THE PERSISTENT DOUBTS ON PAYING FOR CUSTOMS BROKERS' SERVICES

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It is unbelievable how to this date there are still doubts, even among those who are actively involved in foreign trade businesses, on the manner a Customs Broker's services should be paid for. After all, is it or is it not mandatory that these services be paid for through the Customs Brokers Union, i.e., by using a slip of paper identified by the letters "SDA", which is nothing more than an (acronym taken etc.) abbreviation composed by the first three words taken from the said Union's name.

It is a simple matter, really. Paying for a Customs Broker's services through the SDA can only be considered mandatory in one instance only, and even so it takes some good will: when the person is a self-employed Customs Broker and a SDA member as well.

It is certainly **not** mandatory in all other possible instances, i.e., when the person is (a) a self-employed, non-unionized Customs broker; (b) a Customs broker who is also an employee (who was hired to render services **exclusively** to a Customs brokerage firm); or (c) in the case of a company providing Customs brokerage services.

This became a confusing issue mainly because of a language problem, and also on account of a very competent work performed by the thirteen active Customs Brokers Unions in the country, that were coordinated by their national federation[1], in defending their interests.

[1] Federations are higher level Unions, which were organized by State. Under some exceptional circumstances, the Labor Ministry approved the establishment of national or interstate federations (Article 534, paragraph 2, of the Labor Code). Nowadays, all the requirements to apply for or obtain the government's approval to establish or create workers associations or unions have been tacitly revoked, because - with the exception of the proper registration with the pertinent government agency – the government is no longer allowed to interfere or prohibit the organization of workers unions (Federal Constitution, Article 8, item I).

Background

In order to permit a better understanding of the subject, a slight digression would be in order at this point: the activities of Customs brokers (the name given to this profession in the Portuguese language stems from Federal Decree 22104, of November 13, 1932) have always had a very close relationship with the State, so much that ten years later, with the advent of Decree-Law 4014, on January 13, 1942, their work permit depended upon a presidential decree, and the Assistant Customs Broker was appointed by an administrative act.

When Law 4069 came into effect on June 11, 1962, the amount payable to a Customs Broker, which was then referred to as "commission", in accordance with a price schedule, started to be calculated according to what was known as "the thirds system", which meant the following: the amounts collected by the various Customs offices throughout the country that were higher than the limits set forth by Law 2879 of September 21, 1956, were calculated and indicated separately on the Customs papers, and received by the local Union. One third of the said amount was paid to the Customs broker actually involved in the Customs clearance process; one third was distributed among the other Customs brokers, in equal parts, whether or nor they were unionized; and one third was distributed on a 50/50 basis between the assistant who actually did all the work, and the other assistants, also in equal parts.

Decree Law 346 of December 28, 1967 was a hard blow against the "reserved market status" enjoyed by all Customs brokers, because it put an end to that questionable relationship between the brokers and the State. Under the stipulations of the said law, as from April 1, 1968, using Customs brokers services to clear goods through Customs, both on imports and exports, would be a matter of choice, and no longer to be exclusively performed by the Customs Brokers Union's members.

The Customs broker started, from that date on, to be described as a self-employed professional[2], who charged a fee for providing its services and could be freely hired by anyone. In addition to that, Customs was prohibited from collecting any fees to be later distributed to the brokers, which was standard practice until that time. Therefore, hiring a Customs broker was no longer mandatory, what with besides the Customs broker itself, the importer, the exporter or the traveler, also Customs services providers and Customs brokerage firms, were allowed to perform the said services on its own behalf as legal representatives of importers, exporters or travelers, as provided for by Decree Law 366 of December 19, 1968.

[2] The legal description notwithstanding, it is an interesting fact that the Table Of Activities And Professions which, prior to the 1988 Federal Constitution, established the basic requirements for a workers union to be licensed as such, pursuant to the stipulations of the Labor Code, Article 577, which is no longer applicable nowadays because it is not mandatory, listed Customs brokers as professionals, for the purposes of the

After ten years, i.e. on September 18, 1978 that former situation was reverted by Law 6652, and the Customs brokerage firms were no longer permitted to act on its own behalf, nor were importers, exporters, etc. allowed to be represented by power of attorney.

This was the law stipulating that Customs brokers fees would have to be collected by the unions, who in turn would pass them on to the Customs brokers, after calculating the proper amount to be collected and payable to the Federal Revenue Department, as income tax.

After ten years of judicial disputes regarding the possibility of Customs brokerage firms being allowed, by Court order, to carry out their work as in the old days, the issue was finally resolved by Decree law 2472 of September 1, 1988 whereby in accordance with Article 5, paragraph 1, items (a) (b) and (c) Customs brokerage services could only be performed by the importer, the exporter or traveler. In the case of a private corporation, the said services could also be performed by the company's directors, or employees having an exclusive business relationship with the company, whereas in the case of a public corporation, by a specially assigned employee or official, including in either case the assignment of a Customs broker.

However, the said new law maintained under its Article 5, paragraph 2, the same legal command as in the old law, whereby payment of Customs brokers fees and the pertinent income tax calculation, for income tax payment purposes, would have to be carried out by the Brokers Unions.

Per Decree 646 of September 9, 1992 – which was strongly criticized by the workers unions – the requirements for any one person to be invested with the powers of a Customs broker were regulated, as well as those with respect to persons wishing to act as legal representatives of importers, exporters, etc., as provided for by Decree Law 2472/88, Article 5, paragraph 5.

The specific legislation covering the Customs brokers profession is very broad. Besides the legal texts already referred to herein, one should also make reference to law 9611 (Article 33) of February 19, 1998, which permits the importer, exporter or traveler to be legally represented by the Multimodal Transport Operator upon appointment, with respect to cargoes under their responsibility.

The competent work done by the workers unions

Faced with the inevitable changes brought about by modern times, one of the most sensitive is the ever-changing labor relationships that have swallowed a growing number of professions at an alarming speed, which are raising deep concerns over unemployment rates.

National Trade Confederation, under its Group 3 – Self-employed Commerce Agents – and not in any of the groups pertaining to the National Self-Employed Professionals Confederation.

Therefore, it is absolutely reasonable to expect the hard-working class of Customs brokers to defend their legitimate interests that very often are mingled with those of their unions. Consequently, it is obvious that *"… No Customs broker shall, therefore, provide services without the appropriate payment, because this is not only one way to dignify their profession, but also the only way to keep it alive."* (Memo 004/99 dated February 21, 1999, sent by the Customs Brokers Union, page 3), and by using this type of speech the unions make believe they do not know it is possible for self-employed professionals not to be unionized, or even if they are, to get paid directly by whomever hired them and not by the union.

On the other hand, the unions are also fiercely against companies signing up Customs brokers as part of their regular personnel, because this way they lose whatever privilege they enjoy as collectors, payers and parties in charge of withholding payable amounts for income tax purposes.

The unions' reasons for keeping their stand on this matter is the cheap payment offered by the market, which Customs brokers would be subject to - to the entire detriment of their peers - and also their fiscal obligation to withhold payable amounts for income tax purposes.

The legal grounds for such reasoning can be found in Decree 2472/88[3] (Article 5, paragraph 2) and in Decree 3000[4] (Article 719) dated March 2, 1999, the latter being Income Tax Regulations currently in force in the country.

Esprit-de-corps motivations and legal provisos aside, the market itself contributes to the confusion by wrongly considering *"union's fee or union's charge"* the payment made to Customs brokers using the union's slip, known as "SDA", which is merely a standard and sequentially numbered document showing the union's logo, used exclusively for internal control.

The government agencies also contributed for the said concept (*union's fee or union's charge*) to be accepted by the market, because for a very long time they required that proof of payment of the Customs brokers fees be attached to the import documents, or in the course of the Customs clearance process, without any legal grounds, the sole purpose for the said requirement being to do the unions a special favor.

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[3] For providing the services referred to herein, the Custom broker shall be free to set its own fees, which will paid to the Customs Brokers Union having jurisdiction over the broker's work area, who will provide for the withholding of any payable income tax amounts due.

[4] The fees payable to self-employed Customs brokers (who also have the right not to be unionized) with respect to clearing goods through Customs, and for providing whatever other services in relation to foreign trade matters, including clearing passengers' baggage, will be paid to the Customs Brokers Union having jurisdiction over the broker's work area, who will provide for the withholding of any payable income tax amounts due.

The said requirement was canceled within the 8th Fiscal Region - which is where Customs brokers acting within the State of São Paulo are registered - by act of the Government of the State of São Paulo ruling out the attachment, to Customs clearance proceedings, of any proof of payment regarding third party's fees.

It should also be pointed out that, should there be any further doubts on this matter, such privilege is responsible for one of the unions' main source of income, because they keep 10% of whatever amounts are paid using the aforesaid SDA slip. The remaining 90% are paid by the union to the relevant Customs broker (whose name is indicated on the slip), after withholding the appropriate income tax amount.

A problem with the language

With all due respect to the unions representing such an old profession, and to their hard-working directors and members, their stand on the matter, i.e. that payment to Customs brokers must be made by the union, bears no justification.

This is why the writers of papers, documents, books etc. defending the aforesaid standpoint, always take the precaution of qualifying a Customs broker as a self-employed professional only, and evidently a union member, and treat their payment exclusively as professional's fees.

Therefore, if the Customs broker is not a self-employed professional, but a company employee signed up to render exclusive services to the company, as is the case with many professionals[5], it doesn't make sense to require that the employee's payment (in order words, his/her salary) be made by the union.

Certainly, not a single voice shall rise in opposition to the aforesaid argument, and it shall be unanimous the opinion that it is the employer's responsibility to pay the employee's salary directly to him/her, as ordered by labor laws, in accordance with Article 457 of the Labor Code, as well as the applicable income tax payment.

On the other side, even if the Customs broker could be qualified as an authentic self-employed professional, but not a union member, it still doesn't make sense that he/she should receive his/her payment, herein indicated as fees, as processed through a union none of them wish to have any type of relationship with.

[5] For example, lawyers, physicians, dentists, engineers, economists, accountants, teachers, newspapermen, managers, real estate agents, etc.

Title II of the Federal Constitution that provides for the citizen's fundamental rights and guarantees (Article 5, sub-items XX[6], and Article 8, sub-item V[7]), assures total freedom of choice for any one citizen wishing to join a union or be a party to any partnership, and if that is guaranteed by our superior law, no other law under it could provide otherwise, and force any one citizen into receiving his pay through a union the citizen is a not a member of.

In this very same sense, another reference can be found in Decree 646/92[8] (Article 7), which sets forth the appropriate regulations pertaining to Customs broker's activities, as well as those of an assistant Customs broker, whereby should the fees be paid by a company, it is that company's responsibility to provide for the withholding of whatever income tax amount due (paragraph 1): should the said fees be paid by a person, the Customs broker shall be responsible for providing for the appropriate income tax deductible (paragraph 2).

It should also be pointed out that Article 719 of Decree 3000/99, in perfect harmony with the Decree referred to hereinbefore, which indicates that self-employed Customs brokers fees are to be received by the broker through his/her union having jurisdiction over the broker's work area, who must also provide for the pertinent income tax deductible – as it should be – also specifically emphasizes a person's right to freely join any union, therefore excluding from the rule those brokers that are not unionized (sole paragraph[9]), but stipulating that it is the paying company's responsibility to pay the said fees, and provide for the appropriate income tax withholding

On the other hand, a Customs broker who besides being self-employed is also a union member, will be at liberty to get paid as he/she sees fit, i.e., either through the union or directly from the person or company he/she was hired by.

In these cases, the income tax withholding shall be provided for, respectively, by the Customs broker himself/herself, the employer, or by his/her union, as mentioned hereinbefore, with basis on the stipulations of Decree 646/92 (Article 7, paragraphs 1 and 2), and Decree 3000/99 (Sole Paragraph).

Administrative act ADN CST 4/82 issued by the tax collection system coordinator corroborates the aforesaid understanding in that it clearly and transparently states that self-employed Customs

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[6] "no one shall be compelled to associate or remain associated."
[7] "no one shall be compelled to join a union, or remain unionized."
[8] " Article 7 – The Customs broker and the associate Customs broker may freely decide on their professional fees.
Paragraph 1 – Whenever the fees are to be paid by a company, it is the company's responsibility to provide for the appropriate income tax deductible, as regards the amount paid, taking into account the guidelines stipulated by income tax law.
Paragraph 2 – In the event the professional fees are agreed to and paid by a person, it is the Custom broker's and the associate Customs broker's responsibility to provide, personally, for the appropriate income tax deductible in accordance with the law."

brokers fees, whatever the paying source, are subject to income tax withholding, whether the said fees were paid through the union, or directly by the company or person the broker rendered his/her services to, it being the payer's responsibility to provide for the appropriate income tax withholding.

Therefore, only in the case of a unionized Customs broker opting to receive his/her professional fees through his/her union, it shall be mandatory for the union to provide for the appropriate income tax withholding.

Because it is essentially applicable to tax collection, the rule was not intended to create any legal relationship with respect to Customs broker services. It is, therefore, clear that the lawmaker's intent was not to create a legal obligation whereby whatever remuneration earned by every Customs broker would firstly be received by the union to be channeled to the broker thereafter, but instead to create a mechanism whereby a an entire class of professionals would not be sidelined, thereby bestowing the said tax responsibility to third parties, provided they, obviously would also be obliged to pay the appropriate income tax, as required by the National Tax Code (Article 128).

As to the hiring of a company by the interested party, i.e., by a company providing Customs broker services, either a regular Customs brokers agency or an integrated logistics company, known by the market as freight forwarder, or yet a multimodal transport operator, the indisputable fact is that they are a subject to a specific legislation, and have a different tax regime.

The official speech used by the unions in this case is that the remuneration of the said service providers is not be confused with that of a Customs broker, for the former receive an agreed to commission whereas the latter receives fees, if self-employed and whether or not unionized, or a salary, if he/she is an employee that was signed up to render services exclusively to a company providing Customs clearance services, as referred to hereinbefore.

The market behavior

Surprisingly, and contrary to a natural tendency, the companies that are operating in the said market chose, generally, to organize their own specialized departments for providing Customs clearance services.

For that purpose, the majority of such companies – and why not say it, the most representatives in this sector – as the freight forwarders and multimodal transport operators, have signed up experts

[9] " Sole Paragraph – In the case of a non-unionized Customs broker, it shall be the responsibility of the company that is paying the broker's fees to provide for the appropriate income tax withholding."

in Customs services to be their employees, in other words, Customs brokers that were hired to render services exclusively to those companies upon payment of a freely agreed to salary.

Other companies chose to contract with third parties the said Customs clearance services that are offered by Customs Brokers firms.

Some of them have migrated from one model to another quite often, which is worrisome on account of the instability the said movements cause over the market, but obviously with a view to cut costs, and offer more competitive prices.

The self-employed Customs broker who, as the name itself implies, works exclusively for himself, i.e., not connected to any one company, is a professional in danger of extinction - one wonders if there is still anyone insisting to fit such a traditional profile - but who will inevitably be overcome by the changing times.

On the other hand, to the surprise of all those who cared to investigate this subject even deeper, and not because they were not aware of it, for it is common knowledge that all the major companies in this sector do have a number of technical opinions whose conclusion is that paying a Customs broker using the SDA is **not** mandatory, mainly if the broker is self-employed and non-unionized, or is an employee (who was signed up to render services exclusively to a Customs clearance services provider), the fact is that most companies still use the said SDA.

This does not mean that these companies are paying their self-employed Customs brokers or employees that way, nor that they are adopting the professional fees schedule that have quite often been distributed by the unions, because they inform amounts that are merely symbolic, as a rule of preference, on payments that are made using the SDA.

The reason for this behavior is not so much trying to preserve a good-neighbor type relationship with the unions, but simply because it is easier to do it that way, rather than having to explain once and again to importers, exporters or travelers who demand that proof of payment of the SDA be presented, as if the SDA were a *tax* or a *union charge*, i.e., some compulsory payment to be channeled to the unions, because they simply do not know anything about it. This is a procedure followed exclusively in relation to those people making such an uncalled for demand, because, after all, they are the ones who will have to sustain the said expense.

Some people say the amounts paid, ninety percent of which are paid to the respective Customs broker, after income tax withholding, are not really received by the broker but by the companies themselves, to whom the said amounts are transferred by the union, although no one can really say for sure that such procedure is a fact.

This would certainly be unethical – if it really does exist – which if practiced might lead to disastrous consequences in the future for those companies that choose to adopt it, specially in terms of labor and tax laws.

There are those companies, but a few, that as a matter of principle do not absolutely use the SDA slips. They prefer to provide proper clarification to their clients on this subject, even if this may cause some kind of problem, rather than deal with it in a flexible way. The goal of these companies is to abide by the law, and not be exposed to whatever situation, which is a highly laudable attitude, in these liberal times.

However, fewer are the companies who, still today, surprisingly and strictly follow the unions' instructions, and pay Customs broker fees with basis on the said schedule, even though they have their own departments and Customs brokers as their employees, who were signed up to render exclusive services, and are aware such procedure are not cost-effective, mainly in relation to the competition.

There are probably several reasons for this – which one does not know and cannot perceive – but the double costs that are spontaneously sustained by these companies do comprise an undeniably strange fact, for they are not legally obliged to do it, whereas on the other hand the whole market is aware of more cost-effective alternatives.

Conclusion

As from April 1, 1968, using the services of Customs brokers to clear goods through Customs on imports, exports, baggage handling, as well as on re-exportation, transit of goods and cargo re-shipment is optional, which services were up until that date exclusively performed by Customs brokers.

Customs brokers were, from that date on described as self-employed professionals and their payment described as *fees*, which would be freely agreed upon by the parties, and not longer be paid by the Customs houses throughout the country, as it used to be the rule.

The lawmakers, aware of the need to create a mechanism whereby fiscal evasion could be avoided, and for that sole purpose, ratified (Decree Law 2472/88) that Customs brokers fees may be freely negotiated by the parties to contract, and also that the said fees could optionally be paid to the unions and channeled to the broker thereafter, with the unions being obligated to pay the said fees to the broker and provide for the proper income tax withholding.

The market causes the Customs broker not to be a typically self-employed professional, but instead a regular and exclusive company employee and as such included in the company's

payroll, it being the company's responsibility to provide for the appropriate income tax withholding, thereby not making any sense to accept the unions' mediation.

The other Customs brokers who may be described as authentic self-employed professionals, whether or **not** unionized, shall be at liberty to receive their payment as they see fit, i.e., either channeled through the union or directly from the company or person they were hired by.

In these cases, any income tax withholding shall be carried out, respectively, by the Customs broker himself/herself, or by the union, as mentioned above, with basis on Decree 646/92 (Article 7, paragraphs 1 and 2) and Decree 3000/99 (Article 719, sole paragraph).

Therefore, paying a Customs broker using the SDA may be deemed mandatory only in one instance, i.e., in the event the professional is a self-employed Customs broker and unionized.

It is certainly not mandatory in all other possible instances, i.e., when the person is (a) a self-employed, non-unionized Customs broker; (b) a Customs broker who is also an employee (who was hired to render services **exclusively** to a Customs brokerage firm); or (c) in the case of a company providing Customs brokerage services.

On the other hand, the main companies in this business, although they do know that paying for Customs brokers services using the SDA is **not** mandatory, still make use of the said SDA, (even if they do not adopt the price schedule that is recommended by the unions), so as to meet their clients' demands, which in their view is easier than explaining to the clients why using the SDA is not a legal requirement.

There are companies, but a few, that do not use the SDA absolutely, who instead prefer to provide the proper clarification to their clients, in order to comply with the law and not be exposed to whatever situation. Fewer are the companies that still today abide by the Customs brokers unions' instructions, paying Customs brokers fees in accordance with a price schedule distributed by the said unions, in spite of having their own structures and the fact that such procedures are not cost-effective in relation to the competition.

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