

# NEVILLE PETERSON LLP

## GLOBAL TRADE ALERT

Customhouse Broker Penalties

August 2009

## Federal Circuit Tightens Rules for Customhouse Broker Penalties

### Remands UPS Case for Further Proceedings

A new decision from the United States Court of Appeals for the Federal Circuit (CAFC) imposes tighter requirements on United States Customs and Border Protection (CBP) before the agency may assess 19 U.S.C. §1641 penalties against Customhouse brokers based on a claim that the broker failed to exercise “responsible supervision and control” over the transaction of Customs business. At the same time, the CAFC has declined to answer, for now, the question of whether a broker may be penalized more than \$30,000 for a related series of transactions.

In *United States v. UPS Customhouse Brokerage Inc.*, Appeal No. 2008-1409 (August 11, 2009 [available here](#)), Customs had imposed some \$75,000 in broker penalties against UPS in a series of cases, claiming that the broker had failed to exercise responsible supervision and control in classifying certain parts of automatic data processing machines. UPS argued that the classifications it had used were correct. In addition, UPS argued that Customs had failed to consider all of the factors required by regulation before imposing the penalty. The United States Court of International Trade (CIT) held that the classifications used by the brokers were incorrect, and upheld a series of Section 1641 penalties against the UPS totaling \$75,000.

> The training required of employees of the broker;

### Customs Must Consider All Factors, Court Says

On appeal, the Federal Circuit agreed with the CIT that the classifications used by UPS were legally incorrect. However, the Federal Circuit remanded the case to the CIT, holding that Customs had not considered all relevant factors in determining whether the broker had failed to exercise “responsible supervision and control”. In particular, the CAFC ruled, Customs and the CIT were required to consider all 10 of the mandatory factors identified in Section 111.1 of the Customs Regulations [19 U.S.C. §111.1] in making a determination of whether the broker had exercised the appropriate degree of supervision and control. That regulation, which defines “responsible supervision and control”, indicates that:

“While the determination of what is necessary to perform and maintain responsible supervision and control will vary depending upon the circumstances in each instance, factors which CBP will consider include but are not limited to:

> the issuance of written instructions and

guidelines to employees of the broker;

> the volume and type of business of the broker;

> the reject rate for the various customs transactions;

> the maintenance of current editions of CBP regulations, the Harmonized Tariff Schedule of the United States, and CBP issuances;

> the availability of an individually licensed broker for necessary consultation with employees of the broker;

> the frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have a resident individually licensed broker;

> the frequency of audits and reviews by an individually licensed broker by the Customs transactions handled by employees of the broker;

> the extent to which the individually licensed broker who qualifies the district permit is involved in the operation of the brokerage;

> and any circumstance that indicates that an individually licensed broker has a real interest in the operations of a broker.

The Federal Circuit held that Customs must, at a minimum, consider all ten (10) regulatory factors before holding that a broker did not exercise responsible supervision and control.

## Each Case Separately Considered; Factors not Exclusive

There will be cases where not every factor is relevant; in these cases, a finding by Customs that the factor is not relevant is sufficient. Furthermore, Customs may decide how much weight to assign to each factor, and may consider factors other than those enumerated. However,

the CAFC held, Customs must have a minimum, examine all ten of the enumerated factors. It was not clear that Customs and the CIT had done this in UPS' case, so the matter was remanded for further consideration.

Because the CAFC remanded the case, it did not decide certain collateral issues posed in the appeal. The most important of these issues was whether 19 U.S.C. §1641 limits Customs to imposing penalties for a related series of incidents to the amount of \$30,000. Please let us know if you have any questions concerning this interesting new decision.

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