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CUSTOMS DEBT IN THE EU CUSTOMS CODE

fundación aduanera
Foundation for the Dissemination of Knowledge and Customs Duty

AROLA EDITORS

My most sincere thanks to my co-workers, for each and every hour of debate and argument that have been an inspiration for this book.

A heartfelt 'thank you' is due to my students, who bring into life Cicero's maxim: "If you want to be taught, teach" and who make me see the norm from different perspectives through their questions and concerns.

Undoubtedly, my family deserves the warmest thanks of all: without their constant support, this book would never have happened.

INDEX

FOREWORD

It is funny that Mercedes and I, both employees with years of experience in the Customs Department, never happened to meet each other until a few years ago. It may be due to having served in different capacities in very distant geographical areas, despite the years we have been working for the Customs Department.

Mercedes is an excellent professional who has held different positions of responsibility in the Tax Agency, and not only in the Customs Area She has been thus able to expand her knowledge and experience, not only with regard to customs management, but also to domestic taxation.

If anything characterises Mercedes, it is her eagerness at work and her passion for the world of foreign trade, in my opinion. She is in love with everything that has to do with the customs world, and this leads her to give the best of herself in the course of her work, and, to participate in different working groups of the Customs Department and committees of the European Union, and to teach, as well, and now, her eagerness and dedication have led her to write this book on customs debt, which is to the customs setting benefit. A book which I think will be truly useful for all operators related to foreign trade, since it sheds light on the provisions that are established by the Union Customs Code with regard to this matter.

The book is published within a few months of the entry into force of the Union Customs Code, and it opens up a new territory in the analysis of the new customs regulations of the European Union, which I hope that will set an example for others to follow. There is very little literature on customs legislation, at least in Spain: it is difficult to find any work which makes a serious and rigorous analysis of the legislation, and , what is more, which combines legal analysis with a practical approach, -as the author does in this book. In this regard, I would like to congratulate, as well as to thank, the Fundación para la Difusión del Conocimiento y el Derecho Aduanero for its initiative to publish this type of books, which I understand to be utterly necessary in a sector where manuals are long overdue. Customs manuals that enable professionals to deepen their theoretical and practical knowledge as well as to provide their customers with the best possible service.

The book makes its intentions clear in its very title: the subject under study will be the customs debt and its regulation under the Union Customs Code. To this end, the author carries out a thorough study of Title III of Regulation

(EU) 952/2013, of the European Parliament and Council 9 October 2013, establishing the Union Customs Code commonly known as UCC.

Prior to the analysis of this Title, the author addresses one of the most innovative aspects of the UCC the customs procedure. The customs legislation of the European Union did not use to regulate in detail the procedure to be followed by customs authorities for decision-taking, and such aspects were subject to the domestic law of each Member State, which often resulted in important procedural differences. Said differences used to end up being inequalities of treatment of operators according to the country in which they were carrying out their activities. However, the UCC regulates these procedural aspects in detail and it delegates to the Commission the possibility of issuing executive acts (regulations) to ensure that the procedure followed is the same in all Member States, as befits a genuine Customs Union. Thus, in chapter 1 of the book, the author explains what the customs procedure is and how it works, since it is clearly distinct and different from the Spanish tax and administrative procedure.

In the following five chapters, in plain and clear language, the author goes over the different legal aspects concerning the origin of the customs debt; the debtor; the guarantees and their effects; the procedure to enter the debt in the accounts; and, lastly, the ways to extinguish the debt. The different chapters provide practical examples and analysis of the judgements of the European Court of Justice, which will ensure better understanding for the reader.

Another aspect that should be highlighted is the comparative tables of regulations which enable the reader to quickly and easily compare the differences when regulating different aspects of the customs debt as provided to in the current Union Customs Code and the previous legislation in force.

For all of the above, I believe that this is a piece of work that combines technical quality with simplicity in the explanation, which allows us to have a better understanding of aspects as legally complex such as the customs debt. For this reason, I think this book will be an essential work of reference both for professionals working in the Civil service and for foreign trade economic operators who have to relate to the customs offices in the course of their business.

I do not wish to end without congratulating the author for her magnificent book; the Fundación Aduanera for the book's publication and its support for

disseminating research on customs regulations; and, finally, all readers, who, from now on, will have a practical tool which will make their day-to-day work easier and which will help them better understand the complex customs legislation.

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CHAPTER 1
CUSTOMS PROCEDURES

He who knows the path he is on, will get to his destination safe and sound.
SPANISH SAYING

Knowing the path that must be followed to reach a destination is essential to achieve greater efficiency in any action. For that very reason, it is essential to know the customs procedures. They outline the path that shall lead us to our destination.

INTRODUCTION

One of the most significant developments in the new Union Customs Code (hereafter: UCC) is the set of rules governing the procedure to be followed by the customs authorities for the decision-making process, whether upon application of the person concerned or automatically, on their own initiative. This is known as the ***decision theory***.

In the previous Community Customs Code (hereafter: CCC), there were no references to any procedure, and therefore, the customs authorities took decisions by using national procedures.

Until the publication of this new Code, procedural aspects were regarded as matters to be tackled by the Member States. Procedures according to internal regulations should be flexible to comply with all the specifications laid down in the community rules, but in customs matters there was not any fully-fledged community procedure. Therefore, the Member States could lay down rules about this question.

Currently, these national procedures apply only to VAT and other internal taxes. To implement the customs legislation, national procedures cannot be applied. These shall not apply, neither directly nor complementarily.

In our view, there are two fundamental reasons why such amendment has noteworthy advantages over the previous legislation.

- Firstly, it will add to the uniform implementation of the Law. By regulating different procedures in individual Member States, different approaches to enforcemet may occur hitherto. Those states with less stilted procedures allowed for an easier implementation of the Law, being consistent with the 'spirit' of the provision.
- Secondly, in relation to the above, since there was not specific customs regulation in Spain, its General Taxation Law (hereinafter: GTL) had to be applied to customs procedures. It is a well-known fact that this Law was drafted in line with the national procedures, which have been gradually favouring self-assessment procedures rather than the

assessment-clearance ones. The national regulation did indeed include some specific duties for implementing customs law, but, in many cases, they were scarce.

– Besides, the GTL is intended to apply to a tax system with a collecting aim and, thus, it is not easily applicable when regulation pursues different objectives: not only collecting taxes but also making foreign trade operations easier or ensuring safety and security. It should be borne in mind that other objectives have become important, although the new Customs Code still aims to protect the European Union's financial interests. Facilitating foreign trade is mentioned on many occasions in the recitals of the new regulation, after all.

From the date of entry into force of the UCC, the procedures to be taken into account in applying the customs legislations shall be the ones laid down in the code and its development regulations and by-laws, while national regulation shall apply to internal taxation, such as VAT or excise duties.

In this way, the UCC has introduced closer harmonization of the decisions relating to the application of customs legislation, establishing that they should all be covered by the same rules in the European Customs Territory. In particular, the code (UCC) and the Commission Delegated and Implementing Acts (hereinafter: DA and IA) of the code laid down for the first time common general rules for the decision-taking process as well as for the management of decision.

Decision-taking is regulated by Articles 22 and following of the UCC. As referred to in Article 5 (39) of the UCC, decision means "*any act by the customs authorities pertaining to the customs legislation giving a ruling on a particular case, and having legal effects on the person or persons concerned"*. It is, hence, a broad concept which includes not only the decisions taken, upon request of the person concerned but also decisions taken up on their own initiative by the customs authorities.

Decisions taken upon application include the ones that can be found in Annex A of the Delegated and the Implementing Regulation, and the ones upon application as laid down by Annex B of both regulations:[1]

"Lodging of a summary declaration, submission on application for an outward processing procedure, lodging of a customs declaration to put goods

1 In this sense the document which lays down the guidelines on decisions TAXUD.A.2 (2016)3945564, 8 July 2016, version placed on the European Commission site at the time of drafting this book.

under the inward-processing procedure, submission of the bill of discharge of the inward processing for discharge, etc. are different procedures in which customs authorities shall take a decision upon application of the person concerned".

Moreover, bearing in mind the definition of customs authorities found in Article 5(1) of the UCC, the decisions taken not only by the customs authorities of the Member States but also by any other authorities empowered under national law to apply the customs legislation shall be considered as actual "decisions".

An authorisation is a sub-category of a decision taken upon application of the person concerned.

EXAMPLE

An operator who wants to use a comprehensive guarantee must submit an application for an authorisation specifying the accomplishment of all legal conditions required.

This authorisation granted by the customs authorities is a decision.

Apart from authorisations, there are other decisions taken upon application of the person concerned.

EXAMPLE

An operator who wants to release for free circulation some goods must submit the pertinent declaration, including all the necessary documents and particulars.

The granted release of goods is a decision taken by the customs authorities.

Applying for an authorisation or submitting a declaration are unilateral acts carried out by the interested parties and they cannot be regarded as decisions made by the customs authority. The fact of accepting applications or declarations is to be considered as a 'decision' made by the customs authorities (Judgement of the ECJ, 15 September 2011, Case C-138/10, DP GROUP). As explained by Advocate General Pedro Cruz Villarón in his conclusions on the above mentioned case delivered on 9 June 2011, p.

In order to constitute a decision, an act of customs authority must have legal effects; it must be the expression and result of the exercise of discretionary power; and its addressee must be identified.

Any decision taken without a prior application submitted by the person concerned is a decision taken by the administration on its own initiative. *The retrospective* revision of a declaration, the control regarding compliance with procedures, and the reassessment of an authorisation are examples of decisions taken by the customs authorities without prior request.

The procedures to be followed by the customs authorities are laid down in the UCC and its development regulations in any of the two scenarios: on their own initiative or upon request. National regulation shall only apply to matters for which it is expressly entitled.

1. DECISIONS TAKEN UPON APPLICATION

Decisions regarding the application of customs legislation by the customs authorities upon request of the person concerned are laid down in Articles 22 and 23 of the UCC, Articles 8 to14 of the DA, and Articles 8 to 14 of the IA.

The decision-taking process is developed in three key stages such as:

- Application
- Decision taking
- Management of decision

1.1. Submission of an application

Where an economic operator wants to apply for a decision, they shall submit an application and supply all the information required by the competent customs authorities in order to enable them to take that decision. Where the customs legislation applicable to the standards provides, a decision may also be applied for, –and taken with regard to–, by several persons.

Application shall be submitted in accordance with the conditions set out in Annexes A and B to Commission Delegated Regulation.

In general all declarations or applications, as well as the storage of information as required under the customs legislation, shall be made using electronic data-processing techniques.

Once the application has been submitted, its registration by the customs authorities does not entail its acceptance. Registration only records the submission of the application. The customs authorities shall accept it within 30 days of receipt of the application.

As referred to in Article 22(2) of the UCC and Article 11 of the DA, an application for a decision relating to the implementation of the customs legislation shall be accepted provided that the following conditions are met:

a) Completeness of the application, i.e. the application contains all the information required in order for the authorities to be able to take a decision.

The data that shall be included in every kind of application or declaration are set out in Annexes A and B to the Delegated Regulation.

In the case of the application for the status of an authorised economic operator (AEO), the applicant shall submit a self-assessment questionnaire, which the customs authorities shall make available, together with the application, in addition to the information required (Article 26 DA).

b) The application has been submitted to the competent customs authority.

In general, the competent customs authority responsible for taking the decision shall be that of the place where the applicant's main accounts for customs purposes are held or accessible, and where at least part of the activities to be covered by the decision are to be carried out.

Where it is not possible to determine the competent customs authority, in accordance with Article 12 DA, the competent customs authority shall be that of the place where the applicant's records and documentation enabling the customs authority to take a decision (main accounts for customs purposes) are held or accessible.

Despite this general rule, certain exceptions are laid down in the UCC. For instance, the one regarding clearance of goods, as referred to in Article 159 (3) of said Code which states that, except where otherwise provided, the competent customs office for placing the goods under a customs procedure shall be the customs office where the goods are being presented.

c) Where required under the procedure which the application concerns, the applicant shall be assigned an EORI number that is valid.

d) Where required under the procedure which the application concerns, the applicant is established in the customs territory of the Union.

e) The application must not concern a decision with the same purpose as a previous one which was annulled or revoked on the grounds that:

- the applicant failed to fulfil an obligation imposed under that decision, during the one year period preceding the application,
- the period referred to therein shall be three years if the previous decision was annulled or the application is an application for the status of authorised economic operator.

f) Regarding decisions related to binding information, such an application shall not be accepted where the applicant was the holder of a previous decision in respect of the same goods. In the case of a binding origin decision, the goods in question and the circumstances determining the acquisition of origin correspond in every respect to the goods and the circumstances described in the decision (Article 33(1) subparagraph 2 UCC).

After studying the requirements, where the customs authority establishes that the application contains all the information, it shall inform the applicant of the acceptance of the application. On the contrary, where the customs authority establishes that the application does not contain all the information required, it shall ask the applicant to provide the relevant information within a reasonable time limit which shall not exceed 30 days.

Where the applicant does not provide the information requested, the application shall not be accepted and the applicant shall be notified accordingly.

The date of acceptance plays a very important role in the decision-taking process, as it is from this date that the time-limit for the customs authorities.

Customs authorities shall, at the latest within 30 days of receipt of the application for a decision, verify whether the conditions for the acceptance of that application are fulfilled and, eventually, accept it.

Unlike the time-limit for taking the decision, legislation does not allow an extension of the time-limit for the acceptance of the application in order to grant the person concerned an additional time period to provide the omitted information. However, in the guidelines posted on its website, the Commission considers that, where more information needs to be required, the time-limit of 30 days for submission can be extended for the same extension granted to the applicant to provide such information.

As referred to in Article 22 (2) subparagraph 2 of the UCC, customs authorities shall communicate the acceptance to the applicant, within the same period established for the acceptance of that application, i.e. 30 days. It would seem

from this that what should occur within that period of time is the notification of the acceptance. The fact that this very article specifically mentions the period of time in which the communication has to be made, suggests that the mere acceptance by the customs authorities is not enough, but that the notification to the person concerned is necessary instead. The communication is to be understood as the formal notice to the applicant, and it should be entered in the files.

That said, the date of the notification of acceptance is not the date of acceptance itself. Article 12 of the IA states that the date of acceptance of an application shall be the date on which all the information required was received by the customs authority. This means that the date of the acceptance shall be the date of submission of the application if it was complete, or, in those cases where additional information was provided by the applicant, the date when the last piece of information was provided.

EXAMPLE

An application for an authorisation to use a comprehensive guarantee is submitted on 16 July. Compliance to all necessary requirements is checked by the custom authority, who notifies its acceptance to the applicant on 24 July.

Option 1: the application is complete, it contains all the information required by the authorities.

In this case, the date of acceptance is 16 July.

Option 2: the application is incomplete. On 18 July, the customs authorities ask for additional information which is submitted by the applicant on 20 July.

In this case, the date of acceptance is 20 July, the day when the application is complete, irrespective of the fact that it is accepted by the customs authorities on 24 July, date of their notification.

Nevertheless, the above-mentioned article of the Implementing Regulation records an alleged acceptance where the customs authorities fails to communicate to the applicant in relation to whether the application has been accepted or not. By the end of the thirty-day deadline, in the absence of any communication from the customs authorities to the applicant regarding whether their application was accepted or not, the application is deemed to be accepted. In those cases, the date of acceptance should be the date of submission of the application

or, in those cases where additional information has been provided by the applicant following a request of the customs authority as referred to in paragraph 2, the date of acceptance would be the date when the last piece of information has been provided.

EXAMPLE

Let us reconsider the previous case, on the understanding that customs authorities fail to notify the acceptance to the applicant.

Option 1: the time limit is expired, the application contains all the information required by the authorities.

In this case, the date of acceptance is 16 July.

Option 2: the application is incomplete. On 18 July, customs authorities ask for additional information which is submitted by the applicant on 20 July.

In this case, the date of acceptance is 20 July.

1.2. Decision taking

Verification of the data necessary for acceptance does not entail that additional information relevant for the decision-taking process cannot be asked for by the customs authorities.

The acceptance of an application takes place at a preliminary stage of the decision-taking process, where relevance is given to the examination of the elements necessary for the customs authorities to be able to take a decision, but not an examination on the substance of what is requested. Therefore, the acceptance of an application is without prejudice to the final decision on the content of the application.

At this stage, customs authorities may adopt any measures deemed appropriate in order to obtain all information necessary to take a decision.

Once they have carried out proper verification, after the analysis of the information submitted altogether with the application and the information they have gathered, competent authorities shall take the appropriate decision.

Where the decision is favourable to the person concerned, the customs authorities shall take their decision immediately. However, where the customs authorities may take an unfavourable decision, they shall notify the person concerned the reasons on which they intend to base their decision, indicating the period within which the person concerned shall express their point of view

and pledge whatever may be in their best interest. This is known as the ***right to be heard***.

A decision has to be understood as unfavourable where the request made by the interested party is rejected.

CASE 1

The withdrawal of an authorisation for customs warehousing should not be considered as unfavourable merely because it is a revocation. If the interested party applied for the revocation and the customs authorities approved the request, the decision can not be regarded as unfavourable.

CASE 2

The amendment of a tariff heading declared for release for free circulation of goods by an operator can be considered as an unfavourable decision. Even though the interested party requests the release for free circulation and the customs authority allows the release of goods, the elements to be considered by the Administration differ from the ones declared and, therefore, the party should have the right to put forward their viewpoint before any decision is taken by the Administration.

EXAMPLE

An operator submits a customs declaration for release for free circulation of sweet peppers. The person concerned declares a consignment under heading 2001907090 with a tariff rate of 16%. The customs authorities, after checking the goods, deemed the heading 2001902000 with a tariff rate of 5% to be correct.

The fact that a heading with lower tariff is regarded as the right one by the customs authority should not be understood as a favourable decision. Putting goods under a new heading may adversely affect the interested party in ways that the Administration is unaware of.

The Administration decision of classifying the goods under a different heading must be regarded as an unfavourable decision, and the party concerned should be granted the opportunity of expressing what would be in their best interest.