Canada Border Services Agency | Agence des services frontaliers du Canada

Ottawa, September 16, 2008

MEMORANDUM D11-6-3

In Brief

ADMINISTRATIVE POLICY RESPECTING RE-DETERMINATIONS OR FURTHER RE-DETERMINATIONS MADE PURSUANT TO PARAGRAPH 61(1)(c) OF THE *CUSTOMS ACT*

1. This memorandum supersedes Memorandum D11-6-3, *Administrative Policy Respecting Re-Determinations or Further Re-Determinations Made Pursuant to Paragraph 61(1)(c) of the Customs Act*, dated March 18, 1998.

2. This memorandum has been revised to reflect organizational changes resulting from the implementation of the Canada Border Services Agency on December 12, 2003. The revision of this memorandum is part of an overall revision of the Memoranda D11-6 series.

3. This memorandum has been revised to incorporate certain amendments to the *Customs Act*. In addition, changes have been made to clarify policy or procedural issues that have arisen since the last revision to this memorandum.

4. Any questions concerning this matter should be directed to:

Recourse Policy and Planning Division
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ADMINISTRATIVE POLICY RESPECTING RE-DETERMINATIONS OR FURTHER RE-DETERMINATIONS MADE PURSUANT TO PARAGRAPH 61(1)*(c)* OF THE *CUSTOMS ACT*

This memorandum sets out and explains the legislation and procedures by which the President of the Canada Border Services Agency (CBSA) may make re-determinations and further re-determinations of tariff classification, value for duty, and origin under paragraph 61(1)*(c)* of the *Customs Act*, commonly referred to as the "subsequent goods" provision.

It clarifies the following:

(a) the goods to which the provision may apply, in particular, the scope and meaning of the term "other like goods" with respect to subparagraph 61(1)*(c)*(i) of the *Customs Act*;

(b) the eligibility period to qualify as subsequent goods; and

(c) the time frame during which the President will receive claims for subsequent goods.

LEGISLATION

61.(1) The President may

(a) re-determine or further re-determine the origin, tariff classification or value for duty of imported goods

(i) at any time after a re-determination or further re-determination is made under paragraph 60(4)*(a)*, but before an appeal is heard under section 67, on the recommendation of the Attorney General of Canada, if the re-determination or further re-determination would reduce duties payable on the goods,

…

(iii) at any time, if the re-determination or further re-determination would give effect to a decision of the Canadian International Trade Tribunal, the Federal Court of Appeal or the Supreme Court of Canada made in respect of the goods;

…

(c) re-determine or further re-determine the origin, tariff classification or value for duty of imported goods (in this paragraph referred to as the "subsequent goods"), at any time, if the re-determination or further re-determination would give effect, in respect of the subsequent goods, to a decision of the Canadian International Trade Tribunal, the Federal Court of Appeal or the Supreme Court of Canada, or of the President under subparagraph *(a)*(i),

(i) that relates to the origin or tariff classification of other like goods imported by the same importer or owner on or before the date of importation of the subsequent goods, or

(ii) that relates to the manner of determining the value for duty of other goods previously imported by the same importer or owner on or before the date of importation of the subsequent goods.

(2) If the President makes a re-determination or further re-determination under this section, the President shall without delay give notice of that decision, including the rationale on which the decision is made, to the prescribed persons.

62. A re-determination or further re-determination under section 60 or 61 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.

65.(1) If a re-determination or further re-determination is made under paragraph 60(4)*(a)* or 61(1)*(a)* or *(c)* in respect of goods, such persons who are given notice of the decision as may be prescribed shall, in accordance with the decision,

(a) pay any additional amount owing as duties in respect of the goods or, where an appeal is taken under section 67, give security satisfactory to the Minister in respect of that amount and any interest owing or that may become owing on that amount; or

(b) be given a refund of any duties and interest paid (other than interest that was paid by reason of duties not being paid in accordance with subsection 32(5) or section 33) in excess of the duties and interest owing in respect of the goods.

(2) Any amount owing by or to a person under subsection (1) or 66(3) of this Act or as a result of a determination or re-determination under the *Special Import Measures Act* in respect of goods, other than an amount in respect of which security is given, is payable immediately, whether or not an appeal is taken under section 67 of this Act or subsection 61(1) of that Act.

65.1(1) If a person (in this subsection referred to as the "applicant") to whom notice of a decision under subsection 59(1) or paragraph 60(4)*(a)* or 61(1)*(a)* or *(c)*

was given would be entitled under paragraph 59(3)*(b)* or 65(1)*(b)* to a refund of an amount if the applicant had been the person who paid the amount, the amount may be paid to the applicant and any amount so paid to the applicant is deemed to have been refunded to the applicant under that paragraph.

(2) If an amount in respect of goods has been refunded to a person under paragraph 59(3)*(b)* or 65(1)*(b)*, no other person is entitled to a refund of an amount in respect of the goods under either of those paragraphs.

…

67. (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

(2) Before making a decision under this section, the Canadian International Trade Tribunal shall provide for a hearing and shall publish a notice thereof in the *Canada Gazette* at least twenty-one days prior to the day of the hearing, and any person who, on or before the day of the hearing, enters an appearance with the Secretary of the Canadian International Trade Tribunal may be heard on the appeal.

(3) On an appeal under subsection (1), the Canadian International Trade Tribunal may make such order, finding or declaration as the nature of the matter may require, and an order, finding or declaration made under this section is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 68.

GUIDELINES AND GENERAL INFORMATION

1. Paragraph 61(1)*(c)* of the *Customs Act* permits the President to re-determine or further re-determine the origin, tariff classification, or value for duty of imported goods, referred to as "subsequent goods," defined in paragraph 2, to give effect to a decision of:

(a) the Canadian International Trade Tribunal (CITT);

(b) the provincial court of the appropriate jurisdiction for goods classified under tariff item No. 9899.00.00;

(c) the Federal Court of Appeal or the Supreme Court of Canada; or

(d) the President made under subparagraph 61(1)*(a)*(i) of the *Customs Act*

Basic Requirements

2. The term "subsequent goods" refers to goods imported by the same owner/importer of goods that have become the subject of an appeal to the CITT or the courts, that have been imported after the goods appealed, and that:

(a) With respect to tariff classification or origin, are "identical" to the goods that were appealed; and

(b) With respect to value for duty, have their value for duty determined in the same manner as the goods under appeal.

Note: With respect to paragraph *(a)*, "identical goods" means goods for which the tariff classification and origin are determined on the same basis as the goods under appeal and that are the same in all respects, including physical characteristics, material, and function. Minor differences in appearance (e.g., colour) do not prevent goods from otherwise meeting the definition and being considered identical. With respect to paragraph *(b)*, the goods themselves do not have to be identical, but the valuation criteria must be the same.

3. When a complete good qualifies as a "subsequent good," the parts of that good do not qualify as a "subsequent good" in their own right unless they have also been the subject of the appeal dealing with the complete good. Accordingly, requests under the subsequent goods provision will be returned to the claimant without consideration if the parts themselves were not named within the actual appeal.

4. To be eligible for the President's consideration under subsection 61(1)*(c)* of the *Customs Act*, the subsequent goods must have been imported by the same importer or owner between:

(a) the date of the first entry that was appealed to the CITT or the courts, and

(b) the date of the President's decision notice issued under subsection 61(2) of the *Customs Act* in relation to re-determinations or further re-determinations that give effect to the recommendation of the Attorney General of Canada, or the CITT or court decision on appealed goods.

5. Importers requesting consideration under paragraph 61(1)*(c)* of the *Act* concerning the use of the subsequent goods provision must file complete submissions with their regional Recourse Division within 90 days following receipt of the notice referred to in paragraph 4*(b)*, in order for the request to be considered by the President. Submissions received after 90 days will be returned to the claimant without consideration.

Accounting for goods

6. At the time of entry, importers should account for subsequent goods in accordance with Agency advice at that time. The Agency may review, under subsection 59(1) of the *Customs Act*, the accounting records for subsequent goods imported prior to a decision of the CITT or court.

7. Once an importer has filed an appeal under section 67 or 68 of the *Act*, that importer no longer needs to submit adjustment requests against subsequent importations of the goods. This means that in this instance importers need not protect time limits formally or informally in order for their subsequent goods to be eligible for consideration under paragraph 61(1)*(c)* of the *Act*.

8. The Agency cautions importers to take protective action whenever it is doubtful whether the appellate decision will apply to other imported goods. They should contact their regional Recourse Division for written confirmation that the goods in question are considered to be subsequent goods or, alternatively, file timely dispute notices under section 60, or applications for refund under paragraph 74(1)*(e)*. The Agency will generally delay processing such dispute notices requests/applications until after the CITT or court decision. (For information concerning the filing of applications for refund under paragraph 74(1)*(e)*, please refer to Memorandum D11-6-6, *Self-adjustments to Declarations of Origin, Tariff Classification, Value for Duty, and Diversion of Goods*. For information concerning the filing of dispute notices under section 60, please refer to Memorandum D11-6-7, *Importer's Dispute Resolution Process for Origin, Tariff Classification and Value for Duty of Imported Goods*.)

9. The Agency will not make re-determinations or further re-determinations under paragraph 61(1)*(c)* of the *Act* until the issue in dispute has reached a final resolution through the normal recourse route.

General Procedures

10. When the importer uses Form B2 or blanket amendments to seek the President's consideration under paragraph 61(1)*(c)* of the Act, the legislative reference in the justification fields should indicate subparagraph 61(1)*(c)*(i) for tariff classification or origin, and subparagraph 61(1)*(c)*(ii) for value for duty. The relevant President's, CITT, or court decision number must also be included.

11. If the Agency agrees that the importer may present a document other than Form B2, such as a letter or an electronic format (e.g., fax), the importer will include a listing of minimum acceptable information (e.g., importer's name, product names, transaction numbers, transaction line numbers pertaining to the actual goods). The Agency will advise the importer as to the information required.

12. The Agency will review submissions made under paragraph 61(1)*(c)* to determine if the subsequent goods meet the qualifications set out in paragraphs 2 to 5 of this memorandum. If necessary, the reviewing officer will contact the importer to obtain clarification or further information.

13. If the officer finds that the goods do not qualify as subsequent goods, no re-determination or further re-determination will be made pursuant to paragraph 61(1)*(c)* respecting to the goods in question. The Agency will advise the importer in writing of the reasons why the goods do not qualify.

14. The Agency will notify importers in writing of any re-determination or further re-determination made under paragraph 61(1)*(c)* of the *Act*.

15. Re-determinations or further re-determinations made under paragraph 61(1)*(c)* may result in demands for additional duties from the importer or may generate refunds, depending upon the decision of the Attorney General, CITT or court. Refunds generally occur when the importer is successful on the appeal and has already paid the higher duties owing on subsequent entries based on a preceding Agency decision or policy. Reassessments requiring the payment of additional duty are rare but could occur, for instance, when the CITT or court classifies the goods under a completely different tariff item, resulting in a higher rate of duty than was required for the tariff classification originally determined by the Agency

16. Applications or requests which may have been filed, respectively, under paragraph 74(1)*(e)* or under subsection 60(1) of the *Act* concerning the same issue, and which were held in abeyance pending a decision by the CITT or the court, will be processed under those sections of the *Act* respectively, in accordance with the CITT or court decision rendered. Importers should note that interest payments on refund applications made under paragraph 74(1)*(e)* are not as beneficial as those made on decisions made under subsection 60(4) or paragraph 61(1)*(c)* of the *Act*.

Additional Information

17. Further information respecting application of paragraph 61(1)*(c)* of the *Act* may be obtained from the Director of the Regional Recourse Division. Please refer to Appendix H of Memorandum D11-6-7, *Importer's Dispute Resolution Process for Origin, Tariff Classification and Value for Duty of Imported Goods*, for contact information.

REFERENCES

ISSUING OFFICE –

Recourse Policy and Planning Division
Recourse Directorate
Admissibility Branch

HEADQUARTERS FILE –

4502-1

LEGISLATIVE REFERENCES –

C*ustoms Act*, paragraph 61(1)*(c)*

OTHER REFERENCES –

D11-6-4, D11-6-6, D11-6-7

SUPERSEDED MEMORANDA "D" –

D11-6-3, March 18, 1998

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