

CUSTOMS DIRECTIVE

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SUBJECT: RECOVERY OF LOST REVENUE PURSUANT TO 19 USC 1592(D)

REFERENCES: Title 19, United States Code, Section 1592
Title 19, Code of Federal Regulations, 162.79b
Fines, Penalties and Forfeitures Handbook, Chapter FRD
Customs Service Decision (C.S.D.) 81-223

1. PURPOSE

This Directive clarifies and establishes procedures regarding the initiation of a demand for restoration of lawful duties, when a violation of section 1592, is discovered and reported.

2. BACKGROUND

Title 19, United States Code, Section 1592(a), essentially prohibits any person as a result of fraud, gross negligence, or negligence from entering, introducing, or attempting to enter or introduce merchandise into the United States by means of any false statement, act or omission which is material or from aiding and abetting another person to commit the foregoing acts. Section 1592(b), provides for the assessment of monetary penalties against any person found to have committed a violation of subsection (a) of the statute.

In addition, Subsection (d), provides as follows:

"Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate Customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed."

Thus, if a violation of Section 1592 has been committed, duties not paid as a result of such violation may be collected without issuing a claim for monetary penalty. It is Customs long-standing position, recently upheld in the Blum decision described below, that Section 1592(d) demands for duties may be made to anyone legally or contractually liable for duties owed on the entries subject to the Section 1592 violation, even if such person was not a violator of Section 1592. In C.S.D. 81-223, Customs Headquarters further ruled that a surety on a

Customs entry bond is liable for payment of duties that are determined to be due under Section 1592. Thus, in practice, Section 1592(d) demands have been issued against importers of record, sureties, as well as, violators of Section 1592(a).

As a result of the recent decision by the Court of Appeals for the Federal Circuit in *United States v. Blum, et al.*, No. 87-1436 (Fed. Cir. September 30, 1988), Customs practice with regard to the issuance of Section 1592(d) demands has been affirmed. In this case, the Government had sued for collection of duties demanded under Section 1592(d) from a broker/importer of record and a surety, neither of whom were alleged violators of Section 1592(a). The lower court had held that there was no independent cause of action for recovery of lost duties under Section 1592(d), and that such demands, in any case, could not be made against a person who was not guilty of a violation of Section 1592. In reversing the lower court, the Court of Appeals for the Federal Circuit held:

- Section 1592(d) provides an independent cause of action for duties lost as a result of a violation of section 1592.
- Section 1592(d) is not a penalty provision and thus, recovery of lawful duties is allowed not only from persons who violated section 1592(a), but also from "those parties traditionally liable for such duties, e.g., the importer of record and its surety." *Id.* Slip op. at 10.

Although Customs authority to proceed with an independent cause of action under Section 1592(d), has been clarified by the recent decision, it remains important that claims for lost duties under this provision are based upon a demonstrable violation of Section 1592(a). A violation of Section 1592, is established by evidence of a material falsity or omission (e.g., the misdescription or undervaluation), which is associated with an entry, introduction, or attempted entry or introduction of merchandise into the commerce of the United States, and there must exist some level of culpability on the part of the person who has committed these acts.

To ensure that the basis for a section 1592(d) demand for duties exists, the prerequisite for issuing such demands should be the same as for the issuance of prepenalty notices under Section 1592.

3. ACTION

To assist in the development of legally enforceable claims for lost duties under Section 1592(d), the following procedural guidelines have been adopted.

A. Reports Relating To Section 1592(d) Demands For Duties

Any report of violations of Section 1592, which have resulted in a loss of duties shall be submitted promptly to the Area or District Director. These reports shall include the following items of Information:

- 1) A Description of the merchandise involved in the transaction relating to the lost duties (e.g., for Item 807.00 (TSUS) entries, the identity of the articles being imported after the foreign assembly operation).
- 2) A list of the Customs entries, if possible. Otherwise, the period of time that the importations were made and any identification of the Customs ports involved in such importations. "Requests For Data Retrieval" (C.F. 83L) reports should be attached if the demand involves all importations by a given person during a specified time period.
- 3) Identification of the false statements, material omissions, or false acts made in connection with the importation of the merchandise, which caused the loss of duties.
- 4) Any facts which indicate culpability. At a minimum, the facts must show a failure to exercise reasonable care and competence by the person who committed the false statement, act, or omission resulting in the lost duties.

B. Action Upon Receipt of A Report of Section 1592 Violation Involving Actual Duty Loss

- 1) All reports of violations of section 1592, resulting in a loss of duties shall be reviewed by the Fines, Penalties, and Forfeitures (FPF) Office. As is the case in a section 1592 penalty proceeding, the FPF Office shall make or recommend a determination as to whether or not the report establishes that a section 1592 violation has been committed. The FPF Office, however, shall consult with other field and Headquarters personnel, as necessary, in making this determination.
- 2) If it is determined that the report does not establish reasonable cause to believe that a violation of Section 1592, has been committed, the case file shall be annotated to reflect this determination and the report shall be returned to the initiating office with a notation of this determination. If the report included entries on which liquidation has not become final, these entries, however, shall be rate or value advanced as appropriate.

- 3) If it is determined that the report does establish reasonable cause to believe that a Section 1592 violation has been committed and it is determined that a penalty claim is warranted, a prepenalty notice, (or penalty notice, if prepenalty is not required) shall be issued in accordance with the procedures set forth in 19 CFR 162.77-78. See also Chapter FRD of the FPF Handbook.

In these cases, the demand for payment of the lost duties shall be stated in the penalty notice, when issued, in accordance with 19 CFR 162.79.

- 4) If it is determined that the report establishes reasonable cause to believe that a violation was committed, but other circumstances indicate that a penalty proceeding is not warranted, a separate demand for restoration of duties owed as a result of the violation shall be issued pursuant to section 1592(d), in accordance with the guidelines set forth herein.

C. Contents of Section 1592(d) Demands For Duties

Demands for duties under Section 1592(d), shall be issued in writing by the Area and District Directors and shall include the following items of information set forth in the same format as the prepenalty notices issued under Section 1592:

- 1) Identification of the merchandise and list of the entries, if possible. If entry numbers are not available, statement of the period of time importations were made and identification of the ports involved.
- 2) Citation of the laws violated and statement of the material facts establishing the violation of Section 1592(a), and the culpability of the person committing the violative acts.
- 3) Statement of the amount demanded and that such amount shall be due within thirty (30) days from the date of the notice. An appraisal work-sheet shall be included whenever possible.
- 4) Notification of the opportunity to make an oral and written presentation to the Area/District Director as to why the alleged violation did not take place or that the loss of duties is less than the amount demanded.

Notification also shall be made of the opportunity to obtain Headquarters review of the loss of duty determination in accordance with 19 CFR 162.79b.

D. Persons to Whom Section 1592(d) Demands Shall Be Issued

In all cases, demands for actual loss of duties resulting from violations of Section 1592, shall be issued to the following persons and in the following order:

- 1) The person who violated section 1592(a). (If a penalty claim is assessed against this person, the written demand prescribed under section 3.C., supra, would not be required since the actual loss of duties shall be demanded in the written penalty notice to this person.)
- 2) The importer of record on the entries involved in the violation of Section 1592(a), when this person is not also the violator.
- 3) The surety on the Customs entry bond covering the entries involved in the violation, when the importer of record does not pay the lost duties within the time period specified in the Section 1592(d) demand. The surety shall be granted an additional period of thirty (30) days to respond to the demand.

E. Time For Issuance of Section 1592(d) Demands

- 1) It remains the Government's position that there is no statute of limitations applicable to the assessment or collection of duties under Section 1592(d). Accordingly, demands for duties may be issued in accordance with 19 CFR 162.79b and the procedures set forth in this Directive, even after the termination of the statute of limitations period set forth in 19 USC 1621, that would be applicable to the section 1592 penalty action relating to the same entries.
- 2) In order to protect the revenue against the possibility that the foregoing position is not upheld by the Courts, it is Customs policy that demands for duties shall be issued, whenever possible, within the statute of limitations period applicable to a penalty action on the same entries.

4. EFFECT OF THIS ISSUANCE

This Directive rescinds and supersedes Manual Supplement 4400-09, issued on September 17, 1982, and amended by Change No. 1, on April 18, 1985.

5. RESPONSIBILITIES

Regional Commissioners will be responsible for ensuring that the provisions of this Directive are implemented uniformly within their local jurisdictions.

Guidance concerning the application of this Directive may be requested from the Chief, Penalties Branch, Headquarters (FTS 566-8317) or the appropriate Regional Counsel.

The statements made herein are not intended to create or confer any rights privileges or benefits for any private person, but are intended merely for internal guidance.

Commissioner of Customs