

CUSTOMS DIRECTIVE

ORIGINATING OFFICE: CO:R:P:P

DISTRIBUTION: See signature page
CUSTOMS DIRECTIVE NO. 4410-014
OLD NUMBER: 4400-14
DATE: JUNE 14, 1990
REVIEW DATE: JUNE 2004

SUBJECT: REFERRAL OF SECTION 1592 PENALTY CASES TO THE
DEPARTMENT OF JUSTICE

1. REFERENCES

Title 19, United States Code, Sections 1592 and 1621,
Title 19, Code of Federal Regulations, Part 171 and Appendix B of Part 171,
Fines, Penalties & Forfeitures Handbook, Chapter FRD

2. PURPOSE

The purpose of this document is to assure that Title 19, United States Code, section 1592 penalty cases are timely referred to the Department of Justice for the institution of collection proceedings when the alleged violator fails to pay the penalty claim or mitigated penalty amount in the specified time.

3. BACKGROUND

The Department of Justice has expressed its serious concern over the past several years regarding untimely referrals by Customs of certain section 1592 penalty cases to the Commercial Litigation Branch, Civil Division of the Department of Justice. These concerns have merit. (In all cases involving seizures, due process also requires prompt processing.)

Under 19 USC section 1621, Customs ability to recover a penalty or forfeiture of property under section 1592 may be forever barred UNLESS the section 1592 judicial complaint is filed with the Court of International Trade within 5 Years:

- A. From the date of DISCOVERY of the alleged violation if the violation resulted from FRAUD or
- B. from the date the alleged violation was COMMITTED (which is usually the date of the entry) if the violation resulted from GROSS NEGLIGENCE or NEGLIGENCE or
- C. unless the alleged violator is ABSENT from the United States. (The statute will then be suspended during the period of absence from the jurisdiction of the U.S. courts.)

In light of the seriousness of the problem of untimely referrals, the Department of Justice has insisted that Customs refer section 1592 penalty cases to that agency no later than six (6) months before the expiration of the statute of limitations. In order to implement and therefore, accomplish this directive, it is the policy of the Customs Service that a section 1592 penalty case be presented to the Fines, Penalties & Forfeitures office, the Office of Regulations & Rulings, and the Regional/District Counsel's Office in sufficient time to assure a prompt referral to the Department of Justice at least six (6) months before expiration of the statute of limitations as noted above.

RULE OF THUMB

For statute of limitations purposes only, assume that the Government can establish ONLY gross negligence or negligence. By following this procedure, Customs will be far less likely to lose a case to a statute of limitations defense - particularly in those cases where we are unable to establish fraud. In the vast majority of cases, this means that you look at the date of the OLDEST entry involved in the case for statute of limitations purposes because that date ordinarily is the first date of the commission of the violation. Then you add five years to this date to determine whether there is a statute of limitations problem AND whether a WAIVER of the statute of limitations should be solicited.

WAIVERS OF THE STATUTE OF LIMITATIONS

Absent compelling circumstances, Customs will not as a matter of policy, favorably entertain waivers of the statute of limitations for a period of time less than TWO (2) YEARS. All waivers should be forwarded to Headquarters and may be accepted only by the Director, Regulatory Procedures and Penalties Division. The proper format of a waiver was published in the Federal Register as T.D. 90-11 on February 2, 1990 (55 FR 3683), and is attached hereto as Appendix A. It is noted that a corporate resolution authorizing execution of the waiver of the statute of limitations should be submitted with the waiver or shortly after the waiver is filed

REMEMBER

The issuance of a prepenalty or penalty notice will not toll, i.e., suspend the statute of limitations. The statute will continue to run until a Complaint is filed in the Court of International Trade. (However, a violator's absence from the United States will toll the statute.)

4. ACTION

- A. In order to comply with the requirement of the Department of Justice that a section 1592 penalty case be referred to that Office no later than SIX (6)

MONTHS before the expiration of the statute of limitations (or the waiver period), it is essential that in the absence of a recently discovered violation or another unusual extenuating circumstance, all cases must be referred to the appropriate Regional/District Counsel's Office no later than NINE (9) MONTHS before the expiration of the statute of limitations or the waiver period. In the event that these time constraints cannot be met, the appropriate Regional/District Counsel Office shall be notified immediately.

- 1) It is the responsibility of the first Customs official who has reasonable cause to believe that there may be a section 1592 violation to immediately communicate with the local Regional/District Counsel Office, and Fines, Penalties & Forfeitures Office anytime there is any possibility of a statute of limitations problem.
- 2) There is a problem if less than TWO (2) YEARS remain before the expiration of the statute of limitations (based upon the rule of thumb discussed above) AND the case has not been referred to the Fines, Penalties and Forfeitures office to initiate penalty proceedings against the alleged violator. In these cases, it is the responsibility of the Customs officer under whose jurisdiction the case falls at that time (1) to communicate with the Fines, Penalties & Forfeitures Office to ascertain the appropriate procedures for requesting a waiver of the statute of Limitations and (2) to coordinate with the Fines, Penalties & Forfeitures Office to make the request for a waiver from the alleged violator. In the event that the alleged violator does not provide a waiver in a timely manner, it is the responsibility of that Customs officer to communicate that fact to the Fines, Penalties & Forfeitures Office to determine the appropriate action to be taken. It is also the responsibility of the Customs officer to immediately communicate with the local Regional/District Counsel Office to alert that Office about the status of the case.
- 3) If, after the case has been referred to the Fines, Penalties and Forfeitures Office to initiate penalty proceedings against the alleged violator, there is less than TWO (2) YEARS remaining before the expiration of the statute of limitations, it is the responsibility of that office to determine whether it is necessary to request a waiver of the statute of limitations from the alleged violator if not previously provided, or an extension of a previous waiver if necessary. If it is so necessary, the Fines, Penalties & Forfeitures Office will request a waiver or an extension from the alleged violator. It is the responsibility of the Fines, Penalties and Forfeitures Office to communicate with the local Regional/District Counsel Office to alert that office about the status of the case.

- 4) If, during the petitioning/mitigation proceedings, it becomes necessary to obtain a waiver of the statute of limitations, it is the responsibility of the Office of Regulations and Rulings, or the Fines, Penalties & Forfeitures Office, as appropriate, to request a waiver or an extension from the alleged violator.
- B. If the alleged violator declines to provide a waiver, it is Customs policy that the investigation and processing of that section 1592 case be given the highest priority in order for Customs to address the concerns of the Department of Justice (in the absence of a recently discovered violation or other unusual extenuating circumstance).
- C. It should be remembered that waivers of the statute of limitations are not the solution to all problems. Waivers should not be requested merely to delay the processing of a case. Even with a waiver, it is the responsibility of the various Customs officers to process the case in a timely manner. The longer a case takes to process, the less likely a full recovery will be made. This is so because entries are lost, and witnesses die, become unavailable, or cannot be located.

5. RESPONSIBILITIES

Special Agents in Charge and District/Area Directors will be responsible for ensuring that there is compliance with the policy statements and time constraints discussed above for section 1592 penalty cases within their respective jurisdictions. In the pursuit of a criminal case, an agent should not overlook the importance of determining whether there is a statute of limitations problem relating to the civil case, and notifying the Assistant United States Attorney if the request for a waiver is necessary.

Guidance concerning the application of this Directive may be requested from the Chief, Penalties Branch (ORR) (FTS) 566-8317, the local Regional/District Counsel, or the local Fines, Penalties & Forfeitures Office.

District/Area Directors, Special Agents in Charge, Fines, Penalties & Forfeiture officers, Regional/District Counsels, and OR&R officers may release copies of this document to the public upon request without a Freedom of Information Act request.

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

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