of the person making the declaration to describe the goods as exactly as possible, so that they can be correctly classified in line with the classification information; in particular, an answer to an enquiry about a classification could not be viewed as an allocation of goods to a specific category. (Author Linda Graff Brakemeier, Litigation Manager, PwC Basle)



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