

# Customs Boot Camp Session III:

## Customs Valuation

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# About your Speakers



## CINDY DELEON

Before forming Deleon Trade, Cindy served for 12 years as a Senior Auditor and Assistant Field Director of U.S. Customs and Border Protection's Regulatory Audit Division in Chicago.

While working at U.S. Customs she conducted and supervised multiple focused assessment audits, quick response audits, fraud investigations, free trade agreement reviews, drawback audits, NAFTA audits, and prior disclosure reviews of Fortune 500 and midsize companies.

In addition, she designed and led the mentoring and recruiting programs for the Chicago field office and conducted advanced training sessions on technical audit issues and special trade program audits.

Additional information about Ms. Deleon and Deleon Trade is located at <http://www.deleon-trade.com/>

## GEORGE TUTTLE

George Tuttle is an attorney with the San Francisco Bay Area law firm of George R Tuttle Law Offices.

He has been in practice for over 30 years. His practice emphasis is on Customs, international trade regulation, and export compliance and related matters.

He assists companies with compliance audits and to develop effective compliance programs; determine correct customs duties, values, product classifications, and duty preference eligibility; obtain rulings, file protests; and resolve penalty, seizure and enforcement cases. He also litigate trade cases before the United States Court of International Trade and the CAFC.

Mr. Tuttle has written and contributed to several articles and books published by the American Bar Association's International Law Section, including Chapter 9 of the recently revised "Customs Law Handbook" pertaining to Customs Audits.

Additional information about Mr. Tuttle and the firm can be found at [www.tuttlelaw.com](http://www.tuttlelaw.com) .

# Customs Valuation



## ➤ Session III Agenda

- Transaction Value, the concept of “Price Paid” and the first sale rule
- Valuation for Related Party Transactions
- Additions to Value – Assists, Royalties and License fees, etc.
- Valuation of Consignments, Samples, Returns and Repairs

# Customs Valuation -- Regulations



## Subpart D [Reserved]

## Subpart E—Valuation of Merchandise

- §152.100 Interpretative notes.
- §152.101 Basis of appraisement.
- §152.102 Definitions.
- §152.103 Transaction value.
- §152.104 Transaction value of identical merchandise and similar merchar
- §152.105 Deductive value.
- §152.106 Computed value.
- §152.107 Value if other values cannot be determined or used.
- §152.108 Unacceptable bases of appraisement.

A screenshot of the International Trade Today website. The header includes the logo "INTERNATIONAL TRADE TODAY" with a globe icon, the tagline "The source for trade compliance news", and "A service of WA". Below the header is a navigation bar with "PREVIOUS" and "NEXT" buttons, and a central display of "TODAY'S NEWS: Tuesday, August 2, 2016 (3 of 21)". The main content area features a news article titled "CBP Updates Customs Valuation Encyclopedia" with the subtext "CUSTOMS | 2 Aug 2016 | Ref: 1608020010". Below the title are "Print" and "Share" buttons. The article text states: "CBP updated its Customs Valuation Encyclopedia, an informed compliance publication, to include customs rulings through 2015 (here). The document, which was previously updated in 2010, includes snippets of rulings on a wide range of valuation issues. 'The decisions in this summary are organized by subject and by date of issuance of the decision,' CBP said. 'In order to reduce the volume of the 2015 edition, excerpts have only been placed in the subject categories where they are most applicable and exact duplicate entries in various categories have been deleted, noting only a citation and location of the full excerpt.' Newly added language in the document is colored red."

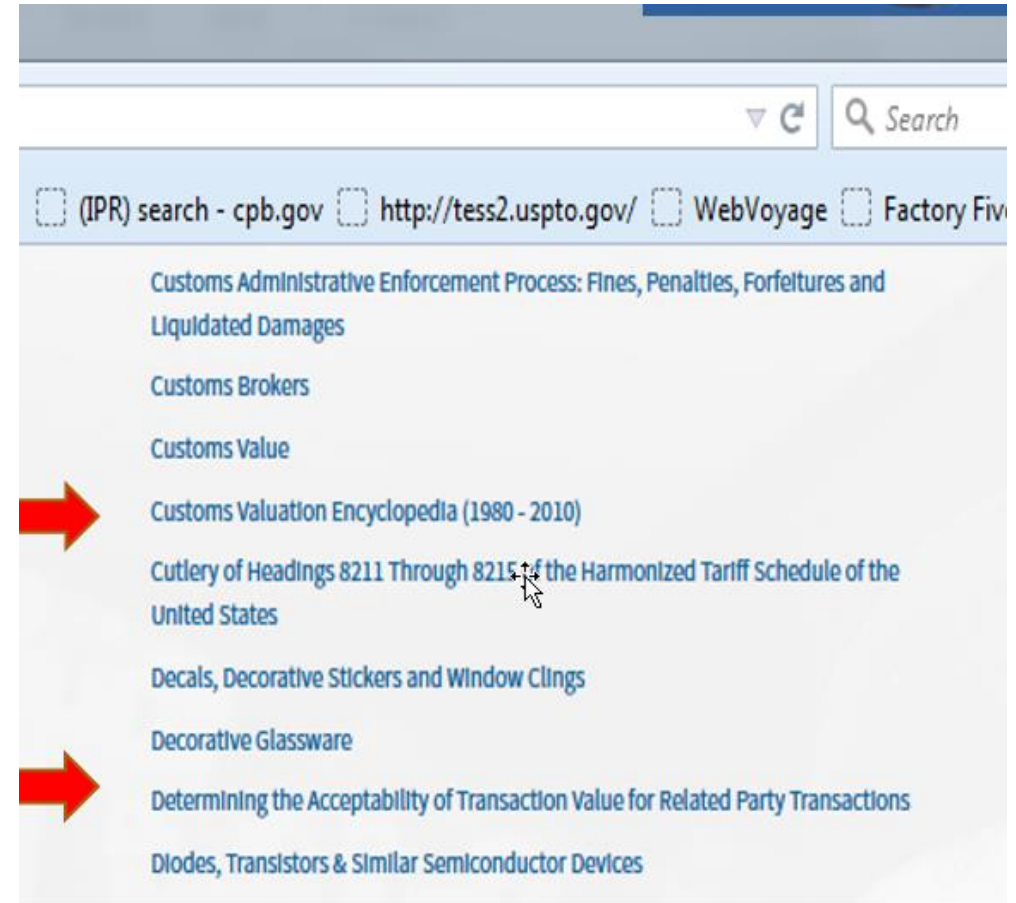
# Valuation Fundamentals



## ➤ Key Resources, cont.

### ■ Customs Informed Compliance Publications

- <http://www.cbp.gov/trade/rulings/informed-compliance-publications>
  - Customs Value
  - **Customs Valuation Encyclopedia (1980 - 2010)**
  - Determining the Acceptability of Transaction Value for Related Party Transactions
  - Bona Fide Sales & Sales for Exportation to the United States
  - Proper Deductions for Freight & Other Costs
  - Buying & Selling Commissions
  - Reasonable Care



# Methods Of Customs Valuation

## 19 USC 1401a(a)



- Customs Value law provides for five methods of valuation, which must be applied in sequential order:
  - Transaction value
  - Transaction value of identical or similar merchandise
  - Deductive value
  - Computed value
  - a derived (fall-back) method reasonably adjusted to circumstances

# Transaction Value



## ➤ What is Transaction Value? (19 USC 1401a(b))

- Defined as:

“transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States”, plus . . .

- The word "payable" refers to a situation in which the price has been agreed upon, but actual payment has not been made before or at the time of importation.

# Transaction Value (1401a(b))



- When is transaction value appropriate?
  1. Must have a **sale** of the goods for export to the United States.
  2. No restrictions on disposition or use, except those
    - Imposed by law
    - Geographical resale territory
  3. **Value** and all additions must be **capable** of determination
  4. Are the parties **related**?



# Transaction Value Sale for Exportation



## ➤ What is a “sale”?

- A "sale" is generally defined as a **transfer of ownership** in property from one party to another for a **price** or other consideration.
  - J.L. Wood v. United States, 62 CCPA, 25, 33, C.A.D. 1139, 505 F.2d 1400, 1406 (1974)
- Did the sale “**cause**” the goods to be exported to the United States?
- (sometimes, there is more than 1 sale that causes the goods to be exported to the U.S.)

# Transaction Value: Sale for Exportation



Is there a “**sale**”?

- Primary factors to consider
  - Has buyer assumed the risk of loss and
  - acquired title to the imported merchandise.
- When does title and ownership transfer?
  - Problem with DDP and Vendor Managed Inventory agreements
  - Intcoterms do not define the transfer of title

Customs Informed  
Compliance Publications:

- **Bona Fide Sales & Sales for Exportation**
- Determining Transaction Value in Multi-Tiered Transactions, T.D. 96- 87 (January 2, 1997)

# Transaction Value: PRICE ACTUALLY PAID OR PAYABLE



## ➤ The term "price actually paid or payable" is:

“the **total payment** (whether direct or indirect) . . . for imported merchandise by the buyer to, or for the benefit of, the seller.”

- Importer pays 3<sup>rd</sup> party supplier for materials purchased by foreign subsidiary and incorporated into finished goods imported into the United States.
- Rebuttable presumption that all payments made by a buyer to a seller are part of the price actually paid or payable for the imported merchandise.
  - (Generra Sportswear Co. v. U.S., 8 CAFC 132 (1990)) HQ 545526 dated Nov. 30, 1995.
  - Burden of establishing payments are **unrelated** rests on the importer. See Chrysler Corp. v. United States, 17 C.I.T. 1049 (Ct. Int'l Trade 1993).
  - Congress did not intend for CBP to engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, are for the merchandise or for something else. Moss Mfg. Co. v. United States, 896 F. 2d 535, 539 (Fed. Cir. 1990)

# Transaction Value: PRICE ACTUALLY PAID OR PAYABLE



## ➤ Additional payments

- Payments to a seller for mold costs and cutting dies are considered to be part of the price actually paid or payable for the imported merchandise. **HQ 544615 dated Sep. 11, 1991**
- **A payment by the buyer to the seller for one of the items listed in section 402(h)(1)(A)(i)-(iv) does not constitute an assist. 544516 dated Jan. 9, 1991**
- Reimbursement for unused materials and components was not a part of the value. **544820 dated Oct. 18, 1991**
- Rather, the payment is part of the price actually paid or payable for the imported merchandise. See **HRL 542812**, dated July 19, 1982; **HRL 543324**, dated August 8, 1984 and **HRL 543983**, dated December 2, 1987.

# Transaction Value: PRICE ACTUALLY PAID OR PAYABLE



- Importers are often invoiced separately by vendors / suppliers for:
  - Materials, tooling, molds, packaging, and equipment
  - Expedited or “hot lot” manufacturing fees and mall lot or small quantity surcharges
  - Production modifications and **Non-reoccurring engineering (NRE)** or separate charges for line setup or retooling
  - Testing costs (testing performed by vendor and billed to importer)
    - HQ 544508, dated June 19, 1990; 543645 dated Feb. 17, 1987; 542187 dated Nov. 7, 1980 (TAA No. 11).
  - Payments for **product liability insurance** made by the buyer to a third party insurer were part of the price actually paid or payable for the imported merchandise as **indirect payments**, where a condition of the sale required the seller to obtain suitable insurance and bear the cost thereof. HQ 546584 September 10, 1997; HRL 542984, April 8, 1993

# Transaction Value: PRICE ACTUALLY PAID OR PAYABLE



## ➤ Assembly Cost Only Contracts

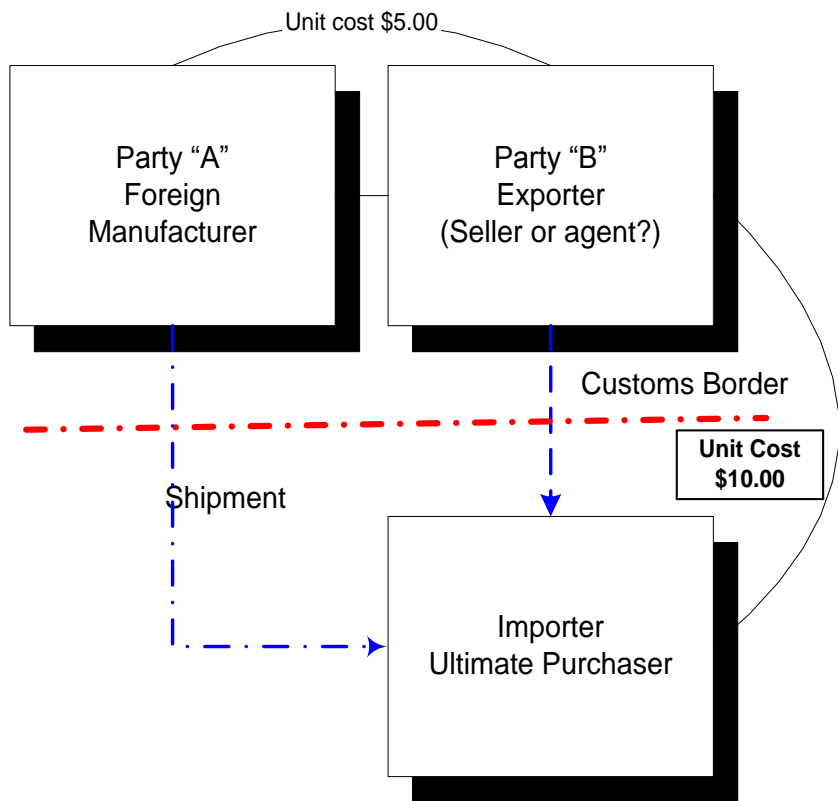
- 152.103(a)(1)(3) Assembled merchandise
  - The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler.
  - The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.
- Maquiladora Manufacturing
- Toll Manufacturing Contracts



# Treatment of Discounts

- When determining transaction value:
  - the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations . . . .
- A discounted price constitutes the price actually paid or payable for the merchandise
  - Where a seller agrees to discount its price to a buyer prior to exportation, and
  - The price actually paid reflects the discount, then the discount is taken into account in determining transaction value
  - HQ H003356 2-Feb-07; discounts. Purchase Price discounts; defective merchandise discount; reviews rulings on allowance of discounts
- A **retroactive discount** received after the importation of the merchandise is not considered in determining the transaction value of the imported merchandise.

# Sales for Exportation & Multi-tiered Transactions



## Nissho Iwai American Corporation vs. U.S., 982 F.2d 505 (1992)

- Court held that Mfg selling price to middleman is acceptable when:
  - There is a sale (i.e., transfer of ownership of the goods)
  - negotiated at **arm's length**, free from any non-market influences
  - FIRST SALE: are goods are clearly destined for export to United States?
  - HQ **H255028**, November 21, 2014



# Sales for Exportation & Multi-tiered Transactions



- Importers need to test transaction for First Sale eligibility, including:
  - **Related party** valuation (if applicable)
  - Middleman is **acting as an agent** (is there a **sale**?) (free to sell the transferred item at any price he or she desires, selects or could select its own downstream customers without consulting with the seller, and could order the imported merchandise and have it delivered for its own inventory)
  - Was the **original sale** for “exportation to the US”? (irrevocably destined to the US)
  - Is middleman in **possession of goods**?

# Sales for Exportation & Multi-tiered Transactions



- HQ H016966, dated December 17, 2007,
  - CBP stated that "[w]henver there is a purported series of sales, and the same terms of sale are used in both transactions, there is a concern that the middleman obtains risk of loss and title only momentarily or never at all, and thus has nothing to sell to the ultimate purchaser.
  - CBP held that the use of identical terms of sale suggested that there was only one sale. Based on that and other factors, CBP concluded that there was not a bona fide sale between the manufacturer and the middleman.
- Treasury Decision ("T.D.") 96-87, 30 Cust. Bull. 52/1 (January 2, 1997)
  - Description of the roles of the parties involved and must supply relevant documentation addressing each transaction
  - Purchase orders, invoices, proof of payment, contracts, and any additional documents (e.g. correspondence) that establishes how the parties deal with one another

# Transaction Value: 1401a(b)(2) Related Party Rule



- 1401a (b)(2)(A) provides that transaction value shall be the appraised value of merchandise only if -
  - \*\*\* (iv) the buyer and seller are **not related**, or
  - the buyer and seller are **related** but the transaction value is found to be **acceptable**
- Burden is on importer to establish that the relationship does not affect the price

# Transaction Value: 1401a(b)(2) Related Party Rule



- When are parties related? (19 U.S.C. 1401a(f))
  - (A) Members of the same family.
  - (B) Any officer or director of an organization and such organization.
  - (C) An officer or director of an organization and an officer or director of another organization, if each such individual is also an officer or director in the other organization.
  - (D) Partners.
  - (E) Employer and employee.
  - (F) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the voting stock or shares of any organization and such organization.
  - (G) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

# Transaction Value: 1401a(b)(2):Related Party Test



- A “transaction value” between related parties will be acceptable if:
  - The value of the imported merchandise closely approximates an acceptable “test value”
  - Satisfies the “circumstances of the sale” test
- **Test Values**
  - The value of imported merchandise closely approximates
    - Transaction value of identical or similar merchandise in sales to unrelated buyers in the United States; or
    - Deductive or computed value of identical merchandise or similar merchandise from other import transactions.
    - Customs will not accept “test values” as a means of verifying value unless there has been an actual appraisal entry at the test value

# Transaction Value Related Parties



## ➤ The “circumstances of the sale” Test

- An examination of the “circumstances of the sale” of the imported merchandise indicates that the relationship between the buyer and seller did not influence the price
- 19 CFR §152.103(I): the following circumstances demonstrate that the relationship has not influenced the price:
  - Price reflects the normal pricing practice for the industry (must have objective evidence)
  - The price was settled in a manner consistent with the way the seller settles prices for sales to buyers who are not related to it; or
  - Selling price includes all costs plus an amount for profit and general expenses (most common method)

# Transaction Value -- Related Parties: Transfer Pricing



## ❖ Related Parties may have:

- Informal understanding on how prices are set
- Written agreement
- Prices may be based on a “transfer pricing study”
- Study may look at how other companies in related field do business, allocate costs, and identify and allocated profits.
- Advanced Pricing Agreements with one or more taxing authorities in affected jurisdictions

## ❖ Transfer prices can be:

- Fixed, or
- may be adjusted after importation to change profit and cost allocations

# Acceptability of Transfer Prices For Customs Based On “IRS” Transfer Pricing Methodology



## ❖ HQ 546979, August 30, 2000

- “While the goal of both the [[Customs Value Law](#)] and section 482 of the Tax Code is to ensure that the transactions between related parties are at arms length, [the method of making that determination is different](#) under each law.”
- “Customs approach to related party transactions [differs from the IRS approach](#) . . . the [IRS] methods review profitability on an aggregate basis, not a product by product basis.”
- “Customs generally analyzes related party transactions at a more detailed product by product level . . .”





## Customs Position On Transfer Pricing

- ❖ April 2007, CBP Informed Compliance guide on: TRANSACTION VALUE FOR RELATED PARTY TRANSACTIONS
- ❖ Quotes:
  - “The mere fact that the importer has satisfied the requirements of Section 482 IRC, either through an APA or otherwise, does not mean that transaction value is acceptable under 19 U.S.C. §1401a.”
  - “It is still necessary for the importer to analyze whether the related party sale satisfies the circumstances of sale test or the test value method ... before making a value declaration . . .”
  - “An importer that relies solely on an APA or transfer pricing study to conclude that transaction value is acceptable would not be exercising reasonable care.”

# Transaction Value Related Parties -- Using Transfer Pricing Studies



- ❖ Are products covered by a TP study or APA comparable to the imported products at issue is an important consideration, i.e., same class or kind as the imported merchandise. See HQ H037375; HQ 547672, dated May 21, 2002.
- ❖ The transfer pricing study should include companies in the same industry as the importer, including some competitors.
- ❖ The methodology selected for use in a transfer pricing study is also relevant. See HQ 548482, July 23, 2004. CBP notes that CPM is the least relevant method for customs purposes. See HQ H219515 (October 11, 2012)
- ❖ Information in a transfer pricing study may be relevant in examining circumstances of the sale, but the weight to be given this information will vary depending on the details set forth in the study.
- ❖ CBP does not consider the industry in question to consist of other functionally equivalent companies if those companies do not sell goods of the same class or kind. See HQ 548482, dated July 23, 2004.
- CPM compare the profitability of the tested party to that of comparable companies that engage in similar business activities under similar circumstances

# Transaction Value -- Related Parties: Post Entry Adjustments



- ❖ If a transfer price is subject to post importation adjustments and the adjustments are within the control of either the buyer or the seller:
- ❖ then transaction value cannot be applied and the merchandise must be appraised using one of the other valuation methods in 19 U.S.C. §1401a.
- ❖ Unless:
  - (1) A written “Intercompany Transfer Pricing Determination Policy” is in place prior to importation and the policy is prepared taking IRS code section 482 into account;
  - (2) The U.S. taxpayer uses its transfer pricing policy in filing its income tax return, and any adjustments resulting from the transfer pricing policy are reported or used by the taxpayer in filing its income tax return;
  - (3) The company’s transfer pricing policy specifies how the transfer price and any adjustments are determined with respect to all products covered by the transfer pricing policy for which the value is to be adjusted;
  - (4) The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States; and,
  - (5) No other conditions exist that may affect the acceptance of the transfer price by CBP.
- ❖ HQ W548314, May 16, 2012

# Transaction Value: Related Parties “All Costs Plus Profit” Method



- ❖ Importer can demonstrate relationship did not influence the price by establishing that:
  - "the price is adequate to ensure recovery of all costs to manufacture or acquire product, plus
  - a profit that is equivalent to the firm's overall profit realized over a representative period of time in
  - sales of merchandise of the same class or kind . . ." **(COS-3)**
  - 19 C.F.R. 152.103 (l)(1)(iii).
- ❖ COS-3 “is the most objective method of meeting the circumstances of sale test when there are no sales to an unrelated buyer.”
  - P. 9, DETERMINING THE ACCEPTABILITY OF TRANSACTION VALUE FOR RELATED PARTY TRANSACTIONS

# Transaction Value Deductions: International Freight



- 19 USC 1401a(b)(4) excludes costs incurred for international transportation, insurance, and related services
- Importer must be able to document actual payments for int'l transportation, insurance and related services
- Customs informed compliance publication on - **Proper Deductions for Freight & Other Costs and T.D. 00-20.**
  - In HRL 546226 dated March 25, 1996, determined that if actual costs are not available or cannot be verified, costs for international transportation will not be excluded
  - HQ W563617 14-Sep-07 Foreign inland freight; no documentation was provided from the seller to evidence the actual costs it incurred for the foreign inland freight.

# Transaction Value: Other Deductions (1401a(b)(1)(c)(3))



## ➤ “Services incident to international shipment” (“illustrative”)

- Airline documentation, airway bill ("AWB") fee, bill of lading ("BOL") fee
- Automated Manifest System ("AMS") fee related to collecting and transmitting AMS data to CBP
- Container Freight Station ("CFS") fees
- Port entry fee/port security fee
- Booking fee charged to the vendor by the carrier's booking agents
- [HQ H249096, March 17, 2015; H092560, H148715, and H219516](#), provided that all documentary requirements are satisfied.

## ➤ Post Shipment deductions, if [separately itemized](#):

- Construction, erection, assembly, maintenance, or technical assistance provided with respect to the merchandise **after** importation
- transportation of the merchandise after importation.
- Customs duties and other **Federal** taxes.

# Foreign Inland Freight: Deductions



- Deductions of foreign inland freight and other inland charges incident to the international shipment of merchandise are found in §152.103(a)(5)
- Ex-factory sales
  - If the price for the imported merchandise does not include a charge for foreign inland freight or other charges for services incident to the international shipment of merchandise, those charges will not be added to the price.
- Sales other than ex-factory
  - If the price includes a charge for foreign inland freight, charge will be part of the value, unless:
    - if they are identified separately on the invoices or other commercial documents
    - Charges occurred after the merchandise has been sold for export to U.S. and
    - Placed with carrier for through shipment to the United States.
    - To ensure that the above criteria has been met Customs requires that a “through bill of lading” be presented.

# Foreign Inland Freight: Deductions



- Sales other than ex-factory. Allowable deductions
  - Charges for foreign inland freight and **other services incident to the shipment** of the merchandise to the United States may be considered incident to the international shipment of that merchandise within the meaning of §152.102(f)
    - If they are identified separately
    - Charges occurred after the merchandise has been sold for export to U.S. and
    - Placed with carrier for through shipment to the United States.
  - To ensure that the above criteria has been met Customs requires that a “through bill of lading” be presented.
  - Denied deduction in international freight charges for DDP transaction when insufficient evidence was provided as to who paid charges. **HQ H189076, June 26, 2013 (IKEA: "FCA Supplier" sales ); HQ H023812, April 4, 2008.**



# Transaction Value: Additions to Value



- Transaction value includes certain **statutory additions** if not otherwise included in the price:
- packing costs
  - selling commissions
  - assists
  - royalty or license fees paid as a condition of importation
  - Proceeds of a subsequent resale, disposition, or use
  - Acronym “**CRAP**”

# Transaction Value: Additions to Value -- Assists



➤ **19 U.S.C. 1401a(b)(1)** states:

The transaction value of imported merchandise is the price actually paid or payable for the merchandise . . . plus amounts equal to . . . the value, apportioned as appropriate, of any assist . . .

# Transaction Value: Additions to Value -- Assists



Assists are defined (19 U.S.C. 1401a(h)) as:

- (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
- (ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.
- (iii) Merchandise consumed in the production of the imported merchandise.
- (iv) Engineering, development, artwork, design work, plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

# Transaction Value: Additions to Value -- Assists



- To be treated as an "assist" the article or design must be:
  - Supplied directly or indirectly by the buyer
  - Provided free of charge or at reduced cost
  - Used in connection with the production or sale for export to the United States of the merchandise

# Transaction Value: Additions to Value – Assists --Test Equipment



- Test equipment provided free of charge to the foreign manufacturer by the U.S. importer will constitute an assist within the meaning of section 402(h)(1)(A) of the TAA if the equipment is:
  - used for testing during the production process and
  - Testing is essential to the production of the product. **544508 dated June 19, 1990.**
  - **HQ H023814 2-Jun-08** Testing Equipment ICT fixtures are dutiable assists even though the PCBA's can be produced without testing, if or when testing is performed it is part of the production process
  - **HQ H255442, October 9, 2014;**

# Transaction Value: Additions to Value – Assists (19 CFR 152.103(d))



## ➤ **How do we value an assist?**

- Cost of acquisition if acquired by the buyer from an unrelated seller
- Cost of production (including R & D) if the assist was produced by the buyer.
- The value of the assist must include transportation costs to the place of production.
- The cost of procuring an assist, i.e., receiving inspection, and warehouse costs are not part of the value of an assist.

## ➤ **HQ 548568, dated 10/19/2004**

- “Cost of production” of an assist includes the value of any license or royalty fee payments made for the design, manufacturing, or process rights to manufacture or produce the article
- Would include any NRE or related expenses, such as masks or tooling costs

# Transaction Value: Additions to Value – Assists: Adjustments



- If the tools, dies, molds, or similar item has been **used previously by the buyer**, regardless of whether it had been acquired or produced by him, the original cost of acquisition or production will be **adjusted downward** to reflect its use before its value can be determined. HQ W548667, October 5, 2005– (Braumiller ruling)
- Repairs or modifications to an assist may increase its value



## Transaction Value: Additions to Value – Assists-- Apportioning the value

- If the entire anticipated production using the assist is for exportation to the United States, the total value may be apportioned over:
  1. the **first shipment**, if the importer wishes to pay duty on the entire value at once
  2. the number of units produced up to the **time of the first shipment**, or
  3. the entire **anticipated production**.
    - If the anticipated production is only partially for exportation to the United States, or if the assist is used in several countries, the method of apportionment will depend upon the documentation submitted by the importer. **Section 152.103(e)**
- **Customs has the authority under 19 CFR 152.103(e)(1) to accept or reject a proposed apportionment method. See Headquarters Ruling Letter (HRL) 545031 , dated June 30, 1993, and HRL 544194 , dated May 23, 1988.**



# Transaction Value: Additions to Value – Assists--Apportioning the value



- "apportionment .. will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.
- The method of apportionment used will depend on the details in the documentation provided by the importer to substantiate his requested method." 19 C.F.R. 152.103(e). HQ H057735, July 15, 2009.
- In ruling HQ 545031CBP states:

There is no link between the proposed apportionment method and the imported merchandise. . . . The problem with the lack of connection between the proposed apportionment method and its imported toys becomes apparent when the fact that the class life of the molds usually is longer than the demand for the toys is examined.

It follows, therefore, that a proposed apportionment method that routinely allowed a portion of an assist's value to remain nondutiable would not be acceptable to Customs. For this reason, the use by xxxxx of the IRS depreciation schedules to apportion the value of the tools, dies and molds to the imported toys is unreasonable and not appropriate to the circumstances. The fact that the method is in accordance with GAAP is immaterial.



# Services Provided Abroad

- 1401a(h) (A) (iv)
  - Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.
  
- (B) No service or work to which subparagraph (A)(iv) applies shall be treated as an assist for purposes of this section if such service or work:
  - is performed by an individual who is domiciled within the United States;
  - is performed by that individual while he is acting as an employee or agent of the buyer of the imported merchandise; and
  - is incidental to other engineering, development, artwork, design work, or plans or sketches that are undertaken within the United States.



# Services Provided Abroad

- Are the activities/services necessary for the production of imported merchandise?
  - When considering whether services provided by a buyer to a manufacturer located abroad constitute an assist, one must distinguish between those services that are completely unrelated to the production of the imported merchandise and those services necessary for the production of the imported merchandise.
  - Are the services necessary for the production of the garments? HQ 548540, July 28, 2004 (Nordstrom/Facconnable Ruling)
  - Work provided by an independent on-site footwear commercialization/ production engineer constitute an assist. HQ H057735, July 15, 2009

# Transaction Value Additions -- Royalties & license fees



- General Notice, Dutiability of Royalty Payments, Vol. 27, No. 6, Cust. B. & Dec., February 10, 1993:
  - three factors are relevant in assisting in determining whether royalty payments are related to the imported merchandise and are a condition of sale:
    - whether the imported merchandise was manufactured under patent;
    - whether the royalty was involved in the production or sale of the imported merchandise and;
    - whether the importer could buy the product without paying the fee.

# Transaction Value Additions -- Royalties & license fees



- Royalties or license fees for patents covering a process to manufacture imported merchandise generally will be dutiable.
- Payments made by the importer/buyer to a third party for the right to:
  - Distribute or resell imported merchandise with mark
  - Generally considered selling expenses of the buyer and will not be added to the price actually paid or payable for the imported merchandise unless:
    - The payments are a condition of the sale of the merchandise for exportation to the United States.
- **Separate license fees paid to related party seller for right to distribute or resell is a “proceed of subsequent resale.”**

# Transaction Value Additions -- Royalties & license fees



- In HQ H004991, dated April 2, 2007
  - The fact that the royalty payments are made to an unrelated third party is not always determinative
  - CBP's position is that royalties will be dutiable, even if paid to third parties, if they constitute a **condition of the sale** for exportation.
  - Payments based on the number of units sold or resold in the U.S. is “not relevant to determining the dutiability of the royalty payment.”
  - Royalty payments and license fees are a condition of sale when they are paid on each and every importation and are inextricably intertwined with the imported merchandise.

# Transaction Value Additions -- Royalties & license fees



- HQ W548692; HRL 548489, August 4, 2004; and HQ H004991, April 2, 2007
  - CBP found that the royalty payments and the purchase of the imported goods were “inextricably intertwined,” even though:
    - there was no restrictions on the purchase or importation of the imported products in the license agreement, and
    - the manufacturing agreement was not tied to the payment of the royalty fee.
  - HQ H024980, July 22, 2008



# Other Methods Of Valuation

- If Transaction value can not be established
  - No sale
  - Related party status influences price
  - Lack of information
  
- CBP will resort to alternative methods
  - Transaction value of identical or similar merchandise
  - Deductive value
  - Computed value
  - a derived (fall-back) method reasonably adjusted to circumstances



# Valuation of Consignments, Samples, Returns and Repairs



- Imports of goods on Consignment, Samples, Returns and Returns for Repairs **generally** do not involve a “**sale**” for exportation
  - A “sale” requires “consideration”
  - Note: return exchange programs might constitute consideration
  - If there is no sale, there is no “transaction value.”
  - Must work through each of the “alternative methods” of valuation to find the applicable method.

# Transaction Value

## Is there A Sale for Export?



- GATT Value Code Technical Committee Advisory Opinion 1.1
- Advisory opinion lists situations in which imported goods would not be deemed to have been the subject of a sale.
  - Free consignments (Samples, gifts, etc.)
  - Goods imported on consignment (Consignment sales)
  - Goods imported by intermediaries who do not purchase the goods but who sell them after importation
  - Goods imported by branches which are not separate legal entities
  - Goods imported under a lease contract or on loan
  - Goods consisting waste or scrap imported for destruction

# Transaction value of identical or similar merchandise

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- Transaction value of identical or of similar merchandise (1401a(c)) uses the transaction value of previously imported merchandise that is --
  - Either identical or similar to the merchandise being appraised, and
  - Exported to the United States at or about the time that the merchandise being appraised is exported to the United States, and
  - At the same commercial level and in substantially the same quantity as the sales of the merchandise being appraised.



# Method #3: Deductive value

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## ➤ Deductive value (1401a(d)) is defined as:

- The price the merchandise is sold for to the first unrelated party at or about the time of importation (or within 90 days of importation):
- The selling price must be reduced by an amount equal to -
  - The addition usually made for profit and general expenses in connection with sale in the United States,
  - costs associated with transportation and insurance incurred with respect to the international shipment of the merchandise from the country of exportation to the United States
  - Customs duties and other Federal taxes payable on the merchandise

# Computed Value Method 19

## U.S.C. 1401a(e)



- Based on:
  - Cost of materials and processing incurred in the foreign production, plus
  - an amount for profit and general expenses of the producer company equal to
  - Amount usually reflected in sales of merchandise of the same class or kind, and
  - the value of any assists and packing.

# The "Fallback" Method

## 19 U.S.C. 1401a(f); 19 CFR 152.108



- When merchandise cannot be appraised under one of the methods set forth in 19 U.S.C. 1401a(b)-(e), value is determined in accordance with the "fallback" method set forth in section 1401a(f).
- Provides that merchandise should be appraised on the basis of a value derived from one of the (b)-(e) methods, reasonably adjusted to the extent necessary to arrive at a value.
- Value may not be on the basis of:
  - the price in the domestic market of the country of export
  - the selling price in the U.S. of merchandise produced in the U.S.,
  - minimum values, or arbitrary or capricious values.

# Importing Used Articles



- CBP has issued several rulings on the subject of importing used articles to be repaired in the U.S.
  - In most cases, value was determined using the **fallback method** derived from a prior method, e.g.:
  - transaction value or deductive value with reasonable adjustments to take into account the fact that the goods were imported to be repaired and were used goods.

# Used articles Imported For Repaired



## ➤ HRL 547877 , dated January 23, 2002

- CBP held that for equipment returned to the U.S. for repair, two deductions from the new sales price list were permitted:
  - one for the repair and
  - one for depreciation

## ➤ HRL 548688, dated October 20, 2005

- valuation of merchandise returned to the United States for evaluation and repair, or recalibration
- Units were imported at no charge to the customer under a "depot exchange program".
- Importer could not at time of importation access the unit's original selling price or determine the nature or extent of repairs required
- CBP agreed that the value of returned units could be determined
  - using the current standard cost of new units less
  - the average cost of the repair per product line.



# Other Rulings on Valuation of Returns



- Other important rulings on valuation of returns
  - HQ H019722, dated March 21, 2008 (Rotation of inventory stocks. Rolling cost average starting with FMV.)
  - HRL 548698, dated October 4, 2005 (value of used books)
  - HRL 548211, dated July 2, 2003 (valuation of PCBA for IC testers returned as a part of upgrade program or because of failure at various % of new list price)
  - HRL 544377, dated September 1, 1989 (use of inventory value in the importer's accounting records to appraise telephone equipment returned for repair. inventory value was based on % of the standard cost of new equipment)