

CUSTOMS

EXTERNAL POLICY

OFFENCES AND PENALTIES

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1 SUMMARY

- a) Where it has been established that the Act has been contravened or not complied with, the Commissioner is empowered to offer a Section 91 to a client as an alternative to prosecution.
- b) The client has the option of accepting or rejecting the offer of the Section 91. Failure to comply with the request will result in a letter of demand for the underpayment of any duties or taxes being issued to the client.
- c) Under no circumstances will Customs accept a deposit lodged in terms of Section 91 under protest.
- d) Goods dealt with in contravention with the provisions of the Act are liable to forfeiture and if the goods are not available at the time of a Customs intervention, forfeiture may be imposed.
- e) Where goods have been detained, seized or forfeited, the Commissioner can direct that the goods are returned to the owner where good cause is shown.
- f) Any person whose rights have been adversely affected by administrative action has the right to be given written reasons, as contemplated in the Constitution of South Africa and the Promotion of Administrative Justice Act.

2 POLICY

2.1 Penal provisions

- a) Customs penalties are imposed in accordance with the specific Sections 78 to 86A commonly termed "the penal provisions".
- b) The Act distinguishes between less serious offences and serious offences and the severity of penalties increase depending on the extent of the infringement.

2.2 Administrative penalties (Section 91)

- a) In instances where it has been established that the Act has been contravened or not complied with, the Commissioner is empowered to offer a Section 91 to a client as an alternative to prosecution. This necessitates that Customs have *prima facie* proof of a contravention or non-compliance.
- b) The offer of Section 91 is forwarded to clients:
 - i) On a notice of intent with a DA 70 attached; or
 - ii) Via a CUSRES message to submit an import clearance declaration (CCD). See SC-CF-55 for the submission of CCDs.
- c) Customs Officers determine the deposit for a possible penalty on a case-by-case basis by considering all the facts of each individual case together with the relevant legislation and Contravention list (refer to SC-CO-01-01-A01).
- d) The client has the option of accepting or rejecting the offer of Section 91. **Clients electing to be dealt with departmentally** must communicate this decision to Customs within seven (7) working days from the date of the EDI notification or the notice of intent **by**:
 - i) **Completing** the forms and payment mentioned in **paragraphs (e) and (f) below; and**
 - ii) **Providing supporting documents as evidence for any mitigating circumstances to be taken into consideration when determining the possible penalty. If the client:**
 - A) Agrees that they have failed to comply with the requirements and can give proof of mitigating circumstances the deposit for a possible penalty as levied by Customs must be paid in full.**
 - B) Disagrees with the representations or the *prima facie* findings, factual or legal the deposit for the disputed offence may be deducted from the total deposit amount before payment is made. If the evidence submitted to Customs does not prove compliance the case will not be dealt with departmentally until the full deposit has been paid.**

- e) Where an import CCD is requested as a deposit for a contravention a formal application must be made by the client on a company letterhead which must be signed, dated and scanned to the inspection case with the following minimum information:
 - i) SSM reference <insert PP case number>;
 - ii) Local/Movement reference number <insert LRN/MRN>;
 - iii) Applicant details <insert name and client code>; and
 - iv) The declaration: "For the purpose of Section 91, I <insert full names>, for and on behalf of <insert company's/client's name> in his/her capacity as <insert capacity> being duly authorised to sign this declaration, hereby –
 - A) apply for the matter in the circumstances stated above to be determined by the Commissioner;
 - B) agree to abide by the Commissioner's decision; and
 - C) deposit the amount required by the Commissioner."
- f) The client must submit the deposit for a possible penalty on a DA 70 or CCD (with a signed letter as prescribed), as well as any information that the client considers relevant, within seven (7) working days from the date of the EDI message or notice of intent.
- g) For manual submissions of the deposit amount refer to SC-CF-25 and SC-CF-32 for the use of the DA 70.
- h) Customs may not accept a deposit lodged in terms of Section 91 under protest.
- i) Once a Section 91 is offered, and accepted by the client, criminal prosecution cannot thereafter be considered, unless it becomes known that not all aspects have been truthfully declared. Refer to Section 44(ii).
- j) Customs will consider the matter based on the *prima facie* facts communicated to the client, review all the evidence including the representations made by the client. Customs will then deal with the matter summarily and decide what penalty amount is to be imposed.
- k) The client will receive a notification from Customs with the outcome of the decision reached which could be the following:
 - i) The full amount of the deposit may be imposed as a penalty/forfeiture;
 - ii) The full amount paid may be liquidated to the client; or
 - iii) The deposit amount paid may be liquidated partially. Refer to the Provisional Payment Policy - SC-CF-25 where the liquidation process is dealt with.
- l) An Officer may not detain cargo or disrupt business to enforce payment of a Section 91 deposit.
- m) Clients who do not agree with the *prima facie* findings or the factual or legal basis, may submit representations [within the seven (7) working days]. In the case of CCD based deposits, this must be scanned to the inspection case.
- n) In cases where the client refuses the Section 91 this will result in a letter of demand for any underpayments of any duties or taxes being issued to the client.
- o) Where the client elects **not** to be dealt with departmentally, or no representation from the client is received, or he/she does not agree with the *prima facie* findings or the factual or legal basis he/she may be subject to prosecution.

2.3 Forfeiture

- a) Any goods which are dealt with in contravention with the provisions of the Act are liable to forfeiture in terms of Section 87(1).
- b) Officers are entitled in terms of Section 88(1)(a) to detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether it is liable to forfeiture under this Act.

- c) Where it has been proven that the goods are liable to forfeiture, the discretion lies with the Commissioner whether or not to seize the goods [Section 88(1)(c)].
- d) However, if the goods liable to forfeiture that have been selected for seizure are missing and the goods cannot be found, a forfeiture amount equal to the value for duty purposes can be demanded instead of the goods [Section 88(2)(a)]

2.4 Amount required in terms of Section 93(1)(c) in order to return to the owner goods detained, seized or forfeited

- a) Where goods have been detained, seized or forfeited, the Commissioner can direct that the goods are returned to the owner where good cause is shown. One (1) of the conditions that the Commissioner could impose, pending return of the goods, is the payment of an amount not exceeding the value for duty purposes. This amount is discretionary.
- b) The remission amount as per Section 93 is not forfeiture but a payment made by the owner to secure return of detained, seized or forfeited goods. This means for instance that where Customs has detained a shipment, release thereof can be granted to the owner once the remission amount has been paid.

2.5 Application of Section 88(2)(a) and Section 93

- a) A Section 88(2)(a) forfeiture or the Section 93 amount cannot both be applied to one (1) consignment with the exception where part of a consignment is missing and the remainder has been detained.
- b) In this instance, forfeiture will be imposed for the goods that are gone and if Customs elects to return the remainder of the consignment, Section 93 remission can be applied for.

2.6 Keeping records

- a) Every client must keep for record purposes for a period of five (5) years:
 - i) Books, accounts and documents in respect of all transactions relating to the Rules for the purpose of any acquittal procedure; and
 - ii) Any data related to such documents created by means of a computer.
- b) The five (5) year period is calculated from the end of the calendar year in which the document was created, lodged or required. (Sections 101 and 101A).
- c) Every client must produce such books, accounts and documents on demand.

2.7 Penalties

- a) Failure to adhere to the provisions of the Act is considered an offence.
- b) Offences may render the client liable to, as provided for in the Act:
 - i) Monetary penalties;
 - ii) Criminal prosecution; and/or
 - iii) Suspension and/or cancellation of their deferment account, registration, license, accreditation and/or designation.

2.8 Promotion of Administrative Justice Act

- a) Any action on behalf of the State, which may be detrimental to any person, organisation or company, must be made in a fair manner with good reason(s). All penalties are therefore carefully deliberated, uniformly implemented and reasons and/or evidence for such actions maintained.

- b) The Promotion of Administrative Justice Act (PAJA) No. 3 of 2000 gives effect to everyone's right to administrative action that is lawful, reasonable and procedurally fair. Any person whose rights have been adversely affected by administrative action has the right to be given written reasons, as contemplated in Section 33 of the Constitution of the Republic of South Africa, 1996. PAJA:
 - i) Provides for the review of administrative action by a court or where appropriate, an independent and impartial tribunal;
 - ii) Imposes a duty on the State to give effect to those rights;
 - iii) Promotes an efficient administration as well as good governance; and
 - iv) Creates a culture of accountability, openness and transparency in the Public Administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to fair and just administrative action.
- c) Administrative action which significantly and unfavourably affects the rights or valid expectations of any person must be procedurally fair. A fair administrative procedure depends on the circumstances of each case.
- d) Just administrative action requires that any Customs Officer consider all the facts and obtain all information needed in addition to affording clients the opportunity to be heard, prior to imposing the penalty amount.
- e) A person must be given:
 - i) Written reasons of the nature and purpose of the proposed administrative action;
 - ii) A reasonable opportunity to make representations;
 - iii) A clear statement of the administrative action; and
 - iv) Adequate notice of any right of review such as or internal appeal, where applicable.
- f) Before administrative action can be provided taken by Customs the client must be allowed the opportunity to:
 - i) Obtain assistance and, in serious or complex cases, legal representation;
 - ii) Present and dispute information and arguments; and
 - iii) Appear in person.
- g) Clients whose rights have been significantly and unfavourably affected by administrative action and who have not been given reasons for the action may, within thirty (30) days after the date on which the client became aware of the action, request Customs to furnish them with written reasons for the action.
- h) Customs must within forty five (45) days after receiving the request, give the client adequate reasons in writing for the administrative action, or advise that adequate/sufficient reasons have already been provided. If Customs fails to furnish adequate reasons for the administrative action, it is presumed in any proceedings for judicial review that the administrative action was taken without good reason.

2.9 Appeals against decisions

- a) In cases where clients are not satisfied with any decision taken in terms of the Customs and Excise Act they have a right of appeal to the relevant appeal committee. The policy in this regard, as well as the process to be followed, is contained in document SC-CA-02 - Internal Administrative Appeal – External Policy.
- b) Should clients be unhappy with a decision of any appeal committee their recourse will be to lodge an application for ADR (Alternative Dispute Resolution) with the relevant appeal committee. The committee will add its comments thereto and forward the application to the ADR Unit for attention. The policy in this regard, as well as the process to be followed is contained in document SC-CC-26 - Alternative Dispute Resolution – External Policy.

3 RELATED INFORMATION

3.1 Legislation

TYPE OF REFERENCE	REFERENCE
Legislation and Rules administered by SARS:	Customs and Excise Act No. 91 of 1964: Sections 78-88, 91 and 93 Customs and Excise Rules: Rule 120.10
Other Legislation:	Promotion of Access to Information Act No. 2 of 2000: All Promotion of Administrative Justice Act No. 3 of 2000: Sections 1, 3, 5 and 6
International Instruments:	Kyoto Convention Specific Annex H Chapter 1: Customs Offences Kyoto Convention General Annex Chapter 10: Appeals in Customs matters

3.2 Cross References

DOCUMENT #	DOCUMENT TITLE
SC-CA-02	Internal Administrative Appeal – External Policy
SC-CC-26	Alternative Dispute Resolution – External Policy
SC-CF-25	Provisional Payments – External Policy
SC-CF-32	Completion of DA 70 – External Manual
SC-CF-55	Clearance Declarations – External Policy
SC-CO-01-01-A01	Contravention List – External Annex

3.3 Quality Records

- a) Completed forms as listed below will be regarded as records which must be kept for record purposes.
- b) The following Quality Records are generated in terms of this procedure.

Number	Title
	Any correspondence/declaration(s) received from the client or SARS
DA 70	Application to make provisional payment
SC-CO-01-01-A03	Notice of intent – Internal Annex
SC-CO-01-01-A04	Imposition of penalty – Internal Annex
SC-CO-01-01-A05	Letter of demand – Internal Annex

4 DEFINITIONS AND ACRONYMS

Act	Customs and Excise Act No. 91 of 1964
Administrative error	Errors made on the face of the entry that do not result in an incorrect duty or value calculation
CCD	Customs clearance declaration
Customs offence	Any breach, or attempted breach, of Customs Law
Customs Processing	Any Customs process to ensure Customs control and compliance with Customs Law
Detain	The administrative act of establishing and retaining control over goods for purposes of the Act – this requires the intervention of a duly delegated Officer
Forfeited	Goods liable to forfeiture which were seized and in respect of which seizure is complete; i.e. the provisions of Section 89 have not been complied with; this does not require administrative intervention
Forfeiture incurred	Where goods cannot readily be found, an amount may be demanded and if it is not paid, forfeiture is incurred as a consequence of law
Liable to forfeiture	Goods dealt with contrary to the provisions of the Act or in respect of which an offence has been committed are liable to forfeiture – it is a legal consequence and does not require any administrative act
Prima facie	A Latin expression meaning "at first sight" used in law to denote evidence that on its own is sufficient to establish the fact in question, or at least a presumption of it, unless rebutted by other evidence
Seizure	The act of taking possession or control over goods liable to forfeiture for the purposes of the Act – this requires the intervention of a duly delegated Officer

5 DOCUMENT MANAGEMENT

Policy Owner	Head: Customs: Border Operations, Ports of Entry & Customs Compliance
Detail of change from previous revision	Expanded on the payment process when a client elects to be dealt with departmentally in terms of Section 91
Template number and revision	GC-TM-03 - Rev 9