A BILL

for

AN ACT TO AMEND THE CUSTOMS AND EXCISE ACT

BE IT ENACTED by the King and the Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

PART I
PRELIMINARY

Short title and Commencement

1. (1) This Act may be cited as The Customs and Excise (Amendment) Act, 2003.

(2) This Act shall come into force on a day to be proclaimed by His Majesty in Council.

Interpretation

2. In this Act, "Principal Act" means the Customs and Excise Act (Cap. 67).

PART II
VALUATION OF IMPORTED GOODS

Repeal of section 15

3. Section 15 of the Principal Act is amended by the insertion after section 15(1) of the following subsection:

(1A) This section shall not apply to imports after 31st July 2004.

Insertion of PART IIA

4. The Principal Act is amended by inserting the following Part at the end of Part II –

"PART IIA
VALUATION OF IMPORTED GOODS

Interpretation

44A. (1) In this Part, unless the context requires otherwise–

"foreign inland insurance" means the cost of any insurance relating to foreign inland freight;

"foreign inland freight" means the cost of transportation (including loading, unloading, handling and other expenses associated with transportation) of the goods to the place in the country of export from which the goods were shipped to Tonga;

"identical goods", in relation to imported goods, means goods that the Chief Commissioner is satisfied –

(a) are the same in all material respects, including physical characteristics, quality and reputation, as the imported goods;

(b) were produced in the same country as the imported goods; and

(c) were produced by or on behalf of the producer of the imported goods,

but does not include goods in relation to which –

(d) art, design, development, or engineering work undertaken or substantially undertaken in Tonga; or

(e) models, plans, or sketches prepared or substantially prepared in Tonga,

was or were supplied, directly or indirectly, by or on behalf of the purchaser free of charge or at a reduced cost for use in relation to their production;

"overseas freight", in relation to imported goods, means amounts (but not an amount of overseas insurance) paid or payable in respect of the transportation of the goods from their place of export to Tonga;

"overseas insurance", in relation to imported goods, means amounts paid or payable in respect of insurance of the goods from their place of export to Tonga;

"place of export", in relation to imported goods, means:

(a) the place where the goods were posted for export to Tonga;

(b) the place in the country of export to Tonga that the goods were packed into a transport container;

(c) if goods, not being goods referred to in (a) or (b), were exported from a country by air or sea – the place where the goods were placed on board a ship or aircraft for export to Tonga; or

(d) in any other case – a place determined by the Chief Commissioner

"price", in respect of imported goods, means the sum of all amounts paid or payable, directly or indirectly, for

the goods by or on behalf of the purchaser to or for the benefit of the vendor;

"related persons" has the meaning in subsection (2);

"similar goods", in relation to imported goods, means goods that the Chief Commissioner is satisfied –

(a) closely resemble the imported goods in respect of their component materials and characteristics;

(b) are functionally and commercially interchangeable with the imported goods;

(c) were produced in the same country as the imported goods; and

(d) were produced by or on behalf of the same producer as the imported goods,

but does not include goods in relation to which –

(d) art, design, development, or engineering work undertaken or substantially undertaken in Tonga; or

(e) models, plans, or sketches prepared or substantially prepared in Tonga,

was or were supplied, directly or indirectly, by or on behalf of the purchaser free of charge or at a reduced cost for use in relation to their production; and

"time of importation", in respect of goods means the date on which the Chief Commissioner prescribes those particular goods are deemed to be imported.

Transaction Value is the amount determined under section 44D.

(2) For the purposes of this Part, two persons are related persons if –

(a) both being natural persons –

(i) they are connected by blood relationship, marriage, or adoption; or

(ii) one of them is an officer or director of a company controlled, directly or indirectly, by the other;

(b) both being companies –

(i) both are controlled, directly or indirectly, by a third person (whether or not a company);

(ii) both together control, directly or indirectly, a third company; or

(iii) the same person (whether or not a company) is in a position to cast, or control the casting of 5% or more of the maximum number of votes that might be cast at a general meeting of each company;

(c) one person being a company is, directly or indirectly, controlled by the other person (whether or not a company);

(d) one person being a natural person, is an employee, officer, or director of the other person; or

(e) they are members of the same partnership.

Customs value

44B. (1) For the purposes of any Act under which any import duty is imposed on imported goods by reference to their value, the value of the goods for customs purposes shall be the customs value determined in accordance with this section.

(2) Subject to this section, the customs value of imported goods shall be the transaction value of the goods as determined under section 44D.

(3) If the Chief Commissioner cannot determine the transaction value of imported goods or the transaction value cannot be used as a result of section 44C, the customs value of the goods shall be determined in accordance with the first of the following methods, applied in the order set out below, that can be applied in respect of the goods –

(a) the transaction value of identical goods as determined under section 44E;

(b) the transaction value of similar goods as determined under section 44F;

(c) the deductive value of the goods determined under section 44G; or

(d) the computed value of the goods determined under section 44H.

(4) An importer may apply, in writing, to the Chief Commissioner for the order of consideration of the methods in subsection (3)(c) and (d) to be reversed.

(5) An application under subsection (4) must be made before the Chief Commissioner commences to determine the customs value of the goods.

(6) If the customs value of imported goods cannot be determined under subsection (3), the customs value shall be determined under section 44I.

Transaction value of imported goods not to apply

44C The transaction value of imported goods shall not be the customs value of the goods if –

(a) there is a restriction on the disposition or use of the goods by the purchaser, other than a restriction –

(i) imposed by Tongan law;

(ii) limiting the geographical area in which the goods may be resold; or

(iii) that does not substantially affect the value of the goods;

(b) the sale or price of the goods is subject to a condition or consideration for which a value cannot be determined;

(c) part of the proceeds of any disposal, use or resale of the goods by the purchaser accrues, directly or indirectly, to the vendor, unless an appropriate adjustment can be made in terms of section 44D(2)(g); or

(d) the vendor and purchaser are related persons at the time the goods were sold for export unless –

(i) the Chief Commissioner is satisfied that the relationship did not influence the price paid or payable for the goods; or

(ii) the importer satisfies the Chief Commissioner that the transaction value of the goods closely approximates the transaction value, deductive value, or computed value of identical or similar goods sold at comparable trade and

quantity levels to unrelated buyers in Tonga at or about the same time as the goods to be valued.

Transaction value of imported goods

44D. (1) The transaction value of imported goods is the price of the goods at the time they are sold for export to Tonga increased by the amounts specified in subsection (2) and decreased by the amounts specified in subsection (3).

(2) For the purposes of computing the transaction value of imported goods, the price of the goods shall be increased by the sum of the following amounts paid or payable, directly or indirectly, by or on behalf of the purchaser in respect of the goods to the extent that the amount is not included in the price –

(a) commission and brokerage, other than buying commission;

(b) packing costs, including any labour and material costs;

(c) the cost of containers that are treated as being as one with the goods;

(d) royalties or licence fees payable as a condition of sale, other than for the right to reproduce the goods in Tonga;

(e) the cost of foreign inland freight and foreign inland insurance;

(f) the cost of overseas freight and overseas insurance;

(g) the whole or any part of the proceeds of a subsequent use, resale or disposal of the goods by or on behalf of the purchaser that accrues to the vendor; and

(h) the value of any of the following goods and services supplied, directly or indirectly, by the purchaser free of charge or for reduced consideration for use in connection with the production and sale for export of the imported goods, apportioned to the goods in a reasonable manner and in accordance with generally accepted accounting principles –

(i) any materials, components, parts, and other goods incorporated in the imported goods;

(ii) any tools, dies, moulds, and other goods utilised in the production of the imported goods;

(iii) any materials consumed in the production of the imported goods; and

(iv) any engineering, development, art, or design work, plans or sketches undertaken outside Tonga and necessary for the production of the goods.

(3) For the purposes of computing the transaction value of imported goods, the price of the goods shall be decreased by the sum of the following amounts to the extent that these amounts are separately identified in the price paid or payable for the goods –

(a) any expenditure incurred for the construction, erection, assembly or maintenance of, or technical assistance provided in respect of the goods after importation;

(b) the cost of transportation (including loading, unloading, handling and other expenses associated with transportation) of the goods after importation, and the cost of any insurance relating to such transportation; and

(c) any duties or taxes paid or payable by reason of the importation or sale of the goods in Tonga.

Transaction value of identical goods

44E. (1) If the customs value of imported goods cannot be determined under section 44D, the customs value shall be the transaction value of identical goods in a sale of those goods for export to Tonga if –

(a) the transaction value of the identical goods is the customs value of those goods; and

(b) the identical goods were exported to Tonga at the same or substantially the same time as the imported goods and were sold to a purchaser –

(i) at the same or substantially the same trade level as the imported goods; and

(ii) in the same quantities as the imported goods.

(2) If subsection (1) does not apply solely because identical goods were not sold under the conditions specified in subsection (1)(b), the customs value of the imported goods may be determined by reference to the transaction value of identical goods in a sale of those goods for export to Tonga if the identical goods were sold under any of the following conditions –

(a) to a purchaser at the same or substantially the same trade level, but in different quantities from the imported goods;

(b) to a purchaser at a trade level different from the purchaser of the imported goods, but in the same or substantially the same quantities as the imported goods; or

(c) to a purchaser at a trade level different from the purchaser of the imported goods and in different quantities from the imported goods.

(3) The customs value of imported goods under this section shall be the transaction value of identical goods referred to in subsection (1) or (2) adjusted to take account of –

(a) commercially significant differences in the foreign inland freight and foreign inland insurance costs of the identical goods and those costs for the imported goods attributable to differences in distance and modes of transport; and

(b) if subsection (2) applies, differences in the trade levels, quantities, or both, as the case may be.

(4) If, in relation to imported goods, there are two or more transaction values for identical goods that meet the requirements of subsection (1) or (2), as the case may be, the customs value of the imported goods shall be determined on the basis of the lowest such transaction value.

(5) This section shall not apply If there is insufficient information to determine the customs value of imported goods under subsection (3).

Transaction value of similar goods

44F. (1) If the customs value of imported goods cannot be determined under section 44D or 44E, the customs value shall be the transaction value of similar goods in a sale of those goods for export to Tonga if –

(a) the transaction value of the similar goods is the customs value of those goods; and

(b) the similar goods were exported to Tonga at the same or substantially the same time as the imported goods and were sold to a purchaser –

(i) at the same or substantially the same trade level as the imported goods; and

(ii) in the same quantities as the imported goods.

(2) Section 44E(2)-(5) apply for the purposes of this subsection on the basis that the reference to "identical goods" is a reference to "similar goods".

Deductive value

44G. (1) Subject to section 44B(4), if the customs value of imported goods cannot be determined under section 44D, 44E, or 44F, the customs value shall be the deductive value of the goods.

(2) If –

(a) the imported goods, or identical or similar goods are sold in Tonga at the same or substantially the same time as the time of importation of the imported goods;

(b) the goods were sold in Tonga in the same condition in which they were imported;

(c) the sale was made at the first trade level after importation; and

(d) the Chief Commissioner is satisfied that the purchaser in the sale was not related to the importer and did not incur any costs referred to section 44D(2)(h) in relation to the goods sold,

the deductive value of the imported goods is the unit price of the imported goods, or identical or similar goods, as the case may be, at which the greatest number of the goods are sold reduced by the following amounts determined on a per unit basis –

(e) the amount of any commission;

(f) an amount for profit and general expenses, including all costs of marketing the goods based on sales in Tonga of goods of the same class or kind as the goods sold;

(g) the cost of transportation of the goods in Tonga (including loading, unloading, handling and other expenses associated with transportation) and insurance in relation to such transportation to the extent not deducted under paragraph (f); and

(h) any amount referred to in section 44D(3)(c).

(3) If –

(a) the imported goods, or identical or similar goods are not sold at the same or substantially the same time as the time of importation but are sold within 90 days after the time of importation; and

(b) subsections (2)(b) to (d) are satisfied,

the deductive value of the imported goods is determined in accordance with subsection (2) by reference to such later sale.

(4) If –

(a) the imported goods, or identical or similar goods are not sold in Tonga at the time of importation or within ninety days after that time;

(b) the goods are sold in Tonga, after being assembled, packaged, or further processed, within 180 days after the time of importation; and

(c) subsections (2)(b) to (d) are satisfied,

the deductive value of the imported goods is determined, at the request of the importer, in accordance with subsection (2) by reference to such sale and making a reduction on a per unit basis for the value added attributable to the assembly, packaging or further processing in Tonga.

(5) Subsection (4) shall not apply if the Chief Commissioner has insufficient information to determine the amount of the reduction for the value added attributable to the assembly, packaging or further processing in Tonga.

Computed value

44H. (1) If the customs value of imported goods cannot be determined under section 44D, 44E, 44F, or 44G, the customs value shall be the computed value of the goods.

(2) The computed value of imported goods is the sum of the following amounts –

(a) the cost or value of materials used in producing the goods;

(b) the cost of manufacture or processing to produce the goods;

(c) any costs referred to in subsection 44D(2)(c), (f) and (g);

(d) the value of any goods or services referred to in section 44D(2)(h); and

(e) an amount for profit and general expenses equal to that generally applicable in sales of goods of the same class or kind as the imported goods, which are made by producers in the country of exportation.

Residual method of valuation

44I. Subject to subsection (2), if the customs value of imported goods cannot be determined under the preceding sections, the value shall be determined by the Chief Commissioner having regard to the methods for valuation specified in this Part and to any other information available to the Chief Commissioner but not including any of the following matters -

(a) the selling price in Tonga of goods produced in Tonga;

(b) any system that provides for the acceptance for valuation purposes of the higher of two alternative values;

(c) the selling price of goods on the domestic market of the country of exportation of the imported goods;

(d) the cost of production, other than computed values which have been determined for identical or similar goods in accordance with section 44H; or

(e) the price of the goods for export to a country other than Tonga;

(f) a system of minimum customs values; or

(g) arbitrary or fictitious values.

Value of goods to be in Tongan currency

44J. (1) Where an amount to be determined under this Part is an amount in a currency other than Tongan currency, that amount is to be converted into a Tongan currency equivalent amount by using the ruling rate of exchange of that other currency at the time of export of the imported goods.

(2) The Chief Commissioner may from time to time specify the ruling rate of exchange for a particular day in relation to a

foreign currency after having regard to the commercial rates of exchange applicable on or about that day and to such other matters as the Chief Commissioner considers relevant.

(3) "Time of export" for the purposes of subsection (1) means:

(a) where the imported goods were exported by post and the Chief Commissioner is satisfied with the date of posting – that day;

(b) where the imported goods were exported by sea or air and the Chief Commissioner is satisfied with the date of export – that day; and

(c) where the Chief Commissioner has reason for doubt about the date of export, a day determined by the Chief Commissioner after having regard to the circumstances.

Information to remain confidential

44K. (1) Subject to subsection (2) commercial information provided to the Chief Commissioner or his delegate under this Part shall remain confidential and must not be disclosed unless the specific permission of the provider is first obtained.

(2) Subsection 1 does not apply where:

(a) commercial information provided under this Part is required by another Tongan government department and that department has undertaken that it will not disclose that information; or

(b) the administration or enforcement of a Tongan law otherwise requires the disclosure of that information.

Right of appeal without penalty

44L. (1) Where the Chief Commissioner determines a customs value under this Part, a person liable for the payment of duty may request the Chief Commissioner to provide in writing particulars of how that determination was made.

(2) If a person liable for the payment of duty disagrees with the Chief Commissioner's determination, that person may within 28 days of the issuing of the particulars in subsection 1, provide to the Chief Commissioner reasons for any disagreement and request the Chief Commissioner to reconsider that determination without penalty.

(3) Where the Chief Commissioner reconsiders a determination pursuant to subsection 2 and maintains the determination, the person liable for the payment of duty will be notified in writing.

That person may within the time prescribed and without penalty commence an action in a court of competent jurisdiction for the recovery of such amounts paid.

Publication of administrative rulings of general application.

44M. (1) Subject to subsection (2) the Chief Commissioner shall ensure that administrative rulings of general application relating to the valuation of imported goods are published promptly and made available to importers.

(2) The Chief Commissioner shall not disclose pursuant to this section confidential information which would:

(a) impede law enforcement;

(b) be contrary to public interest; or

(c) prejudice a person's legitimate commercial interests.

Delays in determining valuation not to affect cargo clearance

44N. (1) The Chief Commissioner may require and take securities for compliance with this Part where there is a delay in the final determination of the customs value of imported goods.

(2) Securities shall be in a form approved by the Chief Commissioner and subject to approval, may be a bond, cash deposit or other method.

(3) The amount of the security should not exceed the amount of duty payable having regard to the Chief Commissioner's initial determination.

Reliable information required

44O. (1) The Chief Commissioner must be satisfied about the truth or accuracy of statements, documents and declarations presented for determining a customs value under this Part.

(2) Where the Chief Commissioner is not satisfied that there is sufficient reliable information presented to determine a customs value in accordance with this Part the Chief Commissioner may:

(a) elect not to use that particular valuation method;

(b) apply the particular valuation method but add back the amount in contention; or

(c) apply the particular valuation method but not deduct the amount in contention.

Regulations

44P. The Chief Commissioner may make regulations to give effect to this Part."

Application

44Q. This Part shall apply to imports on or after 1st August 2004.