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Canada-U.S. *Blog*
LEGAL DEVELOPMENTS AFFECTING CANADA-U.S. CROSS BORDER TRADE

Canada's Customs Voluntary Disclosure Policy Has Been Revised

By Cyndee Todgham Cherniak on December 6th, 2015

Posted in Corporate Counsel, Cross-border deals, Cross-border trade, Customs Law, origin, tariff classification, valuation

On November 25, 2015, the Canada Border Services Agency ("CBSA") issued revised D-Memorandum D-11-6-4 "Relief of Interest and/or Penalties Including Voluntary Disclosure". This D-Memorandum is important because importers can make mistakes or fail to provide all information. Mistakes are often costly. Normally, the amount of duties & taxes, plus interest plus penalties (including Administrative Monetary Penalties (AMPs)) would be payable. The interest and penalties can add up if the error has been made for a number of years. If a voluntary disclosure can be properly made, the importer may not be required to pay the penalties and the full amount of interest. All applicable duties and taxes would be of course remain payable. In short – Voluntary Disclosures are all about saving money when the chips are down.

D-Memorandum D-11-6-4 "Relief of Interest and/or Penalties Including Voluntary Disclosure replaces D-Memorandum D-11-6-4 "Legislative Authorities and Supporting Documentation Requirements for Form B2 Adjustment Requests (January 1, 1991) and D-Memorandum D-11-6-6 Self-Adjustments to Declarations of Origin, Tariff Classification, Value for Duty, and Diversion of Goods", paragraphs 52-56 and Customs Notice N-332, Voluntary Disclosures Program. The new D-Memorandum is an evolution of the policy and is about transparency.

The CBSA can provide relief under the *Customs Act* and the *Customs Tariff*, including unpaid interest, late-paid anti-dumping duties, and penalties. The CBSA has statutory discretion to cancel or waive interest at any time and grant other forms of relief. The key word is "discretion" and the CBSA is not obligated to waive or cancel interest and/or penalties. The CBSA may decide in appropriate cases to cancel/waive interest or penalties – that is where the voluntary disclosure policy comes in. The D-Memo sets out the "rules" for obtaining relief.

The Voluntary Disclosure Policy is intended to encourage importers to voluntarily come forward when they discover (without a pending verification) that they made errors in their reporting to the CBSA. Importers are encouraged to voluntarily:

1) disclose previous unreported information; or

2) correct inaccurate or incomplete information.

If the disclosure/correction is made within 90 days of the importer's "reason to believe" an error has been made, the importer may correct the entries under section 32.2 of the *Customs Act* and does not have to file under the Voluntary Disclosure Policy. If the disclosure/correction is made after the 90 day "reason to believe" period, the importer must satisfy the conditions for a valid voluntary disclosure.

Conditions for a Valid Voluntary Disclosure

A voluntary disclosure must meet the following conditions to be valid:

(a) It is voluntary;
(b) It involves the potential imposition of a penalty and/or specified interest or the potential of an action against the goods or person;
(c) It is complete in all material respects and includes all incidences of non-report or failure to account for the same or similar imported goods for the six years prior to the disclosure; or in the case of exported goods, all incidences of non-compliance up to six years prior to the disclosure in addition to the current year;
(d) It takes account of the special considerations related to regulated or restricted imports and exports and prohibited goods; and
(e) With the exception of disclosures to comply with section 32.2 of the Act, the contraventions are non-repetitive (a voluntary disclosure may be denied when a previous voluntary disclosure has been granted for the same compliance issue) and the importer explains how the non-compliance occurred and how it has been corrected or what measures have been put in place to reduce the risk of future non-compliance.

A disclosure is voluntary if it is initiated by the importer and is not prompted by any activity or action taken by the CBSA or other government department or any action of other persons in authority (e.g., police) related to the importer or the subject of the disclosure. A disclosure is not voluntary if it is made after an officer has informed the importer in any manner that the officer is referring (or has referred) goods for examination. With respect to trade program verifications, importers do not contravene the "voluntary" condition if they apply for voluntary disclosure benefits prior to the issuance of a verification "Notification Letter". This applies even if they may be aware of CBSA's verification priorities. An audit by the Canada Revenue Agency for income tax of GST/HST purposes that includes imported goods does not preclude an importer from making a voluntary disclosure concerning non-compliance. A trade program verification does not preclude an importer from presenting, or the CBSA from accepting, at any time, voluntary disclosures on– another trade program than that which is the subject of the verification for the same or similar goods.

Caution

Since the CBSA has discretion when it comes to voluntary disclosures, it is important to approach the CBSA with caution. The CBSA may thank you for your neatly prepared package of information and your calculations and issue a detailed adjustment statement with interest and penalties. A voluntary disclosure does not preclude criminal prosecution when the CBSA considers it warranted.

As a result, we strongly recommend that importers start with a no-names voluntary disclosure with the assistance of legal counsel. Legal counsel can help determine if the CBSA will accept that the conditions for a voluntary disclosure have been satisfied. Counsel may also assist with ensuring that the disclosure is complete – that is, counsel can put themselves in the place of the CBSA and ask questions to ensure that the disclosure is complete and does not cover importers where there were no mistakes made. Lawyers offer solicitor-client privilege in case an importer decides to not proceed with a voluntary disclosure.

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Tags: Canada Border Services Agency, CBSA, discretion, interest, no-names voluntary disclosure, penalties, voluntary disclosure, waiver

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