Customs Update
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Customs' proposed revisions to penalty guidelines include important changes

In its continuing effort to promote "informed compliance" and "shared responsibility," the U.S. Customs Service has published a Notice of Proposed Rulemaking that addresses revisions to the guidelines for imposing and mitigating penalties for violations (19 U.S.C.1592).

Such violations principally involve the entry of goods into the United States by fraud, negligence or gross negligence. Comments on this issue must be received by Customs before Dec. 28.

While Customs noted that the proposed revisions are primarily a reorganization of current guidelines, there are important changes.

For example, the proposed guidelines now specifically note that if one unintentionally transmits a clerical error to Customs electronically, and that clerical error is transmitted repeatedly, Customs will not consider the repetitions to be a pattern, unless Customs has drawn the error to the party's attention.

Another enhancement includes express guidance regarding statute of limitations considerations and Customs' policy regarding waivers when the issuance of pre-penalty and penalty notices are involved.

Customs also has added sections that address settlement offers and highlight instructions to be followed in instances where it makes a demand for payment of actual loss of duties.

However, while the foregoing improvements may serve to reform the penalty guidelines, the extent of Customs' ability to mitigate a penalty for interest due on a loss of revenue determined from a prior disclosure remains unclear.

Interest can cost you a lot after five years

It is to be noted that, in practical terms, interest on such matters can often be very substantial as the scope of the disclosure can extend back five years.

For example, a revenue loss of a $100,000 or more can result in an interest penalty totaling tens of thousands of dollars at prevailing interest rates.

By statute, Customs has express authority to remit or mitigate such a penalty.

Moreover, the Customs regulations state that the Fines, Penalties and Forfeitures officer may mitigate or remit penalties incurred under the penalty statute when the total amount of those penalties does not exceed $50,000.

Nonetheless, under the former guidelines, in both non-revenue-loss as well as actual revenue-loss cases where a prior disclosure was filed and the degree of culpability was fraud, Customs was directed to accord "no further mitigation in the absence of extraordinary factors."

Under the suggested provisions discussed herein, that instruction has been completely removed.

The likely purpose of this action was to bring the guidelines into compliance with the aforementioned provisions.

Treasury falls short on some fine regulations

Unfortunately, the Department of the Treasury seems to have fallen short of that goal. The regulations refer to the computation of a penalty for negligent, grossly negligent and fraudulent violations, but are generally silent as to the proper disposition by Customs of such violations.

It is only in the instance of a negligent or grossly negligent non-revenue-loss violation that an explicit instruction exists as to the disposition of the penalty, i.e., that it should be remitted in full.

Clearly, if the Department of the Treasury desired to control Customs' discretion to mitigate, it would have so indicated by regulation as it did in this instance.

Accordingly, the absence of this limitation, coupled with the mandates of the statute and regulations concerning the mitigation of penalties, makes it clear that Customs has the authority to reduce penalties for interest assessed in revenue loss situations where a prior disclosure was filed. The penalty guidelines fail to explicitly outline these capabilities.

Furthermore, in the case of negligent and grossly negligent violations, Customs must have the authority to mitigate penalties; otherwise, the penalties appropriate for grossly negligent violations will be concomitantly imposed on merely negligent infractions.

While the guidelines state that it is the policy of the Department of the Treasury and the Customs Service to encourage the submission of valid prior disclosures, they serve as a disjointed and vague set of criteria for calculating the rigid penalties Customs assesses as a result.

In addition, Customs' refusal to mitigate penalties for interest in such instances demonstrates the clear lack of universal understanding of these provisions which currently prevails.

When rules are vague, officers must improvise

This highlights the inherent problem with promulgating such contradictory and vague guidance. It forces various port and field officers who rely thereon to generate disparate interpretations of these provisions.

As a result, the trade is left to develop its own means of addressing violations of the penalty statute.

Rather than adopt the proposed guidelines as they stand, the drafters should continue the positive reforms they have implemented thus far and establish a comprehensive and unambiguous set of mitigation standards.

In doing so, the Department of the Treasury will provide both Customs and the trade with a more user-friendly environment in which to operate.

Customs Update is a weekly column examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, partner and associate, respectively, in the international law firm of Graham & James LLP, N.Y., and reflects the opinion of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, N.Y. 10048.