

## LEGAL CORNER

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### **Writing a Petition for Relief from Fines and Penalties Assessed by U.S. Customs in Drug Seizure Cases (Part I)**

**T**here is a right way and a wrong way to petition for relief from a fine or penalty assessed by U.S. Customs in drug seizure cases. Generally speaking, the right way is to have your lawyer write the petition. The wrong way is to do it yourself. However, since you are the ultimate responsible party, it behooves you to know what your lawyer should be doing on your behalf. In the next two Legal Corners we shall explore some of the things you should know.

The first thing you need to understand is the holding in the case of *ARCA Airlines, LTDA v. U.S. Customs Service*, 726 F.Supp. 827 (S.D. Fla. 1989), affirmed, 945 F.2d 413 (11<sup>th</sup> Cir. 1991). That case involved an international air carrier (ARCA) that brought an action in federal district court in Miami challenging the penalties imposed by Customs following the seizure of smuggled narcotics. The simplified facts of the case were that upon discovery of smuggled narcotics Customs notified ARCA that a penalty would be assessed. ARCA commenced negotiations to mitigate or remit the penalty, Customs ultimately mitigated the penalty to half the original assessment, and ARCA paid. Thereafter, ARCA filed suit for judicial review under a theory of equitable restitution to recover what it had paid.

The court first held that mitigation and remission decisions are committed to the discretion of the “executive” (i.e., Customs), and that a district court may only require Customs to *exercise* its discretion and consider a petition for mitigation. The court cannot review the *merits* of the decision that Customs reaches in the exercise of that discretion. Next, the court ruled that, if ARCA had truly believed the penalties were erroneously assessed, it could have

*refused* to pay Customs and Customs would have been *forced* to file a penalty collection action pursuant to 28 U.S.C. §1355. By way of defense, ARCA could then have *challenged* the validity of the penalties. However, on the advice of counsel, ARCA elected to petition for mitigation rather than defend a penalty collection action, and thereby *made its election of remedies* which subsequently precluded it from contesting the penalties ultimately assessed.

Thus, upon receiving notice from Customs of an assessed penalty, a common carrier is faced with a choice: (1) it can petition Customs for relief pursuant to 19 C.F.R. §172.11 *et seq.*, or (2) it can defend against a penalty collection action in federal court by relying on the legal standard contained in 19 U.S.C. §1584. If it chooses to petition Customs for relief, it will not later be allowed to contest a decision by Customs to assess either a mitigated or non-mitigated penalty. If it chooses to defend in court, then 19 U.S.C. §1584 will apply, and the carrier will not be subject to the assessment of penalties “if it appears to the satisfaction of the court that neither the master nor any of the officers...nor the owner of the vessel knew, and could not, by *the highest degree of care and diligence*, have known, that such narcotic drugs were on board.” What constitutes the “highest degree of care and diligence” is the subject for a later article.

Since the subject of *this* article concerns the writing of a petition for relief, we shall assume you, as the affected carrier, have chosen to petition Customs rather than force a court battle. The question therefore becomes, how should the petition be drafted? This will be the subject of the continuation of this article, Writing a Petition for Relief from Fines and Penalties Assessed by U.S. Customs in Drug Seizure Cases (Part II), in the next Legal Corner. In the meantime, both the editor of this newsletter and I encourage your submission of legal questions for inclusion in future issues.