

## **CLAIMS FOR LIQUIDATED DAMAGES; AMENDED GUIDELINES FOR THE ACCEPTANCE OF UNTIMELY PETITIONS AND MITIGATION OF CLAIMS**

In 1994, the U.S. Customs and Border Protection (CBP) mitigation guidelines governing the late or untimely (CBP uses the terms interchangeably) filing of petitions in liquidated damages claims were published in Treasury Decision (T.D.) 94-38 (see 28 Cust. B. & Dec. 428), and were updated and amended in 2002 by T.D. 02-20 (see 36 Cust. B. & Dec. 97). The late petition mitigation guidelines were promulgated to encourage settlement of liquidated damages claims prior to litigation by allowing the filing of petitions after regulatory time frames had expired but before legal collection action had begun. The most favorable mitigation terms were offered to those who timely filed a petition for relief. Consideration or acceptance of late-filed petitions was at the discretion of the Fines, Penalties, and Forfeitures (FP&F) Officer at the port where the claim was issued and the petition was filed. Over time, CBP saw an increase in untimely filed petitions. Accordingly, CBP amended its mitigation guidelines again through the publication of CBP Decision (CBP Dec.) 13-1 on January 9, 2013 (see 47 Cust. B. & Dec. 1). Through CBP Dec. 13-1, CBP amended the mitigation guidelines to limit the time period and circumstances in which late petitions are considered or accepted. CBP also chose to change the formula through which late petition mitigation is calculated. The text below is based on the guidelines in CBP Dec. 13-1 and applies only to petitions for relief and does not apply to offers in compromise submitted pursuant to section 1617 of Title 19, United States Code (19 U.S.C. § 1617), and section 161.5 of Title 19, Code of Federal Regulations (19 CFR 161.5).

Although CBP is not required to grant relief in any specific case, CBP may reference these guidelines when deciding whether to grant relief in a specific case and, if CBP deems that relief is appropriate, to determine the mitigation, remission, or cancellation amount. CBP reviews the specific facts and circumstances of each case individually and may deviate from these guidelines if CBP determines that such deviation is appropriate. Pursuant to 19 U.S.C. §§ 1618 and 1623, as well as other applicable regulatory authorities, duly authorized CBP officials are entitled to grant relief under such terms and conditions as they deem appropriate, sufficient, reasonable and/or just.

### **I. Regulatory Deadlines for Timely Petitions**

- A. Under existing regulatory authority, in order to be considered timely, petitions for relief in response to claims for liquidated damages must be filed:
  - 1. By bond principals within 60 days from the date of mailing of the notice of liquidated damages (see 19 CFR 172.3(b)) or any lawful extension thereof; or
  - 2. By sureties within 60 days of the demand for payment by CBP (see 19 CFR 172.4) or any lawful extension thereof.

- B. When circumstances so warrant, extensions of the time period to file a petition may be granted by the FP&F Officer (FPFO) if such an extension of time is requested during the 60-day period available for timely filing a petition (see 19 CFR 172.3(c)).

## II. Mitigation Guidelines Concerning Untimely Petitions

- A. Untimely petitions will be accepted or considered only if the petitioner is able to demonstrate the existence of extraordinary circumstances that prevented the petitioner from filing a timely petition or timely seeking a lawful extension of time in which to file a petition. Extraordinary circumstances may include some intervening event beyond the petitioner's control resulting in a justifiable inability to timely address or respond to the claim. The FPFO will exercise his or her discretion in determining whether circumstances existed so as to warrant CBP's consideration or acceptance of a late petition.
- B. Subject to the exception noted below, no untimely petition will be accepted in any circumstance if it is filed:
  1. More than 180 days after the date of mailing of the notice of claim to the bond principal, or in the case of a surety, the date of mailing of the first demand on surety;
  2. After the petitioner has previously submitted a petition in the same case and/or been offered mitigation in the same case, and such mitigation amount was not paid within the prescribed period;
  3. After the claim has been referred to Office of Chief Counsel for collection action;
  4. After the commencement of sanctioning action against the bond principal; or
  5. After the issuance of a notice to show cause against a surety.

*Exception:* Irrespective of extraordinary circumstances, untimely petitions for relief of liquidated damages claims issued for: (1) the late filing of an entry summary; (2) the late payment of estimated duties (including late payment of duties under the periodic monthly statement test); (3) the late payment of passenger processing fees; or (4) late filing or late payment of reconciliation entries may be accepted without regard to the limitations expressed in paragraphs 1 and 2 above at any time prior to the circumstances described in paragraphs 3 through 5 above.

- C. An untimely petition is not a supplemental petition described in 19 CFR 172.41. A supplemental petition, as described in 19 CFR 172.41, must be timely filed following a decision on an original petition filed in accordance with the established regulatory time frames. The rejection of an untimely petition does not constitute a “decision” for purposes of 19 CFR 172.41.
- D. Petitions that are filed untimely and are not accepted for consideration will be rejected. A party responsible for a liquidated damages claim may submit an offer in compromise to CBP pursuant to 19 U.S.C. § 1617 and 19 CFR 161.5.

### III. Calculation of Mitigated Amounts Pursuant to Late Petitions

- A. In calculating the mitigated amount on a late petition, CBP will first determine the base amount (*i.e.*, the amount of mitigation that would have been afforded on a timely petition or the previously available option one amount). CBP will then determine the “additional mitigation amount” by multiplying the full assessed amount of the claim by 0.1 percent (.001) and then multiply by the number of days the petition is late (*i.e.*, .001 times the number of days late times the full assessed claim amount.) The product will be the additional amount which will be added to the base amount to produce the mitigated amount applied to the untimely filed petition. In no case will the additional mitigated amount to be added to the base amount be less than \$400. [Mitigated Amount = base amount + (full assessed amount of claim times .001 times number of days petition is late)].

For example, a \$100,000 liquidated damages claim for which a petition is filed 30 days late will be mitigated to the amount provided by the guidelines plus an additional amount calculated by the new formula (30 days late x .001 = .03 x 100,000 = \$3,000 added charge.)

- B. Exception for certain violations. For untimely petitions submitted in response to a claim for liquidated damages for: (1) the late filing of an entry summary; (2) the late payment of estimated duties (including late payment of duties under the periodic monthly statement test); (3) late payment of passenger processing fees; or (4) late filing or late payment of reconciliation entries, the additional mitigated amount calculation will not use the actual liquidated damages assessed amount as described above. Rather the calculation will be based upon an “assessed amount” (for mitigation purposes only) of double the duties, taxes and fees or \$1,000, whichever is greater. In all cases, the minimum additional mitigated amount will be no less than \$400.

CBP will determine the “additional mitigation amount” in mitigation of these claims by multiplying two times the duties, taxes and fees (or \$1,000) due in payment by 0.1 percent (.001) and then multiply by the number of days

the petition is late (i.e., .001 times the number of days late times the “assessed amount,” as referenced above.)

For example, a late summary filing liquidated damages claim for which a petition is filed 30 days late and for which the summary had \$25,000 in estimated duties, taxes and fees will be mitigated to the amount provided by the guidelines plus an additional amount calculated by the new formula (30 days late x .001 = .03 x 50,000 [an amount equal to double the duties, taxes and fees] = \$1,500 added charge.)