PO Box 3130
Laredo, TX 78044-3130

U.S. Customs and Border Protection

MAR 03 2016

CERTIFIED MAIL RETURN RECEIPT
7015 0640 0002 1156 7722

ENF-4-02-L::F NEF

[redacted]
C/o Baker & McKenzie LLP
815 Connecticut Avenue NW
Washington, D.C. 20006-4078

Re: [redacted]
Penalty CN [redacted]

Dear Mr. Murphy:

This letter is in response to your petition filed on behalf of your client, [redacted] received on August 26, 2015.

[redacted] seeks relief from a penalty which was assessed in the amount of $778,199.52 pursuant to 19 USC 1592 at a degree of culpability of negligence.

Please be advised that your petition was referred to the Office of Regulations and Rulings, Office of International Trade for review and decision as outlined in 19 CFR 171.12. It was determined by that office to remit the penalty in full. Enclosed herewith is a copy of their decision.

In view of the foregoing OR&R decision, the penalty for this case is hereby remitted in full.

Any questions pertaining to this case, you may call Norma E. Flores, Paralegal Specialist at (956) 523-7305. Please have the case number available when calling.

Sincerely,

Liza Lopez
Fines, Penalties & Forfeitures Officer

Enclosure

U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and Border Protection

October 27, 2015

OT:RR:BSTC:PEN [redacted]
Ms. Liza Lopez
Fines, Penalties & Forfeitures Officer
U.S. Customs and Border Protection
P.O. Box 3130
Laredo, TX 78044-3130

RE: FP&F Case Number [redacted], 19 U.S.C. §1592

Dear Ms. Lopez:

This is in response to your memorandum dated September 24, 2015, forwarding a petition for relief filed by Michael E. Murphy and Christopher W. Lucas of Baker & McKenzie LLP ("Counsel"), on behalf of [redacted] ("Petitioner") in Laredo Port Case number [redacted].[1] Petitioner seeks relief from a penalty assessed in the amount of $778,199.52, representing two times the loss of duties of $396,471.98 of which $7,372.22 is a potential loss of duties, and $389,099.76 is an actual loss of duties,[2] which was assessed against it pursuant to Title 19, United States Code ("U.S.C."), Section 1592 at a degree of culpability of negligence. The actual loss of duties has not been tendered. Our decision in this matter is set forth below.

FACTS:

[redacted] based corporation that imports condensers from Mexico. From March 1, 2010 through August 2, 2011, Petitioner filed 264 entries of condensers into the United States from a related party in Mexico. All but one of the subject entries were filed at the Port of Laredo, Texas.[3] The entries were filed under subheading 8415.90, Harmonized Tariff Schedule of the United States (HTSUS) as NAFTA originating articles under the applicable rules of origin.

By letter dated May 25, 2012, Petitioner filed a prior disclosure at the Port of Laredo pursuant to 19 U.S.C. 1592(c)(4), sections 162.74 and 181.21(b) of the U.S. Customs and Border Protection (CBP) Regulations (19 CFR §§162.74 and 181.21(b)). The prior

[1] Petitioner signed a Statute of Limitations ("SOL") waiver on March 30, 2015, thereby extending the SOL date to March 30, 2016. A request for another extension of the SOL was sent on October 5, 2015, by FP&F, Laredo. The request is still pending with Petitioner.
[2] 19 C.F.R. §162.71(a)(1) and (a)(2) define actual loss of duties as "the duties of which the Government has been deprived by reason of the violation in respect of entries on which liquidation has become final," and potential loss of duties as "the duties which the Government tentatively was deprived by reason of the violation in respect of entries on which liquidation has not become final."
[3] Entry Number [redacted] (July 15, 2010) was filed at the Port of McAllen, TX.

disclosure stated that Petitioner was recently advised by its Mexican producer/exporter, [redacted], that certain of the condensers that it had certified as originating under the terms of the NAFTA in 2010 and 2011, did not in fact qualify as originating goods under NAFTA. The Mexican producer/exporter's revocation of the NAFTA Certificates of Origin was necessitated because it was informed that an unrelated U.S. supplier of a key component of the compressors, [redacted], revoked the NAFTA Certificates of Origin it had previously provided. In its notification, [redacted] advised that the coils it had previously certified as being U.S.-origin, NAFTA-originating articles, were, in fact, of Chinese origin. Consequently, [redacted] revoked the NAFTA Certificates of Origin it provided in 2010 and 2011 for coils classified under subheading 8415.90, HTSUS. Since the coils are actually non-originating articles and classified in the same subheading as the finished condensers, this had a significant impact on the NAFTA eligibility of the finished condensers produced in Mexico. The NAFTA rule of origin applicable to the subject condensers, which are classified in subheading 8415.90, HTSUS, provides as follows:

> A change to subheading 8415.90 from any other heading.

General Note 12(t)/84.35, HTSUS. Therefore, pursuant to the NAFTA rule of origin applicable to the good, each non-originating component included in the condenser must be classified in a heading outside of 8415.90, HTSUS, in order for the finished condenser to be eligible for NAFTA treatment. Since the coils supplied by [redacted] are non-originating and classified in the same subheading as the finished condensers (8415.90, HTSUS), the coils will not satisfy the required shift in tariff classification in Mexico. Therefore, the fact that [redacted] revoked its previously provided certifications renders the models of condensers that utilized the coils as non-originating articles.[4] As part of the prior disclosure, Petitioner also tendered $7,372.22, for the additional duties and merchandise processing fees for the unliquidated entries. However, the duties for the liquidated entries was not tendered at this time.

In response to the Petitioner's claimed prior disclosure of May 25, 2012, CBP issued a letter dated September 20, 2012. CBP stated that a review of the information provided by Petitioner reveals that the merchandise is subject to duties, fees and taxes. The letter demanded payment pursuant to 19 CFR §162.74(c) in the amount of $429,375.76, representing $361,847.43 in duties and $54,477.43 in merchandise processing fees, and $13,050.90 in interest due. The letter further stated that "[i]n order to be afforded the benefits of a valid prior disclosure and avoid being penalized, duties must be tendered upon demand." Petitioner was given 30 days from September 20, 2012, in which to tender the duties, fees and interest due.

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[4] The Mexican producer/exporter advised [redacted], that the coil supplied by [redacted] was used in the following condenser models: [redacted]

On October 15, 2012, Petitioner filed a Protest and Application for Further Review (AFR)[5] of CBP's duty demand letter. Petitioner argues that the claimed duties are not owed on the liquidated entries in this case since the original claims for NAFTA preferential treatment were made with reasonable care. The Petitioner claims that since it did not violate 19 U.S.C. §1592(a), there is no legal basis under 19 U.S.C. §1592(d) for CBP to demand payment of duties and fees on the entries at issue in this case.

On August 29, 2013, the Office of Fines, Penalties & Forfeitures (FP&F), Laredo, issued a Pre-penalty Notice to [redacted]. The Pre-penalty Notice described the alleged violation as follows:

> [redacted] entered or caused to be entered merchandise into the commerce of the United States by means of material false statements, acts and/or omission. Specifically, 264 entries involving shipments of condensers made entry into the United States during 2010 through 2011 and were flagged as NAFTA qualifying. [redacted] then submitted a prior disclosure advising of the error and was allowed sufficient time to tender the duties owed as demanded by U.S. Customs and Border Protection and failed to tender the duties demanded thereby failed to perfect the disclosure as required. The benefits of a valid prior disclosure were partially denied since [redacted] tendered duties for the unliquidated entries (PLOR).

The Pre-penalty Notice alleged negligence as the tentative determination of culpability. A demand for duties in the amount of $832,649.70, representing two times the actual ($416,324.86) plus the potential ($7,372.22) loss of duties, was made.

By letter dated September 27, 2013, Petitioner submitted a response to the August 29, 2013, Pre-penalty Notice. Petitioner contended that a penalty should not be issued because the Company exercised reasonable care by relying on the NAFTA Certificates of Origin voluntarily provided by the Mexican exporter/producer of the condensers to make the subject duty preference claims. Therefore, Petitioner argues that since its actions did not result in a culpable violation of 19 U.S.C. §1592(a), there is no legal basis to assess a penalty or to demand additional duties and fees on liquidated entries that are beyond the period for voluntary reliquidation.

On February 5, 2015, FP&F, Laredo issued a letter rescinding the September 20, 2012, demand for duties and the August 29, 2013, Pre-penalty Notice. The letter further advised that an additional tender of $416,324.86 would be necessary within thirty (30) days, in accordance with 19 U.S.C. §1592(c)(4), in order to "permit further processing of your request for prior disclosure treatment."

In response to FP&F's letter rescinding the demand for duties and Pre-penalty Notice, Petitioner submitted a letter dated March 2, 2015. In its letter, Petitioner advised CBP that in its original submission dated May 25, 2012, it sought to make a corrected NAFTA declaration pursuant to 19 CFR 181.21(b). The letter further stated that the May 25, 2012, letter was "not intended to disclose a violation of 19 U.S.C. §1592(a)." To the contrary, Petitioner contended that no such violation of 19 U.S.C. §1592(a) occurred, as it exercised

[5] The AFR was forwarded to ORR on January 30, 2015.

reasonable care in claiming preferential tariff treatment under NAFTA at the time of importation. Therefore, Petitioner advised that inasmuch as it had tendered the amount owed on the unliquidated entries covered by its corrected declaration, it would not be tendering any additional amounts with regard to its May 25, 2012 submission.

Subsequently, FP&F, Laredo issued two letters dated March 13, 2015, in response to Petitioner's March 2, 2015, letter. The first letter informed Petitioner that inasmuch as Petitioner "failed to tender the duties and fees requested, the prior disclosure was not perfect, and the NAFTA declarations were not truly corrected because the applicable duties were not paid." Therefore, FP&F, Laredo informed Petitioner that its request for prior disclosure treatment pursuant to 19 CFR §162.74 was denied. The second letter issued by FP&F, Laredo advised that a claim for monetary penalty was being contemplated against Petitioner for violation of 19 U.S.C. §1592, and issued a Pre-penalty Notice alleging negligence as the level of culpability and proposing a monetary penalty in the amount of $832,649.72, representing two times the loss of duties ($7,372.22 potential loss of duties and $416,324.86 actual loss of duties).

On March 24, 2015, FP&F, Laredo subsequently issued an amendment to the March 13, 2015, Pre-penalty Notice. Both the Pre-penalty Notice and the Amended Pre-penalty Notice described the alleged violation as follows:

> [redacted] entered or caused to be entered merchandise into the commerce of the United States by means of material false statements, acts and/or omission. Specifically, 264 entries involving shipments of condensers made entry into the United States during the period of 2010 through 2011 and were flagged as NAFTA qualifying. [redacted] then submitted a prior disclosure advising of the error and was allowed sufficient time to tender the underpayment of duties and fees owed as requested by Customs and Border Protection. Since [redacted] failed to tender the duties and fees requested, the prior disclosure was not perfected, and the NAFTA declarations were not truly corrected because the applicable duties were not paid. Therefore, the request for prior disclosure treatment pursuant to 19 CFR §162.74 is herein denied.

The Amended Pre-penalty Notice reduced the loss of duties to $396,471.98 (representing $7,372.22 potential loss of duties and $389,099.76 actual loss of duties). Both the Pre-penalty and Amended Pre-penalty Notices alleged negligence as the level of culpability. The Amended Pre-penalty Notice proposed a penalty in the amount of $778,199.52.

By letter dated April 7, 2015, Petitioner submitted a response to the Amended Pre-penalty Notice dated March 24, 2015. Petitioner contends that a penalty should not be issued on the grounds that it did not violate 19 U.S.C. §1592(a) and, therefore, there was no legal basis to demand payment of duties and fees on liquidated entries that were beyond the period for voluntary reliquidation or to impose penalties.

In response to Petitioner's April 7, 2015, letter, FP&F, Laredo issued a letter dated July 2, 2015, advising Petitioner that CBP was going forward with the issuance of a Penalty Notice for a violation of 19 U.S.C. §1592. The Penalty Notice in this case described the violation as follows:

[redacted] entered or caused to be entered merchandise into the commerce of the United States by means of material false statements, acts and/or omission. Specifically, 264 entries involving shipments of condensers made entry into the United States during the period of 2010 through 2011 and were flagged as NAFTA qualifying. [redacted] then submitted a prior disclosure advising of the error and was allowed sufficient time to tender the underpayment of duties and fees owed as requested by Customs and Border Protection. Since [redacted] failed to tender the duties and fees requested, the prior disclosure was not perfected as required by 19 CFR §181.82(B)(5) and the NAFTA declarations were not truly corrected.

The Penalty Notice did not specifically state a level of culpability, but was issued in the amount of $778,199.52, representing "two times the loss of duties, taxes and fees of which the United States is or may be deprived."

PETITIONER'S CLAIM(S):

Petitioner makes the following arguments:

(1) CBP failed to comply with its own regulations in issuing the Penalty Notice. Petitioner argues that the Penalty Notice failed to contain all of the elements required by 19 CFR §162.31(b). Specifically, the Petitioner submits that the Notice did not contain a "description of the specific acts or omissions forming the basis of the alleged violations", but instead makes general claims that the Company entered the subject merchandise by means of "material false statements, acts and/or omission." In addition, Petitioner claims that the Penalty Notice fails to specifically identify the alleged loss of revenue, or explain how that loss was calculated.

(2) Petitioner argues that no violation of 19 U.S.C. §1592(a) has occurred. Petitioner alleges that it exercised reasonable care at the time the subject NAFTA claims were made by relying on NAFTA Certificates of Origin voluntarily provided by the Mexican exporter/producer of the condensers to make the subject duty preference claims.

LAW:

19 U.S.C. §1592(a)(1)(A) provides that

(1) Without regard to whether the United States is or may be deprived of all of a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence-

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document, or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material.

To violate the statute, the material falsity or omission may be made at the time the entry is filed, or subsequent to the entry filing, until the entry is finally liquidated. *See United States v. Ford Motor Company*, 387 F. Supp.2d 1305, Slip Op. 05-86, July 20, 2005 (*aff'd in part and rev'd in part* 463 F.3d 1286 (Fed. Cir. 2006); *United States v. Hitachi America, Ltd.*, 21 C.I.T. 373, 389, 964 F. Supp. 344, 361 (1977), *rev'd in part and aff'd in part on other grounds*, 172 F.3d 1319 (Fed. Cir. 1999).

Negligence is defined as:

> [A]n act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.

19 C.F.R. Part 171, App. B, Para. (C)(1).

19 U.S.C. §1592(e)(4) provides:

> [I]f the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

19 U.S.C. §1484(a)(1) provides that the importer shall use "reasonable care" in "filing with the Customs Service. . . the classification and rate of duty applicable to the merchandise. . . to enable the Customs Service to. . . properly assess duties on the merchandise."

19 C.F.R. Part 171, App. B, Para. (B) defines materiality as:

> A document, statement, act or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: . . (2) determination of an importer's liability for duty. . . [and] (4) determination as to the source, origin, or quality of the merchandise.

NAFTA Article 501, paragraph 3 states, in pertinent part:

Each Party shall:

(a) Require an exporter in its territory to complete and sign a Certificate of Origin for any exportation of a good for which an importer may claim preferential tariff treatment on importation of the good into the territory of another Party; and
(b) Provide that where an exporter in its territory is not the producer of the good, the exporter may complete and sign a Certificate on the basis of
    i) Its knowledge of whether the good qualifies as an originating good,
    ii) Its reasonable reliance on the producer's written representation that the good qualifies as an originating good, or
    iii) A completed and signed Certificate for the good voluntarily provided to the exporter by the Producer.

Further, Article 502, paragraph 1 states:

> Except as otherwise provided in this Chapter, each Party shall require an importer in its territory that claims preferential tariff treatment for a good imported into its territory from the territory of another Party to;
> (a) Make a written declaration, based on a valid Certificate of Origin, that the good qualifies as an originating good;
> (b) Have the Certificate in its possession at the time the declaration is made;
> (c) Provide, on the request of that Party's customs administration, a copy of the Certificate; and
> (d) Promptly make a corrected declaration and pay any duties owing where the importer has reason to believe that a Certificate on which a declaration was based contains information that is not correct.

CBP has implemented Article 502 by promulgating Subpart B and Subpart C to Part 181 of the CBP Regulations, 19 C.F.R. §§181.11 to 181.13 and 19 C.F.R. §§181.21 to 181.23. Section 181.11(a) provides that a Certificate of Origin shall be employed to certify that a good being exported either from the United States into Canada or Mexico or from Canada to Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA.

Section 181.21(a) requires (with certain exceptions) that a claim for preferential tariff treatment under NAFTA:

> be based on a complete and properly executed original Certificate of Origin, or copy thereof, which is in the possession of the importer and which covers the good being imported.

19 C.F.R. §181.22(a) requires that:

> Each importer claiming preferential tariff treatment for a good imported into the United States shall maintain in the United States, for five years after the date of entry

> of the good, all documentation relating to the importation of the good. . . include[ing] a copy of the Certificate of Origin.

Subsection 181.22(b) provides:

> An importer who claims preferential tariff treatment of a good under Section 181.21 of this part shall provide, at the request of the port director, a copy of each Certificate of Origin pertaining to the good which is in the possession of the importer.

ANALYSIS:

As a preliminary matter, Petitioner contends that CBP failed to comply with its own regulations in issuing the Penalty Notice since the Notice fails to: 1) describe the specific acts or omissions forming the basis of the alleged violation; 2) identify the alleged loss of duties; and 3) identify the level of culpability. 19 U.S.C. §1592(b)(1)(a) requires the Pre-penalty and Penalty notices to "state all the material facts which establish the alleged violation." In the instant case, Petitioner claims that the Penalty Notice did not include a "description of the specific acts or omissions forming the basis of the alleged violations." However, we note that in Petitioner's letter dated May 25, 2012, it claimed that it was submitting a prior disclosure pursuant to 19 U.S.C. §1592(c)(4), for false NAFTA claims inasmuch as "certain of the condensers it had certified as originating under the terms of NAFTA in 2010 and 2011 did not in fact qualify." Moreover, in both the Pre-penalty, Amended Pre-penalty and Penalty Notices, CBP acknowledged that Petitioner had submitted a prior disclosure for filing erroneous NAFTA claims on 264 entries consisting of condensers filed during the period from 2010 through 2011 through the Port of Laredo. Therefore, it is clear that Petitioner fully understood the material facts of the violation, as demonstrated by the fact that it was Petitioner who initially brought the false NAFTA claims to the attention of CBP, and based on the Notices from FP&F, Laredo.

Petitioner further claims that the Penalty notice fails to identify the alleged loss of duties or explain how the loss of duties was calculated and fails to specify the level of culpability. Contrary to Petitioner's claim that CBP did not explain how the penalty was calculated, we note that both the Pre-penalty and Amended Pre-penalty Notices included a list of the entries involved in the case with a breakdown of the loss of duties for each entry. Furthermore, in regard to Petitioner's claim that the Penalty Notice failed to state the level of culpability, we also note that both the Pre-penalty and Amended Pre-penalty Notices clearly stated negligence as the level of culpability. *See United States v. CTS Holding, LLC*, Slip Op. 15-70, June 30, 2015. Pursuant to 19 U.S.C. §1592(b)(2) and 19 C.F.R. §162.79(b)(2), the Penalty Notice is required to include any changes in the information contained in the Pre-penalty Notice. In the instant case, since there were no changes to the information contained in the Pre-penalty Notices, Petitioner was fully apprised as to the level of culpability and loss of duty calculation alleged in the Penalty Notice and CBP abided by the procedural requirements of 19 U.S.C. §1592(b). It is clear that, under the foregoing facts, the failure of the penalty notice itself to explicitly state the specific acts or omissions forming the basis of the alleged violation, the loss of duties and level of culpability constituted, at worst, harmless error.

Petitioner argues that it should not be subject to a penalty pursuant to 19 U.S.C. §1592 since there is no evidence to support the conclusion that a violation of 19 U.S.C. §1592(a) occurred. Petitioner submits that it exercised reasonable care when it made the NAFTA claims since it relied on valid NAFTA Certificates of Origin voluntarily supplied by its Mexican exporter/producer for the condensers to make the subject duty preference claims and had no reason to suspect that the Certificates of Origin were inaccurate. In this particular case, we agree.

We find that Petitioner was not negligent pursuant to 19 U.S.C. §1592 with respect to all 264 entries at issue in this case because it exercised reasonable care and competence expected from a person in the same circumstances. 19 U.S.C. §1592(a) and 19 CFR Part 171, App. B(C)(1). Petitioner relied upon the NAFTA Certificates of Origin supplied by the unrelated producer [redacted], and had no reason to doubt their validity. *See* NAFTA Article 501(1); 19 CFR §§181.21 and 181.22. Pursuant to 19 CFR 181.22(b)(2), at the time Petitioner made the NAFTA claim, it had in its possession a valid NAFTA Certificate of Origin that had been voluntarily provided by the Mexican exporter/producer for the condensers, which at the time, Petitioner had no reason to believe was inaccurate. As we understand the facts of this case to be, we accept as true that the Mexican exporter/producer reasonably relied upon [redacted]' certifications when it performed its analysis, determined that the condensers qualified, and issued the NAFTA Certificates of Origin for the finished good. It appears that neither the Mexican exporter/producer nor [redacted] US had any reason to believe that the NAFTA Certificates of Origin voluntarily provided by [redacted] were false, Petitioner was not aware that the NAFTA certificates were false, and that Petitioner had no reason to suspect they were inaccurate until it received notice on May 1, 2012, almost nine months after the last entry was filed, from the Mexican producer/exporter, [redacted], that one of the components supplied by [redacted] did not qualify as NAFTA-originating. Upon receipt of the information from its Mexican producer/exporter, Petitioner came forward immediately to disclose the circumstances of the violation to CBP. We find the fact that Petitioner voluntarily came forward with a prior disclosure as soon as it received information that the condensers did not qualify for NAFTA preferential treatment as evidence that Petitioner acted in good faith.

CONCLUSION:

We find that Petitioner did not violate 19 U.S.C. 1592(a) and, therefore, it is our decision to remit the penalty and duty demand in full. Please notify Petitioner, through counsel, of our decision and provide a copy of this letter with your notification. Thank you for your attention to this matter.

Sincerely,

GEORGE F MCCRAY JR

George Frederick McCray
Supervisory Senior Attorney/Chief-Penalties Branch
Office of International Trade - Regulations and Rulings