



Tax Alert

Customs Bonds: Compliance Essentials

January 2025

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In line with provisions of the East African Community Customs Management Act (“EACCMA”), there are numerous instances in cross border trade when the law requires importers and exporters of goods to execute a customs bond. The bond is to secure customs duties that may be payable to the Commissioner, Customs and Border Control Department (“Commissioner”), Kenya Revenue Authority (“KRA”). In addition, there are instances when the Commissioner may exercise her discretion to require security.

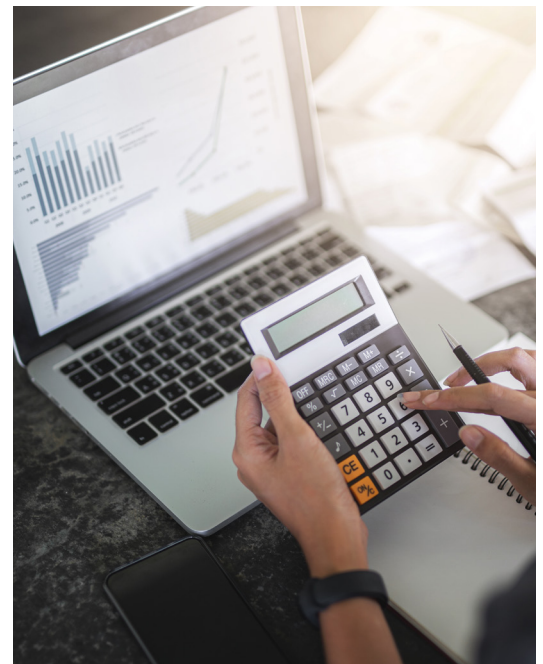
What is a bond?

The June 2024 version of the World Customs Organization (“WCO”) Glossary of International Customs Terms defines a ‘bond’ as “An undertaking in due legal form, by which a person binds himself to the Customs to do or not to do some specified act”. There are two types of bonds, general bonds which can cover multiple transactions/customs declarations over its validity period and particular bonds which are used for a single transaction/customs declaration.

Who are the parties to a bond?

There are typically three parties to a bond:

1. The Commissioner who requires security to ensure due compliance with the law by importers or exporters and their customs agents, as well as to protect customs revenue;
2. The importer or exporter who is the person giving the bond (the principal) and is bound to the Commissioner for the due performance of its conditions. A customs agent may also execute a bond, and in such instances the customs agent shall be the considered the principal; and
3. The surety, typically an insurance company or bank which provides a guarantee to the Commissioner and undertakes to pay the bond if the principal fails to fulfil its conditions.



When is a bond necessary?

There are numerous classes of bonds to cover various customs transactions requiring security. Examples of such transactions are:

- Where goods are cleared for transit to another country, up until the goods cross the Kenyan border;
- Where perishable goods are imported and need expedited clearance, where the importer has a couple of days, from taking

delivery of the goods, to lodge complete customs documents;

- Where goods are imported temporarily, such as equipment and goods for exhibition, up until they are re-exported; and
- Where goods are imported under a customs incentive, such as duty exemption on equipment and machinery for use in projects, up until they are re-exported, or their local use is ascertained.

Bond cancellation and enforcement for non-compliance

Once an importer or exporter has complied with the conditions of a bond, or upon expiration of the validity period, whichever is earlier, then they are required by law to apply for cancellation (or retirement) of the bond by the Commissioner.

Where the bonds are not cancelled, the Commissioner is empowered by the law to issue written notices to the defaulting importer/exporter requiring them to pay the amount of the bond

or otherwise account for the affected goods. Where such notices are not complied with, the Commissioner may enforce payment through issuance of agency notices. Important to note is that the Commissioner may, under the provisions of the law, deem the surety to be the principal debtor and hold them liable for the outstanding bonds, especially when the importer/exporter is non-responsive.

Interest and penalties will apply in addition to the bond in force amount in cases of non-compliance.

Varied decisions by the Tribunal

The Tax Appeals Tribunal (“Tribunal”) has issued varied decisions in cases of bond disputes. We highlight some of the cases below:

In the first case, the Commissioner issued a demand to an insurance company in relation to bonds executed by a manufacturing company (the principal). These bonds had been issued over ten years before the date of demand. The KRA subsequently

issued agency notices to the insurance company’s banks resulting in a dispute. In the Tribunal’s analysis, it noted that the bonds had validity periods and that the Customs authorities were enforcing the bonds long after the timelines prescribed by law. The Tribunal acknowledged that the law provides a 5-year timeline within which Customs may require records.

It further challenged the Commissioner for failing to discharge the burden of proof in confirming or denying whether the goods covered by the bonds had been auctioned. The Tribunal found that the Commissioner had erred in enforcing the security bonds and allowed the insurance company’s appeal.

In the second case, the Commissioner sent various letters to the insurance company’s principals, in this case customs agents, informing them of unaccounted transit security bonds but received no responses. Consequently, the Commissioner issued agency notices against the insurance

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company's bank accounts which led to a series of interactions culminating in a dispute.

The insurance company argued that the transit bonds executed in the years 2011 and 2013, did not carry any obligations or rights as these had ended by effluxion of time and the expiry of the validity periods.

In the Tribunal's analysis, it noted that transit bonds are guarantees against specific conditions attached to them which if not met, then the guarantor should make good the claims. The Tribunal dismissed the appeal and decided that the Commissioner's demand was valid. As such the insurance company was required to pay the demanded amounts.

In yet another dispute, a customs agent executed bonds for its client, a company which operated a bonded warehouse and re-exported goods from the warehouse to the border of exit under bond.

Following a review, the Commissioner found that there were outstanding bonds for various re-exportation entries between 2006 and 2008 which lacked proof of having exited the country.

The Commissioner sent relevant notices to the company which failed to

account for the goods. The customs agent sought to renew its license with the KRA as required by law but could not comply with one of the conditions, being the provision of a Certificate of Bond Clearance. The customs agent could not obtain this certificate because the bonds it had executed were yet to be retired. Subsequently, the customs agent's password providing access to the Integrated Customs Management System (iCMS) was suspended.

The customs agent thus sought the Tribunal's intervention to compel the Commissioner to reinstate its password to the iCMS. The agent advanced numerous grounds including that the exporter had the responsibility of maintaining proper records for all goods stored in the bonded warehouse and ensuring that the goods were duly exported.

The Tribunal, in its analysis, noted that the customs agent had uncleared customs bonds arising out of export transactions processed on behalf of the company, and that there were unaccounted taxes due and payable by the company.

The Tribunal further noted that the customs agent was liable for the discharge of the taxes to the same extent as its client in line with the

provisions of EACCMA. The Tribunal dismissed the application on the basis that the customs agent ought to have fully exhausted the available legal mechanisms under the law in resolving its pending customs license renewal.

Conclusion

In our view importers, exporters and their customs agents should ensure that they seek cancellation of bonds in time as the expiry of the validity period is not a guarantee that the liability will cease.

In addition, importers and exporters need to keep adequate records such as the customs entries, the bonds, exemption letters, exit notes, etc. as these are typically required in accounting for the goods prior to bond cancellation.

Further, financial institutions which act as surety or guarantors should proactively monitor the compliance of their principals as the law deems the financial institutions the principal debtors who have the ultimate responsibility when the Customs authorities cannot reach their clients in cases of default.

Should you have any queries please feel free to reach out to any of our team members listed herein to discuss this further.