

**SUBJECT: CUSTOMS LICENSING**

**ACT CUSTOMS AND EXCISE No. 10 OF 1982 AS AMENDED**

**SECTION: SECTIONS 60 AND 66**

**DATE: MARCH 2011**

**Preamble**

In this Ruling-

- 1.1 Unless the context requires otherwise, the term “Act” means the Customs and Excise Act, 1982 and “regulations” means Customs and Excise Regulations of 1984;
- 1.2 References to sections are to sections of Customs and Excise Act unless otherwise stated;
- 1.3 Unless the context otherwise indicates, any word or expression in this Ruling bears the meaning ascribed to in Customs and Excise Act;
- 1.4 Unless the context requires otherwise “LRA” means Lesotho Revenue Authority.

**2.0 Purpose**

This Public Ruling provides guideline on licensing of clearing agents as provided for by Sections 60 and 66 of the Act. The Ruling considers the following:

- 2.0 Who may become a customs clearing agent;
- 2.1 Purpose of the competency test;
- 2.2 Registration process;
- 2.3 Security;
- 2.4 Customs licensing process;
- 2.5 Customs License Cancellation;
- 2.6 Obligations of clearing agents;

### **3.0 Background**

- 3.1 The Act recognizes the complexities of the customs clearance work and many requirements for fulfillment of customs formalities. For these reasons the Act has provided that importers and exporters may appoint a customs clearing agent to undertake clearance process on their behalf.
- 3.2 Customs clearing agent licensing therefore is a critical factor in that it provides an opportunity for competent persons in Customs and Excise matters to carry out customs clearing work on behalf of the importers and exporters. The Act also does not mandatorily require importers and exporters to appoint such clearing agents. It therefore means that, the importers and exporters may decide to undertake clearance of their goods. However where an importer and exporter opts for the clearance of own goods, it is required that they should have the competency and necessary skill to undertake the clearance work in terms of all the rules relating to the clearance process as indicated in 6.1 of this Public Ruling. It must be understood that though an importer or exporter is not required to sit for the competency test per se, failure to comply with the clearance processes in terms of the prescribed rules will attract penalties.

### **4.0 The Law and its application**

- 4.1 The Act is the legal basis for licensing of operators under Customs and Excise. Section 60 (1) and (2) of the Act provides that no person shall perform any act or be in possession of or use anything in respect of which a license is required under this Act unless he has obtained the appropriate license.
- 4.2 In terms of Section 66 of the Act, a clearing agent is any person who, for reward, makes due entry of imported or exported goods under the Act. The defining factor under Section 66 for one to qualify as a clearing agent is a reward, which may be of a monetary nature or any other form of consideration. Thus, the Commissioner General will determine whether one is a clearing agent or not, regardless of whether monetary or in-kind payments are received by the service provider, that is, the person who makes due entry of goods on behalf of another for reward.

### **5.0 Who may become a customs clearing agent**

- 5.1 In terms of the Act, anyone can be a clearing agent, whether a natural person or a legal person, provided that such a person has duly applied and is granted a licence to operate as a clearing agent.
- 5.2 An important consideration to take into account is that the Commissioner General is empowered by law to impose such other conditions, as the Commissioner General deems necessary, which must be complied with by the licensee before a license is issued. Thus the Commissioner General may require the applicant to submit the following;
  - (a) a license issued by the Ministry of Trade, Industry, Cooperative and Marketing (Traders license)

- (b) In the case of a company, a certified copy of certificate of incorporation, memorandum and articles of association of the company registered with the Registrar of Companies
- (c) In the case of a partnership, a certified copy of the deed of partnership
- (d) certified copy of managing director's passport or identity document
- (e) A surety bond duly signed from a local bank
- (f) tax clearance certificate

5.3 Consequently, it is advisable that the applicant or the licensee be sufficiently competent and knowledgeable in customs processes and procedures to be able to assist clients in the customs clearance work and also to be in a position to provide sufficient proof to the Commissioner General of his competency in customs processes generally. Further, where the Commissioner General deems necessary, a competency test is arranged for the applicant.

## **6.0 Purpose of the competency test**

- 6.1 The competency test is arranged to test an applicant on a range of the following areas:
- (a) knowledge on customs Tariff Classification;
  - (b) usage of all Classification Instruments and Techniques;
  - (c) customs Valuation Principles and Techniques, as embedded in the Act and other international instruments;
  - (d) rules of Origin, which determines if goods being treated under customs law in Lesotho fall within preferential tariff regimes; and
  - (e) generally on all customs procedures such as importation, exportation, and other related formalities and laws governing importation and exportation of goods.
- 6.2 It is a crucial requirement that a person sitting for the competency test be the person who shall be responsible for clearance work and whose signature should be endorsed in all declarations processed under the licence issued.
- 6.3 It must be noted that the Commissioner General will reject any declaration from any licensed clearing agent if the person who signed such a declaration is not attested through competency test as demonstrated in example 1 below. The Commissioner General therefore requires that a specimen signature of each authorised person/s be availed to him for purposes of clearance. The issuance of the customs license rests not with the clearing agent company but with the competent persons within the company.

## **7.0 Security**

- 7.1 Before any person is issued with a customs clearing agent license, such a person is required in terms of Section 66(3) to furnish security in the manner as is determined by the Commissioner General. Surety bond for customs clearing agents amounts to M25, 000.00 which can increase generally or increase depending on the circumstances that the Commissioner General deems necessary. For guidance purposes, the factors that the Commissioner General may consider in respect of whether or not to increase the surety bond from the current M25, 000.00 will include, but are not limited to the factors such as:
- (a) the general tax compliance status of the applicant/licensee,
  - (b) the track record in respect of due diligence in undertaking the clearance work of the clients
  - (c) consideration in relation to the general worthiness and integrity of the applicant/licensee as a whole.
- 7.2 The required surety bond has to be lodged with a local bank. Security so lodged may be utilised by Commissioner General for the purposes of customs clearance where the clearing agent fails to follow through with clearance processes and procedures. For instance, where the clearing agent wishes to cancel his operating license, the security is used to offset the customs duties and other taxes that may be owing to LRA. When the clearing agent wishes to cancel the license and no customs and excise duties and other taxes are liable for payment or owing, the surety bond lodged can be cancelled and thereafter the clearing agent will be allowed to cancel the operating license.

## **8.0 Customs licensing process**

- 8.1 Importers, exporters or any other persons may appoint another person (clearing agent) to perform imports and exports transactions on their behalf and represent them in terms of their transaction(s) and/or declaration(s) to customs. Clearing agents so appointed must therefore accept to answer all questions put before them by a customs officer in relation to concerned transaction(s) and/or declaration(s). A Customs officer may, however, still require that the importer or exporter be personally present for such questioning.
- 8.2 Regulation 46 provides that an application form shall be completed in all respects and if false or incomplete information is furnished on the form, any license issued against such an incomplete form or a form containing false information shall be considered as invalid. An application to become a customs clearing agent is done on the form called CE 185 (hereinafter attached for ease of reference) which is a form approved by the Commissioner General. Therefore, applicants are required to take caution when filling up the form.
- 8.3 In terms of Regulation 46 (4), a licence issued to the clearing agents remains valid for a specific period which expires on the 31<sup>st</sup> day of

December each year. In other words, a license obtained in any month of the year shall expire in December of the same year. Applications for renewal of the said license must be submitted between the 1<sup>st</sup> and 31<sup>st</sup> October prior to the date of expiry failing which penalties shall be charged over and above a license fees.

## **9.0 Customs License Cancellation**

- 9.1 Section 60(2)(c) provides that the Commissioner General may suspend or cancel any existing license or refuse to renew the same if the holder of that license has:
- (a) contravened or failed to comply with the Act and any other Act administered by the LRA;
  - (b) been convicted of any offence under the Act or any other Act administered by the LRA, or has incurred a penalty related to disposal of seized goods; or
  - (c) been convicted of an offence concerning dishonesty, such as an economic offence, fraud or any other revenue offence contemplated within the revenue laws.

## **10.0 Obligations of clearing agents**

- 10.1 A licensed clearing agent is liable in respect of any entry made or bill of entry (SAD 500) delivered to customs office. The clearing agent undertakes responsibility and accepts any liability including payment of duties for goods cleared by him for customs purposes. A clearing agent is therefore required to produce proof of appointment by the importer or exporter. Such proof is in the form of the duly filled clearing instruction form prescribed by the Commissioner General, in terms of section 101.
- 10.2 Every importer, exporter, container operator, pilot, manufacturer, licensee, remover of goods in bond or other principal must, in terms of the Act, be responsible for any act done by an agent acting on his behalf whether within or outside Lesotho. Provided that the personal attendance of the pilot may be demanded by the Commissioner General
- 10.3 Although clearing agents are liable for the clearance of goods on behalf of their importers and exporters, they may be exempted from such liability as provided in section 100 of the Act. The exemption only applies where the clearing agent provides reasonable proof that:
- (a) he was not a party to the non-fulfilment of any applicable obligation on the principal;

- (b) when he became aware of such non-fulfilment, he notified the Commissioner General as soon as it is practicable about such non-fulfilment; and
- (c) all reasonable steps were taken by him to prevent such non-fulfilment.

10.4 The Commissioner General reserves the right to require the principal concerned to remain so liable for fulfilment of his obligation in terms of section 100.

## 11.0 **Examples**

### Example 1

11.1 Mosiuoa Agents (Pty) Ltd is a registered company in Lesotho and applies to become a customs clearing agent. The company has 4 directors namely, Mrs Blue, Mr. Green, Mr. Yellow and Ms. White. They indicated that only Mr. Green and Ms. White will sit for the competency test on behalf of the company.

11.2 Both directors pass the competency test and the company is issued with customs clearing agent license. Both directors interchangeably sign the bills of entry for clearance of goods and do represent their clients on customs matters.

11.3 However, one year later, the company employs a secretary/receptionist, Ms. Purple. The company therefore assigned Ms. Purple a role of preparing and signing for bills of entry. A Customs officer realises a new set of entries which are signed by a new signatory from the client.

### 11.4 Questions

What should the customs officer do in relation to the matter?

### 11.5 Solution

Since the Commissioner General has provided that only those persons who sat for the competency test may prepare and present bills of entry to customs, the customs officer must reject the entry until such time that Ms. Purple has passed the competency test.

### 11.6 Question 2

Would it be a problem if either Mrs. Blue or Mr. Yellow starts signing bills of entry on behalf of the company?

### 11.7 Solution 2

The company has competency only as far as only Mr. Green and Ms. White are concerned. Therefore, the customs officer must reject the entries signed by either Mrs. Blue or Mr. Yellow even though both persons are directors of the company.

### Example 2

11.8 Graise Agents (Pty) Ltd is a registered company in Lesotho and applies to become a customs clearing agent. The company has 2 directors

namely, Mrs Brown, Mr. Red. They indicated that only Mr Hlapisi will sit for the competency test on behalf of the company.

- 11.9 Mr Red passed the competency test and raised X amount as a surety bond with the local Bank and the company is issued with customs clearing agent license. Only Mr Red signs the bills of entry for clearance of goods and do represent their clients on customs matters.
- 11.10 Three years down the line Mr Red resigns and the company has to bring another person for the competency test whereby the person fails. The company license will be revoked as there is no person in the company who has the competency to process customs declarations on behalf of the company clients.

### **Disclaimer**

This Public Ruling provides the general interpretation of the law and considers broad principles in guiding the implementation of Sections 60 and 66 on the law applicable in issuing clearing agents licenses. The Public Ruling has no binding legal force and does not affect a taxpayer's right of objection and appeal to the Commissioner General, the Revenue Tribunal or the Courts of Law. This Ruling shall not affect the taxpayer's right to argue for a different interpretation, where necessary, in any appeal process, as stipulated in the revenue laws. Neither is this Ruling binding on the Commissioner General, should circumstances arise for deviation as necessary or as the Commissioner General may deem otherwise in his discretion.