

# **MEMORANDUM D11-6-5**

Ottawa, January 4, 1993

## **SUBJECT**

### **INTEREST AND PENALTY PROVISIONS: DETERMINATIONS/RE-DETERMINATIONS, APPRAISALS/RE-APPRAISALS, AND DUTY RELIEF**

This Memorandum outlines and explains the application of the interest and penalty provisions contained in sections 34 and 58 to 94 of the Customs Act and in Part II of the Customs Tariff. These provisions were enacted under Bill C-74, an Act to amend the Customs Act, the Customs Tariff and the Excise Tax Act, which received Royal Assent on June 23, 1992.

### **GUIDELINES AND GENERAL INFORMATION**

The following guidelines are not intended to be either exhaustive or to restrict the spirit or intent of the legislation. They may be adjusted as required.

#### **Rates of Interest**

1. The prescribed annual rate of interest in any calendar quarter is based on the average annual rate of interest on 90-day Treasury Bills in the first month of the preceding quarter. (See Memorandum D17-1-19, Interest Rate for Customs Purposes Regulations.)
2. The specified annual rate of interest is the sum of the prescribed rate plus six percentage points and will be charged on amounts owing from the day after the amount became payable until it is paid.
3. Section 3.2 of the Customs Act and section 67.2 of the Customs Tariff authorizes the Minister of National Revenue or any officer designated by the Minister to apply the prescribed rate of interest, rather than the specified rate, when certain criteria are met. The criteria are listed in Appendix B to this Memorandum.
4. The Minister or any officer designated by the Minister, pursuant to subsection 3.3(1) of the Customs Act and subsection 67.3(1) of the Customs Tariff, can waive or cancel all or any portion of any penalty or interest that is otherwise payable. The criteria under which a waiver or cancellation may be considered are listed in Appendix C to this Memorandum.
5. All penalty and interest will be calculated on a compounded daily basis with the exception of interest on duties assessed under the Special Import Measures Act (SIMA) as outlined in paragraph 35 of this Memorandum.

## **Determinations and Appraisals**

6. When the amount of duties is decreased as the result of a determination of the tariff classification or origin of goods imported from the United States or an appraisal of the value for duty made pursuant to section 58 of the Customs Act, interest at the prescribed rate will be paid from the day after the amount was paid to the date the refund cheque is issued, calculated on the amount refunded. This is pursuant to subsection 66(3) of the Customs Act.

7. When a determination or appraisal results in an increase in the amount owing to the Department, interest at either the specified rate or the prescribed rate will be charged on the additional duties from the day after the amount was payable until the date of the determination or appraisal pursuant to subsection 33.4(1) of the Customs Act. The circumstances, when the prescribed rate of interest rather than the specified rate of interest is charged, are detailed in Appendix B to this Memorandum.

## **Re-determinations and Re-appraisals**

8. When a re-determination or re-appraisal made by a designated officer under section 60 or 61 of the Customs Act or by the Deputy Minister under section 63 or 64 of the Act results in a decrease in the amount of duties, interest at the prescribed rate will be paid from the day after the amount was paid until the refund cheque is issued, calculated on the amount of the refund. Where the amount refunded includes any interest previously charged, interest at the prescribed rate will also be paid on that interest. This is pursuant to subsection 66(3) of the Act.

9. When a re-determination or re-appraisal results in an amount owing to the Department, interest at either the specified rate or the prescribed rate will be charged from the day after the amount was payable until the date of the re-determination or re-appraisal. The circumstances when the prescribed rate of interest rather than the specified rate of interest is charged will be the same as those for a determination or appraisal made pursuant to section 58 of the Customs Act, per Appendix B to this Memorandum.

10. The revised provisions for interest payable or chargeable respecting determinations, appraisals, re-determinations and re-appraisals made under the Customs Act, will affect goods released from Customs on or after January 4, 1993.

## **Payment of Duties and Interest**

11. Pursuant to subsections 58(3), 62(2) and 65(2) of the Customs Act, all amounts owed by or to an importer must be paid within 30 days after the date of the determination, appraisal, re-determination or re-appraisal, i.e., the "decision date" on the Detailed Adjustment Statement (DAS). The only exception is in cases where security is given in respect of amounts owing pursuant to paragraphs 58(2)(a), 62(1)(a) and 65(1)(a) of the Act.

12. If the amount owing under subsection 58(2) of the Customs Act by the importer is paid within the 30-day time period, no additional interest will be charged. If the amount owing is not paid within 30 days, the importer will be liable to interest at the specified rate, calculated on the total amount owing, from the day after the date the amount was originally liable to be paid (e.g., end of month for importers on periodic payment), until the total amount is paid.

13. If the amount owing under subsections 62(2) and 65(2) of the Customs Act by the importer is paid within the 30-day time period, no additional interest will be charged. If the amount owing is not paid within 30 days, the importer will be liable to interest at the specified rate, calculated on the total amount owing, from the day after the date of re-assessment (i.e., the decision date on the DAS), until the total amount is paid.

### **Voluntary Assessment**

14. If an importer makes a voluntary amendment on an importation and pays the additional amount of duties which are subsequently owing to the Department, the period for the calculation of the interest which may be charged, will be from the day after the additional amount would have otherwise been payable until the day it is paid.

15. When an additional amount is believed to be owing and that amount is tendered, interest at the prescribed rate is payable up to the date the payment is made. If the total amount tendered is subsequently found to be insufficient, interest on the unpaid balance is calculated from the date duties were originally payable. If the amount tendered exceeds the amount owing, interest at the prescribed rate will be calculated on the amount refunded from the date the additional payment was made.

### **Interest where Security is Given**

16. When security is given pursuant to paragraph 58(2)(a), 62(1)(a) or 65(1)(a) or subsection 69(1) of the Customs Act to secure duties and interest owing and the duties are subsequently found to be owing to the Department, the total amount of duties and interest not paid are to be paid, together with interest at the prescribed rate on the total amount, calculated from the day after the day the security was given until the subsequent re-determination or re-appraisal is made.

17. Paragraph 16 of this Memorandum will apply to assessments and re-assessments of duties owing on goods released from Customs on or after January 4, 1993.

18. Where security proves to be insufficient (for example as the result of additional interest accruing), additional security may be requested by the Minister or an officer designated by the Minister pursuant to section 3.4 of the Customs Act. If the additional security is not given within the time required, the amount of the insufficiency is payable immediately.

19. Section 3.4 of the Act will apply to any requirement for additional security or any failure to provide the additional security occurring on or after January 4, 1993, regardless of when the goods, in respect of which the duties and interest are owing, were released from Customs.

### **Interest on Drawbacks and Refunds**

20. Pursuant to subsection 80(1) of the Customs Act, interest will be paid at the prescribed rate on the amount of duties refunded under section 74, 76, 77 or 79 of the Act. Interest will be calculated beginning on the 91st day after the refund application is received and ending on the day the refund is granted.

21. Pursuant to section 87 of the Customs Act, interest will be paid at the prescribed rate on the amount of a drawback of duties granted under section 82 or 86 of the Act. Such interest will be calculated beginning on the 91st day after the drawback application is received and ending on the day the drawback is granted.

22. Pursuant to section 107 of the Customs Tariff, interest will be paid at the prescribed rate on the amount of a drawback or refund of duties granted under Part II of the Customs Tariff other than refunds granted under Division III or III.1 or section 101 of the Customs Tariff. Such interest will be calculated beginning on the 91st day after the drawback or refund application is received and ending on the day the drawback or refund is granted.

23. The revised provisions for interest payable to an applicant under the duties relief/refund provisions of the Customs Act or the Customs Tariff will affect applications for refund or drawback received on or after January 4, 1993, regardless of when the goods were released from Customs.

### **Failure to Comply with Conditions of Drawback, Remission or Relief**

24. Where a drawback has been granted and the goods have been subsequently diverted or the conditions of a drawback granted under section 34 or 82 of the Customs Act have not been met, the person who received the drawback must report the diversion or failure to comply within 30 days and repay the amount of the drawback and any interest thereon, pursuant to section 84 of the Act. Interest at the specified rate will be payable, calculated on the total amount owing from the day after the drawback was granted until the date the total amount is paid.

25. Where the diversion or failure to comply is not reported within 30 days, a six per cent per year penalty will be charged on the amount of the drawback that is owing. Pursuant to subsection 84(1.2) of the Customs Act, the penalty will be calculated from the 31st day after the diversion or failure to comply to the date the report is made to the Department.

26. Where goods are diverted or the conditions of the remission are not met pursuant to section 88, 89, 91 or 92 of the Customs Act, the person who is liable for payment must report the diversion and pay the amount of duties owing or repay the amount of a refund or remission within 90 days of the date of diversion or failure to comply. In the event that the amount is not paid within the 90-day period, interest at the specified rate will be payable, calculated from the day after the diversion until the total amount is paid. This is pursuant to section 93 of the Act.

27. Where the diversion or failure to comply is not reported within 90 days pursuant to section 88, 89 or 92 of the Customs Act, a six per cent per year penalty will be charged on the amount owing. This penalty will be calculated from the 91st day after the date of diversion or failure to comply to the date the report is made to the Department.

28. Where goods, which were subject to a relief granted under section 80 of the Customs Tariff, are exported to the United States, the person who exported the goods must report the exportation within 30 days. If the exportation is not reported within the 30-day period, a six per cent per year penalty will be charged on the amount of the relief, calculated from the 31st day after exportation until the report is made to the Department. This is pursuant to section 83.2 of the Customs Tariff.

29. The amount of the relief which had been granted on the goods subsequently exported to the United States must be paid within 90 days of the date of export by either the person who exported the goods or the person who received the relief. In the event that the amount is not paid within the 90 day period, interest at the specified rate will be payable, calculated from the 91st day after the date of export until the day the amount is paid.

30. The provisions of section 83.2 of the Customs Tariff will cover goods exported to the United States on or after January 1, 1994.

31. Where goods are diverted or the conditions of relief or remission of duties pursuant to subsection 74(1), 75.1(1), 79(3), 79.5(3) or 82(2) or section 86, 90 or 101 of the Customs Tariff have not been met, the person who diverted the goods or failed to comply must report same within 90 days. If the diversion or failure to comply is not reported within the 90-day period, a six per cent per year penalty will be charged on the amount of the relief or remission that is owing or must be repaid. This penalty will be calculated from the 91st day after the date of diversion or failure to comply to the date the report is made to the Department. This is pursuant to section 103 of the Customs Tariff.

32. Under section 103 of the Customs Tariff, failure to comply with the terms and conditions of relief or remission would include remission orders under the machinery remission program (see Memorandum D8-5-1, Machinery Program), temporary importation, Canadian goods abroad and inward processing programs and certain other remission orders made pursuant to the Customs Tariff.

33. Where goods are diverted or the conditions of relief, remission, refund or a drawback of duties pursuant to subsection 74(1), 75.1(1), 79(3), 79.5(3) or 82(2) or section 69, 80, 86, 90, 97 or 101 of the Customs Tariff have not been met, the person who failed to comply with the conditions or received the relief, drawback, refund or remission must pay an amount equal to the relief, drawback or remission that is owing or must be repaid under paragraph 103(1)(b), 105(1)(a) or 105(2)(a) of the Customs Tariff. If the amount owing is not paid within 90 days of the date of the diversion or failure to comply, interest at the specified rate will be payable on that amount. This interest will be calculated from the day after the date of diversion or failure to comply until the day the total amount has been paid. This is pursuant to section 106 of the Customs Tariff.

34. The revised provisions for interest and the six per cent per year penalty will apply to diversions and failures to comply with the relief provisions of the Customs Act or the Customs Tariff occurring on or after January 4, 1993.

### **Special Import Measures Act (SIMA)**

35. The manner in which interest is paid or charged on SIMA duty and the Goods and Services Tax, which is assessed as the result of a SIMA duty assessment or re-assessment, has not been changed. For additional information on these interest provisions, please refer to the relevant sections of the Special Import Measures Act. The following departmental memoranda also provide details on the application of interest:

Memorandum D14-1-3, Re-determination of Goods under Special Import Measures Act;

Memorandum D14-1-5, Procedures for Release from Customs of Goods Subject to Provisional Duty under the Special Import Measures Act and Bonds Used to Secure Payment of Provisional Duty; and

Memorandum D14-1-6, Liability for Payment of Provisional Duty, Anti-dumping Duty and Countervailing Duty under the Special Import Measures Act.

### **Request for Cancelling or Waiving Interest and Penalties**

36. Importers or their authorized agents can make requests in writing to the Department concerning the cancellation or waiver of interest and/or penalties which have been assessed. Requests can also be made in writing by importers or their authorized agents regarding the application of interest at the prescribed rate rather than at the specified rate. Such requests may be made by letter but may also be made on Form B 2, Adjustment Request, whether or not a request for re-determination or re-appraisal is made at the same time. (See also Memorandum D17-2-1, Coding of Adjustment Request Forms.)

37. A request must contain the following information:

- (a) a copy of the Customs documents relating to the charging of the relevant interest and/or penalties;
- (b) a detailed justification for the request. In the justification, reference must be made to the appropriate criterion or criteria listed in either Appendix B or C to this Memorandum; and
- (c) any supporting documentation such as end-use certificates, certificate of origin, special authority applications, death certificate, medical certificate, relevant file or case numbers, departmental rulings, etc.

38. Requests must provide all of the information necessary to support the importer's application. Failure to do so may result in an unfavourable decision or delay in processing the request. Any information submitted is subject to verification by departmental officials.

39. Requests must be sent by mail or delivered by hand to the appropriate regional Customs office or to any Customs office in the region where the goods were released.

#### **Status of Departmental Decisions**

40. There are no provisions in either the Customs Act or the Customs Tariff which permit a formal appeal of the Department's application of the interest and penalty provisions, i.e., prescribed/specified rate, or the application of the six per cent per year penalty, or with respect to a request for cancellation or waiver of interest and/or six per cent per year penalty. However, to the extent that the legislation provides for redress or refund, e.g., re-appraisal of the value for duty under section 63 of the Customs Act, refunds of duties and taxes will result in refunds of interest.

## **APPENDIX A**

### **PRINCIPAL INTEREST AND PENALTY REFERENCES OF THE CUSTOMS ACT AND THE CUSTOMS TARIFF**

Listed below are the principal references relating to the new interest and penalty provisions of the Customs Act and the Customs Tariff.

#### **Customs Act**

- 2.1 Definition of "specified rate".
- 3.1 Method for compounding interest and penalties.
- 3.2 Authority to apply the prescribed rate rather than the specified rate of interest.
- 3.3(1) Authority to waive or cancel interest or penalties.
- 3.3(2) Interest on penalty or interest refunded.
- 3.4(1) Additional security to cover duties and interest owing.
- 3.4(2) Payment where additional security is not given.
- 33.4(1) Charging interest at the specified rate.
- 33.4(2) When duties are deemed payable.
- and (3)
- 33.4(4) 30-day interest-free period for paying assessments and re-assessments.
- 34(2.1) Penalties for failing to report non-compliance with conditions respecting the release of goods without the payment of duty.
- 58(3) Payment of amount owing or refund payable.
- 62(2) Payment of amount owing or refund payable.
- 65(2) Payment of amount owing or refund payable.
- 66(1) Interest on payments owing on determinations, appraisals, re-determinations and re-appraisals.
- 66(2) Interest where security is given in lieu of payment.
- 66(3) Interest on refunds payable on determinations, appraisals, re-determinations and re-appraisals.
- 69(1) Refund pending an appeal to the Canadian International Trade Tribunal or the Federal Court.
- 69(2) Interest where security is given in lieu of payment concerning appeals of assessments or re-assessments.
- 80(1) Interest on refunds of duty.
- 80.1(1) Interest on past refunds of duty.
- 84(1) Diversions of goods for which drawback has been granted.
- 84(1.2) Penalty for failure to report a diversion where a drawback was granted.
- 84(2) Interest on amounts owing from diversions.
- 87(1) Interest on drawbacks.
- 93(1) Interest on amounts owing from diversions of goods for which a refund or remission has been granted.
- 93(3) Penalty for failure to report a diversion.
- 93(5) Computation of interest on certain duties.

## **Customs Tariff**

- 2 Definition of "specified rate".
- 67.1 Method for compounding interest and penalties.
- 67.2 Authority to apply the prescribed rate rather than the specified rate of interest.
- 67.3 Authority to waive or cancel interest or penalties.
- 83.2(3) Interest on exports of goods to the United States for which relief is granted.
- 83.2(4) Penalty for failure to report export to the United States.
- 103(1) Failure to comply with the conditions of relief, refund or remission.
- 103(1.1) Penalty for failing to report non-compliance with the conditions of relief, refund or remission.
- 106(1) Interest on amounts owing as the result of non-compliance with the conditions of duty relief.
- 106(2) Interest not charged on amount owing.
- 106(3) Computation of interest on certain duties.
- 107(1) Interest on approved applications for drawback or refund of duties.
- 107(2) Computation of interest on certain duties.

Note: This is not a complete list of all the interest and penalty provisions contained in the Customs Act or the Customs Tariff.

## **APPENDIX B**

### **CRITERIA FOR THE APPLICATION OF THE PRESCRIBED RATE OF INTEREST LEVIED AS A RESULT OF DECISIONS UNDER SECTIONS 34 AND 58 TO 94 OF THE CUSTOMS ACT OR THE PROVISIONS OF PART II OF THE CUSTOMS TARIFF**

(As specified by the Minister)

1. Where the importer, of his own volition, makes a voluntary amendment prior to any action being initiated by the Department and pays any additional duty owing.
2. Where specific information (see Note 1), on matters subject to interpretation (see Note 2), was not previously provided to the importer or his agent, and was not available in the public domain (see Note 3) which gives rise to the importer not providing the correct tariff classification, origin or value for duty information.
3. Where the action giving rise to the interest was as a result of a Certificate of Origin that was reasonably relied on but later was found to be invalid.
4. Where importations are made within 30 days of the first departmental decision made on a particular subject or issue, for example tariff classification or value for duty.

5. Where the importer requests a re-determination, re-appraisal or an appeal of an assessment or re-assessment and fails to provide acceptable security within 30 days but does so within 90 days. The prescribed rate of interest will apply for the entire period between the date of the Detailed Adjustment Statement (DAS) and the date security is provided.

6. Where an assessment or re-assessment of duties and taxes results in a substantial amount of money owing and the importer, who is unable to pay the amount at one time, negotiates a deferred payment plan and honours it.

7. Where the importation is non-commercial, that is, an importation for other than sale, commercial, industrial, occupational, institutional or other like use.

Notes: 1. This refers to information which is directly germane to the tariff classification, the value for duty or the origin of goods that are the subject of the importation at issue. Such information would normally be obtained from sources that are not in the public domain, such as departmental rulings, departmental opinions, previous determinations, appraisals, re-determinations and re-appraisals.

2. This refers to situations where no clear guidance has been issued to the importer and none is available within the public domain. For example, it is sometimes a matter of interpretation as to whether or not a "royalty payment" is to be included in the value for duty. However, this rule would not apply to the misclassification of an imported product where common sense ought to apply, for example a diamond ring cannot be classified under the tariff item for automotive piston rings.

3. This refers to information which has been published for dissemination to the public on matters relating to compliance with Customs legislation. This would include, but is not necessarily limited to, Customs Notices, D-Memoranda, Canadian International Trade Tribunal decisions, Court decisions, statutes and regulations published in Part I, II or III of the Canada Gazette and other relevant Government of Canada publications.

## **APPENDIX C**

### **CRITERIA FOR WAIVING OR CANCELLING INTEREST OR PENALTIES LEVIED AS A RESULT OF DECISIONS UNDER SECTIONS 34 AND 58 TO 94 OF THE CUSTOMS ACT OR THE PROVISIONS OF PART II OF THE CUSTOMS TARIFF**

(As specified by the Minister)

1. Interest and penalties will be waived or cancelled when the sum total of the accumulated interest and penalties accrued between the date of an individual assessment or re-assessment (Detailed Adjustment Statement (DAS)) and the date of payment does not exceed \$5.
2. Interest and penalties will be waived or cancelled when the sum total of the accumulated interest and penalties accrued between the date payment was originally due and the date of assessment or re-assessment (DAS) does not exceed \$5 on an individual assessment or re-assessment.
3. Cancelling or waiving interest or penalties, in whole or in part, may also be appropriate if the interest or penalty arose primarily because of actions of the Department, such as:
  - (a) errors proven to have been committed by employees of the Department which resulted in incorrect information being supplied to the importer in specific instances; and
  - (b) material published by the Department, directed to the importing public, which contained errors that resulted in the importer's actions giving rise to the interest or penalty. This would include, but is not necessarily be limited to, Customs Notices and D-Memoranda.
4. Interest and penalties may be waived or cancelled at any time, in whole or in part, where the situation giving rise to the interest or penalty resulted from circumstances beyond the importer's control and which prevented the importer from otherwise complying with the Customs Act, Customs Tariff or Regulations made thereunder. Some examples are:
  - (a) natural or human-made disasters such as flood or fire which destroys the records of the importer;
  - (b) civil disturbances or disruptions in services, such as a postal strike, and where no reasonable alternative service or arrangement is possible; or
  - (c) death or incapacity of the employee who is directly responsible (see Note below) for ensuring the importer's compliance.

5. It may be appropriate in instances where there is an inability to pay amounts owing to waive interest or penalties, in whole or in part, to facilitate collection. Some examples are:

(a) when collection has been suspended due to an inability to pay; or

(b) when an importer is unable to conclude a reasonable payment arrangement because the interest charges absorb a significant portion of the payments.

All requests for waiver or cancellation of interest and/or penalties under criteria 3, 4 or 5 must be accompanied with full documentation in accordance with paragraphs 36 to 39 inclusive of this Memorandum.

Note: For the purposes of criterion 4, this refers to the individual in the importer's operations who approves, or has signing authority for, documentation that is required for compliance with Customs legislation, and/or payments for duty and taxes owing and no other person in the organization can immediately fulfill the required role. This would include, but is not limited to, individuals occupying positions such as controllers, import-export specialists, finance officers/managers and traffic managers.

## **REFERENCES**

### **ISSUING OFFICE —**

Valuation Division

### **LEGISLATIVE REFERENCES —**

Bill C-74

### **HEADQUARTERS FILE —**

N/A

### **SUPERSEDED MEMORANDA "D" —**

N/A

### **OTHER REFERENCES —**

N/A

SERVICES PROVIDED BY THE DEPARTMENT ARE AVAILABLE IN BOTH OFFICIAL LANGUAGES.

THIS MEMORANDUM IS ISSUED UNDER THE AUTHORITY OF THE DEPUTY MINISTER OF NATIONAL REVENUE.