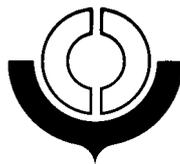


KYOTO CONVENTION

GENERAL ANNEX GUIDELINES

Chapter 10

APPEALS IN CUSTOMS MATTERS



WORLD CUSTOMS ORGANIZATION

Table of contents

1. Introduction..... 3

2. Right of appeal..... 3

3. Form and grounds of appeal 6

4. Consideration of appeal 7

5. Conclusion 8

1. Introduction

It is a general principle of the Kyoto Convention that all Customs matters must be treated in a transparent and fair manner. As a consequence there is another general principle that all persons who deal with Customs must be afforded the opportunity to lodge an appeal on any matter. In everyday practice situations may arise in which a decision or omission of the Customs is not acceptable to the person directly affected by it. It is therefore important that provision be made for the person concerned to be given, upon request, an explanation of the reasons for the decision or omission and for the person to have a right of appeal to a competent authority. The competent authority may be the Customs themselves, another administrative authority, one or more arbitrators, a special tribunal and, in the final instance, a judicial authority.

This right of appeal ensures protection for the individual against decisions of Customs that may not be in compliance with the laws and regulations which they are responsible to administer and enforce. It also ensures protection against omissions by Customs in any matter. At the same time, the review of challenged decisions or omissions by a competent authority and the verdicts of these reviews can be a suitable means of ensuring uniform application of the laws and regulations. Depending upon the legal system of the country concerned, these verdicts may or may not constitute legal precedents or official interpretations that will relate to like or similar disputes to be settled in the future.

The provisions contained in this Chapter provide for a transparent and multi-stage appeal process. It is intended to prevent the perception of victimization by those affected by Customs decisions. Furthermore the availability of an independent judicial review as a final avenue of appeal should instill confidence by the public and the trade in the government institutions and in particular in the Customs administration. The principles contained in the provisions of this Chapter are also consistent with Article 11 of the WTO GATT Valuation agreement.

This Chapter covers appeals in all matters relating to the laws and regulations which the Customs are responsible for administering and enforcing such as in matters of tariff classification, origin and Customs valuation, as well as appeals against provisions of a general character. It does not, however, embrace appeals in penal matters or appeals against opinions expressed by Customs which are not binding in effect.

2. Right of appeal

Standard 10.1

National legislation shall provide for a right of appeal in Customs matters.

This Standard requires that the right of appeal on Customs matters be provided for in national legislation. This is important so that there is no uncertainty about the existence of such rights.

The appeal procedure must be clearly outlined in the legislation, and the legal requirements and procedures for filing an appeal must be made readily accessible to the trade community and the general public. The manner in which such requirements and procedures could be made available is detailed at length in the Guidelines to Chapter 9 on Information, decisions and rulings supplied by the Customs in the General Annex.

As stipulated in Article 2 of the Body of the Kyoto Convention, Customs may always grant facilities for appeals that are greater than those provided for in this Chapter.

Standard 10.2

Any person who is directly affected by a decision or omission of the Customs shall have a right of appeal.

This provision ensures the right of appeal to any person directly affected by a decision or omission of Customs. It is up to each individual Customs administration to define in its legislation what constitutes a “person who is directly affected” for purposes of appeal rights. Examples of such persons would include importers, exporters, Customs brokers or agents and travellers.

In order to avoid confusion over what types of decisions and omissions can be appealed, the national legislation must set forth the specific types of decisions and omissions that are subject to appeal. Usually this includes decisions on valuation and classification matters and rules of origin, as well as matters affecting travellers.

An omission, on the other hand, generally occurs when Customs fails to fulfill its obligations under national legislation or in its published client’s charter. As an example, a delay by Customs in processing a transaction within the established time may cause the importer to be liable to additional duties and taxes due to changes in exchange rates that vary from one period to another. The importer might also have to pay additional demurrage or other storage charges. Another example would be when Customs has not responded to or supplied a specific information requested by an importer within a reasonable or established period, and the delay results in the importer having to incur additional duties, taxes or other charges. Such failures on the part of Customs would constitute an omission, and the person concerned must be given the right to appeal against the omission.

Omissions can take various forms depending on the procedure or operation involved. Whether Customs has committed an omission will have to be evaluated in relation to its obligations under Customs law and the provisions of the General Annex of the Kyoto Convention.

This Standard is included with good administrative practice in mind and does not oblige or require the person concerned to ask for the reason for the decision or omission before lodging an appeal.

Standard 10.3

The person directly affected by a decision or omission of the Customs shall be given, after having made a request to the Customs, the reasons for such decision or omission within a period specified in national legislation. This may or may not result in an appeal.

Upon request, those persons directly affected by a decision or omission should be provided with a full explanation and reasons for the decision or omission within a reasonable period specified in the national legislation. This provision is necessary so that the affected person is able to lodge a timely and effective appeal.

As noted for Standard 10.2 above, some decisions may not be subject to appeal, for example the hours of business at a particular port or office or the official rates of exchange. While there are not many instances which should not be subject to appeal in an open and transparent government, the administration, too, has a right not to be unduly burdened with requests not related to an appealable decision or omission. A Customs administration should only be required to provide explanations and reasons for those decisions or omissions that are

subject to appeal as set forth in the national legislation.

Standard 10.4

National legislation shall provide for the right of an initial appeal to the Customs.

It is important that an affected person be provided with an opportunity to address a decision or omission initially within Customs at the administrative level without first having to resort to an independent judicial authority. This principle in Standard 10.4 for an initial appeal to Customs may result in a more expeditious resolution of the matter and at less cost and time to both the affected person and the Customs administration.

The appeal may be made to the Customs office responsible for the decision or omission or to a higher authority within the Customs administration.

In perhaps the most common situations an importer or a traveller is aggrieved by the decision of the frontline officer. The initial recourse should be to appeal to a supervisory officer, to the head of the local Customs office or to the Regional office. This avenue should be available before the issue is raised to the Customs Headquarters. Such appeal processes not only enable solutions to be found efficiently and quickly for the convenience of the importer or traveller, but also reduce the burden within Customs hierarchy in resolving appeals which may be minor or only local in nature. Information concerning this appeal process should be made available in public notices and in the Customs offices. See also the Guidelines to Chapter 9 of the General Annex.

In some countries the initial appeal may be made either to Customs or to an authority independent of the Customs administration at the option of the person concerned. The authority independent of the Customs may be an administrative tribunal, which although not strictly part of the judicial system, nevertheless has full powers to adjudicate such appeals.

Lodging an initial appeal with the Customs office responsible for the decision or omission can often provide the most expeditious and least costly method of remedying an erroneous decision or omission. This is particularly evident as this office may, after considering the appeal, modify its decision or in relation to an omission take a decision.

Standard 10.5

Where an appeal to the Customs is dismissed, the appellant shall have the right of a further appeal to an authority independent of the Customs administration.

In order that the process for a right of appeal provides an affected person with a fair and impartial review of his appeal, Standard 10.5 stipulates that there must exist a right to appeal to an authority independent of the Customs administration which initially examined the appeal.

The constitution and field of jurisdiction of such an independent authority may vary from one country to another. It may be, for example, a court of law or a special tribunal with power to settle Customs disputes, or it may be part of an established arbitration procedure.

National practices of this standard are set out in the “Method of Application” (Appendix) to these Guidelines.

Standard 10.6

In the final instance, the appellant shall have the right of appeal to a judicial authority.

Another important principle is specified in Standard 10.6 which requires that an appellant have the legal right to appeal ultimately to an independent judicial authority. National legislation in some countries sets out the judicial authority that is empowered to hear such appeals.

Many administrations allow this appeal at any stage in the overall process. For example, if a local Customs office renders a decision that the person decides to appeal against, the person should be allowed to appeal directly to an independent judicial authority without going through higher levels of the Customs administration. The costs involved in this course of action usually result in appellants following a stage-by-stage process. However in certain cases, such as with large multinational corporations, the appellant may opt to submit the matter to the highest authoritative body as early as possible. Some international traders may have a large volume of transactions or a high amount of investment and clients which would be affected by the outcome, and therefore decide to expedite the entire appeals process to obtain the earliest definitive ruling.

3. Form and grounds of appeal

Standard 10.7

An appeal shall be lodged in writing and shall state the grounds on which it is being made.

In order that the basis of an appeal is clear and specific, Standard 10.7 requires that appellants lodge appeals in writing and state with particularity the grounds on which the appeal is being made. This allows that the consideration of the matter will be based on clear facts and not submitted to subjective interpretations.

Customs administrations should review an appeal for its substance and content and not for its form. In other words, in keeping with the principle of the revised Kyoto Convention that Customs could accept information in a variety of formats, including especially electronically, Customs should refrain from creating any particular formats or forms for appeals. They should accept the information submitted based on its sufficiency for making a fair and full assessment. Therefore, legislation should not set unreasonable or unnecessary requirements for the form in which an appeal must be lodged.

A person lodging an appeal must have the right to withdraw the appeal if done so before the reviewing authority has rendered a decision on the appeal.

Standard 10.8

A time limit shall be fixed for the lodgement of an appeal against a decision of the Customs and it shall be such as to allow the appellant sufficient time to study the contested decision and to prepare an appeal.

To ensure that any appeal rights may be fully exercised, Standard 10.8 requires that prescribed periods be set that provide an adequate and reasonable amount of time for the lodging of an appeal against a Customs decision. These periods must therefore not be too short. They will also have to take into account any statutes of limitation applicable to a case.

There will likely be different periods depending on the nature of the decision or omission. For example, tariff and valuation rulings may have a certain period and matters involving infractions or minor offences may have a different period. Some countries allow at least 90 days for an appeal to be submitted regarding any decision of Customs.

Many Customs administrations provide in their national legislation for extensions of time in which to lodge an appeal in exceptional cases.

Standard 10.9

Where an appeal is to the Customs they shall not, as a matter of course, require that any supporting evidence be lodged together with the appeal but shall, in appropriate circumstances, allow a reasonable time for the lodgement of such evidence.

In order to mount an effective appeal, the appellant must be provided with an adequate and reasonable amount of time in which to gather evidence in support of his appeal after it has been lodged. This may involve obtaining supporting documents or statements from a foreign shipper or client in order for the appellant to demonstrate the basis of his initial declaration or statements. It may also require the appellant to obtain a certificate or statement from a foreign government. Thus this period to gather evidence should allow for the practical considerations necessary to allow Customs to have all the facts at hand. On the other hand, Customs should not normally impose requirements for supporting evidence where it will not be necessary or relevant to the case.

In order to prevent any abuse or misuse of the appeals process, once the time for lodging an appeal against a decision by Customs has expired, no new claims or appeals should be allowed against that decision. The only additional evidence that should be allowed to be submitted would be evidence in support of the claims that were lodged timely against the decision.

4. Consideration of appeal

Standard 10.10

The Customs shall give its ruling upon an appeal and written notice thereof to the appellant as soon as possible.

In the interests of good management and fair and open government, Standard 10.10 requires that Customs render its decision on an appeal as soon as possible. It also requires that Customs notify the appellant in writing as soon as possible of the decision taken on the appeal. This not intended to place undue administrative burden on Customs, but to instill accountability in the appeals process and predictability for both appellants and Customs.

Standard 10.11

Where an appeal to the Customs is dismissed, the Customs shall set out the reasons therefor in writing and shall advise the appellant of his right to lodge any further appeal with an administrative or independent authority and of any time limit for the lodgement of such appeal.

Further developing the need for fairness in administration, Standard 10.11 requires Customs to indicate in writing to an appellant the specific reasons for denying an appeal. Moreover, Customs must also advise the appellant in writing of his right to lodge any additional or further appeals against the decision with any other body and include the time limit for lodging such further appeals.

This is a necessary extension of Standard 10.5 which stipulates that the appellant shall have a right of further appeal to an authority independent of Customs. In some countries the appellant is advised on the avenues of further appeal in the decision denying the appeal, whereas in others this advice is given through pre-printed notices, brochures or pamphlets that

provide information to the appellant on further avenues of appeal. Whatever written method is used, it must be clear to the appellant when there is a further avenue of appeal and how he can avail himself of this further appeal if he so chooses.

Standard 10.12

Where an appeal is allowed, the Customs shall put their decision or the ruling of the independent or judicial authority into effect as soon as possible, except in cases where the Customs appeal against the ruling.

Standard 10.12 describes another important principle of good governance. When an appeal has been decided in favor of the appellant, the Customs administration must implement the decision as soon as possible. In other words, just because Customs may not like the final verdict in an appeals process, they cannot stall in implementing a decision which is not in their favor.

However when the Customs administration has lodged an appeal of its own against the decision resulting from the appeal, they normally will need not implement this decision until the Customs appeal has been decided by the reviewing authority.

As an example, if the decision on an appeal required Customs to refund duties and taxes by classifying a commodity in a different tariff heading with a lower rate, Customs would not have to furnish the refund until its own avenue of appeal has been completed. If, however, Customs decided not to seek a further appeal, it would have to adjust the classification and refund the amount in question without delay once the ruling had been given.

5. Conclusion

In summation, the right to appeal a Customs decision or omission is fundamental. The process for administering and deciding any appeal must be as simple, straightforward and timely as possible. All requirements on both the appellant and Customs must be clearly laid out in legislation and easily accessible to all parties. Customs must inform appellants in writing of decisions and must implement final decisions promptly.

Appendix

Method of Application

(1) New Zealand

1. New Zealand administers Standard 10.5 by way of the Customs Appeal Authority (CAA).
2. The CAA is an independent judicial body established under the Customs and Excise Act 1996 and administered by the Ministry of Justice.
3. It hears appeals against the assessments, decisions, rulings, determinations or directions made under statute by the Chief Executive of the New Zealand Customs Service.
4. The CAA can confirm, reverse, or amend a decision by the Chief Executive of the New Zealand Customs Service.
5. A person can appeal against the decision of the CAA to the High Court. The High Court has jurisdiction over both criminal and civil matters, and deals with cases at first instance or on appeal from other courts and certain tribunals.
6. The CAA is currently composed of one person, appointed by the Governor-General on the recommendation of the Minister of Customs, and the Minister of Justice. However, more than one Authority can be established if required. Hearings are held throughout New Zealand.
7. The CAA provides an easy access, low cost way of appealing decisions of the New Zealand Customs Service's Chief Executive. The CAA is independent of the New Zealand Customs Service, and is able to hear cases "on the papers" without the need for parties to appear.
8. The legal provisions governing the CAA are found in the Customs and Excise Act 1996, Part 16, Customs Appeal Authorities (sections 244 to 274). Part 16 sets out the establishment of the CAA and its proceedings.
9. The Customs and Excise Act 1996 is available on the following website:
www.legislation.govt.nz.
10. Recent amendments to the Customs and Excise Act 1996 give further effect to Standard 10.5. The appeal provisions relating to goods that have been seized as forfeit have been changed to allow an appeal to the Chief Executive in the first instance, with a right of appeal to the CAA if not satisfied with the Chief Executive's decision.

(2) United States

Long before becoming a contracting party to the Original or the Revised Kyoto Convention, the United States had an established appeal process that allowed persons adversely affected by Customs' final administrative decisions to seek review of such decisions, initially from the United States Customs Court and thereafter, its successor, the United States Court of International Trade (USCIT).

The Customs Court Act of 1980 created the USCIT as a replacement for the 90 year old United States Customs Court. The USCIT hears cases involving international trade matters including appeals and protests filed with various U.S. agencies to include U.S. Customs and Border Protection (CBP). The Customs Court Act of 1980 came about due to the growing scope and complexity of litigation involving customs and international trade and was aimed at improving the efficiency of the federal court system with regard to international trade litigation.

USCIT is part of the judicial branch of the United States government, which is completely independent of the executive branch under which CBP and other law enforcement agencies reside. Depending on the nature of the case, appeal action must commence within a specified period of time as provided by statute. See for example, 28 U.S.C. 2636 for the time to seek judicial review of protests.

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the USCIT with subsequent appeals being heard by the Supreme Court, the ultimate and final United States court.
