(Sec. 6, 38 Stat. 721; (15 U.S.C. 46). Interprets or applies sec. 5, 38 Stat. 719, as amended; (15 U.S.C. 45, 52))

Carol M. Thomas,

Secretary.

[FR Doc. 80-21729 Filed 7-18-80; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 355

Certain Fasteners From India; Final Countervailing Duty Determination and Countervailing Duty Order

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Final Countervailing Duty Determination and Countervailing Duty Order.

SUMMARY: This notice is to advise the public that the Department of Commerce has determined that the Government of India confers benefits upon the production or export of certain fasteners which constitute subsidies within the meaning of the countervailing duty law. Future imports of this merchandise will be subject to the payment of countervailing duties.

EFFECTIVE DATE: July 21, 1980.

FOR FURTHER INFORMATION CONTACT: Mary S. Clapp, Supervisory Import Administration Specialist, Office of Investigations, International Trade Administration, Department of Commerce, Washington, D.C. 20230 (202-377-5496).

SUPPLEMENTARY INFORMATION:

Background

On January 30, 1980, the Department of Commerce received a petition in satisfactory form on behalf of domestic producers of certain industrial fasteners, alleging that bounties or grants (subsidies) are being provided on the manufacture, production, or exportation of certain industrial fasteners from India. A "Notice of Initiation of Countervailing Duty Investigation" was published in the **Federal Register** on February 25, 1980 (45 FR 12277). A notice of "Preliminary Affirmative Countervailing Duty Determination" was published in the **Federal Register** on April 30, 1980 (45 FR 28786).

On January 1, 1980, Title I of the Trade Agreements Act of 1979 (93 Stat. 150) (the TAA) went into effect. The TAA added Title VII to the Tariff Act of 1930, (the Act) which superseded section 303 of the Tariff Act of 1930 for any country determined to be a "country under the Agreement", as defined in section 701(b) of the Act (19 Stat. 151, 19 U.S.C. 1671(b)). Title I also amended section 303 of the Act (13 U.S.C. 1303) for those countries determined not to be a "country under the Agreement". Subsidy investigations under section 303 are to be conducted in accordance with the provisions of Title VII, with a few exceptions. The only exception of interest in this case is that investigations under section 303 are not to include injury determinations by the International Trade Commission. India is not presently a "country under the Agreement." This case is, therefore, governed by section 303 of the Act. Accordingly, we will not refer this case to the International Trade Commission for a determination of material injury.

The industrial fasteners covered by this Determination enter the United States under the following item numbers of the Tariff Schedules of the United States (TSUS)—646.49, 646.54, 646.56, 646.58, 646.60, and 646.63.

Nature of Industry

The Indian fastener industry is made up primarily of small firms which produce only fasteners. A few firms do produce other similar items. Fastener production is labor intensive. The materials used are, for the most, supplied locally rather than being imported.

Many of the fastener producers export their total production. All exporters of industrial fasteners are required to belong to the Export Engineering Promotion Council (EEPC). Many of the manufacturers also belong to the Trade Development Authority (TDA). Both of these organizations assist in export promotion.

Programs Investigated

The petitioner has alleged that Indian exports of industrial fasteners to the United States receive a variety of subsidies, most of which are direct export subsidies.

The major program involved is a system of cash compensatory supports for exports. Representatives of the Indian exporters have argued that this program should be considered a rebate of indirect taxes which are not otherwise rebated to exporters and, therefore, payments made under it should not be considered subsidies. The other programs investigated are, in terms of the benefit to the exporter, far less significant.

Since the preliminary determination in this case, counsel for the petitioner has requested that the investigation be expanded to cover raw material subsidies, preferential freight rates and a proposed export promotion program. Information presented concerning the alleged raw material subsidies and the proposed export promotion program did not provide a sufficient basis upon which to expand the investigation. If additional information is furnished, we could investigate these programs. We have, however, obtained evidence that preferential freight rates are not available to exporters of fasteners.

Programs Found to be Subsidies

Of the programs investigated, we have determined that the following constitute subsidies within the meaning of the countervailing duty law:

1. *Cash Compensatory Support on Export (CCS)*—The CCS program was introduced in 1966 and, since then, has been revised periodically. The Government of India has stated that the primary—but not exclusive—purpose of the CCS program is to compensate exporters for various indirect taxes paid, and not otherwise rebated, on export. CCS payments are designed to support exports in a manner consistent with the competitive need of Indian producers.

The CCS rate varies depending upon the product exported. It is determined after taking into account the incidence of indirect taxes paid by producers of a particular product and not otherwise refunded, the existence of other disincentives to exports, and the competitive need of the producers. There is no "right" to CCS payments; none are granted even where there are indirect taxes not otherwise rebated if the Government of India decides that the competitive need of a particular industry does not warrant CCS payments.

In the case of fasteners, the CCS rate was established, effective April 1, 1979, at 17.5% of the f.o.b. value of the exported merchandise. In October, 1978, the Ministry of Commerce had requested all Export Promotion Councils, including the EEPC (which represents the fastener industry), to submit updated information on the indirect taxes levied on specific products. The Ministry stated that this information was needed to determine revised CCS payment levels. The CCS rate for fasteners was established after the data on the incidence of indirect tax levels paid by fastener exporters has been reviewed.

The issue presented by the CCS program is clear-cut. Can CCS payments to exporters of fasteners reasonably be considered non-excessive rebates of indirect taxes not otherwise rebated on export? If so, they are not subsidies within the meaning of the countervailing duty law; if not, they are subsidies.

The non-excessive refund of indirect taxes levied on exported products and their components is not a subsidy under rules of General Agreement on Tariffs and Trade (GATT) or the U.S. countervailing duty law. While the TAA limited the use of indirect taxes not rebated on export as *offsets* against the amount of any subsidy found, it did not intend this limitation on the use of offsets to:

"prohibit the administering authority from determining that export payments are not subsidies if those payments are reasonably calculated, are specifically provided as non-excessive rebates of indirect taxes within the meaning of Annex A of the (Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the GATT) and are directly related to the merchandise exported". (Senate Rept. No. 96-249, July 17, 1979 at 84-85).

Thus in determining whether the CCS program is a subsidy, the primary considerations are (1) whether the CCS program operates for the purpose of rebating indirect taxes, (2) whether there is a clear link between eligibility for CCS payments and payment of indirect taxes, and (3) whether the government has reasonably calculated and documented the actual indirect tax incidence borne by exported fasteners and has demonstrated a clear link between such tax incidence and the amount of the CCS payments.

We will not accept *ex post facto* rationalizations of subsidy programs designed to meet these criteria. In this case, the actions of the Indian Government affecting the structure of the CCS program were taken well before the filing of the countervailing duty petition. Accordingly, we have determined that the explanation advanced on behalf of the Indian producers is not an *ex post facto* rationalization of a pre-existing subsidy program.

Counsel for petitioner has argued that a number of factors require the conclusion that, by its very structure, the CCS program cannot be considered a rebate of indirect taxes. Counsel has pointed out that the program is designed to serve objectives other than the rebate of indirect taxes, that CCS payments are not available by right to Indian producers, and that the Ministry which operates the program is not the taxing authority.

We do not believe that any of these points is decisive. What the Indian Government may or may not hope to accomplish from the CCS payments does not determine the nature of the payments. There is nothing contradictory about rebating indirect taxes for the purpose of strengthening export performance. Similarly, the fact that the Government of India reserves the right not to grant CCS payments has no bearing on whether, when made, the payments are or are not indirect tax rebates. Finally, we do not believe that it is appropriate for the Department to determine the character of CCS payments because they are made by one government agency as opposed to another. The question is not how the funds are distributed but whether the payments constitute *bona fide* rebates of indirect taxes.

Our determination in this case turns not on such general arguments, but rather on specific analysis of the relationship between the CCS payments and the incidence of indirect taxes borne by fastener exports. The link between the indirect tax incidence and the CCS payments has not been satisfactorily demonstrated.

We have reviewed data on the actual indirect taxes paid by five producers which export to the United States and which provided the Indian Government with information for purposes of fixing the level of CCS payments. For all but one, the total indirect taxes paid were less than 17.5% of the value of the merchandise. Moreover, these tax calculations included several payments (i.e., payments to an import pool fund, a development surcharge, an engineering goods export assistance fund, a port trust fund, port congestion charges and taxes on electricity and fuel) that we would not consider indirect taxes which may be rebated on export. Thus the CCS program, as it is applied to exporters of industrial fasteners, does not appear to involve indirect tax rebates as much as it does a general export payment which, while undoubtedly compensating in some measure for indirect taxes which were not otherwise rebated, goes well beyond this purpose.

In addition to the difference in incidence of indirect taxes and the level of CCS payments, the manner in which the information on the tax levels was submitted to the Government of India and relied on raises, of itself, certain problems. The Commerce Ministry required the Export Promotion Council governing the fastener sector to submit information relating to its indirect tax burden. Some individual company experiences were provided by the Ministry without an appropriate aggregation (except for one category of fasteners) showing the weighted average tax incidence for the sector as a whole. In order to satisfy the question of whether export payments are made to remit indirect taxes, we would require evidence demonstrating that the tax incidence of any given product sector had been determined quite precisely. In this case, there is no such satisfactory evidence.

Since the Government of India has not satisfactorily demonstrated the requisite linkage between the indirect tax incidence and the level of CCS payments, nor has shown that the actual indirect tax incidence has been reasonably calculated and documented, we have concluded that, in this case, the CCS payments must be considered a subsidy program and have found the amount of subsidy to be 17.5% of the f.o.b. value of the exported merchandise.

2. *Preferential Export Financing*—Packing credit loans are available to exporters of industrial fasteners. These loans have a sliding scale interest rate which varies with the duration of the loan. The interest rate ranges from 11% to 17%. Normal credit terms range from 11% to 18%, with an average interest rate of approximately 15%.

In this case, the Government of India (through the Reserve Bank of India) apparently underwrites the lower interest rate by paying the lending bank an additional 1.5% interest rate without any charge to the exporter. There is a direct transfer of funds to support the loan from the Central Bank to the lending bank.

Accordingly, we have found that packing credit loans involve a subsidy of 0.4% of the f.o.b. value of the exported merchandise.

3. *Tax Deductions*—The GOI has a program which allows for a special income tax deduction for export market development.

The Export Markets Development Allowance provides for a tax deduction of 133% of certain specific expenses. These include expenses incurred both before and after sale. However, commissions normally are not an allowable deduction unless they are tied to other specific expenses. The claims made by the manufacturers for this special deduction normally exceed the amount eventually allowed for deduction by the tax authorities. Final settlement of the tax returns normally takes 2 to 3 years.

Since the expenses allowed under the special deduction would normally be deductible in full, the benefit to the manufacturers would be 33 percent of the allowed amount applied to the corporate tax rate. On this basis, we have determined that exporters of fasteners receive a subsidy under this program in the amount of 0.1% of the f.o.b. value of the exported merchandise.

Programs Not Used by the Exporters

1. *Import Permits*—Indian exporters of galvanized fasteners are eligible to receive automatically permits to import

goods used in the manufacture of such fasteners. The amount which may be imported under a permit is calculated with reference to a fixed percentage of the f.o.b. value of the exported fasteners. The purpose of the program is to allow manufacturers/exporters to replenish their stock of imported inputs. The permits are negotiable. To extent they have a market value, they could confer a special benefit upon the manufacturer/exporter. However, we have found that the permits obtained by the fasteners manufacturers are not resold and thus do not constitute a subsidy within the meaning of section 303 of the Act.

2. *Kandla Free Trade Zone*—The petition alleged that benefits were received by manufacturers or exporters of industrial fasteners based on their location within the Kandla Free Trade Zone. Information has been provided which shows that one company has been given a license to locate in the zone but to date has not produced or exported fasterners from the zone. Thus, there is no question of any benefit that would constitute a subsidy within the meaning of the countervailing duty law.

Programs Found Not to be Subsidies

1. *Tax Deductions for Capital Equipment and New Industrial Undertakings*—The Government of India allows income tax deductions for purchases of new capital equipment and establishment of new industrial enterprises. We have found that these deductions are generally available (i.e., they are not industry or enterprise specific) and therefore have concluded that they are not subsidies as defined in section 771(5) of the Act.

2. *Market Development Assistance*—Under the Market Development Assistance program grants have been provided for export promotion to the Engineering Export Promotion Council (EEPC) and the Trade Development Authority (TDA). These grants have been used by the EEPC and the TDA to operate overseas offices and organize exhibits designed to promote Indian exports generally. Firms which belong to these organizations pay dues which exceed any specific benefits they derive from EEPC and TDA activities. In addition, the firms are billed for all special services such as participation in trade shows, listing in directories, etc. We have, accordingly, decided that such market development assistance does not amount to a subsidy under the countervailing duty law.

Verification

Staff in our Office of Investigations verified the information relied upon in reaching this determination through examination of Government documents, discussions with Government, trade organizations, and corporate officials, and corporate books and records. Examples of the type of documents examined include an official report published by the Ministry of Commerce, announcements of Government programs, letters from banks, ledger sheets, and income tax reports.

Determination

I hereby determine that the Government of India provides bounties or grants (subsidies) within the meaning of section 303 of the Act and that the estimated aggregate net amount of these benefits equals 18.0% of the f.o.b. value of the exported merchandise.

The Department has afforded interested parties an opportunity to present oral views in accordance with § 355.35, Commerce Regulations (19 CFR 353.35, 45 FR 4946). In addition, written views and oral views have been received in accordance with § 355.34(a), Commerce Regulations (19 CFR 355.34(a), 45 FR 4946).

Customs officers are hereby directed to assess within 6 months after the date on which the Secretary of Commerce receives satisfactory information on which the assessment may be based, but in no event later than 12 months after the end of the annual reporting period of the manufacturer or exporter within which the merchandise is entered or withdrawn from warehouse for consumption, countervailing duties on entries of certain fasteners from India on which liquidation was suspended, equal to the amount of the net subsidy determined or estimated to exist. Those entries for which liquidation was previously suspended should be liquidated within six months of publication of this notice.

Effective on the date of publication of this notice in the **Federal Register** and until further notice, deposit of estimated countervailing duties shall be required at the time of entry, or withdrawal from warehouse, for consumption. The amount to be deposited in 18.0% of the f.o.b. value of the merchandise.

Annex III part 353 of the Department of Commerce regulations (19 CFR Part 355) is amended by inserting after the last entry for India the words "certain fasteners" in the column headed "commodity", the **Federal Register** citation of this notice in the column headed "Treasury Decision" and the words "Net Subsidy Declared—Rate" in the column headed "Açtion."

This notice is published pursuant to sections 303 and 706 of the Act (19 U.S.C. 1303, 1671(e)), and § 355.36 of the Department of Commerce regulations (19 CFR 355.36).

Robert E. Herzstein,

Under Secretary for International Trade.

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DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 296

[T.D. ATF-73, Ref: Notice No. 334]

Regulations Relating to the Distribution of Cigarettes

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF).

ACTION: Final rule; Treasury decision.

SUMMARY: This Treasury decision requires each person who distributes more than 60,000 cigarettes in a single transaction to keep suitable commercial records of each disposition of more than 60,000 cigarettes. This rule implements the recordkeeping provisions of Pub. L. 95-575. The Bureau of Alcohol, Tobacco and Firearms feels that records of disposition maintained by persons who distribute more than 60,000 cigarettes in a single transaction would be useful in tracing the movement of contraband cigarettes and would help curtail the illicit traffic of cigarettes between States.

EFFECTIVE DATE: September 19, 1980.

FOR FURTHER INFORMATION CONTACT: Thomas L. Minton, Research and Regulations Branch, 202-566-7626.

SUPPLEMENTARY INFORMATION:

Background Information

On January 15, 1980, ATF published Notice No. 334 in the **Federal Register** (45 FR 2855) which proposed amending 27 CFR Part 296, by adding Subpart F—Distribution of Cigarettes. The purpose of this proposal was to implement the recordkeeping requirements of Pub. L. 95-575.

Interested persons were given until February 29, 1980, to submit relevant data, views, or arguments regarding this proposal. This Treasury decision is the result of that proposal.

Discussion of Regulations

These regulations amend 27 CFR Part 296—Miscellaneous Regulations Relating to Cigars, Cigarettes, and Cigarettee Papers and Tubes by adding a new Subpart F—Distribution of Cigarette. The requirements of this new subpart apply to each distributor of cigarettes. A "distributor" is any person who sells, ships, issues, gives, transfers, or otherwise disposes of more than 60,000 cigarettes in a single transaction. Persons who distribute cigarettes in single transactions consisting of 60,000 or less are not considered a "distributor" under these regulations and are not subject to the requirements of this subpart.

Pub. L. 95–575 makes it unlawful for most persons to purchase, receive, possess, transport, ship, sell or distribute more than 60,000 cigarettes in a single transaction on which the State cigarette tax has not been paid. However, the law does allow certain persons to possess and handle cigarettes on which the State tax has not been paid. These persons are referred to in the regulations as "exempted persons." An exempted person is any person who—

(1) Holds a permit as a manufacturer of tobacco products or as an export warehouse proprietor;

(2) Operates a customs bonded warehouse;

(3) Is an agent for a tobacco products manufacturer, export warehouse proprietor, or customs bonded warehouse operator;

(4) Is a common or contract carrier transporting cigarettes under a proper bill of lading or freight bill which states the quantity, source, and destination of the cigarettes;

(5) Is licensed by the State in which he possesses cigarettes to account for and pay cigarette taxes imposed by that State and who has complied with the accounting and payment requirements with respect to any cigarettes involved;

(6) Is an agent of the United States, an individual State or a political subdivision of a State and who has possession of cigarettes in connection with performance of official duties; or

(7) Operates within a foreign-trade zone established under 19 U.S.C. 81b, when the cigarettes involved have been entered into the zone under zone-restricted status, or in respect to foreign cigarettes, have been admitted into the zone but which have not been entered into the United States.

Each distributor of cigarettes is required to show certain information on commercial records relating to each disposition of more than 60,000 cigarettes. The type of information required to be kept depends on whether the parties involved in the transaction are "exempted persons."

Discussion of Comments

Several written comments were received in response to the notice of proposed rulemaking. Most of the commenters agreed with the objectives of the regulations and were concerned about the detrimental effects which the traffic in contraband cigarettes has had upon the States involved and on the legitimate cigarette industry. Some commenters suggested changes and voiced questions concerning the regulations. A discussion of the comments follows.

Definition of Contraband Cigarettes

One commenter suggested that the definition of "contraband cigarettes" be revised to exclude untax-paid cigarettes used for experimental purposes. Under 26 U.S.C. 5704(a), cigarettes used for experimental purposes are exempt from Federal excise taxes. Section 270.232, 27 CFR, allows, with the prior approval of ATF, the shipment of cigarettes exempt from Federal taxes to research facilities. The commenter felt that these cigarettes would be subject to seizure as contraband and should, therefore, be excluded from the definition of contraband cigarettes.

ATF has decided against modifying the definition of contraband cigarettes for several reasons. First, cigarettes used for experimental purposes cannot be excluded from the contraband cigarette category since the Congress enacted a specific definition of the term "contraband cigarettes."

Further, ATF does not believe that the definition of contraband cigarettes will adversely affect the distribution of cigarettes used for experimental purposes. The exemption of Federal taxes on cigarettes used for experimental purposes is irrelevant to the contraband cigarette definition. Rather, the question of whether cigarettes are contraband revolves on the applicable *State* taxes. Therefore, in States which do not impose a tax on cigarettes used for experimental purposes, these cigarettes cannot be contraband. However, if a State does impose a tax on cigarettes used for experimental purposes, then all applicable State requirements must be complied with prior to disposing of the cigarettes in quantities of more than 60,000 to other than an exempted person.

Definition of Exempted Person

(1) *Agents.* Two commenters suggested that the definition of "exempted person" be broadened to include all employees or representatives who may not be actual agents of a tobacco products manufacturer, export warehouse proprietor or customs bonded warehouse operator but are acting on their behalf. This proposed definition would include operators of private and public warehouses storing cigarettes for a manufacturer and contract distributors of complimentary products.

The category of persons who may possess or handle untaxpaid cigarettes are specifically listed in the law. For this reason, ATF is unable to broaden the definition of "exempted person" to include representatives of manufacturers, export warehouse proprietors, and customs bonded warehouse operators who are not agents of these principals.

However, ATF considers employees acting on behalf of their employers to be agents of their employers. Also, most manufacturers often use public warehouses as their regional distribution facilities. The manufacturer usually stores its cigarettes in the public warehouse for shipment to accounts in the particular region where the warehouse is located. The manufacturer maintains title to the cigarettes and is responsible for the sale of the cigarettes, while the warehouse operator makes disposition of the cigarettes by releasing them for delivery to the customers of the manufacturer as required by the manufacturer. In these cases, the warehouse operator is acting as an agent for the manufacturer and is, therefore, considered an exempted person.

(2) *Government employees.* One commenter felt the regulations should be clarified to include expressly the employees of the Puerto Rican, the District of Columbia, and the Virgin Islands governments as exempted persons in the same category as "State" employees. ATF agrees. Pub. L. 95–575 includes these jurisdictions in the statutory definition of the term "State." ATF fully intended the regulations to include employees of these jurisdictions in the same category as employees of any State. In order to eliminate any confusion over this issue, § 296.143 is changed to include the statutory definition of the term "State." The term "State" is defined in the regulations as, "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands."

(3) *Carriers.* Section 296.143 basically defines a "common or contract carrier" as a carrier holding a valid operating authority under the Interstate Commerce Act, or an equivalent operating authority from a regulatory agency of the United States or of any State.

One commenter stated that some States do not require any operating authority for local for-hire carriers operating within a limited jurisdiction. The commenter stated that these local unregulated dray operators often service the cigarette industry by conveying untaxpaid cigarettes from the manufacturer's distribution facility to the licensed wholesaler. By doing so, however, the unregulated carriers may be in violation of the law by possessing untaxpaid cigarettes since these carriers are not exempted persons. The commenter suggested expanding the definition of common or contact carrier to include local carriers operating within an unregulated jurisdiction in accordance with the laws of that jurisdiction.

The definition of common or contract carrier in § 296.143 parallels the statutory definition in Pub. L. 95–575. The law is specific. The legislative history of the law shows that the Senate bill, the House bill, and the conference committee recommendation intended to limit the independent transportation of untaxpaid cigarettes in quantities of more than 60,000 to regulated carriers. Therefore, the definition of common or contract carrier cannot be expanded. Local unregulated carriers may transport untaxpaid cigarettes only when acting as an agent for a manufacturer of tobacco products, export warehouse proprietor, or customs bonded warehouse operator. However, ATF believes that a local unregulated carrier transporting a manufacturer's untaxpaid cigarettes to the manufacturer's customer in the same state under the manufacturer's invoice would be acting as an agent for the manufacturer in making that delivery.

(4) *Licensed distributors.* One commenter questioned the meaning of the language in the definition of "exempted person" requiring that the distributors licensed by a State account for and pay the applicable State tax. This language states that a licensed cigarette distributor qualifies as an exempted person only when the distributor "has complied" with accounting and payment requirements relating to the State license and with respect to the cigarettes involved.

The commenter felt that because the definition is phrased in the past tense, it could pose a problem for the cigarette distributor who is in compliance with accounting and payment requirements at a specific instant yet has not complied by making actual payment or by making an actual accounting at the moment the licensed person takes possession of the untaxpaid cigarettes. The commenter cited an example where a State may permit a licensed distributor to hold cigarettes without the application of State indicia for a specified period of time after receipt, usually not exceeding 48 hours. Also, the commenter felt that a problem may arise where special circumstances or emergencies may dictate that the compliance requirements of the State cannot be met.

The language in the definition concerning a licensed distributor's compliance with State requirements was adopted from the law. ATF feels that the present language should not pose a problem. The definition does not require a licensed distributor to immediately account for and pay the State tax in order to be an exempted person unless the State requires immediate accounting and payment. The distributor must have complied with the State's accounting and payment *requirements.* If the State's requirements allow a licensed distributor to hold cigarettes before accounting for and paying the applicable taxes, then at any specific instant during the allowed holding period, the distributor has complied with the State's accounting and payment requirements even though the distributor has not yet accounted for or paid the tax.

A similar interpretation applies in cases where an emergency or special circumstance causes a deviation from the normal compliance requirements of the State. Where the State allows a deviation from normal compliance requirements in emergencies or under special circumstances, the distributor has complied if the allowed procedures have been followed. In all cases, the licensed distributor must have complied with all applicable State accounting and payment requirements up to the specific instant in question.

Recordkeeping Requirements

A commenter suggested that a distributor should not be required to maintain records concerning dispositions of cigarettes if the dispositions are carried out on behalf of a tobacco products manufacturer and the manufacturer's records show the required information concerning the dispositions. This commenter also stated that the retention period in § 296.150 was much longer than the period for which these records are normally maintained by public warehouse operators. The commenter felt that the required retention period would place an undue burden on some distributors.

Section 2343(a), 18 U.S.C., places the recordkeeping requirements on "Any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction * * *." Therefore each distributor must meet the recordkeeping requirements for qualifying dispositions. Also, the purpose of the recordkeeping requirement is to assist ATF in tracing the movement of contraband cigarettes. By maintaining disposition records at a location other than the business premises, a possible violator could hamper an investigation.

Section 296.150 requires each distributor to maintain records of disposition for 3 years following the close of the calendar year in which the records are made. ATF feels that this retention period will not normally impose a burden on most distributors. Tax-related records are customarily retained over a period of several years. Further, by allowing disposition records to be discarded shortly after a cigarette disposition is made, ATF would lose an important investigative tool specifically provided for in the authorizing legislation.

However, ATF realizes that situations may arise where a distributor's required records may be duplicated by the tobacco products manufacturer. Therefore a provision has been added to § 296.150 which permits, in certain circumstances, distributors to apply for permission to employ a shorter record retention period. This provision applies where the distributor is an agent of a tobacco products manufacturer, the manufacturer will keep the required record of the distributor's dispositions for the full retention period, and a shorter retention period will not unduly hinder the administration or enforcement of these regulations. Each distributor proposing to employ a shorter retention period must apply to the regional regulatory administrator of the region in which the distributor is located. A definition of "regional regulatory administrator" is added to § 296.143.

Other Comments

(1) *Name of purchaser.* A commenter felt that the requirement to show the full name of the purchaser on records of disposition could cause confusion to distributors in cases where there may not be a purchaser. This confusion could arise where cigarettes are being shipped to research facilities, sampling contractors, or public warehouses for storage until sold. In cases such as these, the recipient is not a purchaser.

ATF agrees that a situation may arise where the recipient is not a purchaser. Therefore, § 296.147(a)(1)(i) is changed to require the name of the recipient of the cigarettes when there is no purchaser. Section 296.147(a)(1)(i) now reads—

"(i) The full name of the purchaser (or the recipient if there is no purchaser);". Also, a parenthetical phrase is added to § 296.147(a)(2)(i) to indicate that the name of the purchaser is not required when there is no purchaser. Section 296.147(a)(2)(i) now reads—

"(i) The full name of the purchaser (if any);".

(2) *Government agencies and instrumentalities.* The government instrumentality which handles cigarettes for sale on military reservations requested specific regulatory language exempting it from the recordkeeping requirements of this subpart.

ATF agrees that government agencies and instrumentalities are exempt from the requirements of this rule. The conference report indicates that Congress has intended the definition of "person" in 1 U.S.C. 1 to apply in this case. Government agencies and instrumentalities are not included in that definition.

Also government agencies and instrumentalities are not included in the definition of "person" in these regulations. Since the regulatory definition of "person" is clear, ATF does not feel that any further specific regulatory language is necessary.

(3) *Government access to records.* One commenter objected to § 296.153(a) which permits any ATF officer to enter the business premises of any cigarette distributor to inspect the records required by these regulations pursuant to either an administrative inspection warrant or a criminal search warrant. The commenter felt that this rule was an "attempt by regulations to change the statutory requirements for a 'search warrant' into a regulatory requirement for an 'administrative inspection warrant.' "

Public Law 95–575 authorizes ATF officers, as agents of the Secretary of Treasury, to enter a distributor's premises upon that distributor's consent or in accordance with a "duly issued search warrant." There is no specific mention of an administrative inspection warrant in the law itself. The legislative history of both the Senate bill, S. 1487, and the House bill, H.R. 8853, indicate that the search warrant requirement was intended to bring the law in line with the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S.C. 307 (1978), wherein the Court set out guidelines for the use of administrative inspection warrants. *See Senate Rep. No. 95–962*, 95th Cong., 2d Sess. 18 (1978); and *H.R. Rep. No. 95–1629*, 95th Cong., 2d Sess. 8 (1978). Therefore, these regulations reflect the Congressional intent by authorizing the use of an administrative inspection warrant.

(4) *Splitting dispositions.* The Departments of the Revenue of two States submitted comments concerning the language in § 296.146 relating to a cigarette distributor dividing a single agreement for the disposition of more than 60,000 cigarettes into the delivery of smaller components of 60,000 cigarettes in order to avoid the recordkeeping requirements of this rule.

One state tax commissioner stated that experience based on the results of a recent joint investigation conducted with ATF, indicates that the splitting of cigarette dispositions by distributors is currently being practiced to remove shipments of cigarettes from the jurisdiction of Pub. L. 95–575. A representative of the other State tax agency questioned the language of § 296.146 and asked for clarification of "what constitutes evidence of a distributor's intent to split cigarette dispositions to avoid the regulatory recordkeeping requirements?".

The regulations do not preclude a distributor from dividing a single agreement for the disposition of more than 60,000 cigarettes into smaller components of 60,000 cigarettes or less; however, the distributor must record the required information for each component of the agreement. If a distributor fails to keep the required records for each component of an agreement for the disposition of more than 60,000 cigarettes, the distributor would be in violation of the regulations. The word "agreement" is a term of art in the field of contract law, particularly under the uniform Commercial Code, and is susceptible to a uniform application by the courts. Even so, ATF cannot make a general or universal statement of what constitutes evidence of a distributor's intent to avoid the regulatory requirements of this rule. The evidence indicating any violation of the requirements cannot be defined outside the context of a particular case.

(5) *Forfeitures.* A commenter requested that specific provisions be implemented which would allow the affected State to recover lost revenue through the resale of contraband seized in accordance with these regulations.

While the affected State may be allowed through its concurrent jurisdiction to seize contraband involved in a violation of State tax laws, contraband seized by ATF for a violation of 18 U.S.C. Chapter 114 must be disposed of in accordance with 27 CFR Part 72—Disposition of Seized Personal Property. Section 2344(c), 18 U.S.C., does not require that the seizure of contraband subject to seizure and forfeiture under both State and Federal law be accomplished under the Federal statute. Nevertheless, regulatory language permitting the automatic transfer of property seized by ATF to the affected State is not authorized.

Changes in the Final Rule

The following changes are made in the final rule:

(1) Definitions of "state" and "regional regulatory administrator" are added to § 296.143.

(2) Sections 296.147(a)(1)(i) and 296.147(a)(2)(i) are changed to clarify the recordkeeping requirements where the recipient of the cigarettes may not be the purchaser.

(3) A provision permitting, a distributor, in certain circumstances, to retain the required records for a shorter retention period is added to § 296.150.

Drafting Information

The principal author of this document is Thomas L. Minton of the Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms.

Authority

This Treasury decision is issued under the authority of 18 U.S.C. 2346.

Regulations

On the basis of the foregoing, 27 CFR Part 296 is amended as follows:

PART 296—MISCELLANEOUS REGULATIONS RELATING TO CIGARS, CIGARETTES, AND CIGARETTE PAPERS AND TUBES

1. The table of sections in 27 CFR Part 296 is amended to include the addition of a new Subpart F as follows:

* * * * *

Subpart F—Distribution of Cigarettes

General

* * * * *

2. Part 296, 27 CFR, is amended by the addition of Subpart F—Distribution of Cigarettes. Subpart F reads as follows:

Subpart F—Distribution of Cigarettes

Authority: 18 U.S.C. 2341–2346, unless otherwise noted.

General

§ 296.141 Scope of subpart.

The regulations in this subpart relate to the distribution of cigarettes in excess of 60,000 in a single transaction.

§ 296.142 Territorial extent.

The provisions of the regulations in this subpart apply in the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

§ 296.143 Meaning of terms.

When used in this subpart, terms are defined as follows in this section. Words in the plural shall include the singular, and vice versa. Words indicating the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not named which are in the same general class or are otherwise within the scope of the term defined.

ATF officer. An officer or employee of the Bureau of Alcohol, Tobacco and Firearms (ATF) authorized to perform any function relating to the administration or enforcement of this subpart.

Business premises. When used with respect to a distributor, the property on which the cigarettes are kept or stored. The business premises includes the property where the records of a distributor are kept.

Common or contract carrier. A carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under the Interstate Commerce Act, or under equivalent operating authority from a regulatory agency of the United States or of any State.

Contraband cigarettes. Any quantity of cigarettes in excess of 60,000, if—

(a) The cigarettes bear no evidence of the payment of applicable State cigarette taxes in the State where the cigarettes are found;

(b) The State in which the cigarettes are found requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes; and

(c) The cigarettes are in the possession of any person other than an exempted person.

Disposition. The movement of cigarettes from a person's business premises, wherever situated, by shipment or other means of distribution.

Distribute. To sell, ship, issue, give, transfer, or otherwise dispose of.

Distributor. Any person who distributes more than 60,000 cigarettes in a single transaction.

Exempted person. Any person who is—

(a) Holding a permit issued pursuant to Chapter 52 of the Internal Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor;

(b) Operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555);

(c) An agent of a tobacco products manufacturer, an export warehouse proprietor, or an operator of a customs bonded warehouse;

(d) A common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of the cigarettes;

(e) Licensed or otherwise authorized by the State, in which he possesses cigarettes, to account for and pay cigarette taxes imposed by that State; and who has complied with the accounting and payment requirements relating to his license or authorization with respect to the cigarettes involved; or

(f) An agent of the United States, of an individual State, or of a political subdivision of a State and having possession of cigarettes in connection with the performance of official duties.

(g) Operating within a foreign-trade zone established under 19 U.S.C., section 81b, when the cigarettes involved have been entered into the zone under zone-restricted status or, in respect to foreign cigarettes, have been admitted into the zone but have not been entered in the United States.

Person. Any individual, corporation, company, association, firm, partnership, society, or joint stock company.

Regional Regulatory Administrator. The regional official in charge of regulatory enforcement.

State. A State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands.

Records

§ 296.146 General requirements.

Each distributor of cigarettes shall keep copies of invoices, bills of lading, or other suitable commercial records relating to each disposition of more than 60,000 cigarettes. Dividing a single agreement for the disposition of more than 60,000 cigarettes into the delivery of smaller components of 60,000 cigarettes or less does not exempt the distributor from the recordkeeping requirements of this subpart. The distributor shall include the information prescribed in § 296.147 in his commercial records of disposition.

§ 296.147 Required information.

(a) *Distributors who are exempted persons.* Each distributor who is an exempted person as defined in § 296.143 shall show the following information in his commercial records.

(1) For each disposition of more than 60,000 cigarettes to an exempted person; or for each disposition of more than 60,000 cigarettes to a person who is not an exempted person and which is delivered by the distributor to the recipient's place of business, the distributor shall show on dated records—

(i) The full name of the purchaser (or the recipient if there is no purchaser);

(ii) The street address (including city and state) to which the cigarettes are destined; and

(iii) The quantity of cigarettes disposed of.

(2) For each disposition of more than 60,000 cigarettes, other than the dispositions specified in paragraph (a)(1) of this section, the distributor shall show on dated records—

(i) The full name of the purchaser (if any);

(ii) The name, address (including city and state), and signature of the person receiving the cigarettes;

(iii) The street address (including city and state) to which the cigarettes are destined;

(iv) The quantity of cigarettes disposed of;

(v) The driver's license number of the individual receiving the cigarettes;

(vi) The license number of the vehicle in which the cigarettes are removed from the distributor's business premises;

(vii) A declaration by the individual receiving the cigarettes of the specific purpose of receipt (such as personal use, resale, delivery to another person, etc.); and

(viii) A declaration by the person receiving the cigarettes of the name and address of his principal when he is acting as an agent.

(b) *Distributors who are not exempted persons.* Each distributor who is not an exempted person as defined in § 296.143 shall show on dated commercial records the information specified in paragraphs (a)(2)(i)—(a)(2)(viii) of this section for each disposition of more than 60,000 cigarettes.

§ 296.150 Retention of records.

(a) *General.* Each distributor of cigarettes shall retain the records required by §§ 296.146 and 296.147 for three years following the close of the year in which the records are made. The distributor shall keep the required records on his business premises.

(b) *Shorter retention periods.* The regional regulatory administrator may, pursuant to an application submitted by a distributor, approve a shorter retention period where—

(1) The distributor requesting the shorter retention period is an agent of a tobacco products manufacturer;

(2) The tobacco products manufacturer will keep the required record for each disposition of more than 60,000 cigarettes from the agent's premises for the full retention period specified in paragraph (a) of this section; and

(3) The approval of a shorter retention period will not unduly hinder the administration of enforcement of this subpart.

(c) *Application requirements.* Each distributor proposing to employ a shorter retention period shall submit a written application, in duplicate, to the regional regulatory administrator of the region in which the distributor is located. A distributor may not employ a shorter retention period until approval is received from the regional regulatory administrator. Each application should indicate the duration of the proposed retention period and should include the information required by paragraph (b) of this section.

Other Provisions Relating to the Distribution of Cigarettes

§ 296.153 Authority of ATF officers to enter business premises.

Any ATF officer may enter the business premises of any distributor of cigarettes to inspect the records required by §§ 296.146–296.147 or to inspect any cigarettes stored on the premises—

(a) Pursuant to duly issued search warrant or an administrative inspection warrant; or

(b) Upon the consent of the distributor to enter his premises.

Penalties and Forfeitures

§ 296.154 Penalties.

(a) Any person who knowingly ships, transports, receives, possesses, sells, distributes, or purchases contraband cigarettes shall be fined not more than $100,000 or imprisoned not more than five years, or both.

(b) Any person who knowingly violates any regulation contained in this subpart or makes any false statement or misrepresentation with respect to the information required to be recorded by this subpart shall be fined not more than $5,000 or imprisoned not more than three years, or both.

§ 296.155 Forfeitures.

(a) Any contraband cigarettes involved in any violation of the provisions of 18 U.S.C. Chapter 114 shall be subject to seizure and forfeiture. All provisions of the Internal Revenue Code of 1954 (Title 26 U.S.C.) relating to the seizure, forfeiture, and disposition of firearms, as defined in § 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures of contraband cigarettes under the provisions of 18 U.S.C. Chapter 114.

(b) Any vessel, vehicle or aircraft used to transport, carry, convey, or conceal or possess any contraband cigarettes with respect to which there has been committed any violation of any provision of 18 U.S.C. Chapter 114 or the regulations in this subpart shall be subject to seizure and forfeiture under the Customs laws, as provided by the Act of August 9, 1939 (49 U.S.C. 781–788).

(18 U.S.C. 2344; 53 Stat. 1291 (49 U.S.C. 782))

Signed: May 23, 1980.

Stephen E. Higgins,
Acting Director.

Approved: July 10, 1980.

Richard J. Davis,
Assistant Secretary (Enforcement and Operations).

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1601

Procedural Regulations

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim rule with request for comments.

SUMMARY: The Equal Employment Opportunity Commission is publishing revisions to its procedural regulations §§ 1601.21 (b) and (d) and 1601.28(d). They are effective immediately. They are, however, interim pending receipt of comments by the public. The procedural regulations § 1601.21 (b) and (d) currently provide that the Commission may reconsider a previously issued determination, but when it does reconsider, it need only provide prompt notification of its *decision.* The Commission is amending its procedural regulations, among other things, to provide for notice of the Commission's intent to reconsider previously issued determinations of reasonable cause or of dismissals of charges. The revisions provide that the Commission or its designated officer may reconsider a dismissal of a charge under Title VII of the Civil Rights Act of 1964, as amended, at any time and that issuance of a notice of intent to reconsider will always vacate the dismissal and will revoke a previously issued notice of right to sue in certain instances. These revisions apply to charges of discrimination filed by private sector employees and public sector employees. The revisions further provide that the Commission or its designated officer may reconsider a determination finding reasonable cause to believe a charge is true at any time in cases involving private sector employees. However, the Commission or its designated officer will not reconsider a determination of reasonable cause previously issued against a government, governmental entity or political subdivision after a failure of conciliation as set forth in § 1601.25. After a failure of conciliation in cases involving a public respondent, the Commission takes no further action and refers the case to the Attorney General.

The Commission amends § 1601.28(d) to reflect the interpretation of § 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, adopted in *Shea* v. *City of St. Paul,* 601 F.2d 345 (8th Cir. 1979) and *DeMatteis* v. *Eastman Kodak Company,* 511 F.2d 306, modified 520 F.2d 409 (2d Cir., 1975), which hold that notice of the dismissal of a charge constitutes notice of final administrative action and of the right to sue. Henceforth in all cases where the respondent is a government, governmental agency, or a political subdivision, the notice of dismissal issued by the Commission will include the notice of right to sue. Because the present state of the law threatens the rights of thousands of charging parties to a determination of their rights on the merits, the regulations are being adopted on an interim basis pending receipt of comments.

DATES: Effective July 21, 1980. Comments on the interim regulations must be received on or before August 20, 1980. The Commission proposes to consider the submissions for a period of at least ten days thereafter before adopting any final regulations.

ADDRESSES: Interested persons are invited to submit written comments regarding the revisions to Marie Wilson, Executive Secretariat, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. Copies of the comments submitted by the public will be