



OFFENCES AND PENALTIES

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1 PURPOSE

- a) The purpose of this policy is to establish as well as outline the legislative and administrative framework governing possible Customs and Excise contraventions, penalties, forfeiture, VAT and related interest.
- b) Chapter XI of the Customs and Excise Act, of 1964 *inter alia* sets out legal provisions applicable to offences, detention, seizure and forfeiture of goods, administrative penalties, remission or mitigation of penalties and forfeiture. Furthermore, it provides the notice of action and period for bringing legal action against the Commissioner.
- c) A contravention occurs when a client fails to comply with the requirements of the Act, either by doing something prohibited or by failing to do what is required. This contravention could constitute an offence as provided for in the penal provisions and could be pursued criminally by the Commissioner.
- d) A client 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 (PAJA).

2 SCOPE

- a) This policy covers the imposition of penalties and forfeiture for Customs, Excise and VAT.

3 POLICY STATEMENT

3.1 Penal provisions

- a) Customs and Excise penalties are imposed in accordance with the penalty provisions of the Act read with the penal provisions found in Sections 78 to 86A.
- b) The Act distinguishes between less serious offences and serious offences, and the severity of penalties increase depending on the extent of the infringement.

3.2 Section 91 Administrative penalties

- 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 of the Act administrative penalty to a client as an alternative to prosecution. This necessitates that Customs and Excise have *prima facie* findings of a contravention or non-compliance.
- b) The offer of Section 91 of the Act must be forwarded to clients:
 - i) On a notice of intent, with a DA 70 attached; or
 - ii) Through a CUSRES message to submit an import goods declaration. See SC-CF-55 for the submission of goods declaration.
- c) A deposit is determined, for a possible penalty, after considering all the facts of each individual case with reference to the relevant legislation and Contravention List.
- d) A client has the option of accepting or rejecting the offer of Section 91 of the Act. Clients electing to be dealt with departmentally must communicate this decision to Customs and Excise within the recommended working days from the date of the EDI notification or the notice of intent by:
 - i) Completing the forms and making 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.

- e) Where an imported **goods declaration** 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) Case 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 **of the Act**, 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 **goods declaration** (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 SE-PP-02** for the use of the DA 70.
- h) Once a Section 91 **of the Act** is offered and accepted by the client, criminal prosecution **in respect of the same offence is precluded in terms of Section 91(3) of the Act. However, where it subsequently becomes apparent that the administrative settlement was based on false, misleading, or incomplete information, SARS is not precluded from instituting criminal proceedings in respect of any separate or newly discovered offence, including offences relating to false declarations.**
- i) Customs **or Excise** 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 **or Excise** will then deal with the matter summarily and decide what penalty amount is to be imposed.
- j) The client will receive a notification from Customs **or Excise** 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 **or SE-PP-03** where the liquidation process is dealt with.
- k) In cases where the client rejects the Section 91 **of the Act** offer, **a Letter of Demand will be issued to the client for any outstanding duties and/or taxes.**
- l) Where the client elects **not** to be dealt with departmentally, they may be **referred for criminal** prosecution.

3.3 Forfeiture

- a) Any goods which are dealt with in contravention with the provisions of the Act or those involved in an offence under the Act, are liable to forfeiture in terms of Section 87(1) **of the Act**.
- b) The Commissioner is entitled, in terms of Section 88(1)(a) **of the Act**, 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) **of the Act**].
- 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) **of the Act**]

3.4 Section 37A(6) – RFTU

- a) Where goods are detained and tested for the presence of a marker, SARS must not take enforcement action under any other provision of the Act unless a prescribed report has been issued by a designated and authorised client confirming that the goods were dealt with in contravention of the Act.
- b) Section 37A(7)(d) of the Act renders the owner or whoever has possession or control of any goods ship, vehicle etc. liable for any reasonable costs and expenses, including the costs of analysing any sample, incurred by and charges due to the Commissioner in handling and dealing with such goods ship, vehicle, etc.

3.5 Section 75

- a) Any client who has been granted a refund of levies under this Section of the Act and Rebate Item 670.04 of Schedule 6, and who either submitted a false refund application or used or disposed of the fuel in contravention of the applicable provisions, commits an offence.
- b) On conviction, such client is liable to a fine not exceeding R100 000 or twice the amount of the levies refunded, whichever is greater, or to imprisonment for a period not exceeding ten (10) years, or to both.
- c) The fuel involved in the offence is also liable to forfeiture under the Act.

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

- a) Where goods have been detained, seized or forfeited, the Commissioner can direct that the goods be 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 amount as per Section 93 of the Act is not forfeiture but a payment made by the owner to secure the return of detained, seized or forfeited goods. This means, for instance that where the Officer has detained a shipment, the release thereof can be granted to the owner once the amount has been paid and other conditions set are complied with.

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

- a) A Section 88(2)(a) forfeiture or the Section 93 of the Act 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 and Excise elects to return the remainder of the consignment, Section 93 remission can be applied for.

3.8 Value Added Tax (VAT)

- a) In terms of section 213(1) of the Tax Administration Act, 2011 read with section 39(4) of the VAT Act, 1991 a compulsory VAT penalty of 10% is imposed on the importer of the goods where the incorrect VAT capital was declared on importation. VAT interest at the prescribed rate is also payable and imposed on the importer in terms of section 39(4)(b) of the VAT Act, 1991.
- b) Customs is responsible for collecting VAT on imported goods at the time of entry for home consumption as provided for in terms of section 7(1)(b) of the VAT Act, 1991.
- c) VAT and Customs duty are both payable before goods are released from Customs' control, unless a deferment arrangement is in place.
- d) If an importer fails to pay VAT at the required time (e.g., due to under-declaration, late payment, or errors), Customs is allowed to impose the 10% penalty and interest as per section 213(1) of the Tax

Administration Act, 2011 read with section 39(4) of the VAT Act, 1991 (penalty) and section 39(4)(b) of the VAT Act, 1991 (interest).

- e) Deferment accounts allow registered Customs clients to defer payment of VAT and duty for up to thirty (30) days. However, if there is an under-declaration or late payment, the penalties and interest still apply once the liability is established.
- f) The above must be supported by the Notice of Intent – SC-CO-01-01-A03 and letter of demand.
- g) Invalid or incorrect declarations must be amended without delay. Even if amended voluntarily, this does not indemnify the importer from the imposition of penalties and interest in terms of the relevant legislation.

3.9 Interest

- a) Where a Customs or Excise client fails to pay the outstanding duties and taxes, interest shall be payable from such date and for such period as the Commissioner may determine on any outstanding amount payable in terms of Section 105 of the Act.
- b) Where an Excise warehouse client fails to pay Excise duty by the prescribed due date in terms of Rule 19A.2, the client is liable for a late payment penalty and interest on the outstanding duty in terms of Section 19A(2)(b)(i-) and (ii) of the Act, calculated from the day after the due date until payment is made in full.

3.10 Penalties

- a) Failure to adhere to the provisions of the Act is considered a **contravention of the Act**.
- b) **Contraventions** 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.

4 REFERENCES

4.1 Legislation

TYPE OF REFERENCE	REFERENCE
Legislation, Rules, Regulations and Interpretation Notes 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 Tax Administration Act of 2011: Section 213(1) Value Added Tax Act of 1991: Sections 39(4) and 39(4)(b)
International Instruments	Revised Kyoto Convention Specific Annex H Chapter 1: Customs Offences Revised Kyoto Convention General Annex Chapter 10: Appeals in Customs matters

4.2 Cross References

DOCUMENT NUMBER	DOCUMENT TITLE
SC-CF-25	Provisional Payments – External Policy
SC-CF-25-A01	Completion of DA 70 – External Annex
SC-CF-55	Goods Declaration – External Policy
SE-PP-02	Provisional Payments – External Policy
SE-PP-03	Completion of DA70 – External Guide

5 DEFINITIONS AND ACRONYMS

- a) [Link for centralised definitions and acronyms: Glossary A-M | South African Revenue Service \(sars.gov.za\)](#)