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Basic Principles of Customs Valuation: Part 2

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Current Hot Topics in Customs Valuation

➤ What is covered in this Webinar?

- Basic Principles of Customs Valuation: Additions to Value --
 - Assists & Supplemental Payments
 - Royalties and License fees

➤ Key Resources

- Customs Valuation Law 19 USC 1401a
 - <http://www.law.cornell.edu/uscode/text/19/1401a>
- Customs Regulations 19 CFR 152
 - <http://www.law.cornell.edu/cfr/text/19/part-152>
 - <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=%2Findex.tpl>
- Customs Rulings
 - <http://rulings.cbp.gov/>

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

Valuation Fundamentals



- The law (19 U.S.C. 1484) requires importers (and their agents) to use “**reasonable care**” when providing Customs with information regarding:
 - Classification
 - Value
 - Rate of duty
 - Admissibility

- Civil Penalty Provisions 19 U.S.C. § 1952 —
 - . . . No person . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of —
 - (i) any document, written or oral statement, or act which is material and **false**, or
 - (ii) an omission which is material . . .

Valuation Fundamentals



- Customs value law (1401a) provides for five methods of **appraisement** of merchandise
- 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

Valuation Fundamentals



➤ What is Transaction Value?

- 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 . . . [statutory additions]

If not already included in the price:

- (A) the packing costs incurred by the buyer with respect to the imported merchandise;
- (B) any selling commission incurred by the buyer with respect to the imported merchandise;
- (C) the value, apportioned as appropriate, of any **assist**;
- (D) any **royalty or license fee** related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
- (E) the **proceeds of any subsequent resale**, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

Valuation Fundamentals



➤ Transaction Value

- The “**price actually paid or payable**” will be increased by the amounts attributable to the items (and no others) described in subparagraphs (A) through (E) only to the extent that each amount is
 - (i) not otherwise included within the price actually paid or payable;
 - (ii) based on sufficient information.
- If sufficient information is not available, for any reason, with respect to any amount to be added, the transaction value will be treated as one that cannot be determined.

Supplemental Payments & The Generra Rule



- There is a presumption that all payments made by a buyer to a seller, or a party related to the seller, are part of the price actually paid or payable for the imported merchandise. (*Generra Sportswear Co. v. U.S.*, 8 CAFC 132 (1990))
- Congress did not intend for Customs 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.
- The burden of establishing that payments to a seller are unrelated to the imported merchandise rests on the importer. (*Moss Mfg. Co. v. United States*, 896 F. 2d 535, 539 (Fed. Cir. 1990))

Supplemental Payments



- ❖ All **payments** made by a buyer to a seller are presumed to be part of the price actually paid or payable, unless rebutted by evidence which clearly establishes that the payments are unrelated to the imported merchandise. HQ 545526, dated Nov. 30, 1995
- ❖ HQ H242894, dated December 4, 2013
 - Payments for exclusive right to distribute the seller's branded products in the United States are **not** dutiable as part of the transaction value
- ❖ HQ H134595, dated July 31, 2012
 - Tooling payments made by a 3rd party to foreign manufacturer are dutiable as part of the transaction value
- ❖ HQ H137435, January 5, 2012
 - Research and development (R&D) payments are not specifically listed under the statutory additions under 19 U.S.C. 1401a(b)(1)(A)-(E), but still need to be included as part of the price actually paid or payable for goods.

Supplemental Payments



- ❖ Additional payments made by the buyer to the seller
 - Additional amount paid by the buyer of imported merchandise to the manufacturer to produce tools necessary to produce that merchandise constitutes part of the price actually paid or payable. **542812, dated July 19, 1982**
 - U.S. companies will often pay suppliers separately for:
 - Expedited or “hot lot” manufacturing fees
 - Small lot or small quantity surcharges
 - NRE or separate tooling charges for startup production costs
 - Tools and molds, production and test equipment

Supplemental Payments



- ❖ **HQ 544615, dated Sep. 11, 1991, modified by 544820, dated Oct. 18, 1991**
 - Payments to a seller for mold costs, reimbursement for unused materials and components, and cutting dies are considered to be part of the price actually paid or payable for the imported merchandise.
 - The fact that the payments occur post-importation does not preclude their being considered part of the transaction value.

Supplemental Payments



- **545456, dated Oct. 21, 1994, affd. by 545995, dated Oct. 12, 1995**
 - In addition to the transfer price of merchandise, the buyer sends regular weekly payments to the seller which are used to pay the seller's operating expenses, including labor, overhead and administrative costs.
 - While the amounts in question are related to the imported merchandise, they are not identified with specific shipments.
 - The additional payments constitute part of the price actually paid or payable for the imported merchandise.

Supplemental Payments



❖ Testing Charges & Other Additions

- Testing costs are not assists but are dutiable as part of the price actually paid or payable **when paid to the seller** of the imported merchandise.
- **542187, dated Nov. 7, 1980 (TAA No. 11); 543645 dated Feb. 17, 1987**

Supplemental Payments



- ❖ Longstanding position that payments from the buyer to the foreign manufacturer are **not** assists within the meaning of 402(h)(1)(A)
 - HRL 543376, November 13, 1984, Customs held that a payment by an importer to a foreign manufacturer for the design and development of a prototype industrial robot was not an assist, but, rather, the payment is a part of the total price paid.
 - See also HRL 543983, dated December 2, 1987
- ❖ Proration of Supplemental Payment **not** Permitted
 - “Customs Regulations do not provide guidelines specifically for the apportionment of direct payments, as they do for assists.” HQ 544484, dated January 31, 1989
 - “no authority exists to apportion these expenditures over the anticipated number of units produced.” HQ 544381, November 25, 1991

Indirect Payments



❖ Examples of indirect payments

- Payment by the buyer of a debt owed by the seller to a 3rd party
- Buyer receives a price reduction on a current importation as a means of settling a debt owed to him by the seller.
- Reductions in price for current shipments in satisfaction of a debt owed to the buyer by the seller for previous shipment of defective goods constitutes indirect payments and are part of the price actually paid or payable. 543766, dated Sep. 30, 1986; 543830, dated Nov. 7, 1986.
- Payments made by the buyer to the seller for tooling are indirect payments and part of the price actually paid or payable for the imported merchandise. 543951, dated Sep. 23, 1987.
- A **credit** owed to the importer by the seller that was applied toward the payment for imported ceiling fans should be included in the transaction value of the imported merchandise as an indirect payment ("HRL") 543766.



Indirect Payments

- ❖ An indirect payment by the buyer to the seller includes:
 - The settlement by the buyer of a debt owed by the seller,
 - A price reduction received by the buyer on a current importation as a means of settling a debt owed him by the seller. See 19 C.F.R. 152.103(a)(2).

- ❖ Also includes
 - A payment made by the ultimate purchaser in the United States, **through the importer**, to the foreign manufacturer
 - Payments made by the buyer's related company to the seller. See (HRL's) 546007, September 21, 1995; 554999, January 5, 1989, and 545381, May 4, 1998
 - A payment made by a third party to the seller to **satisfy the buyer's obligation** to the seller would be another example of an indirect payment.

- ❖ “Payments made **directly by the ultimate consignees** of the merchandise (not the Importer of Record) to the foreign exporter **without passing through the importer** should be included in the transaction value of imported cigarettes.” W563503, dated May 26, 2006

Additions To Transaction Value: Assists

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

- Materials, components, parts, and similar items incorporated in the imported merchandise
- Tools, dies molds, and similar items used in the production of the imported merchandise
- Materials consumed in production of the imported merchandise
- Engineering, development, artwork, & design work undertaken elsewhere than in the United States and necessary for the production of the imported merchandise.

(h) Definitions

As used in this section—

(1)

(A) The term "assist" means any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:

(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, 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—

(i) is performed by an individual who is domiciled within the United States;

(ii) is performed by that individual while he is acting as an employee or agent of the buyer of the imported merchandise; and

(iii) is incidental to other engineering, development, artwork, design work, or plans or sketches that are undertaken within the United States.



Customs Valuation: Assists

- ❖ To be treated as an "assist" the article or design must be:
 - Supplied directly or indirectly by the buyer
 - Although fabric is supplied free of charge to the seller of merchandise, neither the buyer nor a party related to the buyer supplies the fabric and, therefore, the fabric is not an assist. 545172 dated May 6, 1993
 - Palladium, a material used in the production of an imported product, was provided free of charge to the foreign manufacturer/seller by the ultimate U.S. consignee rather than by the importer/buyer. The importer/buyer maintained that the material was not an assist because it was not supplied by the buyer. Nevertheless, CBP determined that the palladium was an assist and that its value was therefore properly included in the appraised value . . . since to disregard the value of the palladium would have rendered the phrase "supplied directly or indirectly" meaningless. **HRL 543439** , May 6, 1985. See also **HQ 545172**, May 6, 1993.
 - Provided free of charge or at reduced cost
 - Used in connection with the production or sale of the merchandise for export to the United States

Valuing 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, royalties and license fees) if the assist was produced by the buyer or party related to the buyer
- The value of the assist must include transportation costs to the place of production.

Valuing an assist



- ❖ 544323, dated Mar. 8, 1990 (542144, dated Feb. 4, 1981 (TAA No. 16) and 542412, dated Mar. 27, 1983 (TAA No. 20))
 - The cost of acquiring an assist is its purchase price plus actual transportation costs.
 - The cost of procuring an assist, i.e., receiving inspection, and warehouse costs are not part of the value of an assist.
 - Commissions or fees paid to 3rd party to acquire an assist are a part of its value.

Adjustments to Assist Values



- ❖ If the tool, die, mold, or similar item has been used previously:
 - The original cost of acquisition or production will be adjusted downward to reflect its use before its assist value is determined
 - Repairs, upgrades & modifications to an assist will increase its value

Apportioning of the Value of Assists (Section 152.103(e))



- ❖ If the entire production using the assist is for exportation to the United States, the total value may be apportioned over:
 - The first shipment, if the importer wishes to pay duty on the entire value at once
 - The number of units produced up to the time of the first shipment or
 - The entire anticipated production
 - HQ 548547, March 7, 2006 – Reasonableness of design fee allocation
 - In Chrysler 17 Ct. Int'l Trade at 1052, court considered payments buyer made to the seller for tooling expenses. After determining that the tooling payments were not assists, but instead were of the price paid, the court found that it was necessary to determine which portion of the tooling expenses were part of the price paid. Noting that the tooling expenses were incurred in anticipation of the production of 181,423 engines, court said that tooling expenses should be apportioned over 181,423 engines, not the actual number of engines imported. The court determined that once allocated in this manner, expenses are properly considered part of the price actually paid for the subject merchandise.
- ❖ If the 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)

Apportionment of Assists



- ❖ “Under” Allocation of Tooling Costs (HQ W563531, October 27, 2006)
 - **Seller** added a tooling charge to the purchase price by allocating the total tooling costs over forecasted quantity expected to be ordered within 15 months of the initial order
 - Importer actually **ordered less** than the forecasted quantity
 - **Importer reimbursed** the vendors for their tooling costs by creating an "under-amortized" factory ledger to pay for any tooling costs still due to the vendor
 - Customs has looked to the intent of the parties, the evidence presented and found the apportionment of such costs acceptable
 - Did not require 100% of tooling cost to be added to the imported value

Depreciation of Assists



❖ Treatment of Tools, Molds and Equipment vs. Materials

❖ 543233, Aug. 9, 1984

- If a mold which is supplied free of charge to the foreign manufacturer is depreciated to zero on the books of the importer in a manner consistent with generally accepted accounting principles
- The value of the assist will be limited to the cost incurred in transporting the assist to the place of production

❖ **Materials** -- 542356, Apr. 13, 1981 (TAA No. 24); 542477, July 27, 1981

- In determining the value of fabric furnished without charge to an unrelated assembler, the cost of acquisition to the importer must be used, not the depreciated cost as reflected on the importer's books.

Depreciation of Assists



❖ 542302, dated Feb. 27, 1981 (TAA No. 18)

- Machinery may be apportioned on a yearly basis at the depreciated cost as reflected on the books of the importer, assuming the depreciation is determined in accordance with generally accepted accounting principles. *Contra.*, HQ 545031, February 19, 2003

❖ 544243, dated Oct. 24, 1988; 544256, dated Nov. 15, 1988

- If, in accordance with generally accepted accounting principles, the value of an assist provided to the seller is fully depreciated according to the importer's records, then the value of the assist is limited to the cost of transporting the assist to the place of production.

Depreciation of Assists



❖ HQ 543450, dated June 25, 1985

- While the value of a fully depreciated assist is limited to transportation costs to the foreign plant, capital assets which are permitted to be expensed by GAAP are not necessarily assets with a zero book value for Customs valuation purposes.
- Such assets require the determination as to what, if any, book value remains if being depreciated over their useful lives.



Depreciation of Assists

- ❖ Limitation on Depreciation or Apportionment-- **HQ 545031, February 19, 2003**
 - There must be a **link** between the proposed apportionment method and the imported merchandise
 - The problem with the **lack of connection** between xxxxx's proposed apportionment method and 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 non-dutiable** 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.**



Valuing an Assist: Production Costs

- ❖ HQ 542948, dated Nov. 29, 1982 (TAA No. 55)
 - The value of the assist is the full cost of acquisition, which includes any research and development costs incurred in producing the chip, whether it is fabricated in the United States or elsewhere.

- ❖ HQ 548568, dated 10/19/2004
 - Cost of production of an assist is to include the value of any license or royalty fee payments made for the design, manufacturing, or process rights to manufacture or produce the article
 - Includes any NRE or related design expenses, such as masks or tooling costs

Tooling Costs



❖ 543405, dated June 21, 1985

- Where imported merchandise consists of components which are sold by the importer to the foreign assembler at a price which does not include the cost of tooling used in the production of the components, the components are considered assists since they are provided at a reduced cost.

❖ 543405, dated June 21, 1985

- Since the transfer price between the importer and Taiwanese assembler does not reflect tooling costs, the parts are provided at a reduced cost and therefore, constitute dutiable assists.

❖ 543096, dated June 21, 1983 (TAA No. 63), 544201 dated Dec. 12, 1988.

- Freight and related transportation charges paid by a buyer in connection with shipments of material to a foreign assembler are assists.

Equipment



- ❖ General purpose equipment supplied by a buyer free or at a reduced charge is an assist. **542122, dated Sep. 4, 1980 (TAA No. 4)**
- ❖ Air conditioning equipment, power transformers, telephone switching equipment, emergency generators, and other equipment **not used in the production** of imported goods are not assists. **542302, dated Feb. 27, 1981 (TAA No. 18); 542762, dated Jan. 14, 1983; 544261, dated Feb. 28, 1989; 544421, dated Apr. 3, 1990; 544480, dated Sep. 21, 1990.**

Yielding



- ❖ The value of waste, scrape, or defective components or materials that are assists must be “yielded” into the value of the value of the components or materials actually used
 - Example: takes 105 components to make 100 finished units.
 - The assist value is = value of 105 components / 100 finished units

- ❖ The value of “unused” components or materials is not yielded

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, June 2, 2008.
 - ICT fixtures are dutiable assists in the transaction value of imported power conversion and control systems.
 - The ICT fixture is a tool that performs the testing which contributes directly to the manufacture of the PCBAs, is clearly used in the production of the PCBAs, and contributes to a higher yield of functioning PCBAs.

Services Provide Abroad



- ❖ 1401a(h) (A) (iv)
 - Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and 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 if such service or work:
 - Is performed by an individual who is domiciled (residing) 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 Provide Abroad— When is Work “Incidental” ?



- ❖ 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 that are necessary for the production of the imported merchandise. See 546782 (December 2, 1999).

Services Provide Abroad— When is Work “Incidental” ?



❖ In HQ 546054 (October 23, 1996)

- The following “services” were held part of the development of the imported merchandise and necessary for the production of the imported merchandise:
 - Review of technical development issues and technical problems that the manufacturers have in complying with design and development requests of the importer;
 - Confirmation of the specifications agreed to between the importer and the manufacturers;
 - Evaluation of trial samples at each stage of trial production, and work with the manufacturers and the importer when necessary;
 - Evaluation of the final sample of the merchandise to be produced by the manufacturers; and
 - Attending the manufacturers' trial mass production run to determine if the goods were made in conformity with the agreed upon design.

Services Provide Abroad— When is Work “Incidental” ?



❖ HQ 548540, July 28, 2004

- Held that U.S. employees of a U.S. Company working at foreign manufacturing location and providing technical design services are providing an assist when:
 - The technical designer does not create the design.
 - The technical designer becomes involved once an order has been placed.
 - After the pattern has been created, the technical designer looks at the pre-production pattern to test fit and conducts points of measurement to determine if it meets all design specifications.
 - Technical Design Manager — Managed a team of technical designers of which three are U.S. nationals and one is a French national.
 - Customs concludes that the duties of these positions are integrally involved in the production of the imported merchandise.

Services Provide Abroad— When is Work “Incidental” ?



- ❖ H057735, July 15, 2009 – Consulting Fees
 - Independent on-site production engineer supervise production of footwear
 - Dutiable assist
- ❖ H031244, April 10, 2009 –
 - Design work by subsidiary for garments is a dutiable assist
 - May **not** apportion assist value to first duty free entry
- ❖ H563534, May 6, 2009 –
 - Design work by subsidiary for garments is a dutiable assist
- ❖ H047284, June 22, 2009 –
 - Payments to a foreign parent company for Technical Assistance agreement related to auto parts design a dutiable assist

Quality Control Services



- ❖ Quality control services do not generally constitute an assist within the meaning the value law as set forth in 19 U.S.C. 402(h). See 546511 (April 15, 1999).
- ❖ Quality control that involves **production-related design** and **intimate involvement** in the nature of the goods produced, however, may be dutiable either as part of the price actually paid or payable or as an assist. (HQ 547006) (April 28, 1998).

Dutiability of Royalty & License Fee Payments



❖ Royalty & License Fee Payments

- (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
- (E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

Dutiability of Royalty & License Fee Payments



- ❖ 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.

Dutiability of Royalty & License Fee Payments



- ❖ Royalties or license fees for patents covering a process to manufacture imported merchandise generally will be dutiable.
- ❖ Payments made by the buyer to a third party for the right to:
 - Distribute or resell imported merchandise
 - 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. (what does licensing agreement say???)

Dutiability of Royalty & License Fee Payments



❖ In HQ H004991, dated April 2, 2007

- The fact that the royalty payments are made to an unrelated third party is not entirely determinative.
- Customs' 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.

Dutiability of Royalty & License Fee Payments



- HQ W548692; HRL 548489, August 4, 2004; and HQ H004991, April 2, 2007
 - Customs found that the royalty payments and the purchase of the imported goods were [“inextricably intertwined,”](#) even though:
 - There were 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

Dutiability of Royalty & License Fee Payments



❖ Meaning of “inextricably intertwined”

- Provisions in the same agreement for the purchase of the imported merchandise and the payment of the royalties;
- License agreements which refer to or provide for the sale of the imported merchandise, or
- Require the buyer's purchase of the merchandise from a specific seller/licensor;
- Termination of either the purchase or license agreement upon termination of the other;
- Termination of the purchase agreement due to the failure to pay the royalties; or,
- Payment of the royalties on each and every importation.

About your Speaker



George Tuttle is an attorney with the law firm of George R Tuttle Law Offices in San Francisco. He has been in practice for over 25 years. George's practice emphasis is on Customs, international trade regulation, and export compliance. He works with both small and large clients, as well as customs brokers and freight forwarders with import and export related matters.

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