



**Goldfarb Seligman**  
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## **Customs & Trade in Israel**

### **A Legal Newsletter**

Adv. Gill Nadel, Chair of the firm's Import, Export and International Trade Law Practice, Tax Department

#### **Disclosure Vs. Confidentiality - The Customs Authority Transparency Obligation**

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A simple Analysis of the balance of power between importers and the Israeli Customs Authority will find it extremely unbalanced in favor of the Customs Authority, especially in the access to information aspect. On the one hand, we have the State of Israel, with practically unlimited information flowing to it from various government offices and authorities, as well as from its contact with numerous other entities. On the other hand, we have a private citizen, who usually lacks access to a broader perspective and possesses knowledge relating only to his own specific case.

For example, if we examine the classification of goods for duty purposes - in the EU and the U.S., as well as in other countries, there are public databases in which the government publishes classification rulings related to a variety of goods for all to see. This allows an importer to access the database, find rulings in cases similar to his own, and plan accordingly.

In Israel, on the other hand, there is no such database to date. This denies importers the possibility to determine the classification of the goods they are planning to import, except by requesting a 'pre-ruling' from the Customs Authority, or reviewing the few classification guidelines published by the Customs Authority on its website.

In 2010, during the Pharma Guri case, deliberated in the Supreme Court, the Customs Authority declared (on protocol) that it intends to establish a public classification ruling database. This will be done in order to increase transparency, and will require certain amendments to existing law. Below is the State's statement, as written in the Court's protocol:

**"We have been informed that there is an intent to act in order to publicly publish advanced rulings regarding the classification of goods. In this manner, the transparency of the Customs conduct will increase regarding the classification of goods, importers will be able to plan in advance according to validated information, and the concern of**



**discrimination will be decreased. We would add that we are aware that publicizing advanced rulings is also a complex matter. For example, it may be possible that an importer who is interested in importing a certain product will be concerned that his business competitors will discover his intent by the publication of the specific product's classification. Either way, it is the State's view that an amendment to the law is required prior to the publication of such advanced rulings becoming possible, as per the confidentiality provisions. One can hope that the required actions will indeed be taken, so that it will be possible to increase the transparency in the matter of classification of goods for the purpose of duty and purchase tax."**

Several years later, the public classification rulings database remains wishful thinking.

In cases in which an importer feels he was discriminated, or tries to determine whether others were classified differently than himself, there is an information gap between the importer and the Customs Authority. While the importer is not always certain of the factual situation, the Customs Authority possesses all information relevant to the subject, but usually refrains from sharing it in the pretext of confidentiality.

Another example of the information gap between the importer and the Customs Authority are the validation proceedings of the certificate of origin. In such cases, when the Customs Authority attempts to validate the origin of goods post factum, it contacts the exporter of the goods directly, and receives from him information regarding the production process, raw materials, and more. This information is transferred directly to the Customs Authority from the exporter, excluding the importer from access.

The Customs Authority may eventually decide to invalidate the importer's certificate of origin post factum, due to noncompliance with the conditions of the trade agreement (resulting with a retroactive tariff deficit). In such cases, the importer will be hard pressed to defend himself from such a decision, due to the information gap between his own knowledge and the full information regarding the production process possessed by the Customs Authority, which will not provide him with the relevant information in the pretext of confidentiality.

In an attempt to balance the information gap between the importers and the Customs Authority, a legal mechanism developed. Importers who file legal claims against the Customs Authority, submit a request to the court to order the defendant, the Customs Authority, to forgo confidentiality and reveal its information.

One of the main principles behind the aforementioned requests is a principle set by the Supreme Court in a ruling on one such case. The Supreme Court stated that an individual is entitled to view the documents possessed by the Customs Authority so that he may better understand the Customs Authority decision in his case, as can be understood in the following quote from the case:

**"The right of an individual to review documents, possessed by the administrative authority and which were taken into consideration as part of its decision regarding the individual, is one of the basic tenets of a democratic rule. This is 'the individual right of review', derived mainly from the right to be heard and the authority's obligation to act transparently."**

In another case that came before the Supreme Court, it was stated that:

**"As for the right of the public to receive information from the public authority, although it is not specifically mentioned in the Basic Law: Human Dignity and Liberty, it also enjoys a special stature in our legal system. It is perceived as one of the foundations of a free society, as a necessary condition for democratic rule, and it is commonly viewed as an aspect of the freedom of speech... consequently, although the right for information is not specifically mentioned as a basic right per se, none dispute its high stature in the human rights echelon recognized by our legal system. Thus, the right for information was described as a right with 'constitutional characteristics'... ; as a 'supreme right among human rights'... ; and as a right deserving of a 'high placement' in the human rights echelon... as stated above, the various rationales which form the basis of this right clearly present themselves in the case before us, and are even reinforced when considering the specific category under which the case falls, taxation laws."**

In a few recent rulings, the courts accepted the importers' arguments, presented by our firm, and ordered the Customs Authority to reveal (under certain restrictions and with blacking out sections of the data) certain details which the importers required in order to manage his defense.

In one of these cases, an importer of goods claimed he was discriminated, since the Customs Authority changed the classification of goods imported by him, but not by the rest of his competitors in the market.

In the ruling (given with the consent of the Customs Authority in this case), the court ordered the Customs Authority to present the importer with a public official certificate, signed by a



representative of the Customs Authority, which will detail the actions taken by the Customs Authority in the relevant years in order to enforce its stance on the classification of the goods. The Customs Authority will address the question of whether other importers were classified in a similar manner, and how the Customs Authority acted in cases in which the classification differed from its proposed classification. The ruling represents a balance between the importer's right to receive information he requires in order to manage his defense, and the Customs Authority's confidentiality claim (as it is not required to detail the names of other importers).

In another case, an importer of goods claimed that the goods fulfill all the requirements of products of origin, and should be exempt from custom fees in accordance with a free trade agreement. The Customs Authority invalidated the certificate of origin based on an internal correspondence between it and the foreign manufacturer, and refused to reveal the contents of the correspondence due to confidentiality claims.

In a recent ruling, the court partially accepted the importer's arguments, and ordered the Customs Authority to reveal part of the details of the correspondence between it and the foreign manufacturer, specifically those pertaining to the percent of local raw material contained in the final product, from which it may be determined which products meet the product of origin criteria and which don't.

Ultimately, when an importer is faced with an information gap, and he believes the Customs Authority may possess additional information which will aid him, the option of turning to the court is open to him. There he may try and force the Customs Authority to reveal the information, under certain restrictions which ensure the confidentiality claim is not compromised.

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**The above review is a summary. The information presented is for informative purposes only,  
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