



February 11, 2009

Colleen McGonigle
Senior Program Officer
Canada Border Services Agency
AMPS Policy and Program Unit
150 Isabella Street, 10th/11th Floors
Ottawa, ON K1A 0L8

Dear Ms. McGonigle:

Re: AMPS Review Consultations

I am writing on behalf of the National Commodity Tax, Customs and Trade Law Section of the Canadian Bar Association (the CBA Section) in response to your invitation of January 26, 2009 to the AMPS BCCC Subcommittee, (on which Greg Kanargelidis represents the CBA Section) to have the CBA Section review the AMPS Review documents proposing collapsed AMPS Contraventions.

Availability of Due Diligence Defence

A strict liability regime should be applicable in AMPS situations, just as it applies in Seizure and Ascertained Forfeiture proceedings under the *Customs Act*. Our view is supported by existing jurisprudence dealing with ascertained forfeitures¹ and with the Goods and Services Tax.²

The jurisprudence on AMPS to date also supports our position. In the Federal Court decision in *Samson v. Canada (National Revenue)*³ the plaintiff argued that he acted in good faith and never intended to make the false statement for which he received a penalty. In the circumstances of that case, the Federal Court found it unnecessary to affirmatively rule on whether a due diligence defence was available under the AMPS regime (as Samson would not have satisfied the test even if there were a defence). However, the Court did not side with the Minister's position that the AMPS regime allowed no such defence. The revised AMPS Contraventions, Customs

¹ *Cata International v. Canada (Minister of National Revenue, Customs, Excise and Taxation – M.N.R.)*, [2004]F.C.J. No. 810.

² *AG (Canada) v. Consolidated Canadian Contractors Inc.*, [1998]2965 ETC(FCA).

³ 2007 FC 975

Enforcement Manual, other policy documents and enforcement in practice should allow the possibility of a due diligence defence in accordance with the principles of natural justice, and for consistency with other enforcement actions by the CBSA. This is especially the case in connection with contraventions such as proposed items 78, 79 and 80, which impose a third level penalty of \$8000 for false statements. No accommodation is made for statements that, although “false”, may be demonstrated to have been made inadvertently or based on a mistaken belief (see *Samson*), particularly if the penalty is levied on a corporation.

Penalties Should Not Exceed Value for Duty of Goods at Issue

The revised AMPS system should not allow for the possibility of penalties greater than the value for duty of the goods subject to the penalty. This runs contrary to the principle that AMPS penalties are intended to be corrective, rather than punitive. While we understand that the proposed new AMPS Contraventions will not assess penalties based on value for duty, this does not mean the CBSA should set penalties in excess of the value for duty of the goods at issue. This is the maximum provided in the Seizure and Ascertained Forfeiture provisions of the *Customs Act*. An administrative penalty should not exceed the maximum penalty imposed for a seizure or ascertained forfeiture, which is the forfeiture of the goods or their value in money.

By way of example from our experience, a penalty for a false declaration of value for duty may be imposed under the current C348 (listed under item 80 of the Collapsed Contraventions). Under the current regime, it is conceivable that an importer could face a \$2000 penalty for a first instance, followed by a \$4000 penalty for a second instance, and then a number of additional penalties at a rate of \$6000 per instance. In one example, the total penalties far exceeded the aggregate value of the importations at issue. It is not reasonable for a penalty under the AMPS regime to be more costly to the importer than a seizure or ascertained forfeiture.

Need for Consistency

A revised AMPS regime must provide for increased consistency between assessing officers. Different officers faced with the same factual scenario should not arrive at contradictory conclusions. A properly functioning system must have some amount of predictability. In this connection, we recommend thorough and precisely worded Backgrounders for each contravention. The greatest concerns typically arise as a result of the manner in which the contraventions are applied and assessed. Therefore, it is important that the CBSA clarify these details in the Backgrounders and consult on the revised Backgrounders.

Item 80 – Should be Limited to “Intentional” Acts

The Backgrounder for C348 currently indicates that “this contravention only applies where there is evidence of intent to provide false written information”. Based on the chart of Collapsed Contraventions in which C348 has been incorporated into item 80, it appears that the terminology imposing liability only for intentional conduct has been removed. Please clarify whether an inadvertent mistake or error (which we submit would not be caught under the current C348), will be captured under C080. If so, please provide the rationale for this decision.

Risk Ranking of Item 80

The proposed list of Collapsed Contraventions indicates that a risk ranking of 5D is proposed for item 80. We question whether this is appropriate. Item 80 contraventions may reflect purely economic infractions (e.g., errors on documentation under the *SIMA*), rather than raising national security concerns in all cases.

We trust you find these comments of assistance in further formulating and refining the AMPS program and the Collapsed Contraventions. We look forward to your response to our comments and welcome further discussion on this matter.

Yours truly,

(Original signed by Tamra Thomson for Dalton Albrecht)

Dalton Albrecht
Chair
National Commodity Tax, Customs and Trade Section