

“The Chief Executive’s Discretion”— sections 109, 110, and 170 of the Customs and Excise Act 2018

Interpretation Statement

Introduction

1. Duty is imposed by Parliament. There is no general power to dispense with the imposition or collection of duty except under the specific provisions in the legislation that apply at the time.¹
2. Historically, “[t]he granting of authority for the raising and spending of public moneys is one of the original functions of Westminster Parliament.”² This same authority was held by the Privy Council to extend to the New Zealand Parliament, in respect of New Zealand.³
3. Successive Governments have imposed greater responsibility on departments (including the New Zealand Customs Service) for efficient and effective management of public financial resources.⁴ The duty system requires duty payers to self-assess their liability. However, the chief executive of Customs will make assessments when duty payers do not comply with their legal obligations, as well as amending assessments to ensure their correctness where necessary. Voluntary self-assessment enables Customs to allocate resources to areas where that is most required.
4. Under the Customs and Excise Act 2018 (the 2018 Act), the chief executive and every Customs officer, has the responsibility to use their best endeavours to protect the integrity of the system for assessing and collecting duty.⁵ In relation to the collection

¹ *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [144] to [145] (“*Terminals (CA)*”) applying *Attorney-General v Steelfort Engineering Company Limited* (1999) 1 NZCC 55-005 (CA). Terminals’ appeal to the Supreme Court was dismissed: *Terminals (NZ) Limited v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121. Section 22(a) of the Constitution Act 1986 states that it shall not be lawful for the Crown, except by or under an Act of Parliament to levy a tax (which also covers a duty as another form of Crown revenue).

² PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 314.

³ *Auckland Harbour Board v R* [1924] AC 318 (PC) at 326.

⁴ Purpose provisions are at: State Sector Act 1988, s 1A; and Public Finance Act 1989, s 1A.

⁵ Customs and Excise Act 2018, ss 109.

of duty the chief executive has an obligation to collect over time the highest net revenue that is practicable within the law.⁶

5. Many of the mechanisms available to the chief executive under the Act to assess and collect duty are framed as discretionary powers. This recognises that any decision on assessing and collecting duty may not be for the absolute correct amount, but result from what is the best information available at the time. Remission or refund of additional duty allows the interests of justice to temper the harshness of automatically penalising late payment if there are circumstances it is considered reasonable and fair to take into account to enable consistent treatment of persons in materially similar circumstances to apply as far as possible. However any discretion available in exercising these powers must be construed relatively narrowly given the general obligation to assess and collect duty.
6. Maintaining the integrity of the duty system is important because the voluntary compliance of duty payers is central to successfully collecting duty. The obligation to collect duty is not absolute – Customs officers are only required to take steps that are practicable and lawful. They are required to have regard to resources available and to compliance costs incurred by duty payers. The experience, knowledge and judgment of the chief executive and Customs officers is important in exercising managerial responsibilities.⁷
7. This document discusses the legal and policy basis for the exercise of the chief executive’s discretion; and how it has been adapted from similar legislation and case law for the purposes of the Customs’ legislation. It is designed to provide guidance to internal and external stakeholders about how it is anticipated the discretion will be exercised.

Background

8. Before the 2018 Act came into force, the scope of the chief executive’s discretion around the assessment and collection of duty, including what considerations could or should be taken into account in entering into a settlement or compromise, was not clear as the legislation had been drafted. This resulted in costly and time-consuming litigation for Customs and the affected businesses.⁸ There was the potential for inconsistency, and a lack of transparency in applying the duty regime.

⁶ Section 110.

⁷ See *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18,583 at [44] to [67], and [71] to [73]. discussing ss 6 and 6A of the Tax Administration Act 1994; and referred to with approval in *Russell v Commissioner of Inland Revenue* [2015] NZCA 351, (2015) 27 NZTC 22-018 at [30].

⁸ *Attorney-General v Steelfort Engineering Co Ltd* (1999) 1 NZCC 55-004; *Rothschild Properties Ltd v New Zealand Customs Service* (No 2) (2006) 1 NZCC 55-032; *Terminals (CA)* see note 1 above.

9. The 2018 Act includes new administrative mechanisms to assist the effective and efficient operation of the duty system. This includes providing the chief executive of Customs with flexibility and discretion in making and correcting assessments; and when collecting duty. The considerations specified in ss 109 and 110 of the 2018 Act are also relevant when settlement proposals are put before the chief executive - for example, if a duty assessment or decision on collecting liability may need to be revised, including in the event of a dispute.
10. Sections 109 and 110 align the regime for the collection of duty as closely as possible with the position that applies under ss 6 and 6A of the Tax Administration Act 1994. It was considered desirable in general (both for duty payers and for the Crown), for the assessment and collection of Crown revenue to be carried out as consistently as possible.⁹

Previous Legislative Position

11. Under the Customs and Excise Act 1996 (the 1996 Act), there was no equivalent of sections 109 and 110 of the 2018 Act. It was not clear on the face of the 1996 Act what the chief executive could and could not do when administering the duty system.
12. The leading guidance concerning the chief executive's discretion was the decision of the Court of Appeal in *Attorney-General v Steelfort Engineering Company Ltd*.¹⁰ There the Court stated that under the Customs Act 1966 (the 1966 Act) there was no absolute obligation to assess and collect duty. It was possible to dispense with the requirement to collect duty, if very small amounts of duty were owed, but the collection of that duty would be uneconomic. However, the discretion did not amount to a dispensing power. The Court expressed the view that where the question of liability for duty is genuinely a matter of dispute, it may be appropriate to enter into a compromise or settlement, foregoing all or part of the claimed duty.
13. In *Rothschild Properties Ltd v New Zealand Customs Service (No 2)*¹¹ the High Court determined that s 88(2) of the 1996 Act- which provides that if the chief executive has reasonable cause to suspect that duty is payable but an entry has not been made - did not allow a discretion around assessment including the rate of duty payable.

⁹ As a consequence of the lack of flexibility in the tax system, amendments to the Tax Administration Act 1994 were made to better reflect the reality of a modern tax administration. Before section 6A(2) [care and management of taxes] and (3) [collection of taxes] were enacted, the Inland Revenue Acts required the Commissioner of Inland Revenue to collect all taxes owing (except de minimis amounts) regardless of the costs and resources involved.⁹ This was an unrealistic obligation, so ss 6 and 6A were enacted to provide the Commissioner with managerial discretion around using independent statutory powers in a cost-effective manner.

¹⁰ *Attorney-General v Steelfort Engineering Company Ltd* (1999) 1 NZCC 55-004.

¹¹ *Rothschild Properties Ltd v New Zealand Customs Service (No 2)* (2006) 1 NZCC 55-032.

14. The Court of Appeal in *Comptroller of Customs v Terminals (NZ) Ltd*¹² stated that the 1996 Act contained a number of sections that conferred a discretion upon the chief executive in relation to the collection of excise duty. Nevertheless the Court was satisfied that the chief executive had a “general duty to levy and collect” duty. That did not “preclude sensible compromise where appropriate”, but endorsed the observations in *Steelfort*, that there was no “general power to dispense with the imposition or collection of duty” except for when that was provided for in specific provisions. The discretion conferred under s 88(2) of the 1996 Act was “much closer to a mandatory obligation in the circumstances in which it applies rather than to a discretionary power”. That is because when the chief executive makes an assessment (if the duty payer has omitted to) absolute accuracy may not be possible. The assessment needs to be in such amount as the chief executive thinks “proper” based on the rates of duty ordinarily payable.

The Customs and Excise Act 2018 – sections 109, 110 and 170

15. Sections 109, 110, and 170 of the 2018 Act impose various responsibilities on the chief executive related to the assessment and collection of duty, including additional duty. While the 2018 Act provides that the primary obligation is to collect over time the highest net revenue from duty that is practicable within the law (s 110(2)), the chief executive is also required to protect the integrity of the system for assessing and collecting duty. These provisions recognise that it is in the public interest to ensure that duty obligations are met in an efficient way; and to protect the integrity of the duty system.

Section 109

16. Section 109 provides that the chief executive, and every Customs officer, when exercising functions under the 2018 Act or any other enactment, must at all times use their “best endeavours” to protect the “integrity of the system for assessing and collecting duty”.

17. Section 109(2) identifies factors that may assist with establishing what is needed to protect the integrity of the system for assessing and collecting duty.¹³ It states that, “[w]ithout limiting its meaning, **the integrity of the system for assessing and collecting duty** includes—

- (a) duty payers’ perceptions of that integrity; and
- (b) duty payers’ rights to have their liabilities for duty determined fairly, impartially, and according to law; and
- (c) duty payers’ rights to have their individual affairs kept confidential and treated with no greater or lesser favour than the affairs of other duty payers; and

¹² *Terminals (CA)*, note 1 above.

¹³ Section 109(2) is materially identical to the definition of “the integrity of the tax system” in s (2) of the Tax Administration Act.

- (d) duty payers' responsibilities to comply with the law; and
- (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of duty payers; and
- (f) the responsibilities of those administering the law to do so fairly, impartially; and according to law.'

18. Importantly, s 109(2) is not intended to be an exhaustive list of factors. Other matters that may also contribute to protecting the integrity of the duty system may be considered. Nor does s 109(2) prioritise one factor over any other. This means that different factors may be more or less important depending on the facts and circumstances of the particular case.

19. The Court of Appeal has said (in the related context of protecting the integrity of the tax system) that this is an aspirational standard; and that will result from determining "liability on a transaction according to law".¹⁴

Section 110

20. Section 110(1) of the 2018 Act requires that the chief executive must secure the collection, over time, of the highest net revenue from duty that is practicable within the law. This obligation prevails over any other provision of the 2018 Act or any other enactment.¹⁵ However, it is not an absolute obligation, ie, the chief executive may decide that on the facts of the case there are sound reasons justifying why the full amount of duty and additional duty should not be assessed or collected.

21. In carrying out this obligation the chief executive is required to have regard to each of the five mandatory relevant considerations at (a) to (e):

- the resources available to the chief executive; and
- the importance of promoting compliance, especially voluntary compliance, by all duty payers with the Act and any other enactment relating to any duty; and
- the compliance costs incurred by duty payers; and
- the objectives of imposing any duty; and
- Customs' other responsibilities and the resources needed to fulfil those other responsibilities.

22. However, it may be that there are additional factors that the chief executive considers (in the circumstances) should be taken into account.

¹⁴ See *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276, [2016] 3 NZLR 303 at [31] and [29].

¹⁵ Section 110(2).

How the chief executive will secure the highest net revenue

Resources available to the chief executive

23. This consideration recognises that the number of transactions to which duty applies continues to increase; and the chief executive has limited resources, which need to be used efficiently and effectively in administering the duty system. Limited resources may refer to staffing, time required to assess and enforce collection of duty, as well as the cost of pursuing duty compared to the amount likely to be returned. In deciding how to exercise the discretion under s 110 to collect the highest net revenue, the chief executive will assess the costs and impact on resources of pursuing collection of the duty from a non-compliant duty payer, compared to whether pursuing the duty will cost more than the amount outstanding, and whether Customs' resources are more effectively applied elsewhere. Risk analysis may inform priorities and target inquiries or investigations. Decisions may need to be made around the nature and extent of investigation undertaken to quantify liability and to pursue recovery. The chief executive is not to maximise collection of duty if to do so would result in an ineffective use of resources.

The importance of promoting compliance, especially voluntary compliance, by all duty payers with the Act and any other enactment relating to any duty

24. The New Zealand duty system relies on a system of voluntary compliance, with duty payers calculating themselves the amount they are liable to pay; with appropriate enforcement action being taken in the event of non-compliance. This approach is necessary to ensure that duty payers comply with their obligations; otherwise the system will be perceived as lacking integrity and imposing an unfair burden on those who conscientiously meet their obligations. It is also important for a system that relies on voluntary compliance for the chief executive to be seen to be acting fairly in what is taken into account and in how the discretion is exercised. In this way, over time the highest net amount of duty will be collected.

Compliance costs incurred by duty payer

25. Compliance costs are incurred by duty payers in meeting their obligations under the duty system and associated laws and regulations; and there are costs associated with administering the duty system. If compliance costs are excessive, net revenue collected may decrease as the costs associated may become too great for many duty payers. However, this factor does not mean there will be no costs for duty payers associated with ensuring compliance with the duty system.

Objectives of imposing any duty

26. The chief executive collects Customs duties on goods imported into, or in some cases domestically manufactured in, New Zealand. The statutory definition of 'duty' is broad and includes taxes, duties, levies and charges imposed under a range of different enactments. The statutory objectives for imposing the particular duty, tax, levy or charge may vary and may be taken into account by the chief executive when exercising powers of assessment, collection and recovery.

Customs' other responsibilities and the resources needed to fulfil those other responsibilities

27. The chief executive has a range of responsibilities under the relevant legislation that relate to the movement of craft, goods and persons arriving and departing New Zealand, and the maintenance of border security. Many of these responsibilities do not relate to the assessment and collection of duty.
28. The fifth factor gives the chief executive the discretion to consider other factors that may impact Customs' wider obligations and responsibilities as an organisation. This is a considerably greater discretionary power that can be used to determine whether to take a particular action, and how that will affect other commitments and obligations that Customs' may have.
29. Section 110 requires the chief executive to consider a number of options when determining how to secure the collection, over time, of the highest net revenue from duty that is practicable within the law. The various factors contained in section 110(1) mean that the chief executive has the ability to consider individual cases based on the circumstances to ensure a fair and equitable duty system is maintained.

Section 170 – Interest and penalties

30. Under section 170, the chief executive may remit or refund any interest or penalty payable under subpart 7 as long as they are satisfied that it is consistent with the general obligation to secure the highest net revenue over time under section 110.
31. When determining whether to remit or refund any interest or penalty there are two mandatory considerations the chief executive must have regard to:
- The effect interest and penalties have on ensuring people comply with their obligations under the duty system; and penalise those who have not met their obligations; and
 - The financial position of the person required to pay the interest or penalty cannot be taken into account.
32. When considering whether to remit or refund interest or penalties, the chief executive must always weigh this against the obligation of collecting the highest net revenue. The financial position of the person by whom the interest or penalty is payable may not be taken into account because everyone is required to meet their legal obligations; and someone who has not done so, must not benefit from that.

What do sections 109, 110, and 170 permit?

33. While sections 109, 110, and 170 require the chief executive to collect the highest net duty over time, they do not require that all duty is collected regardless of the costs and resources involved. Instead the chief executive has the duty to maximise the net revenue collected over time. Sections 109, 110, and 170 may authorise the chief executive to act inconsistently with the rest of the Customs and Excise legislation only to the extent they require the collection of the full amount of duty. Sections 109, 110, and 170 do not permit the chief executive to act inconsistently with any other legislation or constitutional obligations and constraints. The chief executive cannot:
- disregard the requirements for the lawful exercise of powers and discretions conferred by other provisions;
 - alter duty payers' obligations and entitlements;
 - issue extra-statutory concessions;
 - administratively remedy legislative errors and other deficiencies; or
 - interpret provisions other than in accordance with statutory interpretation principles contained in the Interpretation Act 1999 and court decisions.

Dispute Resolution and Settlement

34. The Court of Appeal in the *Steelfort* case considered that the chief executive had an administrative power to settle or enter into a compromise in a dispute including exercising managerial judgment about the extent to which liability may be owed (as a matter of law), or (as a matter of practice) could be collected. That was despite the customs legislation at the time containing no provisions equivalent to ss 6 and 6A of the TAA.¹⁶ The 2018 Act has further clarified the position through enacting ss 109, 110 and 170.

35. In deciding whether to enter into a settlement or compromise, factors similar to those that the Commissioner of Inland Revenue takes into account may be relevant (depending on the circumstances of the particular case). They are not intended to be exhaustive or mandatory, but to act as a guide to what would usually be considered relevant when exercising a discretion properly.

- the resources required to undertake litigation;
- the alternative uses of those resources;
- the amount of the liability in dispute;
- an assessment of the litigation risk (eg, the likelihood of the chief executive succeeding);
- the implications of the chief executive succeeding (in whole or part) if litigation is undertaken;
- whether settling or litigating would better promote compliance, especially voluntary compliance, by all duty payers;
- the amount the duty payer would pay in the event of settlement;
- whether the subject matter of the dispute might be determinative of, or have broader application to, other situations;
- whether the chief executive would be prepared to settle on an equivalent basis with other duty payers in a similar position;
- the uncertainty in the duty system that might be created should the subject matter not be authoritatively determined by the courts; and
- the likely effects on the perception of duty payers about the integrity of the duty system in the event of settling or litigating.

36. As a regulator with public duties, the chief executive cannot treat the matter simply as would a commercial party. Public interest considerations (that are not necessarily relevant to ordinary litigants) will need to be considered, eg, the need to promote

¹⁶ At [13] – [24].

compliance with the statutory regime, the need to clarify disputed points of law, the need to ensure fairness and consistency between different users of the customs and excise regime and the public at large.

Examples

37. We have sought to provide below some examples to illustrate how the discretion might be applied in practice. As discussed above, there is no general power to dispense with the assessment or collection of duty; and, the chief executive's primary obligation is to collect over time the highest net revenue from duty that is practicable within the law. However, applying the mandatory relevant considerations in s 110(1), and using best endeavours to protect the integrity of the system for assessing and collecting duty (including having regard to the factors in s 109(2)), nevertheless the chief executive has the ability to exercise the discretion in appropriate circumstances.
38. To keep the examples simple, so that it is easy to understand the points they are trying to illustrate, although those principles apply to each example, we do not repeat them. Nor are all of the factors that could be relevant discussed in relation to each example.

Example One – Industry practice

39. The chief executive determines that a certain class of goods arriving on international craft are liable to duty and must be entered. Widespread industry practice has been to treat these goods as exempt from entry and no duty assessments have been made in respect of these goods for a considerable period of time. Where the person liable has omitted to make entries quantifying the duty they are liable to pay, the chief executive has the power to assess the duty owing. The legislation does not limit the period such an assessment can cover. Some importers have maintained records for much longer than required by the Act.
40. The chief executive is required to make any assessment she considers to be correct in law. Even though potentially some companies have information that might allow the chief executive to go further back in forming the view necessary to make an assessment, is she required to do so? Given the primary obligation is the collection of the highest net revenue, that seems likely to occur if the highest assessment has been made. However, older or less information, may mean that the chief executive is less certain that the amount of duty she is quantifying is correct. Therefore, it may be that the chief executive would consider she should exercise the discretion restricting the assessments to be made to a date range that covers all of the affected duty payers., so

as to ensure that duty payers who had voluntarily maintained records were not subject to greater liability than those who had not.

41. It is necessary to consider how the mandatory relevant considerations under s 110(1) apply. Action of this nature would require less resources than would be needed if an audit of all impacted duty-payers was undertaken covering the whole of that period. However, a smaller sum of duty would be recovered. Treating all duty payers in the same way might be considered more likely to positively affect voluntary compliance. Other factors that might be relevant include, that compliance costs for the duty payers would be minimised if they only had to retrieve documentation related to the 7-year period, which is likely to be more easily obtainable. If there is a genuine dispute about whether the liability is owed, despite the fact that might result in increased compliance costs for duty payers, it could be in the public interest to have the issue determined by a court. The objectives of imposing the duty might be considered to be met through all industry participants being treated consistently and for reasons considered to be justifiable. How applying significant resources to investigate this issue fits when viewed against Customs' other responsibilities is another operational consideration.
42. The chief executive would also need to consider how such action would affect the integrity of the system for assessing and collecting duty under s 109. In the particular circumstances that apply, are other duty payers (outside the industry) who have complied with their obligations, and paid the whole amount of duty they owe within the timeframes required, likely to consider action of that nature to be fair? Is it likely that would have a negative effect on how likely they are to continue complying with the law in the future?

Example Two – outstanding debt from company that ceased trading

43. Customs identifies that a small excise licensee has an outstanding debt of \$500. Further inquiries determine that it has ceased trading and has no realistic prospect of being able to pay this. The cost of initiating a debt recovery process would exceed the amount of money owed.
44. The discretion could engage here in relation to the efficiency and effectiveness of duty-collection and the resources available to the chief executive. The chief executive might consider that, despite the importance of promoting compliance with the Act (as required by s 110(1)(b)), it would not be practicable to seek to recover the outstanding debt. The resources available to the chief executive are limited; and those resources could be better utilised elsewhere, eg, enforcing recovery of debt from solvent

companies or in complying with other obligations Customs has under the legislation (section 110(1)(a), (d) and (e)).

Example Three – Incorrect advice from Customs

45. A duty payer has relied on incorrect advice they have received from Customs. A duty payer rings the Customs' call centre to ask whether a specific transaction is subject to GST and/or tariff duty. The call centre advised the duty payer that the transaction was not subject to tariff duty but was subject to GST. The duty payer based her assessment on this advice. Later, after auditing the duty payer, Customs becomes aware of the transaction and concludes that the duty payer is required to pay tariff duty on it. The duty payer informs Customs of the advice she received from the call centre, and asks that she not be reassessed because she relied on this advice. Can the chief executive decide not to amend the duty payer's self-assessed liability?
46. Tariff duty is imposed by statute so the chief executive is required to amend the assessment to include that (as the liability is certain and easily ascertained). Nevertheless the chief executive might consider whether under ss 110(1) and s 109 there are grounds for not recovering the whole amount assessed, eg, because the unpaid amount is small, and the resources required to collect that (both in time and cost) could be better applied elsewhere.

Example Four – different assessments

47. Company A, which operates a winery, imports 1000 litres of spirits for manufacturing fortified wine. On importation they classify these spirits as for further manufacture and assess their liability to excise-equivalent duty as nil. During a later audit of wineries in the area Customs determines that the classification used by Company A on importation was incorrect and that the spirits should have had excise-equivalent duties paid on importation, with credits claimed later if the spirits were eventually used in the manufacture of fortified wine. Company A submits an amendment of its original assessment that would pay some, but not all, of the excise-equivalent duty payable. The Chief Executive considers the proposed amendment to be incorrect and assesses all excise-equivalent duties payable on importation. Company A objects to this approach and claims that Company B, a competitor who was also recently audited, was not assessed in circumstances that had some similar features, and that Company A should be assessed in a manner consistent with Company B.
48. The Chief Executive is required to evaluate the correctness of the original assessment and Company A's proposed amendment. How the Chief Executive has treated Company B is not relevant to this exercise under the discretion provisions.

Example Five – Settling litigation

49. X Ltd proposes to Customs that a duty dispute set down for a Customs Appeal Authority hearing be settled on the basis that X Ltd pays an agreed proportion of the duty assessed as being due. Would it be a valid exercise of the balancing of factors under section 110 for the chief executive to settle on this basis?
50. It will depend upon the circumstances. The chief executive could settle with the duty payer if she considers that doing so is consistent with the considerations contained in s 110. Factors such as those referred to in paragraph [35] above will be considered in reaching a decision.
51. However, there may be circumstances where, in order to preserve the integrity of the duty system and promote compliance by other duty payers, the chief executive will be justified in refusing an offer, eg, if a duty payer has previously failed to comply with their obligations and only a relatively minor proportion of the overall debt would be recovered.¹⁷ Also, the chief executive must be prepared to settle on the same basis with others who are in materially similar circumstances.

¹⁷ See *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18,583 (HC).