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*An Editorial*

# Advance Ruling: What went Wrong

**Edward Akrong<sup>1</sup>, Kwabena Ofosu-Appiah<sup>2</sup>, Dr. David King Boison<sup>3</sup>, Gabriel Essilfie<sup>4</sup>**

<sup>1</sup>President, Ghana Institute of Freight Forwarders  
Tel: +233 24 482 0683; Email: tentenhro@gmail.com

<sup>2</sup>Imm. Past President, Ghana Institute of Freight Forwarders  
Tel: +233 24 334 1033; Email: kwabena.jobrenda@gmail.com

<sup>3</sup>Senior Lecturer, Ghana Communications Technology University  
Tel: +233 20 769 6296; Email: kingdavboison@gmail.com

<sup>4</sup>Head of Research and Innovation, Ghana Institute of Freight Forwarders  
Tel: +233249895278; Email: tymegaby@gmail.com

## ***Abstract***

*The concept of advance ruling has become relevant in recent weeks as a result of the special prosecutor's incursion into our space and the subsequent fallout. This has generated a lot of hot air, as well as interesting claims by overnight experts, which in most cases have only muddled the situation further. According to the Trade Facilitation Implementation Guide "Advance rulings are legally binding decisions made by Customs in response to a request from the importer or exporter regarding the importation or exportation of specific items. In preparation for importation or exportation, importers and exporters can request rulings in advance regarding the classification, origin, or Customs value of products. As essential determinations about the products have already been made in the advance ruling, the declaration and subsequently the release and clearing processes are simplified. Advance judgements are binding throughout the Customs jurisdiction at all Customs offices for a specified length of time, such as three months or one year*



## ADVANCE RULING; WHAT WENT WRONG?

### INTRODUCTION

The concept of advance ruling has become relevant in recent weeks as a result of the special prosecutor's incursion into our space and the subsequent fallout. This has generated a lot of hot air, as well as interesting claims by overnight experts, which in most cases have only muddled the situation further. According to the Trade Facilitation Implementation Guide "Advance rulings are legally binding decisions made by Customs in response to a request from the importer or exporter regarding the importation or exportation of specific items. In preparation for importation or exportation, importers and exporters can request rulings in advance regarding the classification, origin, or Customs value of products. As essential determinations about the products have already been made in the advance ruling, the declaration and subsequently the release and clearing processes are simplified. Advance judgements are binding throughout the Customs jurisdiction at all Customs offices for a specified length of time, such as three months or one year".

### THE CONFUSION

The conversation by and large over these past few weeks had rendered the Advance Ruling concept as though it was a valuation method. Whereas the hierarchy of the Division has been pushing an argument of a certain historical antecedent, the OSP maintains that the Division (Customs Division, GRA) departed from the tenets of their own rule book - Act 891. This discourse is to engineer the conversation among ourselves as practitioners, enjoined by the objects of our (GIFF) constitution to shape national policy relative to revenue mobilisation and trade facilitation. The Division maintains they created a dispensation to reward volume as they target revenue, for which reason, the rule book was set aside as claimed by the Special Prosecutor (SP). Our interest however, is to ascertain the right thing to do when faced with the option to apply for Advance Ruling, now that it has become topical and manifestly possible.

### THE PROVISIONS

The definition and scope as presented in the Trade Facilitation Implementation Guide has been domesticated as part of Section 12 of the Customs Act, 2015 (Act 891) as follows:

- (1) *The Commissioner-General may issue a written ruling applying the customs law to a particular set of facts submitted by an interested party.*
- (2) *An interested party in this section includes*
  - (a) *a person, or authorized agent of a person, who has a demonstrable interest in the questions presented in the request, and*
  - (b) *an importer or exporter.*
- (3) *The ruling may relate to the tariff classification, customs value, country of origin of the goods or to any other activity<sup>2</sup> to which the customs law applies.*

(4) *An interested party may request for a customs ruling from the Commissioner-General.*

(5) *The request for a customs ruling shall be in writing and include*

- (a) *a statement of all relevant facts,*
- (b) *the names and addresses of interested parties,*
- (c) *the name of the port where the goods are expected to arrive or depart, and*
- (d) *a description of the transaction in sufficient detail to allow the application of the customs laws.*

Whereas the first four subsections of Section 12 of Act 891 express what the Commissioner General may do in the wake of an application as to who qualifies to apply, the scope of the request (tariff classification, country of origin and valuation) and the authority to apply to, subsections 5 presents the general guidelines on information to be provided while subsections 6 and 7 below presents further detailed requirements for Advance Ruling on Tariff Classification, Country of Origin and Valuation among other possible scenarios.

(6) *A request for a customs ruling in relation to tariff classification of goods shall include, in addition to the requirement in subsection (5),*

- (a) *a complete description of the merchandise including*
  - (i) *the packing weight,*
  - (ii) *the chemical analysis,*
  - (iii) *the description of the goods,*
  - (iv) *the production and expiration date,*
  - (v) *the name and brand of the goods,*
  - (vi) *the physical description,*
  - (vii) *function of the goods,*
  - (ix) *composition of the goods, and*
  - (x) *characteristics of components;*
- (b) *the commercial or technical designation of the goods; and*
- (c) *where the goods consist of more than one material, the composition of the goods by weight, volume and value of each component.*

(7) *A request for a customs ruling in relation to valuation of goods for customs purposes shall include in addition to the requirement in subsection (5),*

- (a) *the information required on an invoice;*
- (b) *the terms of trade including Free on Board, Cost Insurance Freight; and*
- (c) *a description of any relationship between the parties.*

Subsection 8 provides the caveats under which the ruling is binding on the Commissioner-General and the recipient as expressed below:

- (8) *A customs ruling is binding on*
  - (a) *the Commissioner-General, only in respect of goods for which customs formalities are completed after the date on which the ruling takes effect; or*
  - (b) *the recipient of the ruling only with effect from the date on which the recipient receives, or is considered to have received, notification of the customs advance ruling.*

Apart from the allotted time that the ruling may last, subsection 9 hints of the possibility of the Commissioner-General calling it off.

(9) *A customs advance ruling is binding until the ruling is overturned by the Commissioner-General.*

*Subsection 10 below delineates conditions under which a ruling cannot be made:*

(10) *A customs ruling shall not be issued where the request*

*(a) concerns a current or completed customs transaction;*

*(b) presents questions or transactions that are hypothetical in nature; or*

*(c) presents a question that is pending before a court.*

That the ruling shall remain a public document is established by subsection 11 by obligation on the Commissioner-General or by request from an interested party.

(11) *The customs ruling made by the Commissioner-General*

*(a) shall be published; or*

*(b) in respect of a request of an interested party, the party shall be notified not later than thirty days after the ruling is made*

Subsection 12 announces review possibilities by an interested party to the Commissioner General or to the Courts within a specified time frame.

(12) *An interested party may request for*

*(a) a review of the customs advance ruling by the within thirty days of the publication or notification of the ruling; or*

*(b) a judicial review of the customs advance ruling made by the Commissioner-General within thirty days.*

Subsection 13 guarantees the confidentiality of the applicant party's information.

(13) *The Commissioner-General shall treat information submitted under this section as confidential, unless the parties agree otherwise.*

## OUR TAKE

The history, definition, breadth, and our law as expressed should have removed the fetish from this topic, but it appears that we as a people have managed ourselves into an intolerant group of people, or perhaps tolerant of anything that further accentuates the dichotomy between pragmatism and self-aggrandisement, to the point where we feverishly pander to the latter, throwing all sane arrangements to the wind, only to, in most cases, make the proverbial 360 degrees at the

expense of good fortunes to the state, trader and above all our future development.

Otherwise, the framework for operationalizing any type of request under the Advance Ruling is properly established by the provisions as described above.

Whiles at it perhaps we can ponder over Professor Kweku Asare's seven (7) point issues he raised on his Facebook wall in relation to the Office of the Special Prosecutor's report on the Labianca saga:

(1) *whether the applicant and transactions qualified for applying for a customs advanced ruling (CAR)*

(2) *what is the legal basis for issuing the CAR, which reduced the benchmark values;*

(3) *whether, under the law, Mr. Adu had the power to issue the CAR?*

(4) *why the customs technical service bureau's (CTSB) negative advice on the application was ignored or set aside.*

(5) *how the application was resuscitated after the negative advice;*

(6) *whether the CAR was brought to the notice of the Commissioner General; and*

(7) *whether there is influence peddling.*

The law lecturer further asserted that "these are serious issues that belong to a judicial forum constituted to determine whether there is corruption and corruption related tax evasion, especially as the implicated parties are politically exposed persons". As we await the mileage that this saga is likely to travel and the possible ramifications, the issues raised can and must engage our research attention.

## CONCLUSION AND RECOMMENDATIONS

From the narrative so far, it does not look like the case under review adequately falls within the remits of Advance Ruling; it looks more like an extrajudicial creation, fashioned to ostensibly reward volume in a bid to shore up government revenue but at what cost in reference to the National Policy on the local Poultry industry? Be that as it may, we (practitioners) must look out for some of these booby trap situations whilst advising our clients. Our take is to insulate ourselves as practitioners in the wake of the numerous injunctions in the laws that regulate our activities, holding us liable jointly and severally for acts of commission and omission because clearly the footprints of crime, they say, cannot be wiped away by time.

Clearly Advance Ruling is a trade facilitating measure or a tool which, when used appropriately, could potentially result in a significant decrease in total trade expenses. The impact of advance judgements on trade costs in other jurisdictions (Europe) has been projected to make some savings of approximately 5.4% to the trader. Some more degree of transparency as enjoined by the law (Section 12 (11) of Act 891) and further enhanced by Article 1 of the Trade Facilitation Agreement on Publication and Availability of Information is required to place the needed information at the doorstep of all and sundry. This when done will demystify the dispensation under review and perhaps others still cloaked in opacity, thus affording everyone the opportunity to take advantage of what the law permits.

#### CONTRIBUTORS

Edward Akrong (President, GIFF)

Tel: +233 24 482 0683; Email: tentenhro@gmail.com

Kwabena Ofose-Appiah (Imm. Past President, GIFF)

Tel: +233 24 334 1033; Email: kwabena.jobrenda@gmail.com

Dr. David King Boison (Consultant, GIFF Research Hub)

Tel: +233 20 769 6296; Email: kingdavboison@gmail.com

Gabriel Essilfie (Director of Research and Innovation, GIFF)

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