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October 31, 2014

Via email: Brent.McRoberts@cbsa-asfc.gc.ca

Brent McRoberts
Director General, Trade and Anti-dumping Programs Directorate
Canada Border Services Agency
150 Isabella Street, 11th Floor
Ottawa, ON K1A 0L8

Dear Mr. McRoberts:

Re: Comments on Draft D-Memorandum *Relief of Interest and/or Penalties* – April 4, 2014

I am writing on behalf of the Canadian Bar Association's Commodity Tax, Customs and Trade Law Section (CBA Section) in response to the draft D-Memorandum entitled *Relief of Interest and/or Penalties* dated April 4, 2014 (April 2014 Draft).

The CBA is a national association representing over 37,000 jurists, including lawyers, Québec notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section comprises lawyers from across Canada who deal with law and practice issues relating to commodity tax, customs and trade remedy matters.

We would like to draw particular attention to the following substantive issues.

Wash Transaction Policy

It appears the wash transaction relief policy has been deleted from the April 2014 Draft. The current policy, published in 2000, applies in situations where goods are not dutiable and the only issue is GST. In these situations, the interest is waived, similar to domestic wash transactions. Although Appendix E in the April 2014 Draft refers to "GST Wash", the text of the April 2014 Draft does not mention wash transactions. The CBA Section recommends applying the wash transaction policy if voluntary disclosures are to be encouraged. We believe this is fair since wash transactions are applied in domestic transactions.

Criminal Sanctions

Paragraph 25 of the April 2014 Draft states that "the Voluntary Disclosure Program (VDP) does not grant immunity from prosecution." Paragraph 20 states: "acceptance of a voluntary disclosure does not preclude criminal prosecution when warranted." This contradicts the existing voluntary disclosure policy which says that "in accepted voluntary disclosures, customs will not pursue civil action and/or prosecution under the *Customs Act* unless it is later learned that the voluntary

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disclosure was not truthful". CBSA has stated that they do not have the authority to waive criminal prosecutions. However, where no other government department is involved, CBSA appears to have the primary authority to decide whether prosecution is warranted. This requires clarification in the April 2014 Draft. Protection from criminal sanctions is important when encouraging voluntary disclosures. If there is any possibility of criminal or civil penalties being applied beyond interest and penalties, voluntary disclosure becomes less likely. We believe the CBSA has the authority under the *Customs Act* to waive penalties.

Non-Repetitive Disclosures

We are concerned with the definition of "non-repetitive disclosures" in paragraph 18 of the April 2014 Draft. Voluntary disclosure may be denied when a previous disclosure has been granted for the same compliance issue. However, the scope of the term "issue" needs to be clarified. Does it refer to issue by program? If it is not the same substantive issue, even when it is in the same program (for example, valuations could involve assists versus buying commissions or subsequent proceeds, which would all be different issues under the same program), a voluntary disclosure should be allowed. At a minimum, a voluntary disclosure should be allowed if a disclosure was not previously made under the same program.

The ability to disclose should be reset at some point. The *Customs Act* provides a four year reassessment period. A similar time may be desirable for a reset of the voluntary disclosure period. The current policy refers to a "pattern of activity" where voluntary disclosures are made.

The definition of same "issue" should be clarified so that if a particular program is involved in one voluntary disclosure, such as classification, then clients need not review their valuation, origin, compliance, etc., at the same time and should not be precluded from making a disclosure under a different program at a later date.

"No-name" Disclosures

The April 2014 Draft deals with no-name disclosures primarily in paragraphs 28 and 29. The April 2014 Draft policy lacks details applicable to no-name disclosures and some established CBSA policy may no longer apply. In particular, the current voluntary disclosure policy confirms that "Customs will be bound by the opinion given for a period of 60 calendar days after the date of the opinion". Similarly, when a client pursues a voluntary disclosure after receiving the CBSA's opinion, the "effective date of disclosure will be the date the request was received". In our view, these details are important elements of no-name disclosures and should be included in the April 2014 Draft.

We trust these comments are helpful. We would be pleased to further assist CBSA in any way possible.

Yours truly,

(original signed by Noah Arshinoff for Maurice Arsenault)

Maurice Arsenault
Chair, Commodity Tax, Customs and Trade Law Section