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To: Transport Industry Operators

Formula milk powder forfeiture

The Hong Kong High Court issued a Judgment on 5/8/2015 holding that a shipment of formula milk powder without the legally required export licence should not be forfeited. [HCMA171/2015]

This case concerns 11,318.40kg of formula milk powder in 14,148 packages. According to Section 6D of the Import and Export Ordinance (Chapter 60), formula milk powder can only be exported with an export licence. The shipment of the formula milk powder was found in a container truck which was about to leave Hong Kong. The cargo manifest had the declaration of the formula milk powder. However, there was no export licence. The logistics company and the container truck driver were prosecuted, and they pleaded guilty to the offence of attempting to export the prohibited articles with no export licence. The logistics company was fined for HK\$100,000, and the container truck driver was fined for HK\$20,000 plus imprisonment for 8 months (suspended for 12 months). The Magistrate also ordered to forfeit the cargo of the formula milk powder.

The cargo owner appealed against the Magistrate's forfeiture order on the grounds: (i) the cargo owner had no negligence in the shipment of the cargo, (ii) even if the cargo owner had been negligence, such negligence would not have facilitated the offence of exporting the formula milk powder with no export licence, and (iii) the court should exercise its discretion to make sure the cargo owner was not unfairly penalised.

The logistics company had been shipping cargoes for the cargo owner for about 10 years, but this was the first time the cargo owner asked the logistics company to transport formula milk powder. Both the logistics company and the container truck driver had no criminal conviction record prior to the offence in question. The cargo owner bought the formula milk powder from the producer in Holland, and planned to ship the formula milk powder to China for sale. The formula milk powder was not for sale in Hong Kong. The cargo owner had already obtained the import licence issued by the authorities in China, and submitted the formula milk powder's health certificate to the authorities in China. In April 2014, the cargo owner received the logistics company's B/L copy and notification that the shipment would be via Hong Kong for transshipment. The cargo owner at that time knew that the Hong Kong government had imposed some restrictions on exporting formula milk powder. However, the cargo owner did not check with the Hong Kong Customs whether the formula milk powder in question needed an export licence. Several days prior to the export, the logistics company informed the Hong Kong Customs that they were going to export the formula milk powder by container truck, and the Hong Kong Customs did not ask the logistics company whether the cargo of the formula milk powder got the export licence.

The Judge was of the view that (i) the discretion should be exercised on the prerequisite that the forfeiture order must not constitute unjustise, or (ii) the discretion to forfeit the formula milk powder must be exercised on the prerequisite of justice. The cargo owner had the burden to make

submission to the Court proving that the discretion should be exercised to return the formula milk powder to them. One way was to make the Court accept on a balance of probabilities that the cargo owner had not intentionally or negligently done anything to participate in or facilitate the offence of exporting the formula milk powder with no export licence. The Court also at the same time had to take into account the usual two objectives for issuing forfeiture orders: (i) to deter people from committing serious unlawful activities, and (ii) to protect the government's income. The Judge was of the view that proving the cargo owner innocent or the cargo owner not negligent to facilitate the offence was only one of the ways the cargo owner could submit evidence to prove that the Court should exercise discretion to return the cargo to them, but these were not the only factors to be considered. Moreover, no matter what factors to be considered, the discretion must be exercised on the prerequisite of justice.

The Judge held that the cargo owner were to certain extent negligent in not checking with the Hong Kong Customs about the export licence, and this negligence caused the offence (which originally could have very easily been avoided) not to be avoided. However, the Judge was of the view that the cargo owner's negligence did not facilitate the logistics company and the container truck driver to commit the offence. The case in question was not a case of smuggling, and did not involve any secret compartments. The formula milk powder had been declared on the export cargo manifest, got the PRC's import licence. Most importantly, the formula milk powder had never been planned for sale in Hong Kong. Besides, applying for an export licence for formula milk powder is free of charge. The case did not involve any serious unlawful activities, and also did not affect the government's income. The people in Hong Kong did not suffer any damage or losses as a result of the cargo owner's negligence, the supply of formula milk powder in Hong Kong was completely not affected. The only victim was the cargo owner.

Based on the facts of the case in question, no matter whether the cargo owner were innocent or were negligent to a certain extent, the Judge held that it would be unjust if the formula milk powder were ordered to be forfeited.

The Judge overturned the Magistrate's forfeiture order and exercised the discretion to order the formula milk powder to be returned to the cargo owner (i) on the ground that the cargo owner's negligence had not facilitated the offence of the logistics company and the container truck driver, and (ii) based on the prerequisite of justice. However, the cargo owner had to (i) pay the Hong Kong Customs for the cargo storage and transportation costs of HK\$126,060.80, and (ii) bear their own legal costs.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

