



## DRAFT – FOR COMMENT AND DISCUSSION PURPOSES ONLY

- We welcome any feedback on this draft item. Please send any comments to [PublicConsultation@customs.govt.nz](mailto:PublicConsultation@customs.govt.nz) by **24 August 2023**.
- Interpretive Guides set out Customs view of how the law applies in certain situations. They aim to resolve legal uncertainty and assist with voluntary compliance.
- Please let us know at [PublicConsultation@customs.govt.nz](mailto:PublicConsultation@customs.govt.nz) if you:
  - would like to be consulted on future interpretive guidance that Customs issues, or
  - have suggestions for topics that we could usefully publish guidance on.

## INTERPRETIVE GUIDE – VOLUNTARY DISCLOSURES

This Interpretive Guide sets out the factors that the New Zealand Customs Service (Customs) will consider when determining whether a person has made a voluntary disclosure, and the effect of that voluntary disclosure.

Voluntary disclosures are relevant in the following situations:

- liability for an administrative penalty
- quantum of compensatory interest chargeable for late duty payments
- decisions made on enforcement actions

Unless otherwise specified, all legislative references are to the Customs and Excise Act 2018 (CEA).

### Summary

1. Voluntary disclosures are relevant where a person may be liable for:
  - an administrative penalty under s 285 of the CEA if an entry contains errors or omissions that result in incorrect duty being paid or the entry otherwise being materially incorrect
  - compensatory interest under s 156 of the CEA if the correct duty is not fully paid on time.
2. A person who voluntarily discloses the relevant error or omission to Customs will not be liable for an administrative penalty, or where the error relates to duty not being fully paid on time, would be liable for compensatory interest at a reduced rate.



3. Further, Customs will take voluntary disclosures into account when considering enforcement action – for example, it is a factor (amongst others) taken into account when deciding whether to prosecute or infringe a person or to provide them with a warning instead.
4. To be a voluntary disclosure:
  - there must be a disclosure of something to Customs that Customs did not already know, and
  - the disclosure must be made voluntarily, that is, under no obligation.
5. The voluntary disclosure will need to include:
  - sufficient detail of the error or omission, including, where it relates to an incorrect amount, enough detail to enable Customs to determine the correct amount of duty payable
  - any further information that is necessary for Customs to ensure that an entry or assessment is correct, and
  - where the matter relates to compensatory interest or an enforcement matter, an explanation as to why the error or omission occurred.
6. Where the voluntary disclosure is made under s 288 in relation to administrative penalties, the disclosure must be unprompted. That is, it must not be made due to Customs contacting the person about the error. For instance, there will not have been a voluntary disclosure if any of the following apply:
  - Customs has indicated that an entry will be examined or further documentation is required
  - the interactions between the person and Customs indicate that it was reasonable for the person to infer that Customs was already aware of the error
  - Customs has advised the person of an audit.

## Analysis

### Administrative penalties will not apply if an error is voluntarily disclosed

7. Administrative penalties are intended to encourage people to take reasonable care when completing entries. Section 285 of the CEA provides for the imposition of administrative penalties where a person has made an entry that:
  - contains an error or omission that leads to duty not being paid (or being underpaid), or
  - is materially incorrect.
8. For more information on when administrative penalties may apply, see [Operational Policy: Administrative Penalties](#).

9. Even where s 285 is satisfied, administrative penalties will not be imposed if any circumstances in s 288 apply. Relevantly for present purposes, voluntary disclosures are contained in s 288(a) which provides:

**288 No penalty in certain cases**

A person is not liable for a penalty under section 285 if—

- (a) the person voluntarily discloses the relevant error or omission to Customs, except where the disclosure is made after Customs has notified the person of any of the following:
- (i) that the goods to which the entry relates have been selected for examination by Customs;
  - (ii) that documentation is required to be presented to Customs in relation to the entry;
  - (iii) that Customs intends to conduct an audit or investigation in relation to—
    - (A) a selection of entries that includes the entry; or
    - (B) entries made over a period of time that includes the time when the entry was made;

10. Accordingly, for s 288(a) to apply:

- there must be a disclosure
- the disclosure must be made voluntarily
- the disclosure must be of the relevant error or omission, and
- the disclosure must be made before any of the events referred to in s 288(a)(i)-(iii) occur.

### Compensatory interest on unpaid duty under s 156 will be reduced if an inadvertent error is voluntarily disclosed

11. Under s 154 of the CEA, interest applies in various situations where duty is not fully paid within time.
12. Where interest is imposed under s 156 (correction of self-assessed duty) a lower rate of interest may apply. Section 166 of the CEA provides that the chief executive may be required to remit or refund part of any interest payable if the person's assessment was incorrect because of an inadvertent error, and the prescribed conditions are met.
13. The prescribed condition under reg 71B of the Customs and Excise Regulations 1996 are:
- the error must have been disclosed to Customs voluntarily
  - the duty must have been paid in full within the time required.

14. Where s 166 applies, the amount remitted for a voluntary disclosure is the difference between the amount of interest payable and the 90-day bank bill rate.

## What is a voluntary disclosure?

### A “disclosure” means to make new information known to Customs

15. The terms “disclose” and “disclosure” are not defined in the CEA. The *Concise Oxford English Dictionary* (11<sup>th</sup> ed, Oxford University Press, 2012) defines “disclose” as “make (secret or new information) known”.
16. In the present context, this means that the person must make new information known to Customs that Customs did not already know. The information in this context is the relevant error or omission that led to the incorrect entry or the duty not being paid. Customs must both not have been aware of the error, and must be informed of the error.

### “Voluntarily” means to disclose without an obligation to do so

17. “Voluntarily” is also not defined in the CEA. The *Concise Oxford English Dictionary* defines “voluntarily” as “of one’s own free will”. This means acting freely, without compulsion, and not under any obligation.
18. For example, submitting required information will not be a voluntary disclosure. It must not be something that the person is otherwise required to file or submit.

### The disclosure must be of the relevant error or omission

19. In order to qualify as a voluntary disclosure, all the details of the relevant error or omission, including the monetary difference between the original entry and the correct entry (if relevant) should be disclosed. That is, Customs needs to know about the error, what the correct entry and duty amount should be and the amount and/or nature of the shortfall.
20. For example, simply using the override function in Trade Single Window when lodging an entry is not sufficient to be a voluntary disclosure.

### For administrative penalties, the disclosure must also be made before any of the events referred to in s 288(a)(i)-(iii) occur

21. There will not be a voluntary disclosure under s 288 if Customs has notified the person of any of the following:
  - the goods to which the entry relates have been selected for examination by Customs
  - documentation is required to be presented to Customs in relation to the entry
  - Customs intends to conduct an audit or investigation of entries including the relevant entry.

22. The above factors are specific to the voluntary disclosure provision applying to administrative penalties.
23. In *AC v New Zealand Customs Service* [2011] NZCAA 8 (CAA) there were two errors on an import entry:
- The first error was the omission of freight costs which had been picked up by the system when the entry was lodged. This caused Customs to request document verification.
  - The second error was an incorrect tariff classification resulting in an incorrect application of a concession, which was picked up by Customs in a routine post-entry audit two years later.
24. In determining whether there had been a voluntary disclosure of the first error, Judge Barber said (in respect of a materially similar predecessor provision):
- [26] In order for the exemption ... to apply, the appellant would ... have had to notify Customs of the error prior to Customs notifying the appellant that documentation was required to be presented in relation to that entry. That was not done in this case. ... Accordingly, the respondent cannot rely upon s.130(a) of the Act (voluntary disclosure) in order to be exempted from liability to the penalty. It was Customs which identified the error of its own accord.
25. This supports the view that a voluntary disclosure under s 288 must be done prior to the person being notified of an error or of Customs requiring further documentation in relation to an entry.

## Voluntary disclosures in other situations

26. Voluntarily disclosing errors or omissions is an important aspect of Customs' wider voluntary compliance approach.
27. Customs will often take a person's behaviour (such as voluntarily disclosing an error, the reason why the error occurred and actions taken to prevent the error re-occurring) into account when making enforcement decisions under the CEA. The [Solicitor-General's Prosecution Guidelines](#) provide more information on other circumstances that may be taken into account in making such decisions.
28. In this context, a "voluntary disclosure" is not something set out in legislation. Therefore, it does not have precisely the same meaning as a voluntary disclosure under the CEA. However, similar principles will apply. That is, if a person informs Customs of an error or omission prior to Customs being aware of it, then those actions will generally be taken into account when considering the appropriate enforcement action. Other factors will also be taken into account (such as whether the person has made changes to processes to stop the error re-occurring). It should be noted however, that disclosure of an error is just one factor taken into account, and does not necessarily mean no enforcement action will be taken.

## Examples

### Example 1 – voluntary disclosure of accidental error on entry

Andrew purchased fairground equipment from an offshore supplier for USD7,000 for use in his fairground. Andrew's broker inadvertently entered this as NZD7,000 on the entry. The entry was not selected for examination by Customs, nor was supporting documentation requested for the importation. Andrew paid GST and applicable duties on the importation and received delivery of his goods.

Two months later, Andrew's broker realised the error and got in touch with Customs, explaining the error and the resulting difference between the NZD amount (\$11,300) and the USD amount (\$7,000) in respect of which duty and GST should have been paid. Andrew paid the difference immediately.

Because the broker got in touch with Customs before Customs had any knowledge of the error, they will not be liable for an administrative penalty.

Similarly, Andrew would be eligible for compensatory interest at the reduced rate under s 166 of the CEA. This is because the error was an inadvertent one, was voluntarily disclosed, and repaid in time.

However, if Customs had selected the goods for examination, or requested supporting documentation before Andrew and the broker realised the error, then they would not have made a voluntary disclosure.

### Example 2 – Not eligible for reduced rate of CI – no entry made

Mel's Craft Beer Emporium (MCBE) brews craft beer from its premises in Wellington. Mel, the director of MCBE, is not great at administration and failed to make the required entries for beer removed from the Customs-controlled Area between December 2021 and August 2022. In September 2022, Mel realises her mistake and contacts Customs with details of the error.

Customs issues MCBE an assessment for the duty and interest owing. As MCBE had not made an entry, CI is imposed under s 157 (cases where no entry made) rather than s 156 (cases involving correction of self-assessed duty). Therefore, MCBE is not entitled to the reduced rate of CI under s 166/reg 71B.

However, Customs will still take the voluntary disclosure into account when deciding the appropriate enforcement action.

### Example 3 – Not eligible for reduced rate of CI – error not inadvertent

Fiona's Krafty Shoes (NZ) Ltd (FKSNZ) imports designer shoes from Spain. Catherine, FKSNZ's director wants the latest shipment to be cleared as soon as possible. Instead of using the actual documentation for the shipment, FKSNZ's entry is made using a Value For Duty (VFD) based on a standard price list for the previous year. Catherine intends to calculate the correct VFD and amend the entry when she has time.

The following month, Catherine contacts Customs and advises them of the incorrect entry and provides the correct VFD.

Despite making a voluntary disclosure, FKSNZ is not entitled to the reduced rate of CI under s 166 / reg 71B as the error was not inadvertent. FKSNZ was aware when it was making the entry that the VFD was not correct and would need to be amended.

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