

RECORDKEEPING PENALTIES - 19 U.S.C. 1509 (T.D. 00-63)

Overview

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (the "NAFTA Implementation Act"), Public Law 103-182, 107 Stat. 2057. Title VI thereof contained provisions pertaining to Customs modernization and thus is commonly referred to as the Customs Modernization Act or "Mod Act." Sections 614, 615 and 616 of the Mod Act amended sections 508, 509 and 510 of the Tariff Act of 1930, as amended (19 U.S.C. 1508, 1509, and 1510), which pertain to recordkeeping requirements applicable to importers and others. Section 509 of the Tariff Act of 1930, as amended (19 U.S.C. 1509), sets forth procedures for the production of documents to Customs and Customs examination of those records. Section 509 also sets forth penalties for failure to provide records upon Customs demand.

The Mod Act amended various provisions of the Customs laws to grant Customs authority to no longer require the presentation of certain documentation or information at the time of entry. These amendments were intended to permit a reduction of the documentation and information required to be presented to Customs at the time of entry, thereby facilitating the entry process. However, in exchange for relieving importers of the obligation to present documents at the time of entry, and in order not to jeopardize the ability of Customs to obtain those records at a later date, section 614 of the Mod Act amended section 508 of the Tariff Act of 1930 to require that the documentation or information be maintained and section 615 of the Mod Act amended section 509 of the Tariff Act of 1930 to, among other things, provide for the imposition of substantial administrative penalties for a failure of a party required to keep records to comply, within a reasonable time, with a demand by Customs for production of such specific entry records.

Section 509(a)(1)(A) of the Tariff Act of 1930, as amended by Title VI of the Mod Act, requires the production, upon demand by Customs, of records required by law or regulation for the entry of the merchandise. Section 509(e) of the Tariff Act of 1930 (19 U.S.C. 1509(e)), as amended by Public Law 103-182, requires the Customs Service to identify and publish a list of the records and entry information that are required to be maintained and produced under subsection (a)(1)(A) of section 509 (19 U.S.C. 1509 (a)(1)(A)). This list is commonly referred to as "the (a)(1)(A) list." The (a)(1)(A) list was published in the Customs Bulletin on January 3, 1996, as T.D. 96-1 and republished in the Federal Register on July 15, 1996, at 61 FR 36956. It is anticipated that the (a)(1)(A) list will change as entry requirements are revised.

On June 16, 1998 Customs published in the Federal Register (63 FR 32916) the final rule to implement the changes to the statutory recordkeeping provisions effected by the NAFTA Implementation Act. The final rule moved Customs requirements regarding recordkeeping from Part 162 to part 163 and amended the

requirements in accordance with the Mod Act. In addition, the final rule: (1) set forth, as an appendix to new Part 163, the previously published (a)(1)(A) list; and (2) included conforming amendments to various provisions within Parts 24, 111, and 143 of the Customs Regulations (19 C.F.R. Parts 24, 111, and 143).

The monetary penalties applicable for failure to produce entry records are set forth in section 163.6, Customs Regulations (19 C.F.R. 163.6). Pursuant to 19 U.S.C. 1509(g)(5) and section 163.6(b)(5), Customs Regulations (19 C.F.R. 163.6(b)(5)), these penalties may be remitted or mitigated pursuant to 19 U.S.C. 1618.

GUIDELINES FOR THE MITIGATION OF PENALTIES FOR 19 U.S.C. 1509

Pursuant to the Mod Act, a party who is subject to Customs recordkeeping requirements may be liable for penalties for failure to comply with a lawful demand for the production of an entry record unless the party meets certain criteria excusing the party from the penalty. In all cases, the amount of the penalty will depend upon whether the failure to produce the records is the result of willful conduct or negligence.

In addition to any penalty that may be imposed, if the requested records relate to the eligibility of merchandise for a special rate of duty, the entry covering the merchandise will be liquidated or reliquidated under the column 1 general rate of duty or at the column 2 rate of duty if deemed appropriate.

The assessment of a penalty for the failure to produce records for Customs inspection shall not limit or preclude the Customs Service from issuing, or seeking the enforcement of, a Customs summons.

Specific procedures for issuing PrePenalty Notices and penalty claims were not set forth in the statute. Customs will follow the procedures that have been set forth in section 592 (19 U.S.C. 1592) and which are contained in the Customs Regulations in 19 C.F.R. 162 and 19 C.F.R. 171.

The recordkeeping statute provides that any party who has been assessed administrative penalties pursuant to 19 U.S.C. 1509 will be able to petition for mitigation or remission of the penalties under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), if it is determined that there exists such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of penalties arising under section 509 of the Tariff Act of 1930, as amended (19 U.S.C. 1509) and mitigation of those penalties. It is intended that these guidelines shall be applied by Customs officers in penalty (or prepenalty) proceedings and in determining the monetary penalty assessed in any penalty action pursuant to 19 U.S.C. 1509(g).

Except as provided in 19 U.S.C. 1509(g)(4), the assessment of recordkeeping penalties is not the exclusive remedy. The assessed penalty amount set forth in Customs administrative disposition which is determined in accordance with these guidelines does not in any way affect the authority of the U.S. District Court of the United States to impose monetary penalties as well as sanctions for the failure to produce records summoned by Customs.

I. Degrees Of Culpability

In general, a penalty may be imposed pursuant to 19 U.S.C. 1509(g) if a person fails to comply with a lawful demand for the production of an entry record contained in the (a)(1)(A) list and is not excused from a penalty pursuant to one of the exceptions set forth in 19 U.S.C. 1509(g)(3) and 19 C.F.R. 163.6(b)(3). There are two degrees of culpability for penalties under 19 U.S.C. 1509(g) which are defined as follows:

(A) Negligence: A violation under section 509 (19 U.S.C. 1509) is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute.

(B) Willful Conduct: A violation is determined to be willful under section 509 (19 U.S.C. 1509) if the failure to comply with a lawful demand for the production of an entry record was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by a preponderance of the evidence.

II. Procedure For Penalty Assessment

(A) Commencement of Penalty Actions - Penalties for the failure to comply with a lawful demand for the production of entry records may be assessed by the appropriate Customs field officer for any violation which occurs on or after July 15, 1996, the date of publication of the "(a)(1)(A)" list in the Federal Register.

(B) Issuance of PrePenalty Notice and Penalty Notice - The specific procedures and requirements which have been set forth in the case of penalties and petitioning rights under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592) will be followed, to the extent practical, if Customs has reasonable cause to believe that a violation of 19 U.S.C. 1509 has occurred. (19 C.F.R. 162.77-79, 19 C.F.R. 171.11-33). Any penalty imposed under 19 U.S.C. 1509 may be remitted or mitigated under 19 U.S.C. 1618. Part 171, Customs Regulations (19 C.F.R. Part 171), sets forth the general procedures involved in filing a petition for remission or mitigation of a fine, penalty, or forfeiture incurred under any law administered by Customs.

III. Administrative Penalty Disposition

(A) Mitigation Guidelines - A monetary penalty which is imposed for failure to produce (a)(1)(A) entry records for Customs examination within a reasonable time may be mitigated or remitted under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), if it is determined that there exist such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by the Customs Service in arriving at a just and reasonable disposition of penalties arising under 19 U.S.C. 1509.

It is intended that these guidelines shall be applied by Customs officers in arriving at the proper assessment of monetary penalties. In any case, in determining the administrative penalty disposition under 19 U.S.C. 1509, the appropriate Customs field officer shall consider the entire case record, taking into account the presence of any mitigating or aggravating factors. In addition, in deciding whether or not to issue a penalty, the deciding officer may take into account the age and nature of the documents, the overall number of documents requested versus the number of documents produced, and the overall recordkeeping performance of the person. All such factors should be set forth in the written administrative penalty decision.

In addition to administrative penalties, the Mod Act recognizes the authority of courts to impose monetary penalties pursuant to 19 U.S.C. 1510(a) for the failure to produce records summoned by Customs pursuant to 19 U.S.C. 1509. Moreover, it should be understood that these guidelines do not limit or preclude the Customs Service from issuing, or seeking the enforcement of a customs summons.

Liabilities incurred under section 509 (19 U.S.C. 1509), shall be mitigated or remitted in accordance with the following guidelines:

(B) Dispositions:

(1) Non-Participants in Recordkeeping Compliance Program

(a) Definition - Non-participants in the Recordkeeping Compliance Program are all persons required to maintain records and who have not been certified by Customs to participate in a Recordkeeping Compliance Program.

(b) In cases where a non-participant in the Recordkeeping Compliance Program fails to comply with the demand for the production of records required to be maintained under 19 U.S.C. 1509(a)(1)(A), Customs may mitigate the penalty amount as set forth below.

(i) Negligent Violations- Penalty dispositions for a negligent violation made by a non-participant in the Recordkeeping Compliance Program shall be calculated as follows:

(A) If the violation is a result of the negligence of the person in maintaining, storing, or retrieving the demanded information, such person shall be subject to a penalty, for each release of merchandise, not to exceed an amount ranging from a minimum of \$5,000 to a maximum of \$10,000 or an amount ranging from a minimum of 20 percent of the appraised value of the merchandise to a maximum of 40 percent of the appraised value of the merchandise, whichever amount is less.

(ii) Willful Violations - Penalty dispositions for a willful violation made by a non-participant in the Recordkeeping Compliance program shall be calculated as follows:

(A) If the violation results from the willful failure to maintain, store or retrieve records, the penalty for each release will be an amount ranging from a minimum of \$50,000 to a maximum of \$100,000 or an amount ranging from a minimum of 45 percent of the appraised value of the merchandise to a maximum of 75 percent of the appraised value of the merchandise, whichever amount is less.

(iii) Example - A party files an Entry Summary which contains two different line items. The first line item represents an entry of widgets and the second line item represents an entry of bolts showing appraised values of \$1,000 and \$2,500, respectively. Customs makes a written demand pursuant to 19 C.F.R. 162.6(a) for the production of the invoice applicable to each line item listed on the Entry Summary. If the party fails to produce the invoice for the widgets within the specified time period, then Customs may assess a penalty under 19 C.F.R. 162.6(b). If the party's failure to produce the invoice is the result of negligence, in accordance with the mitigation guidelines for negligent violations, the amount of the penalty would range from a minimum of \$200 to a maximum of \$400, which represents a range of a minimum of 20 percent and a maximum of 40 percent of the appraised value (\$1,000) of the widgets.

(c) Remission of Claim - If the Customs field officer believes that a claim for monetary penalty should be remitted for a reason not set forth in these guidelines, the Customs field officer should first seek approval from the Chief, Penalties Branch, Customs Service Headquarters.

(2) Participants in the Recordkeeping Compliance Program

(a) Description of program - The Customs Recordkeeping Compliance Program is a voluntary Customs program under which certified recordkeepers may be eligible for alternatives to penalties that might be assessed under 19 C.F.R. 163.6 for failure to produce a demanded entry record. A participant in the Recordkeeping Compliance Program may be entitled to alternatives to any recordkeeping penalty that may be assessed should the party be unable to produce a requested record. See, 19 C.F.R. 163.12 and 19 U.S.C. 1509(g). In general, special alternative procedures apply in the case of negligent violations of 19 U.S.C. 1509 committed by persons who are participants in the Recordkeeping Compliance Program and who are generally in compliance with the procedures and requirements of that program. If a certified participant in the Recordkeeping Compliance Program does not produce a demanded entry record for a specific release or provide the information contained in the demanded entry record by acceptable alternate means, Customs shall, in lieu of a monetary penalty issue a written notice of violation to the person, provided that the certified participant is generally in compliance with the procedures and requirements of the program, and provided that the violation was not a willful violation or a repetitive negligent violation. However, even where a certified recordkeeper is eligible for an alternative to a penalty, participation in the Recordkeeping Compliance Program has no limiting effect on the authority of Customs to use a summons, court order or other legal process to compel the production of records by the certified recordkeeper.

(b) Certification Requirements for Participants in the Recordkeeping Compliance Program - Certified Recordkeepers are those persons required to maintain records according to 19 U.S.C. 1508(a) and supporting regulations, and who have recordkeeping systems certified by Customs under a Recordkeeping Compliance Program. A recordkeeper may be certified as a participant in the Recordkeeping Compliance Program after meeting the general recordkeeping requirements established under 19 C.F.R. 163.12(b)(3) and 19 U.S.C. 1509(f).

(c) Procedures for Participants in Recordkeeping Compliance Program

(i) First-time negligent violations made by participants in the Recordkeeping Compliance Program (19 U.S.C. 1509(g) and 19 C.F.R. 163.12(d)). Written Notice of Violation - When a participant in the Recordkeeping Compliance Program does not produce a demanded entry record for a specific release or provide the information contained in the demanded entry record by acceptable alternative means, in the absence of willfulness or a repetitive negligent violation, and provided that the participant is generally in compliance with the procedures and requirements of the program, Customs shall issue a written notice (warning letter) of violation to the person in lieu of a monetary penalty. A repetitive negligent violation involves any failure to comply with a lawful demand for the production of an entry record contained in the (a)(1)(A) list which occurs within three years from the date of the violation of which it is repetitive.

(ii) The contents of the notice of violation issued to a participant in the Recordkeeping Compliance Program for failure to produce a demanded entry record or information contained therein are contained in 19 U.S.C. 1509(g)(7)(B) and 19 C.F.R. 163.12(d)(2). Within a reasonable time after receiving written notice of a recordkeeping violation, the recordkeeper shall notify the Customs Service of the steps it has taken to prevent a recurrence of the violation. (19 C.F.R. 163.12(d)(3)).

(iii) Repetitive negligent or willful violations by participants in the Recordkeeping Compliance Program - When a participant in the Recordkeeping Compliance Program commits a repetitive negligent violation or a willful violation, the issuance of monetary penalties is appropriate as well as the removal under the program until corrective action, satisfactory to the Customs Service, is taken. In cases where a participant in the Recordkeeping Compliance Program commits a repetitive negligent violation or a willful failure to comply with a lawful demand for the production of entry records, the penalty assessment guidelines for negligent violations or willful violations that apply to non-participants in the Recordkeeping Compliance Program as stated above, shall be utilized.

(iv) Example - A participant in the Recordkeeping Compliance Program files an Entry Summary on January 1, 1999 for one entry of telephones. By letter dated February 1, 1999, Customs makes a written demand pursuant to 19 C.F.R. 162.6(a) for the production of the invoice covering the telephones listed on the Entry Summary. If the participant fails to produce the invoice for the subject merchandise within the specified time period as the result of negligence, Customs will issue a written notice of violation to the participant. On April 1, 1999, Customs makes a written demand pursuant to 19 C.F.R. 162.6(a) for the production of a GSP Declaration from the same participant in connection with an entry of televisions. If the participant fails to produce the GSP Declaration for the entry of televisions within the specified time period, then, in the absence of fraud, the participant's failure to produce the GSP Declaration will be considered a repetitive negligent violation. Accordingly, Customs may assess a penalty for the second violation using the penalty guidelines for negligent violations applicable to non-participants in the Recordkeeping Compliance Program.

IV. Mitigating Factors

The following factors shall be considered in mitigation of the proposed or assessed penalty claim or final penalty amount for both participants and non-participants in the Recordkeeping Compliance Program, provided that the case record sufficiently establishes their existence. The following list is not all-inclusive.

- 1) Communications are impaired because of a language barrier or because of the mental condition or a physical ailment of the violator;
- 2) Violator cooperates with Customs officers - To obtain the benefits of this factor, the violator must exhibit extraordinary cooperation beyond that expected from a person under investigation for a Customs violation;
- 3) Immediate remedial action - This factor includes the production of and presentation of the entry records and information requested prior to the issuance of a Penalty Notice. In appropriate cases, where the violator provides evidence that immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be considered as a mitigating factor. Customs encourages immediate remedial action to help prevent future incidents of non-compliance;

4) Prior good record - Prior good record is a factor only if the violator is able to demonstrate a consistent pattern of importations without violation of 19 U.S.C. 1509, or any other statute prohibiting false or fraudulent importation practices. This factor will not be considered if the failure to comply is a result of the willful failure of the person to maintain, store, or retrieve the demanded record(s) or information, pursuant to 19 U.S.C. 1509;

5) Inability to pay the Customs penalty - The party claiming the existence of this factor must present documentary evidence in support thereof, including copies of income tax returns for the previous 3 years, and an audited financial statement for the most recent fiscal quarter. In certain cases, Customs may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (e.g., examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay);

6) Contributory Customs Error - This factor includes misleading or erroneous advice given by a Customs official in writing to the violator only if it appears that the violator reasonably relied upon the information and the violator fully and accurately informed Customs of all relevant facts. The concept of comparative negligence may be utilized in determining the weight to be assigned to this factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty claim is to be canceled. If the Customs error contributed to the violation, but the violator is also culpable, the Customs error is to be considered as a mitigating factor;

7) The person required to maintain and produce records is inexperienced in the customs transactions to which the records relate;

8) Violator substantially complies with the demand for the production of records in comparison to the total number of importations for which records are requested.

V. Aggravating Factors

Certain factors may be determined to be aggravating factors in calculating the amount of the proposed or assessed penalty claim or the amount of the final administrative penalty decision. The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violation, but may be utilized to offset the presence of mitigating factors. The following factors shall be considered “aggravating factors,” provided that the case record sufficiently establishes their existence. The following list is not all-inclusive.

1) The person required to maintain and produce records is experienced in the customs transactions to which the records relate;

- 2) The records are concealed, destroyed or withheld to evade U.S. law;
- 3) The importer or other party exhibits behavior, including extreme lack of cooperation, verbal or physical abuse, or attempted destruction of records;
- 4) The importer or other party has a prior recordkeeping violation for which a final administrative finding of culpability has been made;
- 5) The importer or other party has provided misleading information concerning the violation;
- 6) The importer or other party has obstructed an investigation or audit;
- 7) The importer or other party has demonstrated evidence of a motive to evade the production of entry records or information requested by Customs.