

# Miscellaneous Penalties

Penalties imposed in terms of the Act are done so in accordance with sections thereof, commonly termed the penal provisions (Sections 88 to 106).

## 1. DELEGATION OF POWERS TO DEMAND PENALTIES

Penalties may be imposed as follows;

- a. Commissioner Customs and Excise amounts from N\$100.00 to amounts above N\$100 000.00
- b. Deputy Directors up to N\$100 000.00
- c. Control Customs and Excise Officers up to N\$50 000.00
- d. Chief Customs and Excise Officers up to N\$20 000.00

**Note; The aforementioned amounts do not include forfeiture amounts. It must be remembered that forfeiture is not regarded as Customs penalty.**

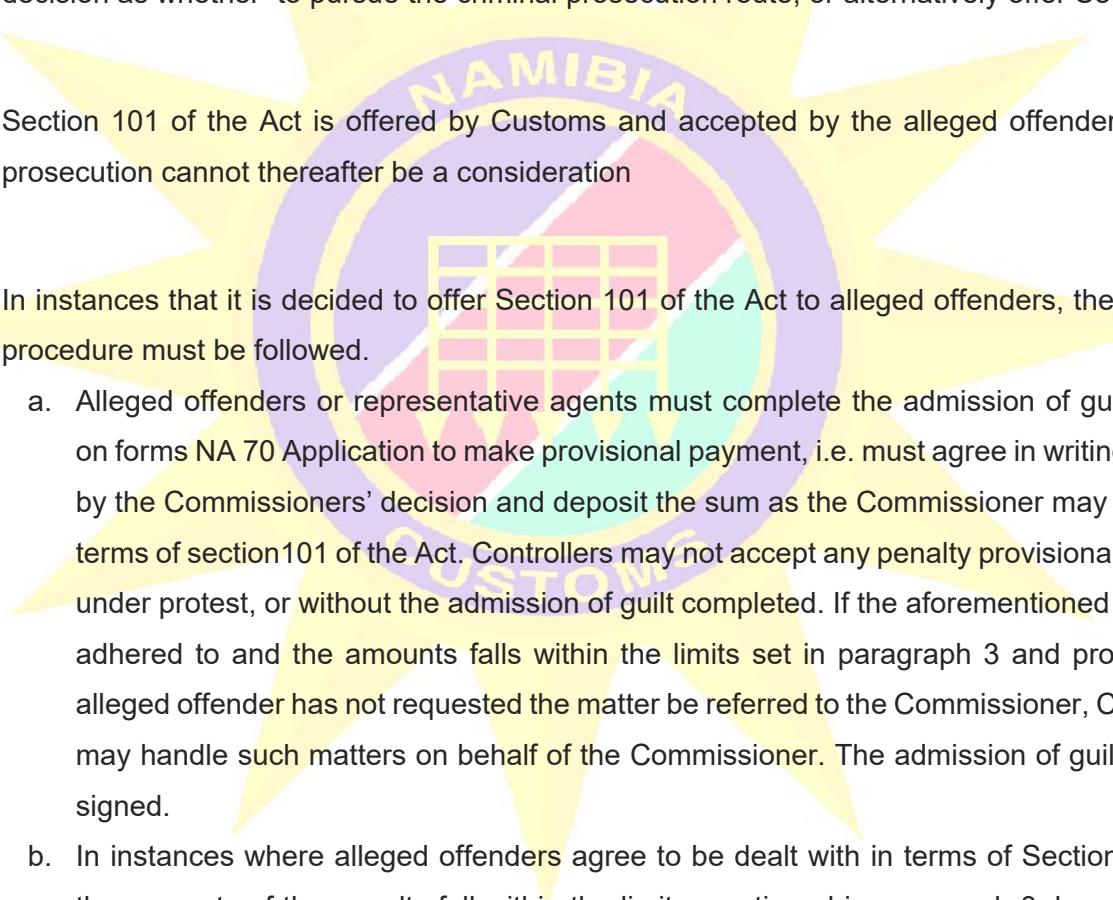
## 2. Rights for alleged offenders

Alleged offender have the right to appeal to the Commissioner with regards to penalties imposed on them. This is termed an "internal appeal". In such instances, Controllers must submit such appeals together with all relevant documentation, including their motivation as well as the alleged offender's representations to Head Office.

It is important that all information is submitted in order that Head Office can make an informed decision. Alleged offender's furthermore, have the right to appeal to the Minister of Finance against any determination, or order of the Commissioners determination, or order. In the aforementioned instances alleged offenders would have elected to be dealt with administratively.

**NOTE: All Customs and Excise Officers must ensure that the alleged offenders are well informed about their rights as stated above.**

3. Demanding and collecting of penalties in terms of Section 101 of the Act as opposed to criminal prosecution.

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- 3.1. In instances where it is alleged that contraventions of the Act have been committed, the commissioner is empowered in terms of Section 101 of the Act, to deal with legal issues outside the Court of Law. The Act, as well as the Offences and Penalty guidelines, have categorised the various types offences into, serious, less serious, administrative and or specific offences.
- 3.2. Where the alleged offense contraventions are suspected, Controllers must immediately assess the seriousness of such and with the assistance of the of the offences and penalty guidelines as well as discretion demand penal amounts in terms of Section 101 of the Act. Should Controllers be of the opinion that any offence is of a serious nature and are in possession of evidence of deliberate fraudulent dealings; criminal prosecution must be a consideration. In these instances the matter fully motivated must be submitted to Head Office: Division Legal Services. At this stage Section 101 of the Act must not be offered to alleged offenders. It is important to collect all relevant information at this stage in order that the Division Legal Services can make an informed decision as whether to pursue the criminal prosecution route, or alternatively offer Section 101,
- 3.3. Section 101 of the Act is offered by Customs and accepted by the alleged offender, criminal prosecution cannot thereafter be a consideration
- 3.4. In instances that it is decided to offer Section 101 of the Act to alleged offenders, the following procedure must be followed.
- a. Alleged offenders or representative agents must complete the admission of guilt section on forms NA 70 Application to make provisional payment, i.e. must agree in writing to abide by the Commissioners' decision and deposit the sum as the Commissioner may require in terms of section 101 of the Act. Controllers may not accept any penalty provisional payment under protest, or without the admission of guilt completed. If the aforementioned has been adhered to and the amounts falls within the limits set in paragraph 3 and provided the alleged offender has not requested the matter be referred to the Commissioner, Controllers may handle such matters on behalf of the Commissioner. The admission of guilt must be signed.
  - b. In instances where alleged offenders agree to be dealt with in terms of Section 101 and the amounts of the penalty fall within the limits mentioned in paragraph 3, however such alleged offenders request that the matter be referred to the Commissioner for a final decision, such matters must be submitted to Head Office. The submission must include all relative correspondences and documentation. The admission of guilt need not be signed at this stage.
  - c. If the amounts demanded exceed the limits mentioned in paragraph 3, and the Controller is of the opinion that the higher penalty amount should stand, whether or not the alleged offender requests submission to the Commissioner, the amounts demanded must be secured on the forms NA 70 (Application to make provisional payment).

The admission of guilt need not be signed at this stage.

#### 4. Minor violations

Penalties imposed for unintentional irregularities (clerical / counter errors): Controllers are discouraged from imposing such penalties except where the person involved has repeatedly made the same mistake and has previously received a warning from Customs that future similar contraventions or failures will result in penalty. Repeated clerical or counter errors should be brought to the attention of the person or company who makes them and they should be advised that repetitions of such errors can and probably will result in penalty action. Controllers must be alert as to the past record of importers, etc., with respect to accuracy of entries, clerical errors, etc. The Controller is generally the judge as to whether an error was a simple clerical error or a result of a higher degree of negligence.

#### 5. Basis of mitigating penalties is based on two factors: loss of revenue and extent of guilt.

- 5.1. Loss of revenue is the difference in the amount of duties and import taxes the importer would have paid had he properly entered the goods as compared to the duties and taxes he would have paid based on his improper entry.
- 5.2. Extent of guilt is broken down into the following categories:
  - a. Simple negligence
  - b. Gross negligence
  - c. Intentional negligence and fraud.

#### 7. Mitigation guidelines for violations within delegated mitigation authority

- 7.1 **Simple negligence:** Simple negligence may be assumed when an importer, exporter, agent, etc. commits an offence or violation for the first time and there is an absence of proof of wilful deceit. In minor cases, Controllers may issue a written warning without penalty at their discretion. Where the case is not minor, in the opinion of the Controller, the forfeiture shall be remitted as follows:

Duty: Collect the full amount of duty and import taxes which are due.

Penalty: Collect a penalty equal to one quarter to one half the loss of revenue.

Forfeiture: Remit (cancel) the forfeiture upon payment of the duty, import taxes and penalty.

7.2 **Gross negligence:** Gross negligence may be assumed when an importer, exporter, agent, etc. has repeatedly committed the same offence or violation, but there is still no proof of wilful deceit. In the case of gross negligence the forfeiture shall be remitted as follows:

Duty: Collect the full amount of duty and import taxes which are due.

Penalty: Collect a penalty equal to half the loss of revenue to the loss of revenue.

Forfeiture: Remit the forfeiture upon payment of the duty, import taxes penalty.

7.3 **Deliberate negligence:** Deliberate negligence implies the wilful action of a person to obtain a certain result, e.g. the evading of duty knowing very well that his action is creating a discrepancy.

A second offence shall be considered deliberate negligence. In the case deliberate negligence or fraud, the forfeiture shall be processed as follows:

Duty: Collect the full amount of duty and import taxes which are due.

Penalty: Collect a penalty two times the loss of revenue.

Forfeiture: Remit the forfeiture upon payment of the duty, import taxes and penalty.

7.4 **Fraud:** Fraud implies the same wilful action as deliberate negligence but with aggravating factors. Aggravating factors may be such things as: the violator has already been penalized under similar circumstances and determined in a previous case to be guilty of deliberate negligence, or the violator concealed goods in hidden compartment or took exceptional pains to conceal his violation. In cases of fraud, no mitigation will be permitted. Controllers should contact the Head Office to determine if prosecution should be undertaken.

7.5 **Exportations:** Since there is no loss of revenue, a mitigated penalty of 10% of the value with a minimum of N\$ 2000.00 for commercial exportations and a minimum of N\$ 100.00 for non-commercial exportations must be called for, however where there is loss of revenue penalty guideline should be consulted.

7.6 **Minimum penalties:** Minimum penalties have been established in certain situation described in this chapter. Please refer to the next chapter for a listing of those situations in which minimum penalty amounts have been established.

## 8. Partial payment of mitigated penalties

8.1 **Provisional payment release** If an importer, agent, etc. does not have sufficient funds available to pay the full penalty and the Controller is confident that the person is located within Namibia and can be relied upon to make full payment, the goods can be provisionally released upon partial payment.

A form NA 70 must be completed, acknowledging that the unconditional release of the seized goods will only be made upon full payment of the penalty. This form must be signed by the violator or his agent. The importer, agent, etc. should be warned that if the balance is not received within 14 days, the matter will be handed to the Namibian Police for prosecution without further notice. Full particulars of the individual should be obtained and the Customs officer must be satisfied with their correctness.

8.2 **Retention of goods as security** If the importer or agent is not located within Namibia and/or is not considered by the Controller to be reliable for the full payment of the penalties due, the goods involved may be retained in the State warehouse or in a Customs warehouse at the expense of the importer or agent until such time as the full penalty is paid. The retention of goods is done by way of a lien notice which can be adapted to suit the particular circumstances. Signatures must in all instances be obtained from the person involved stating that the original was received by him. When a lien is placed on goods a sticker should be affixed to the goods with the following wording: "Lien placed in terms of Section 124 of the Custom and Excise Act No 20 of 1998 at (time) or (date), substantiated with a customs stamp."