STANDARD INTERPRETATION GUIDELINE 2018-13

CUSTOMS ACT – AMENDMENT OF ASSESSMENT - RECOVERY OF DUTIES

This Standard Interpretation Guideline (SIG) sets out Fiji Revenue and Customs Service's (FRCS) policy and operational practice in relation to amendment of assessments and recovery of duty under the Customs Act 1986 (Customs Act).

It is issued with the authority of the Chief Executive Officer (CEO) of FRCS who is also the Comptroller of Customs

All legislative references in this SIG are to the Customs Act 1986 (unless otherwise stated).

This SIG is in effect from 26 July 2018 and may need to be reviewed in the event of any relevant legislative amendments.

CONTENTS

EXECUTIVE SUMMARY

1. The Chief Executive Officer (CEO) of Fiji Revenue and Customs Service (FRCS) has powers to amend assessments and recover any unpaid duty, charge, penalty or fees due and payable under the Customs Act.

2. The authority to assess duty under the Customs laws is found in section 34A of the Customs Act. The assessment is made when an entry[1] for a good or a claim for refund or drawback in respect of goods is made.

3. FRCS has powers to amend assessments of duty paid by a trader if the CEO is satisfied that the initial assessment which is usually based on self-assessment was incorrect.

4. The need for an amendment of an assessment may arise as a result of an investigation or an audit carried out under the provisions of the Customs Act. The powers to amend a customs assessment and recover duty is found in section 101A of the Customs Act.

5. Section 95 of the Customs Act empowers the CEO to recover any unpaid duty as per the initial self-assessment or the amended assessment under section 101A of the Customs Act 1986 within one year from when the correct duty is payable.

6. This SIG is aimed at providing clarity on CEO's interpretation and application of the powers to assess and recover duty together with his or her powers to issue amended assessments.

INTRODUCTION

7. Customs Duty is a tariff or tax imposed on goods when transported across international borders. The purpose of Customs Duty is to protect each country's economy, residents, jobs, environment, etc., by controlling the flow of goods, especially restrictive and prohibited goods, into and out of the country[2].

8. It is important that the correct duty with any associated charges or penalties is paid by the trader for the related import or export.

9. Section 95 of the Customs Act provides FRCS the powers to recover the correct amount of duty, charge or penalty payable by the trader if the same is unpaid within one year from when it is payable

10. An important point that is relevant in the jurisdiction of Fiji is that duty is payable and assessed on a self-assessment basis whereby the trader (declarant) is authorized to assess the amount of duty payable on the import or export.[3]

[1] A entry is made under section 30 of the Customs Act
[2] www.cbp.gov
[3] Section 34A of Customs Act

11. While a self-assessment regime is practiced in Fiji, FRCS reserves the right to verify and assess the correct amount of duty payable through risk profiling (red/green/yellow and blue lane lodgment) audits, inspections and investigation[4].

12. Imported goods may be stored in bonded warehouses whereby the goods remain under the custody and control of FRCS.

13. Once a declaration is made by the trader, an assessment for the duty is raised under section 34A of the Customs Act. Following the assessment and payment of duty by the trader, the goods are released from customs control.

14. FRCS may discover errors in the declaration by the trader or in the assessment of duties and taxes which would have resulted in a short payment. The errors may be inadvertent or unintentional or it may be a result of a fraudulent attempt to evade payment of duty. Common examples include incorrect classification, incorrect tariff rates, under valuation etc.

15. FRCS must correct such errors and amend the assessment to remedy the amount short paid together with any applicable penalties or charges under section 101A of the Customs Act. FRCS may verify from relevant client and brokers responsible prior to any amendment under section 101A of the Customs Act

16. Once the correct amount of duty has been determined, the same is recovered under section 95 of the Customs Act. Section 95 empowers the CEO with the necessary tools for recovery.

17. This SIG aims to provide a comprehensive analysis on the discussion above with the aim of clearly setting out FRCS's interpretation and application of the relevant laws.

18. Any reference to "trader" in this SIG refers to an exporter, importer and/or licensee in a collective manner

19. Any reference to Comptroller of Customs in this SIG refers to CEO of FRCS and vice versa.

LEGISLATIVE ANALYSIS

Amendment of Assessment under the Customs Act

20. Every trader is required to keep business records and other prescribed necessary information for at least seven years[5]. This information must be made available to the CEO of FRCS as and when required[6].

[4] Inspection should be done with emphasis towards HS code while conducting any inspection to avoid any dispute with other relevant Customs official that might result in any short payment notice issued for that matter. This will impact paragraph 29 of the SIG
[5] Section 114A(1) of Customs Act , amended by Act 37 of 2017
[6] Section 114A(3) of Customs Act

21. As highlighted earlier, FRCS may conduct inquires[7] or conduct an audit or an investigation on the business records of a trader under section 114B of the Customs Act. These audits or investigations may be a result of random sampling, risk profiling, identification of anomalies in declarations made or other reasons.

22. Section 114B of the Customs Act allows FRCS officers to examine records of a trader going back 5 years[8]. This time line has been solidified by the case law of *Finest Liquor (Fiji) Limited v Fiji Revenue and Customs Authority* No 6 of 2013 where the Resident Magistrate Mr. Andrew See stated:

> "…The suggestion that otherwise the revision period was only 12 months would also fly against the clear requirement that is Section 114B of this Act, making sure that the importers customs records are available for a period of five years, presumably on the basis that the importer's assessment may otherwise be incorrect"

23. While the Customs Act allows FRCS to amend customs assessment of duty going back 5 years once the correct duty has been determined, the CEO is of the view that this power should be used in a fair and just manner.

24. The CEO is appreciative of the fact that there are traders who are compliant or try to comply but do not always succeed. This may be due to inadvertent or unintentional errors on the part of the trader who were acting in good faith. In such cases, the CEO holds that FRCS will only go back 2 years to amend assessments where the shortfall had resulted from inadvertent errors.

    It is unlikely that FRCS may impose a penalty on the shortfall, but in exceptional circumstances a nominal penalty may be imposed to act as a deterrent. Any application of penalties by the CEO in this case would not exceed 10% of the maximum penalty prescribed in section 137 of the Customs Act. This issue may be addressed in another SIG on Customs Penalties.

    This application is of course, subject to some exceptions which is addressed below (paragraph 30).

25. This position is solidified in the case law of *ABC Holdings (Pty) Ltd v The Commissioner for the South African Revenue Service, Case number ITI13772*. In this case the court concluded from dictionary meanings that a

    "bona fide inadvertent error has to be an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive".

    Subsequently, on the facts of the matter, the court found that there was no doubt that the taxpayer had acted in good faith and with no intention to deceive. It further noted that the taxpayer had relied on an opinion provided by a tax practitioner and the advice of its external accountant. These factors assisted the court in concluding that the taxpayer acted in good faith, with no intention to deceive. Accordingly, the court held that the understatement penalty must be remitted[9].

[7] Section 109(B) of Customs Act
[8] Aligned to the time frame for keeping customs records under section 114A
[9] https://www.schoemanlaw.co.za/wp-content/uploads/2017/11/ST-Website-article-Nov-2017.pdf

26. In the event of an inadvertent error, FRCS may still examine the records of the trader going back 5 years under section 114B of the Customs Act, to determine whether there have been other errors of a similar nature or of any other nature.

27. In contrast, there are traders who decide not to comply or do not want to comply. These traders may engage in fraudulent practices to reduce or evade the duty payable. For these traders, the CEO will impose the full force of the law and go back 5 years to amend any customs assessments to recover the correct amount of duty.

28. The diagram below demonstrates the rationale for CEO's position and application of the powers to amend assessments under the Customs Act:

The diagram above illustrates that if a trader decides not to comply, FRCS will use the full force of the law, while those who do not want to comply will face enforcement through audit and investigation.

If a trader tries to comply but does not always succeed, FRCS will provide the support and assistance required, while a trader who is willing to do the right thing will find that FRCS had made business facilitation simple and easy to comply.

29. In order to determine whether a short payment has resulted from an inadvertent error it is important to determine that there was no intent by the trader which resulted in the shortfall of duty. In order to do so, the following factors are taken into consideration:

    a. Is this the first time the trader has made an error? *A penalty may be imposed if it is the second offence by the trader.*

b. The length of time the trader has been in the business of importing or exporting. If a trader has been importing or exporting for short period of time it can be inferred that the expectation that the trader should have been aware of the correct tariff classification and the correct duty payable would be low.

c. The value of the transaction. If a high value transaction is involved it can be inferred that the trader should have been more careful and have taken reasonable steps to determine the correct tariff classification and the correct duty payable.

d. The degree of co-operation between the trader and FRCS during the audit or investigation stage.

e. The presence of contributory factors where the initial incorrect declarations were accepted by FRCS and no amendments or corrections were made in a timely manner.

It is noted that the factors listed above are not exhaustive or conclusive and are not a definitive means of determining whether there was intent. However, these factors or combination of factors may assist the CEO in arriving to a conclusion in regards to the same.

30. In some circumstances the CEO may go back more than 2 years but not exceeding 5 years to amend assessments for inadvertent errors. These are specifically for cases where it would be in the interest of the public to amend assessments and collect the correct duty payable.

    These may include scenarios where a trader has enjoyed an unfair advantage amongst competitors because of the short paid duty even though the short payment had resulted from an inadvertent error. This also includes errors that has resulted in a significant short payment of duty.

    The discretion to apply this exception rests with the CEO of FRCS.

31. FRCS may in the course of the audit or investigation uncover that the shortfall in payment of duty was a result of fraudulent practices including smuggling of goods. This is where the intent to defraud FRCS could be determined.

    Where it can be determined that there is a fraudulent aspect to an import or export, FRCS may go back 5 years to amend assessments. Relevant penalties and prosecution would apply as well.

32. Once the correct duty, charge, fee or penalty has been determined under section 101A of the Customs Act, FRCS is required to notify the trader of the amended assessment including the basis of the amendment and where relevant the provisions of the law[10].

33. If the trader is not satisfied with the decision of the CEO in relation to the amended assessment, the person may appeal to the Court of Review[11] within 15 days after the date on which the notice of amended assessment was given.

[10] Section 101A(2)
[11] Established and administered under Part 23 of the Customs Act

Recovery of Duty

34. A trader who is issued a notice of amended assessment must pay the correct amount of duty as per the notice to FRCS. Section 101A allows the recovery of the correct duty as per the amended assessment.

35. The CEO is empowered under section 95 of the Customs Act to demand the payment of the correct duty at any time within one year from the date when such duty, charge, penalty or fee, should have been paid, that is the date of the notice of amended assessment.

    Section 95 is relevant when the duty payment required under the Customs laws (including section 101A) remains unpaid within one year from when it is due.

36. In some circumstances the correct amount of duty may be assessable by the Court of Review. This is especially relevant when the trader who is not satisfied with the decision of the CEO in relation to the amended assessment appeals to the Court of Review. As demonstrated in the case of *Finest Liquor (Fiji) Limited v Fiji Revenue and Customs Authority* No 6 of 2013:

> "The language of Section 95 having regards to its location following section 94, that deals with arbitrated disputes within the courts would give this section, a meaning for recovery of duties where a court has determined the "correct amount".

37. The CEO also has the following tools available to recover the correct amount of duty:
    a. The CEO may impose a lien on goods imported or entered for export while stored in a bonded warehouse or in the custody of FRCS in the manner specified in Section 95A1(1)[12];
    b. A departure prohibition order may be imposed on the trader[13];
    c. A garnishee order may be issued in accordance with section 95B of the Customs Act;
    d. The CEO may recover the duty in a court of competent jurisdiction, ideally through a civil suit[14]; and
    e. Any other powers bestowed on the CEO through the Customs Act or Regulations.

Examples

38. John imports a power generator from China for $1500 which includes freight and insurance. He makes the relevant customs entry through a customs agent and pays duty on it accordingly. The goods are released from FRCS control once duty on the declaration has been paid.
    The correct duty payable at time of import is:

Fiscal Duty	Import Excise Duty	VAT
32%	5%	9%
$480	$75	$184.95
Total Duty Payable: $739.95		

[12] Section 95(2)
[13] Section 95(4) in accordance with section 143(C) of Customs Act
[14] Section 95(1)(d)

Situation 1
John had imported the items on 1st November 2015. This was his first import. He was advised by a customs agent that the applicable fiscal duty should be 5%

This import entry and declaration is accepted by FRCS and goods are released.

FRCS conducts an audit in the records of John in August 2018 and determines that John in his entry incorrectly assesses and pays fiscal duty of 5% instead of 32%.

CEO's position
John is a first time importer and this was the first time John had made such an error. There is no evidence to suggest that the error made by John was intentional as he relied on the advice of the customs agent. FRCS has also accepted the import entry and released the goods once duty on the entry was paid.

Therefore, FRCS in exercise of its discretion will limit itself from going back 2 years only to amend assessment under section 101A of Customs Act. As the importation is outside the 2-year period, FRCS will not amend its assessment to recover the correct duty payable.

Situation 2
John had imported items on 1st November 2015.He was advised by an agent that the applicable fiscal duty should be 5%. This import entry or declaration is accepted by FRCS and goods released after the payment of duty.

FRCS conduct an audit in 2018 on the records of John and determined that John in the entry incorrectly assessed and pays a fiscal duty of 5% instead of 32%.

John disputed the amended assessment and lodge an application for tariff ruling to FRCS. FRCS assessed the application and issue a ruling that the goods in dispute should subject to 32% fiscal duty.

CEO's position
CEO will use the factors of Paragraph 29 to make a decision on whether to go forward from the date of the ruling or going back 2 years from the date of the ruling or a maximum of 5 years from the date of the ruling.

Situation 3
John had imported the items on 1 November 2015. This was his third import of similar items.

FRCS conducts an audit in the records of John and determines that in his declaration he had provided an invoice for $1000 although the item was valued at $1500 (including freight and insurance) and duty was paid on $1000 only.

The first two imports had correct valuation and import entries.

This import entry (third import) and declaration is accepted by FRCS and goods are released.

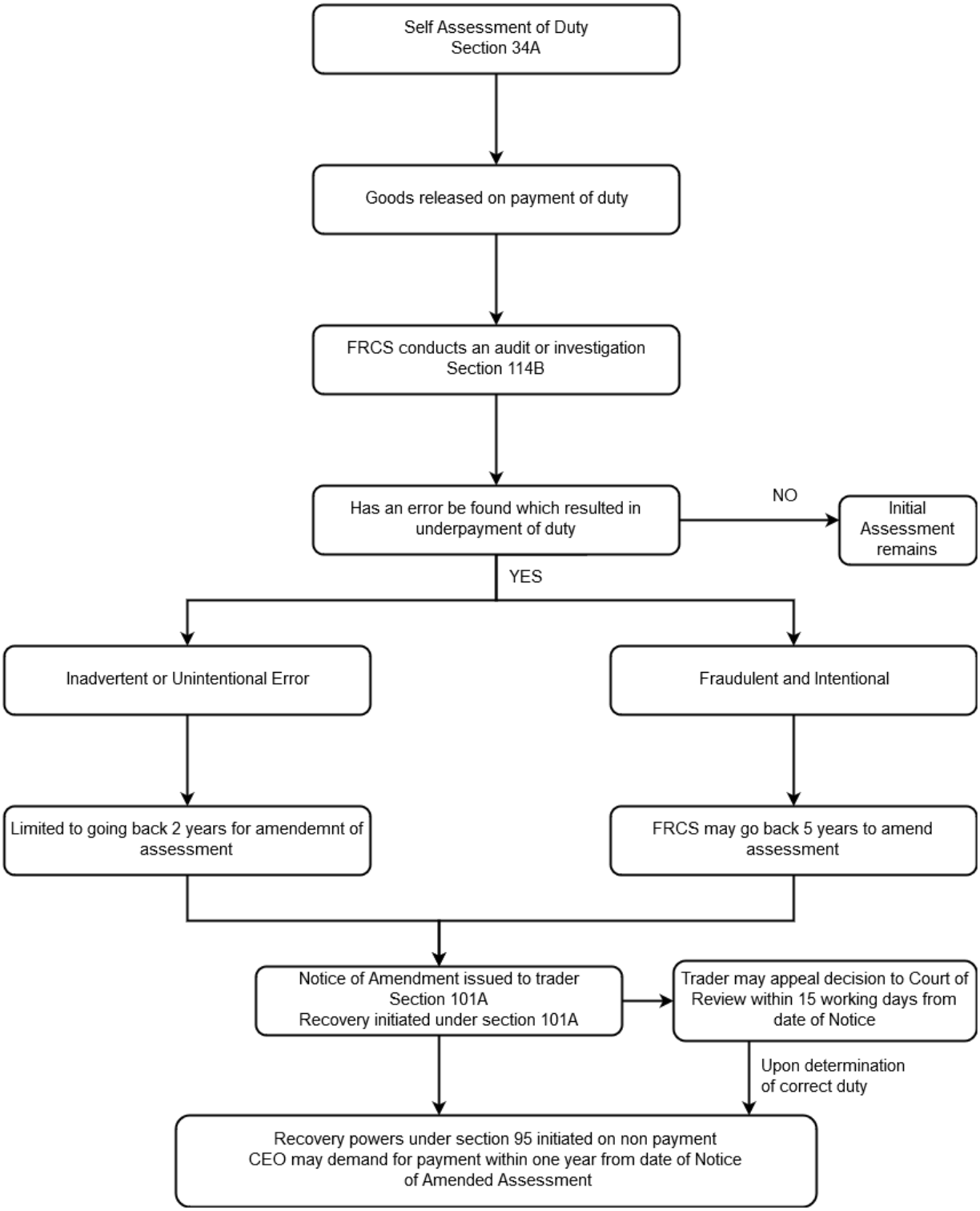
CEOs Position

John has imported similar items previously and should be expected to know the correct tariff on the same. It is also established that John had presented falsified invoices which had resulted in incorrect assessment of duty

It can be easily determined that John had intent to undervalue his imported items to pay reduced and incorrect duty. FRCS in its discretion will go back 5 years to amend assessment and recover correct duty. The initial assessment is within the 5 years, therefore, FRCS will amend assessment with appropriate penalties and charges and recover the same under section 95 of the Customs Act if the correct amount is unpaid.

For further information, please email us on tipu@frcs.org.fj

APPENDIX ONE: FLOWCHART - AMENDMENT OF ASSESSMENT AND RECOVERY OF DUTY



APPENDIX TWO: LEGISLATION

[CUS 34A] Assessment and payment of duty

34A.— (1) An entry for goods or a claim for refund or drawback in respect of goods made under this Act is deemed to be an assessment by the importer, exporter or licensee, as the case may be, as to the duty payable or refundable in respect of those goods.

(2) The Comptroller may approve a person who is required to pay any duty, fee, charge or penalty under the customs laws to pay the duty, fee, charge or penalty by electronic transfer of funds.

[CUS 95] Recovery of duties

95.—(1) The correct amount of any duty, charge or fee due and payable under this Act—

a) may be demanded by the Comptroller at any time within one year from the date when such duty, charge or fee should have been paid;
b) shall constitute a debt payable to the Government;
c) is payable by the importer or exporter, as the case may be; and
d) is recoverable in a court of competent jurisdiction in the name of the Comptroller.

(2) Any goods at whatever time imported or entered for export shall, while stored in a bonded warehouse or otherwise in the custody of the Customs and belonging to the importer or exporter, be subject to a lien for the said debt and may be detained in the manner specified in Section 95A1.

(3) The owner, director, partners and shareholders shall be held personally responsible for payment of correct amount of any duty, charge, penalty or fees due and payable under this Act

(4) The Comptroller may execute section 143C of this Act

(5) Any duty recoverable under this section shall have priority over all claims of whatsoever nature upon the said goods.

(6) Any duty, charge, penalty or fee payable by an importer or exporter under this Act is a charge upon the real of personal property of the importer or exporter and shall be dealt with in accordance with section 28 of the Tax Administration Act 2009, as the case may be.

(7) The Comptroller may determine the manner in which the property under subsection (6) is to be disposed.

[CUS 95A1] Dealing with goods subject to lien

95A1 (1) For any good subject to a lien under section 95(2), the Comptroller may detain the goods and recover the debt within a period as the Comptroller may consider reasonable having regard to the condition of the goods.

(2) If the Comptroller is unable to recover the debt due within the specified time stated in subsection (2), for any goods subject to a lien, the Comptroller may determine the manner in which the goods are to be disposed.

[CUS 95B] Garnishee Order

95B. (1) In this section "payer" means a person who –

a) owes money to an importer;
b) holds money, for or on account of, an importer;
c) holds money, for a joint account of, an importer, with a spouse or another party;
d) holds money on account of some other person for payment to an importer or has authority from some other person to pay money to an importer; or
e) holds money that is deposited to the credit of an importer and includes money held in a joint bank account in the name of the importer and one or more other person, provided the source of income is determined to be the income of the importer.

(2) This section applies if an importer is liable to pay duty and the –

(a) duty has not been paid by the importer by the due date for payment; or

(b) Comptroller has reasonable grounds to believe that the importer will not pay the assessed duty by the due date for payment.

(3) If this section applies, the Commissioner may, by notice in writing, require a payer in respect of the importer to pay the amount specified in the notice to the Comptroller, being an amount that does not exceed the amount of duty that has not been paid or the amount that the Comptroller believes will not be paid by the due date.

(4)_ The notice in subsection 3 shall remain effective for a period of 12 months from the date of issue. (5) A payer must pay the amount specified in the notice under subsection (2) by the date specified in the notice, being a date that is not before the date that the amount owed by the importer becomes due to the importer or held on the importer's behalf.

(6) If a notice served under subsection (3) requires a payer to deduct amounts from a pension, salary, wages or other remuneration payable at fixed intervals to the importer, the amount required to be deducted by the payer from each payment must not exceed 20% of the amount of each payment of pension, salary, wages or other remuneration.

(7) Subject to subsection (6), if a notice served under subsection (3) requires a payer who holds monies in accordance with subsection (1)(c), the payer must deduct the payment of duty specified in the notice, from the income of the importer liable to pay duty owed.

(8) If a payer served with a notice under subsection (3) is unable to comply with the notice, the person must notify the Comptroller, in writing within 14 consecutive days after receipt of the notice, setting out the reasons for the importer's inability to comply.

(9) If a notice served on the Comptroller under subsection (8), the Comptroller may, by notice

in writing –

a) accept the notification and cancel or amend the notice issued under subsection (3); or
b) reject the notification.

(10) A payer or the payer's representative is precluded from appealing the decision of the Comptroller

under subsection (9).

(11) The Comptroller, must, by notice in writing to the payer, revoke or amend a notice served under subsection (3) if the importer has paid the whole or part of the duty due or has made an arrangement satisfactory to the Comptroller for payment of duty.

(12) A copy of the notice served on a payer under this section must be served on the importer.

(13) An amount deducted from the payment by a payer pursuant to a notice served on a payer under this section is held by the payer in trust for the State.

(14) A payer making a payment under this section is treated as acting under the authority of the importer and of any other persons concerned and is hereby indemnified in respect of the payment.

(15) A payer who, without reasonable cause, fails to comply with a notice under this section is personally liable for the amount specified in the notice.

[CUS 101A] Power to amend assessments of duty made by importers, exporters or licensees

101A. (1) If the Comptroller is satisfied, as a result of an investigation or audit carried out under section 114B or for any other reason, that an assessment of duty payable or refundable made by an importer, exporter or licensee contravenes the customs laws or is for any other reason incorrect, the Comptroller may amend the assessment and demand for and recover any short-paid duty.

(2) Notice in writing must be given to the importer, exporter or licensee of—

a) an amended assessment made under subsection (1); and
b) the basis for the amended assessment, and where applicable, the relevant provision of any written law.

(3) Subsection (1) applies whether or not the goods have been released from the control of the Fiji Revenue and Customs Authority and whether or not any duty assessed has been paid.

(4) An importer, exporter or licensee who is dissatisfied with a decision of the Comptroller under this section may, within 15 working days after the date on which notice of the decision was given, appeal the decision to the Court of Review.

[CUS 114A] Keeping of business records

114A.—(1) Every licensee, importer, and exporter must keep or cause to be kept in Fiji in the English language all business records and other prescribed information needed to enable an officer to be satisfied as to the correctness and completeness of the particulars shown in any entry or claim lodged with Fiji Revenue and Customs Authority

(2) The business records and other prescribed information kept under sub section (1) must be kept for at least 5 years.

(3) Every licensee, importer and exporter must, when required by an officer—

a) make the records and the prescribed information kept under subsection (1) available to the Fiji Revenue and Customs Authority;
b) provide copies of the records and the prescribed information as required; and
c) answer any questions relating to matters arising under this Act asked by an officer in respect of them.

(4) If, for the purposes of complying with subsection (2), information is recorded or stored by means of an electronic or other device, the licensee, importer or exporter, or an agent of the licensee, importer or exporter must, at the request of an officer, operate the device, or cause it to be operated, to make the information available to the officer.

[CUS 114B] Powers of officers to examine business records

114B. If a person has exported, imported, warehoused, removed from a warehouse or transhipped any goods or has made a claim for refund or drawback dealing with part or all of the goods, an officer may—

a) at all reasonable times within 5 years after the entry has been lodged or the claim for refund or drawback of duty has been made, for the purpose of this section enter and remain on the premises in which the records required under section 114A(1) are kept;
b) have full and free access, at all reasonable times, to any relevant business document or other accounting book, record, report or document kept on the premises; and
c) inspect, examine, make copies of, or take extracts from, any such document, book, record or report,

for the purpose of verifying any information provided to the Fiji Revenue and Customs Service and being satisfied that all entries, forms and declarations relating to the goods are an accurate and complete record of the matters required to be reported on.