

Customs Communiqué Switzerland 3-09

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We are delighted to present the third Customs Communiqué Switzerland. This issue looks at the latest developments in customs legislation and highlights selected rules in Switzerland's new VAT law that will have an impact on cross-border business. In the last section of the communiqué we present an article by guest contributor Jochen Schmidt (PwC Germany) describing the possible implications of the modernised community customs code for the first sale rule.

Authorised Economic Operator (AEO) Status in Switzerland

The Swiss Federal Customs Administration has just published **amendments to the Customs Ordinance** concerning the provisions on the Authorised Economic Operator status. This means that in the near future, it will be possible to grant businesses and individuals entered in the Swiss or Liechtenstein commercial registers Authorised Economic Operator status. The following criteria must be met for AEO status:

- Record of compliance with the customs regulations;
- A system for managing accounting records and, if required, shipping documents that enable appropriate security-relevant customs inspections;
- Proof of solvency;
- Appropriate security standards.

A draft **self-assessment questionnaire** to be used to apply for the Authorised Economic Operator status has already been published. The Federal Customs Administration will initially certify pilot companies to test the internal and external procedures and the self-assessment questionnaire. This pilot phase (including amendments to the questionnaire and other documentation) is due for completion in the second quarter of 2010. This means that Swiss businesses will be able to apply for AEO status from **mid-2010 at the earliest**. However, sufficient information is already available to take initial steps to achieve certification.

E-Dec Export Update

On 31 March 2010, e-dec export will definitively replace the VAR/RSE simplified export procedure. As of this date, all organisations using the VAR/RSE simplified procedure are bound to implement, set up and test the e-dec export processes (including the interface to their accounting system). Use of e-dec export will not yet be compulsory: until further notice it will also be possible to use NCTS, or even Form 11.030, for exports (electronic handling will probably be made compulsory in 2012/13). If exports are handled electronically, the electronic assessment decree/authorisation (eVV) will be made available to exporters and forwarders for download. Originally, the intention was for all organisations to have specific software to access the eVV. Now, however, the Customs Administration has eased this requirement by offering a new option (in a publication dated 13 August 2009), allowing eVVs to be accessed via an Internet site (a web GUI). It should be noted, though, that this option is also only available for entities that have registered with the customs authorities and have been allocated a **Trader Identification Number** (see www.edec.ch).

EU Customs Clearance

In the last two Customs Communiqués, we reported and explained the change in EU customs clearance. From 1 January 2011, more stringent conditions are to be applied to importers claiming tax exemption on imports of goods followed by intra-community supply (Directive 2009/69/EC). In accordance with this directive, **at the time of import** the importer of record



must provide the responsible authorities of the member state of importation with **at least the following information**: The importer's VAT identification number issued in the member state of importation or the VAT identification number of his tax representative, the VAT identification number of the customer in another member state, and evidence that the imported goods are intended for transport or dispatch to another member state (the latter possibly to be provided to the competent authorities only on request). Member states are now required to adopt this directive in their national legislation and enact detailed provisions as required. In particular, the requirement to provide the recipient's VAT number at the time of importation could make EU customs clearance more difficult.

The New VAT Law: Rules On Cross-Border Transport

The entry into force of the new law on value-added tax (nMWSTG/nLTVA) on **1 January 2010** will introduce various changes and simplified arrangements. The following changes are particularly worth highlighting in connection with cross-border transport: the rules on subsequent price adjustments, combinations of supplies, and the impact of the application of the declaration of assumption. Until now, subsequent adjustments of consideration on the import of goods (including TP adjustments) were not governed by law. If adjustments were made, any interest on late payment also had to be paid. Now, Art. 56 para. 5 nVATL expressly stipulates standard arrangements for subsequent adjustments in the consideration: understated import tax has to be reported to the Federal Customs Administration within 30 days of the adjustment. However, the **notification and the adjustment of the tax assessment may be omitted** if the additional tax payable could be deducted as input tax. It is important to note that this undeclared price adjustment must be documented for. Art. 19 nVATL codifies that several mutually independent supplies which are aggregated into one unit or are offered as a combination of supplies can be treated as a unit according to the predominant supply, provided they are made against an aggregate consideration and the predominant supplies represent at least 70 per cent by value of the aggregate consideration (combination). If this combination rule is applied, for example on the import of goods, a breakdown of the aggregate value must be presented in a calculation of costs by the foreign supplier that put together the combination (only this party can calculate the value of individual supplies as a proportion of the aggregate in accordance with economic criteria). Enterprises entered in the Swiss VAT register can use the application of the declaration of assumption to act as an

importer on the direct delivery of goods from abroad to a recipient in Switzerland. Under the new rule, if an application of the declaration of assumption has been signed, it is **no longer necessary** to differentiate between deliveries that are collected, shipped or forwarded via a third party. In addition, the application of the declaration of assumption will be used for **transactions with both single and multiple components** (so-called serial transactions). The new rules mean that it is always the supplier for whom the declaration has been approved who imports the goods in his own name (in other words he acts as the importer). Further, notwithstanding the application of the declaration of assumption, it is also possible to **waive importation under one's own name**. This is possible provided that this waiver is noted on the invoice to the recipient. We advise all enterprises to study the changes and optimised provisions in detail and implement the necessary steps as early as possible.

Subsequent Handling at the Preferential Customs Rate/ Renewal of Deadlines (Swiss Federal Administrative Court Ruling A-5798/2007 of 6 July 2009).

On 1 July 2006, the Customs Administration issued two provisional assessment decrees, giving the appellant until Monday, 28 August 2006 to submit the required accompanying documentation to the customs office responsible. However, it was not until 29 August 2006 that the appellant reached the customs office by fax to request exemption from duty. In a letter of 25 October 2006, the appellant applied for the deadline to be reinstated, claiming that due to mail and other things, it had only received the necessary assessment decrees from its customer on 29 August 2006, shortly before close of business. The appellant claimed that an application for adjustment and a request had been drawn up immediately, and faxed to the customs office in advance. In its ruling, the administrative court found that the grounds given for failing to meet the deadline were not sufficient for a reinstatement, as the appellant was obviously aware of the deadline and could have easily applied for an extension before it expired. In addition, the appellant had already been informed in a letter from the customs authorities dated 1 July 2006 that if the deadline expires without a response, the provisional assessment is deemed to be final, and any extension of the deadline must be applied for in writing before the deadline expires. In the case in question, the **appeal was rejected in its entirety**. This ruling shows that, once again deadlines laid down by law or the authorities must always be adhered to, because failure to meet them is almost impossible to remedy.



Does the Modernised Customs Code Spell the End of the First Sale Rule?

The European customs legislation in force at present (Art. 147 para. 1 of Commission Regulation (EEC) No. 2454/93) grants importers the option of having customs duties for serial transactions assessed on the basis of the price of one of the transactions, that occurred prior to the transaction that brought the goods into the community (the first sale/prior sale rule). There must, however, be proof that the goods were already destined for export to the EU at that point. With fundamental changes due to take place in customs law (the modernised customs code), there are signs that the European Commission intends to **abolish the option** of assessing duties on the basis of prices from first/prior sales on import, even though this practice was allowed under the existing interpretation of the WTO customs valuation code, and the rules have not yet been changed. In concrete terms, the current draft of the regulation on the modernised customs code redefines the key concept of sale for export to the community contained in Art. 147 of Council Regulation 2454/93. Now it will no longer be possible to apply the prior/first sale price for the assessment of customs duties; instead only the price from the sale that led to the entry of the goods into the EU will be permitted. However, the commission's draft is so unclear at this point that we can expect the interpretations of customs authorities in member states to vary. At the moment the draft is still at the legislative stage, with readings in the customs code committee still under way, and criticism of the planned legislation has been raised among member states. This means that trade associations and other representatives of the importing industry still have the opportunity to influence the modernised legislation in its final form before the scheduled announcement. If, however, EU member states vote by a quali-

fied majority to accept the present wording, **it looks as though it will no longer be possible to apply the first sale rule once the new regulation on the customs code comes into force.**

This being the case, importers that have applied the first sale rule regularly until now will face substantial increases in cost prices. (Article by Jochen Schmidt, PwC Germany Customs Consulting).



Simeon Probst

Head of Customs Consulting Switzerland

PricewaterhouseCoopers

St. Jakobs-Strasse 25

P.O. Box 3877

4002 Basel

Tel. +41 58 792 53 51

e-mail: simeon.probst@ch.pwc.com