John Connors Presents Overview of CBP Penalties Process

By Orisia K. Gammell

On July 10, 2012, the Customs Committee held a brown bag lunch and welcomed John Connors, from U.S. Customs and Border Protection to demystify the penalties process and the role of each CBP office within that process. For those unable to attend, below is a summary of Mr. Connors’ presentation.

Mr. Connors is the Chief of the Penalties Branch in the Office of Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection. Mr. Connors indicated that the Office of Regulations and Rulings, along with several other CBP offices, will be moving to a new location at 90 K Street.

**Four “Penalty” Offices**

There are four primary “offices” within CBP that handle penalty cases:

- Field Fines, Penalties & Forfeitures (FP&F) Office – located at the ports, the FP&F Officers in the field are the initial officers that handle penalty cases.
- Office of Field Operations, FP&F Division – located at Headquarters (“HQ”), handles certain supplemental petitions.
- Office of International Trade, Commercial Enforcement Policy Division – also located in HQ, handles other supplemental petitions.
- Office of Regulations and Rulings (“OR&R”), Penalties Branch – Mr. Connors’ office in HQ, handles penalty cases valued at over $100,000.

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Customs Committee Program in Eilat, Israel

On May 23, 2012, Co-Chair Cyndee Todgham Cherniak and Steering Committee Member Melanie Frank were joined by Daniel Reisner (Herzog Fox & Neeman) and Dr. Efraim Chagai Chalamish (NYU Law) in Eilat, Israel and spoke about “Free Trade in a World Where Security Has a Cost”. This presentation was one of many panel discussions during the 12th Annual Conference of the Israel Bar Association Joint Conference of the American Bar Association.

The Panel was an interactive and frank discussion about a variety of trade and security topics. Melanie Frank led the discussion about supply chain security and supported discussions about best practices and documentation/record keeping. Daniel Reisner shared his insight, as an Israeli lawyer, concerning the changing realities and how to structure business deals. He also provided examples of situations where businesses/clients evolved their manufactured goods from a civilian purpose to a military purpose or vice versa. Dr. Chalamish added practical/academic insight into raising capital and

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Israel Program Update, cont.

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foreign direct investment in the current security focused environment. Cyndee Todgham Cherniak spoke about Canada’s strong ties with Israel and how trade and security is evolving within Canada’s relationships with both the United States and Israel.

The discussion was practical at times and thought provoking at other times. Panelists and participants shared views on this important topic in today’s world. Cyndee commented that, “as practitioners, we know the law and provide advice about the law. We know in our heads why we provide the advice to clients to restrict business activities. Standing on the ground in Eilat, Israel, we know in our hearts as well.”

Customs News from Around the Globe: Russia’s entry into the WTO to take effect next month

On July 21, 2012, Russian President Vladimir Putin signed legislation that brings Russia’s trading laws into compliance with the international standards set under the WTO into law. This action clears the way for the country to become the WTO’s 156th member on August 22. Russia’s entrance in the WTO has been much anticipated and discussed this year. Efforts in the United States to grant Russia Permanent Normal Trade Relations and repeal legislation that limits U.S. trade with Communist countries are ongoing. The bill (H.R. 6156) currently under review by the House Ways and Means Committee is available here: http://waysandmeans.house.gov/UploadedFiles/HR_6156_Bill_Text.pdf. A similar bill passed by the Senate Finance Committee on July 18 is available here: http://www.finance.senate.gov/legislation/download/?id=d4b17eb1-86aa-4802-b5dc-6c301b06493e.

More information about Russia’s entrance into the WTO and the country’s accession package is available at:


If you have an interesting Customs Law update from another jurisdiction for inclusion in a future issue, please contact one of the Co-Chairs.

Committee Members on the Move....

Cyndee Todgham Cherniak: Starting on July 1, 2012, Cyndee changed her arrangement with McMillan and began work for her own firm LexSage in Toronto, Canada. You can now reach Cyndee via email at: Cyndee@lexsage.com. On September 1, 2012, Cyndee will move into her new office on the top floor of Canada’s Flatiron Building (pictured at left).

Peter Quinter: Earlier this year Peter joined GrayRobinson, P.A. as Chair of the Customs and International Trade Law Group in the firm’s Miami, Florida office. More information about how to find Peter is included on Page 4 below.

If you would like to include a new affiliation or job change in a future issue, please contact one of the Co-Chairs.
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For further information re CBP’s delegation of authority among the CBP offices, see TC 00-58 (September 2, 2000).

**Penalty Process**
When a penalty action is initiated, the FP&F Officer in the field has the authority to make the initial decision as to whether a violation has occurred. If the FP&F Officer determines that no violation occurred, the penalty action is cancelled. If the FP&F Officer determines that a violation has occurred, an importer will receive either a Pre-Penalty Notice or a Penalty Notice, depending on the alleged violation. The Notice will specify the government’s claim and the penalty amount. At that point, the importer has two options: pay the specified penalty or file a Petition for Relief.

If the importer files a Petition for Relief and the penalty is under $100,000, then the case will remain with the FP&F Officer for review and decision. If the importer is not satisfied with the decision, the importer may file a Supplemental Petition requesting further relief. The review process for the Supplemental Petition is the same as for the Petition for Relief. However, if the OR&R attorney and Mr. Connors decide that further relief should be granted, the Supplemental Petition is forwarded to the Director of Border Security, currently Glen Vereb, for a final decision.

**Offer in Compromise**
An importer that wishes to avoid the penalty process described above may submit an Offer in Compromise to CBP. However, Offers in Compromise typically do not receive a quick turnaround and can take months or years to be decided upon because they must be reviewed by multiple offices within CBP, including Chief Counsel. As a general rule, OR&R is the decision maker on offers under $1 million. An FP&F Officer in the field has the opportunity to provide recommendations, but ultimately, the FP&F Officer is not the decision maker and therefore cannot guarantee acceptance of an offer.

**Q&A**
At the conclusion of the presentation, participants posed the following questions were posed:

*What is the policy rationale behind the monetary thresholds?*

The monetary thresholds were written in 2000 and were based on the reasoning that higher value items need a higher level of review. They were also intended to divide the work as equitably as possible. Mr. Connors opined that the thresholds are low by today’s standards and does not actually divide the work equitably. CBP is looking to update the monetary thresholds to account for the future realities of the importing world.

*Has there been any consideration to publishing penalty cases?*

Several years ago, CBP considered publishing penalty cases, but a decision was made not to publish due to privacy concerns. CBP does release limited information regarding enforcement actions to the public, although the outcomes in those actions are not published. However, the Court of International Trade and the District Court do publish penalty cases that are brought before those courts.

*Does CBP’s budget allow for effective training of officers?*

Although the budget is limited, training is being conducted every year both by HQ and the local ports. All paralegals and FP&F officers receive the basic training from HQ, and there are also some opportunities for advanced training. After the basic training, they return to the port to be trained on issues specific to each port. However, currently there is no regularly scheduled formal national training program for everyone within CBP.
Here are the last three Committee Leaders for the 2011-2012 bar years.

**Spotlight on Committee Leadership**

**Vice Chair Greg Kanargelidis**

Greg Kanargelidis is a Canadian lawyer and partner in the firm Blake, Cassels & Graydon LLP based in Toronto. Greg was called to the Ontario Bar in 1990 and became a partner in 1996. Greg practises exclusively in the areas of customs, international trade, and commodity tax. In the area of customs law, he has extensive experience advising Canadian and foreign companies on such matters as: tariff classification; customs valuation; rules of origin; export and import controls; marking rules; seizures and ascertained forfeitures; administrative monetary penalties; and voluntary disclosures. Greg’s international trade law practice involves representing clients with respect to global trade and investment issues, and trade remedy matters among others. His commodity tax practice involves advising clients with respect to planning, compliance and appeals involving the goods and services tax, the harmonized sales tax, the Quebec sales tax, the provincial sales tax, and commodity-specific excise taxes and excise duties.

In addition to his role this past year as a Vice-Chair of the Customs Law Committee, Greg is active in several law related associations, committees and similar groups, including among others: Past Chair and longstanding executive committee member of the Ontario Bar Association International Law Section, member of the CITT Bench and Bar Committee, and member of the AMPS Subcommittee of the Border Commercial Consultative Committee.

Outside his legal practice, Greg is very active in the community and, among other positions, is a member of the board of trustees for TMS School and is president of the Hellenic Canadian Community of York Region. TMS School is an independent school in the Greater Toronto Area offering a Montessori and International Baccalaureate education to ages 18 months to 18 years. In his role as President of the Hellenic-Canadian Community of York Region he oversees the organization’s Saturday Greek School program which offers Greek language, culture, and dancing instruction to over 240 students from pre-school age to 14.

Greg is also Vice-President of the Hellenic Heritage Foundation, which among others things established a permanent Chair in Hellenic Studies at York University in the Greater Toronto Area.

When not practicing law, writing, speaking or volunteering, Greg spends time with his wife Toula and their three children, Dean (13), Demetre (11) and Andrea (8).

**Vice Chair Peter Quinter**

Peter is the Chair of the Customs and International Trade Law Group at the law firm of GrayRobinson, P.A. Peter is based in the Miami, Florida, office, in this 275 lawyer firm which has offices all over Florida. Peter is a prior Chair of the Customs Law Committee, and is a regular speaker on customs, export controls, OFAC, and other international trade compliance and enforcement matters at ABA, IBA, and Florida Bar conferences. He is particularly knowledgeable about CBP’s Fines, Penalties and Forfeitures (FP&F) policies and procedures, and has filed over 1,000 petitions with CBP in seizures, penalties, and liquidated damages claims cases. Upon graduation from law school in 1989, he worked for U.S. Customs as the Assistant Regional Counsel in Miami until 1994. He is the author of the popular blog, www.GRCustomsLaw.com, is Board Certified in International Law by the Florida Bar, has been selected for many years as a “Superlawyer”, as one of Florida’s “Legal Elite, as one of “The Best Lawyers in America” in the area of FDA Law, and is nationally ranked as a customs lawyer in the Chambers USA legal guide. Professionally, Peter is Secretary of the International Law Section of the Florida Bar, serves on the International Law Certification Committee, and is active as a member on the Board of Directors of the Florida Customs Brokers and Forwarders Association (FCBF) and the Council of Supply Chain Management Professional (CSCMP) South Florida Chapter.

In his personal life, Peter is passionate about backpacking the Appalachian Trail, playing soccer, and international travel. He and his wonderful wife, Sandy, have two teenagers at their home in Boca Raton, Florida.
Comments drafted by the Committee are Reflected in Customs’ Recent Notice of Revocation

On May 30, 2012, U.S. Customs and Border Protection (“CBP”) HQ published its much awaited “Notice of Revocation of a Ruling Letter HQ 547654 Regarding to Post-Importation Adjustments; Transfer Pricing; Related Party Transactions; Reconciliation.” The Notice, which is available at: http://tinyurl.com/7ouux24, sets out the agency’s new “broadened” interpretation of what constitutes a formula for purposes of using transaction value via new HQ Ruling (HQW548314). Under this new “objective formula” test, imports involving post-importation adjustments can be eligible for appraisement under the transaction value method of valuation in 19 U.S.C. §1401a – provided that CBP’s new “5-factor” test is satisfied.

In advance of this publication, a working group of interested committee members worked diligently to craft comments regarding CBP’s proposed changes that were initially published in the Customs’ Bulletin & Decisions on December 28, 2011. The committee’s efforts resulted in “Technical Comments” that were filed on behalf of the Section of International Law on January 26, 2012. A copy of the comments drafted by our committee is available at this link: http://tinyurl.com/7tvvxyu.

The Section’s comments focused on opposition to CBP’s proposed requirement that importers using the transaction value method for imports involving post-importation adjustments participate in the Reconciliation prototype; refining the 5-factor test initially proposed by CBP to determine whether a formula is sufficiently objective; and eliminating the requirement that importers demonstrate compliance with the so-called “Circumstances of the Sales” (“COS”) test if the 5-factor test has been met.

In response, CBP agreed that, to be valid and objective, the transfer pricing policy must be in writing and be prepared in accordance with IRS Code Section 482. Customs also agreed that Reconciliation, while perhaps the most efficient mechanism for reporting and claiming adjustments to Customs, would be “strongly encouraged” -- but not required. CBP noted that importers claiming adjustments outside of the Reconciliation program must be able to “demonstrate at the time of entry that the price is at arm’s length and to provide supporting information.”

However, CBP disagreed with the Section’s recommendation that satisfaction of the 5-factor test should obviate the requirement for also meeting the COS test. The agency reasoned that the 5-factor test examines the “payable” aspect of transaction value, as well as the objectivity of the formula applied and resulting adjustments. The COS test (or test values) looks at the “arm’s length” nature of the pricing and the relationship between the parties to determine if transaction value applies. As a result, CBP found no overlap between the two tests and required a separate analysis and application of each under the new policy.

The HQ Ruling broadening CBP application of transaction value in related party transactions involving post-importation adjustments is effective as of July 30, 2012.