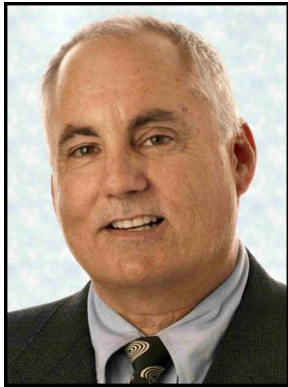


Customs Valuation 101: Additions to Value: Assists, Supplemental Payments, Royalties and License Fees

GEORGE R. TUTTLE, III
GEORGE R. TUTTLE LAW OFFICES
PHONE (415) 288-0428
MOBILE: (415)254-5986
E-MAIL: GEO@TUTTLELAW.COM



About your Speaker



George Tuttle, III is an attorney with the law firm of George R Tuttle Law Offices in San Francisco. He has been in practice for over 37 years. George's practice emphasis is on Customs, international trade regulation, and export compliance. He works importers, as well as customs brokers and freight forwarders on import and export 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.

Mr. Tuttle was the editor and a principal author for the American Bar Association's publication U.S. Customs Law: A Practitioner's Guide: Chapter 9 "Focused Assessments" and Customs Audits. He has also contributed materials for the ABA's annual publication Customs Law Committee Year in Review.

He and the firm litigate matters before the United States Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) in Washington D.C., on customs matters such as classification and valuation.

Additional information about Mr. Tuttle can be found at www.tuttlelaw.com.



Fundamentals of Customs Valuation



- ❖ Why is getting the “right” Customs value important?
- ❖ Where do we start?
- ❖ What additions to the invoice value are required?
- ❖ What deductions from the invoice value are appropriate?
- ❖ How do we make adjustments to the Customs value of imported goods?
- ❖ Getting it right – testing for Customs valuation



Common Value Issues



- ✓ Inadequate justification of intercompany transfer prices
- ✓ Additional Payments &/or Assists
- ✓ Deductions from Value
- ✓ 1st Sale Issues (Nissho Case)
- ✓ Royalty and Licensing fee payments
- ✓ Fictitious values (e.g. returns & defective goods)



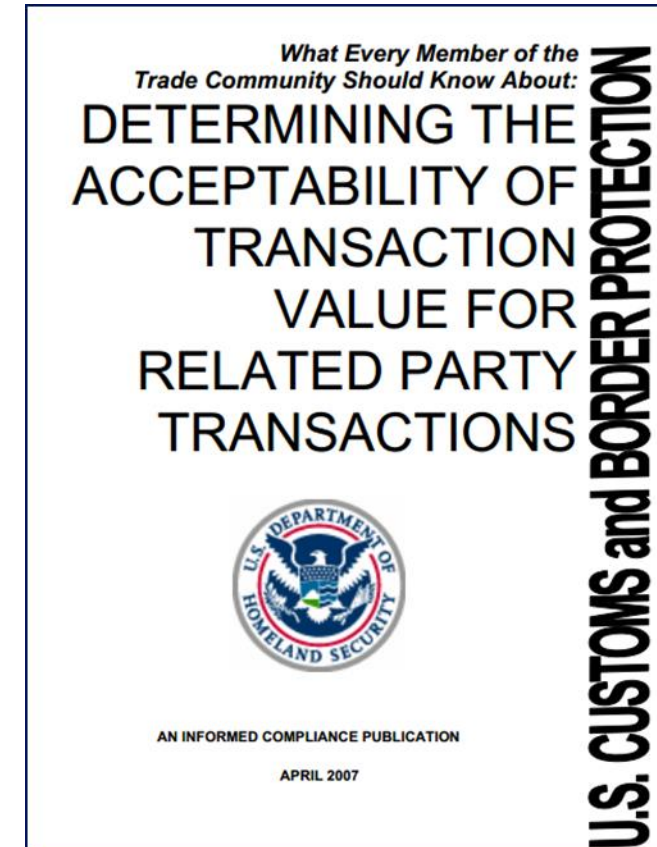
Valuation Resources



➤ Important Resources

■ Customs Informed Compliance Publications

- <http://www.cbp.gov/trade/rulings/informed-compliance-publications>
 - Customs Value
 - **Customs Valuation Encyclopedia (1980 - 2015)**
 - 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





Customs Valuation -- Statute



U.S. Code > Title 19 > Chapter 4 > Subtitle III > Part I > Subpart a > § 1401a

19 U.S. Code § 1401a - Value

<https://www.law.cornell.edu/uscode/text/19/1401a>

US Code

Notes

Authorities (CFR)

prev | next

(a) GENERALLY

(1) Except as otherwise specifically provided for in this chapter, imported merchandise shall be appraised, for the purposes of this chapter, on the basis of the following:

- (A) The transaction value provided for under subsection (b).
- (B) The transaction value of identical merchandise provided for under subsection (c), if the value referred to in subparagraph (A) cannot be determined, or can be determined but cannot be used by reason of subsection (b)(2).
- (C) The transaction value of similar merchandise provided for under subsection (c), if the value referred to in subparagraph (B) cannot be determined.
- (D) The deductive value provided for under subsection (d), if the value referred to in subparagraph (C) cannot be determined and if the importer does not request alternative valuation under paragraph (2).
- (E) The computed value provided for under subsection (e), if the value referred to in subparagraph (D) cannot be determined.
- (F) The value provided for under subsection (f), if the value referred to in subparagraph (E) cannot be determined.



Customs Valuation -- Regulations



CFR > Title 19 > Chapter I > Part 152 > Subpart E

19 CFR Part 152, Subpart E - Valuation of Merchandise

eCFR

Authorities (U.S. Code)

- § 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 merchandise.
- § 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.

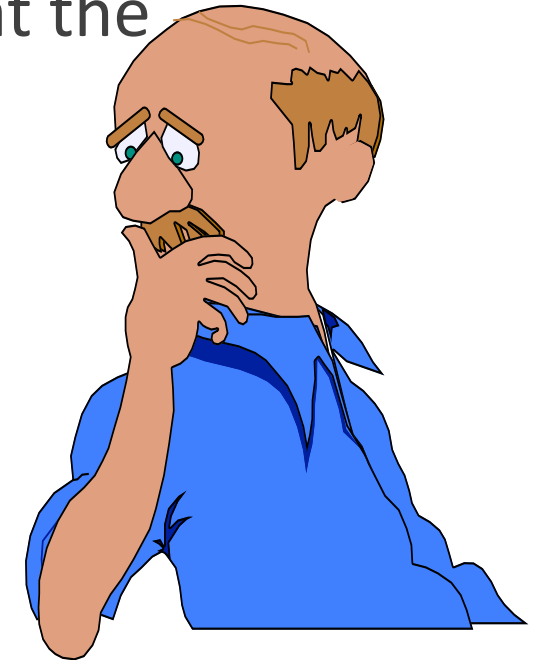
<https://www.law.cornell.edu/cfr/text/19/part-152/subpart-E>

The “Reasonable Care” Requirement



The value law (19 U.S.C. 1484) requires importers to use “reasonable care” when providing information to Customs at the time of entry regarding:

- Classification
- Value/ Appraisement
- Rate of duty
- Admissibility





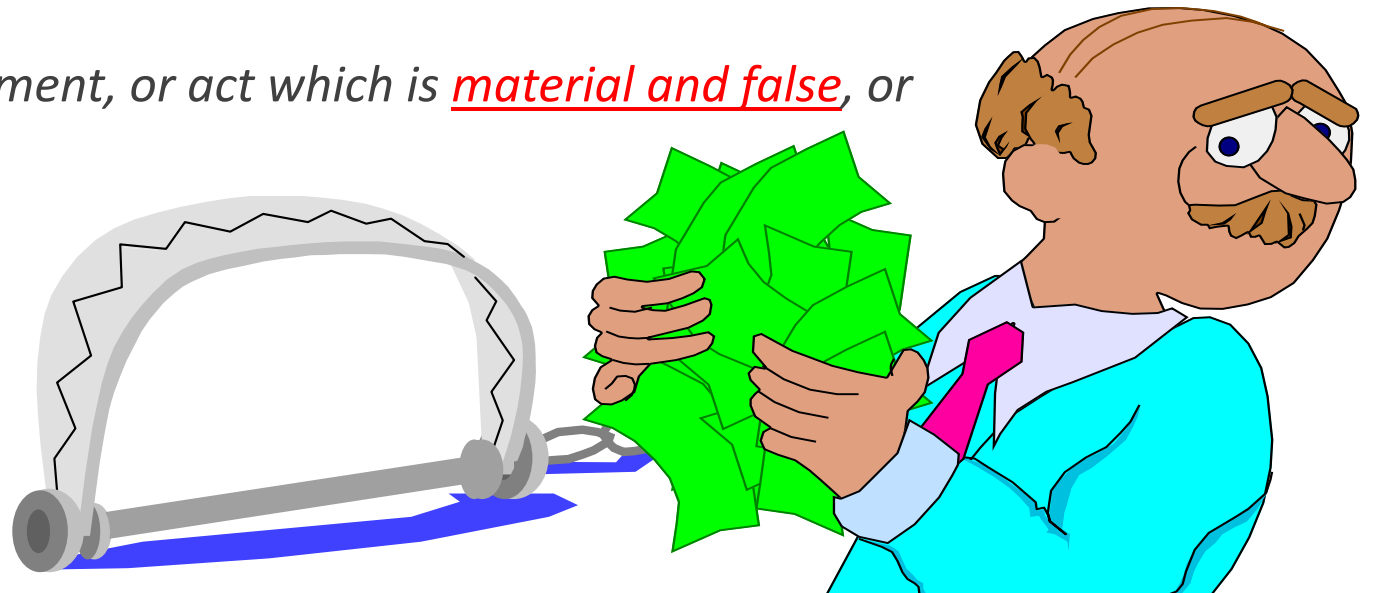
The Importance of Understanding Valuation



19 U.S.C. § 1952

...No person, by fraud, gross negligence, or negligence--(A) 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

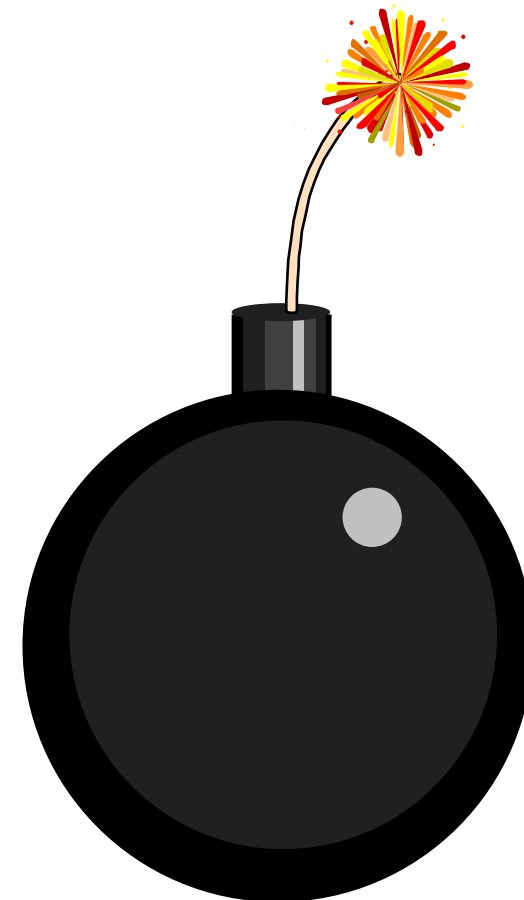




The Importance of Understanding Valuation



- ❖ What is Negligence?
- ❖ An act (or omission) done through the failure to exercise the same degree of reasonable care and competence expected from a person in the same circumstances in:
 - ascertaining your obligations under the statute
 - ascertaining the facts or drawing inferences from them,
 - communicating information in a manner so that it may be understood by Customs.





What is Transaction Value?



❖ Transaction Value is defined in 1401a(b):

(b) TRANSACTION VALUE OF IMPORTED MERCHANDISE

(1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—

- (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.



“Price Actually Paid Or Payable”



- ❖ For purposes of 19 USC 1401a(b)—
- ❖ (A) **The term “price actually paid or payable” means the total payment (whether direct or indirect) and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) **made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.****
- ❖ (B) Any **rebate** of, or other **decrease** in, the price actually paid or payable that is made or otherwise effected between the buyer and seller **after the date of the importation** of the merchandise into the United States shall be **disregarded** in determining the transaction value.



Transaction Value (1401a(b)) Breaking it down



- ❖ When is transaction value appropriate?
- ❖ Always start with transaction value
 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 (1401a(b)) Requirement of a Sale



- ❖ For transaction value to be used as a method of appraisement, there must be a “sale” between the parties Without a sale for exportation to the United States, transaction value must be eliminated as a means of appraisement. H304125: Valuation of Tools Transferred between Related Parties Date: Aug 2, 2019 and VWP of America, Inc. v. United States, 175 F.3d 1327 (Fed.Cir. 1999)
- ❖ CBP may examine whether the purported buyer paid for the goods, and whether, in general, the roles of the parties and the circumstances of the transaction indicate that the parties are functioning as buyer and seller.
 - CBP will consider whether the buyer provided or could provide instructions to the seller,
 - was free to sell the transferred item at any price he or she desired,
 - selected 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.
- ❖ See HQ 547197, dated August 22, 2000; and HQ 546602, dated January 29, 1997, and CBP's Informed Compliance Publication, entitled "Bona Fide Sales and Sales for Exportation."



Customs Valuation – The Statute (1401a(b))



- (A)** The transaction value of imported merchandise determined under paragraph (1) shall be the appraised value of that merchandise for the purposes of this chapter only if—
- (i)** there are no restrictions on the disposition or use of the imported merchandise by the buyer other than restrictions that—
 - (I)** are imposed or required by law,
 - (II)** limit the geographical area in which the merchandise may be resold, or
 - (III)** do not substantially affect the value of the merchandise;
 - (ii)** the sale of, or the price actually paid or payable for, the imported merchandise is not subject to any condition or consideration for which a value cannot be determined with respect to the imported merchandise;
 - (iii)** no part of the proceeds of any subsequent resale, disposal, or use of the imported merchandise by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment therefor can be made under paragraph (1)(E); and
 - (iv)** the buyer and seller are not related, or the buyer and seller are related but the transaction value is acceptable, for purposes of this subsection, under subparagraph (B).



Customs Valuation – Related Party Valuation



(B) The transaction value between a related buyer and seller is acceptable for the purposes of this subsection if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or if the transaction value of the imported merchandise closely approximates—

(i) the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States;
or

(ii) the deductive value or computed value for identical merchandise or similar merchandise;

but only if each value referred to in clause (i) or (ii) that is used for comparison relates to merchandise that was exported to the United States at or about the same time as the imported merchandise.



Customs Valuation – 1401a(b)(2) Related Party Rule




- ❖ Statute requires imported goods be appraised at “transaction value” unless inappropriate
 - (b)(2)(A) -- The transaction value of imported merchandise shall be the appraised value of that merchandise for the purposes of this chapter only if -
 - *** (iv) the buyer and seller are **not related**, or
 - the buyer and seller are related but the transaction value is acceptable
- ❖ Burden is on importer to establish that the relationship does not affect the price

WCO Transfer Pricing Guidance

www.wcoomd.org/en/topics/valuation/instruments-and-tools/guide-to-customs-valuation-and-transfer-pricing.aspx

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 - Decisions taken by the Committee on Customs Valuation
 - Guide to the exchange of Customs valuation information
 - Guidelines on the development and use of a national database as a risk assessment tool
 - Guide to Customs Valuation and Transfer Pricing**
 - Case Study 14.1

Guide to Customs Valuation and Transfer Pricing


[More information](#)  

This Guide concerns the relationship between Customs valuation and transfer pricing. It is designed primarily to assist Customs officials responsible for Customs valuation policy or who are conducting audits and controls on multi-national enterprises (MNEs). It is also recommended reading for the private sector and tax administrations who have an interest in this topic.


The Guide does not provide a definitive approach to dealing with this issue. At the time of writing, the Technical Committee on Customs Valuation - the body which has the competence to consider technical interpretation of Customs valuation matters - continues to discuss the issue. Instead, the Guide provides technical background and offers possible solutions regarding the way forward, and shares ideas and national practices, including the trade view.

WCO GUIDE TO CUSTOMS VALUATION AND TRANSFER PRICING

[WCO GUIDE TO CUSTOMS VALUATION AND TRANSFER PRICING | pdf | 3.5 MB](#)



WCO GUIDE TO CUSTOMS VALUATION AND TRANSFER PRICING



WORLD CUSTOMS ORGANIZATION

123435.pdf

WCO Transfer Pricing Guidance

www.wcoomd.org/en/topics/valuation/instruments-and-tools/case-study-14-1.aspx

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Case Study 14.1

More information

Case Study 14.1 - Use of transfer pricing documentation when examining related party transactions under article 1.2 (a) of the agreement

This instrument was finalised at the 42nd Session of the Technical Committee on Customs Valuation which took place in Brussels from 18 to 22 April 2016.

The instrument contains a case study illustrating a scenario where Customs took into account transfer pricing information in the course of verifying the Customs value.

DISCLAIMER: THIS TEXT HAS BEEN ADOPTED BY THE TECHNICAL COMMITTEE ON CUSTOMS VALUATION AND IS SUBJECT TO APPROVAL BY WCO COUNCIL

DOWNLOADS

[CASE STUDY 14.1 - Use of transfer pricing documentation when examining related party transactions under article 1.2 \(a\) of the agreement | pdf | 90.5 KB](#)

[ESTUDIO DE CASO 14.1 - utilización de documentos referidos a los precios de transferencia al examinar transacciones entre partes vinculadas según el Artículo 1.2 a\) del acuerdo | pdf | 90.6 KB](#)

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CASE STUDY 14.1

USE OF TRANSFER PRICING DOCUMENTATION WHEN EXAMINING RELATED PARTY TRANSACTIONS UNDER ARTICLE 1.2 (a) OF THE AGREEMENT

Introduction

1. This document describes a case where Customs took into account information provided in a company's transfer pricing study based on the Transactional Net Margin Method (TNMM) when examining whether or not the price of imported goods had been influenced by the relationship between buyer and seller in accordance with Article 1.2 (a).

This case study does not indicate, imply, or establish any obligation on Customs authorities to utilize the OECD Guidelines and the documentation resulting from the application of the OECD Guidelines in interpreting and applying the WTO Valuation Agreement.

Facts of Transaction

2. XCO, a manufacturer in country X sells relays to its wholly-owned subsidiary, ICO, a distributor of country I. ICO imports the relays and does not purchase any products from unrelated sellers. XCO does not sell relays or goods of the same class or kind to unrelated buyers.
3. In 2012, ICO entered its goods using the transaction value, based on the price stated on the commercial invoice, which was submitted to Customs of country I. There is no indication that special circumstances exist as set out in subparagraphs (a) to (c) of Article 1 of the Agreement that would prevent the use of transaction value.
4. After importation, Customs in country I decided to review the circumstances surrounding the sale of goods between ICO and XCO, pursuant to Article 1.2 (a) of the Agreement, because it had doubts about the acceptability of the price.
5. The importer did not provide test values in accordance with Article 1.2 (b) and (c), as a means of demonstrating that the relationship did not influence the price.
6. In response to Customs request for additional information, ICO presented a transfer pricing study for the period 2011, prepared by an independent firm on behalf of ICO.
7. The transfer pricing study used the Transactional Net Margin Method ("TNMM") that, in this case, compared ICO's operating margin with the operating margins of functionally comparable distributors of goods of the same class or kind, also located in Country I, that conducted comparable uncontrolled transactions in the same period of time. The transfer pricing study was prepared in order to comply with the requirements of Country I tax regulations and applied principles contained in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of the Organisation for Economic Cooperation and Development ("OECD Transfer Pricing Guidelines"). The transfer pricing study covered all relays purchased by ICO from XCO.
8. Relevant data for ICO, taken from the company's financial records :

- Sales	100.0
- Cost of Goods Sold (COGS)	82.0
- Gross profit	18.0

1.



Transaction Value: When are parties related? (1401a(g))



(g) SPECIAL RULES

(1) For purposes of this section, the persons specified in any of the following subparagraphs shall be treated as persons who are related:

(A) Members of the same family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants.

(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 outstanding 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.

- ❖ Existence of relationships are not always apparent
- ❖ Must check with legal, Finance, Contracts, etc. on status (mergers/ buy-outs/ acquisitions,)
- ❖ Look at **Company 10K** and/or **annual reports**



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 for a period, or
- may be adjusted after importation to change profit and cost allocations at end of year



1401a(b)(2)(B) Related Party Rule



❖ Transaction value between a related buyer and seller is acceptable if an examination of either:

- The **circumstances of sale** indicates that the relationship did not influence the price
- the transaction value of the imported merchandise closely approximates a **test value**.
- “Test values” refer to values previously determined pursuant to actual appraisements of imported merchandise. Thus, for example, a deductive value calculation can only serve as a test value if it represents an actual appraisement of merchandise under section 402(d) of the TAA. See Headquarters Ruling Letter (“HRL”) 543568, dated May 30, 1986. H239496 (2015)

(B) The transaction value between a related buyer and seller is acceptable for the purposes of this subsection if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or if the transaction value of the imported merchandise closely approximates—

- (i)** the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States; or
- (ii)** the deductive value or computed value for identical merchandise or similar merchandise;



Transaction Value: Related Parties Circumstances-of-Sale



❖ Circumstances-of-sale test (COS)

- Appraisement . . . pursuant to the transaction value method will be acceptable, even between related parties, if the price is settled:
- "in a manner consistent with the normal pricing practices of the industry in question" (**COS1**), or
- "the way the seller settles prices for sales to buyers who are not related to him." (**COS2**)

❖ Statement of Administration Action; see also 19 C.F.R. 152.103 (l)(1)(ii).



Transaction Value: Related Parties --Price Negotiation



- ❖ 543519 dated Sep. 5, 1985, aff'd by 554999 dated Jan. 5, 1989
 - **Documentary evidence must be available** to establish that the parties, although related, bought and sold as if they are not related.
 - The importer **negotiates prices** with the related party seller:
 - rejects the prices if dissatisfied and
 - **may purchase from other suppliers.**
 - The importer's sales divisions determine their U.S. resale prices and make their own management decisions.
 - **HQ H160935, February 11, 2015 – CBP accepts evidence of negotiation for price.**



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



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 - P. 9, DETERMINING THE ACCEPTABILITY OF TRANSACTION VALUE FOR RELATED PARTY TRANSACTIONS



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



❖ What is “Equivalent profit”?

- HQ H236152, April 8, 2015
 - “The regulations do not give us the definition of “equivalent” profit; however, if the profit of the seller is equal to or higher on the U.S. imports than the firm's overall profit, the purchase price would not be artificially low for Custom's purposes. See HQ H065024, dated July 28, 2011; HQ H238990, dated April 2014.”
- “The firm's overall profit” means”:
 - Profit of the parent company in sales of “merchandise of the same class or kind”
 - The definition of the “merchandise of the same class or kind” is broader in scope and is not limited to similar or identical merchandise.



Acceptability of Transfer Prices 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 IRS Transfer Pricing Methods



- ❖ 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. See HQ 546998, dated January 19, 2000; and HQ 548095, dated September 19, 2002.
- ❖ 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.



Transaction Value Related Parties -- Summary



- Related party importers should have a “Customs Value” analysis done.
- Does the RP transfer pricing policy provide for “End of Year” or “post entry adjustments”?
 - If so, does the policy meet the requirements of a **“fixed formula”** under [HQ W548314](#)?
- The existence of a transfer pricing study does not, by itself, eliminate the need for CBP to examine the “circumstances of sale”
- Three methods can be used . . .
 - "in a manner consistent with the normal pricing practices of the industry in question (**COS-1**),
 - the way the seller settles prices for sales to buyers who are not related to him.” (**COS-2**),
 - All costs plus a profit equal to the profit of the parent company (**COS-3**)
 - Other -- “totality of circumstances”



Other Methods Of Appraisement



- ❖ If transaction value can not be established because
 - 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



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 even if the payment represents something other than the per se value of the goods." (*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.
- ❖ In **Chrysler Corporation v. United States, 17 CIT 1049 (1993)**, the Court applied the standard set forth in *Generra* and determined that certain shortfall and special application fees that the buyer paid to the seller were not a component of the price actually paid or payable for the imported merchandise.
- ❖ The court found that the evidence established that these fees were independent and unrelated costs assessed because the buyer failed to purchase other products from the seller and not a component of the price of the imported engines



The Generra Rule & Supplemental Payments



- ❖ Importers are often invoiced separately by vendors/suppliers for:
 - Materials, components, tooling, molds, packaging, and production or testing equipment
 - Expedited or “hot lot” manufacturing fees and small lot or small quantity surcharges
 - Production modifications and **Non-reoccurring engineering (NRE)** or separate charges for startup or retooling
 - **Testing costs:** HQ 544508, dated June 19, 1990; 543645 dated Feb. 17, 1987; 542187 dated Nov. 7, 1980 (TAA No. 11).
 - Payments to a seller for mold costs and cutting dies are considered part of the price actually paid or payable for the imported merchandise. HQ 544615 dated Sep. 11, 1991
 - Reimbursement for unused materials and components are not a part of the value. 544820 dated Oct. 18, 1991



The Generra Rule & Supplemental Payments



- ❖ 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.
- ❖ Apportionment
 - Concerning the issue of apportionment, HRL 546771 stated that the issue was addressed in Chrysler Corporation v. United States, 17 CIT 1049 (1993). In Chrysler, the court found that for tooling expenses the costs should be apportioned over the value of the total number of items intended to be produced based on the intent of the parties and the evidence presented. Therefore, in application of Chrysler, we found in HRL 546771 that the cost of the mold should be apportioned over the number of items intended to be produced.



Supplemental Payments



❖ Testing Charges & Other Additions

- **Testing costs** are not assists but are 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**
- Testing costs paid to unrelated 3rd party
 - With regard to the testing services, we have stated in previous decisions that when testing is performed by independent testers for the benefit of the buyer, not the seller, and is paid for by the buyer, such testing costs are not part of the price actually paid or payable for the merchandise. See HQ H256223, dated August 20, 2014



The Generra Rule & Supplemental Payments



❖ 545456 dated Oct. 21, 1994, affd. by 545995 dated Oct. 12, 1995.

- In addition to the transfer price of merchandise, buyer sent regular weekly payments to the seller which were 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.



Indirect Payments



- ❖ An indirect payment by the buyer to the seller includes:
 - Settlement by the buyer of a debt owed by the seller to a third party (such as supplier/vendor)
 - Buyer receives a reduction in price on a current importation as a means of settling a debt owed to him by the seller. See 19 C.F.R. 152.103(a)(2). (**offsets or credits**)
- ❖ 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 (1995); 554999 (1989), and 545381 (1998)
 - A payment made by a third party to the seller to satisfy the buyer's obligation to the seller.



Indirect Payments



❖ More examples of indirect payments

- “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...” W563503, dated May 26, 2006
- **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.
- 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.



Statutory Additions to Transaction 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



Packing Costs Additions



- ❖ “Packing costs” means the cost of all containers (exclusive of instruments of international traffic) and coverings of whatever nature and of packing, whether for labor or materials, used in placing merchandise in condition, packed ready for shipment to the United States. 19 CFR 152.102(e) & HQ H275188 (2016)
- ❖ **Services** are packaging costs if incurred in placing the merchandise in condition ready for shipment to the U.S.
- ❖ Includes hangers, garment protection, carton markings, carton dimensions, packing and folding instructions, and container loading.
- ❖ Price tickets, hang tags, radio frequency identification (RFID) and security tags are all considered packing additions to transaction value. See, e.g. HQ H108098 (2010); HQ H028000 (2008)



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 . . .

❖ 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.



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



Test Equipment



- ❖ Test equipment provided free of charge to the foreign manufacturer by the U.S. importer is an assist if the equipment is:
 - Used for testing during the production process and
 - Testing is essential to the production of the product. 544508 (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 as part of the production process



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) 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 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 expenses, such as masks or tooling costs



Adjustments To Assist Value



- ❖ 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
- ❖ **Repairs or modifications** to an assist will increase its value



Apportioning the Value of Assists



- ❖ 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)
 - HQ H015975, September 13, 2007 – Permitted certain indirect assists to be apportioned and declared on the first entry of the month following the incurrence of such costs, when there was no other reasonable method to allocate the costs
 - H299185: Ruling Request on the Valuation and Apportionment of Assists Ruling Date: Aug 24, 2018



Apportioning the Value of Assists



- ❖ Customs has authority under 19 CFR 152.103(3)(1) to accept or reject a proposed apportionment method
- ❖ “...there must be a connection between the apportionment method selected and the imported articles ...” HQ 545031, June 30, 1993 and HQ H231836, June 19, 2014
 - “Proposed apportionment method is unreasonable if it is based solely on the estimated useful life of the assist.”
 - **Must be a link between “the proposed apportionment method and the imported merchandise.”**
 - “lack of connection between the proposed apportionment and the 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.”
 - “the plan to apportion the value of the assists over the longer 3 1/2 year estimated useful life of the molds means that much of the value of the assists will never be apportioned to the imported toys, and therefore will not be dutiable.”



Depreciation Of Assists

Treatment of Tools, Molds and Equipment vs. Materials



- ❖ 543233, dated 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.

- ❖ 542356, dated Apr. 13, 1981 (TAA No. 24); 542477 dated July 27, 1981
 - In determining the value of fabric furnished without charge to an unrelated assembler, the cost of acquisition to the importer (from an unrelated party) 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.

❖ 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 fully depreciated assists 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.



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.
- H287490: Dutiability of costs incurred for foreign product design and promotion services; Ruling Date: Oct 6, 2017

❖ (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.



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).



Royalties & License Fees



- ❖ Easy find for Customs auditors as there is typically a G/L account for this
- ❖ Dutiability of royalties & license fees
 - Is the fee paid for a **patent, process or formula necessary** to produce the imported merchandise? (**almost always dutiable**)
 - Is the fee paid for the use of a **trademark, trade name, design mark, etc.**, that is applied to the imported merchandise? (almost never dutiable, unless . . .)
 - Payment of the fee is a condition of the sale of the imported merchandise between the seller and buyer (importer).
 - The foreign seller is also the licensor of the **trademark, trade name, design mark, etc.**, or
 - The payment is made to a licensor that is related to the foreign manufacturer/ seller of the goods



Royalties & License Fees



- ❖ The dutiable status of royalties or license fees paid by the buyer will be determined in each case and will depend on:
 - Whether the buyer was required to pay them as a condition of sale of the merchandise for exportation to the United States, and
 - To whom and under what circumstances the royalty or license fee was paid.
- ❖ Separate license fees paid to seller for right to distribute or resell is a “proceed of subsequent resale.”
- ❖ General Notice, Dutiability of Royalty Payments, Vol. 27, No. 6, Cust. B. & Dec., February 10, 1993



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**.



Royalties & License Fees



❖ In HQ H004991, dated April 2, 2007

- The fact that royalty payments are made to an unrelated third party is not entirely 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



Royalties & License Fees



❖ 1401a(b)(1)(E) Proceeds of Subsequent Resale

- Royalty or license fee payments made to the seller or a party related to the seller will (almost) always be dutiable as a proceed of subsequent resale
- **Proceeds of subsequent resale** include joint profit sharing or profit splitting agreements between importer and foreign party



Valuation Strategies for Duty Minimization



- ✓ Deductions from Value
- ✓ Use of 1st Sale & its Issues (the Nissho Case and its progeny)



Valuation Strategies for Duty Minimization



❖ 19 USC § 1401a(b)(4) excludes costs incurred for international transportation, insurance, and related services and charges

- ✓ EXW | Ex Works
- ✓ FCA | Free Carrier
- ✓ FAS | Free Alongside Ship
- ✓ FOB | Free On Board
- ✓ CFR | Cost and Freight
- ✓ CIF | Cost Insurance and Freight
- ✓ CPT | Carriage Paid To
- ✓ CIP | Carriage and Insurance Paid To
- ✓ DAP | Delivered at Place
- ✓ DPU | Delivered at Place Unloaded
- ✓ DDP | Delivered Duty Paid





Transaction Value Deductions: International Freight



- ❖ Importer must be able to document **actual payments** for int'l transportation, insurance and related services and charges
- ❖ Customs informed compliance publication on - **Proper Deductions for Freight & Other Costs** and **T.D. 00-20**.
 - In HRL 546226, dated March 25, 1996, CBP 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.
- ❖ A good ruling to review is HQ W548068, April 5, 2002



Transaction Value: International Freight and Related Costs



- ❖ **Excludes costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment**
 - HQ H004683, 12-Apr-07, Actual freight costs, as well as the "other charges," i.e., fuel surcharge, security charge, and handling fee, should not be included in transaction value.
 - HQ H023812, April 4, 2008, CBP rejected deduction of international transportation costs for DDP transaction.
 - Documents did not enable CBP to ascertain the party that paid the freight.
 - The sea waybill indicated that freight was prepaid, which typically means payment by the shipper.
 - The waybill, however, identifies the freight forwarder as the shipper, and makes no reference to exporter.



Transaction Value: Other Deductions



❖ “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.



Valuation Strategies for Duty Minimization



❖ Example of deductions for “F” terms (FCA, C&F, FOB)

FREIGHT AND CHARGES REVENUE TONS RATE PER	PREPAID
IN GENERAL, LOCAL CHARGE OF 40' HC IS STANDRD FOB(LOCAL CHARGE)	
ORC:USD308	DOC:USD83
AMS:USD40	SEAL:USD8.3
EIR:USD8.3	HC:USD50
TLX:USD50	VGM:USD15
CC:USD83	



Foreign Inland Freight



- ❖ 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 actually paid by the buyer to the seller for the imported merchandise **does not include a charge for foreign inland freight** incident to the international shipment of merchandise, those charges will not be added to the price.
- ❖ Sales other than ex-factory
 - If the price actually paid includes a charge for foreign inland freight, whether or not itemized separately on the invoices or other commercial documents, charge will be part of the value to the extent included in the price.



Foreign Inland Freight



❖ Sales other than ex-factory – When 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 the merchandise within the meaning of §152.102(f)
 - If the inland shipping charges are identified separately,
 - The charges were incurred after the merchandise has been sold for export to U.S., and
 - Placed with carrier for through shipment to the United States.
- Customs requires that a “through bill of lading” be presented.
- *All Channel Products vs. United States*, 16 CIT 169 F. Supp. 1457 (1992), aff’d., 982 F.2d 513 (1992). Customs was correct in not deducting foreign-inland freight and related charges from CIF prices when no evidence of a through bill of lading was provided.



Apportionment of Freight Costs



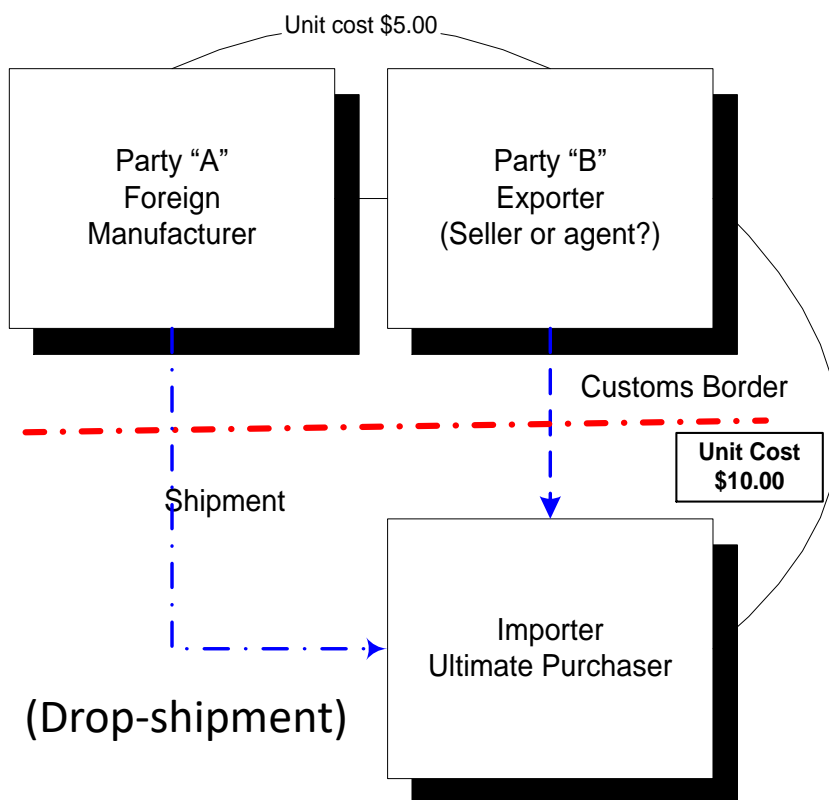
❖ Apportionment of Freight Costs to Entry Lines

❖ HQ W54806, April 5, 2002:

- Customs Directive 099 3550-061, Instructions for Preparation of CF 7501, dated September 18, 1992, states concerning the apportionment of freight charges that "[t]his value [freight charges] shall be shown in whole numbers for each HTS item number beneath the entered value and identified with the letter "C" (e.g. C550).
- Charges are required for each line item valued over \$1250, and in certain special cases for each line item over \$250."
- A memorandum dated February 21, 2002, from the Office of Field Operations concerning **GSN 1(b)(ii) and the reporting of freight charges** states that "[a]ctual freight charges will be reported at the line level on the entry summary (CF7501) if they are known at the time of entry. **It is acceptable to prorate these charges** over all of the lines on the CF7501, as they are required to be reported at the line level."
- The above are the only notices or instructions to the public of which we are aware concerning the apportionment of freight costs to entry lines. Although it is clear that freight charges are to be apportioned at the line level, we are unaware of any instructions on what method is to be used in apportioning these charges. Consequently, we agree with counsel's contention that **Customs has not specified what method should be used to apportion freight costs**. Absent a specified method, the use of value to apportion the freight costs to the entry lines for the subject entries was proper.
- [S]ince freight deductions must be based on actual costs, and we concur that freight charges are typically made on the basis of weight. Consequently, for future entries, we will presume that the **freight was charged on the basis of weight, and the apportionment at the line level should therefore be made using weight as the method**. If another method is used to charge the freight, then that method should be used to apportion the freight at the line level.



Use of the "First Sale" For Customs Valuation



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

- Court held that Mfg selling price to middleman is an acceptable "TV" when:

- There is a **sale** (i.e., transfer of ownership of the goods) [Can be problems with related parties]
- Negotiated at arm's length, free from any non-market influences [Think about this!]
- Goods are **clearly destined for export** to United States

➤ Reaffirmed in Target Stores v. United States, 31 CIT 154, 157, 471 F. Supp. 2d 1344, 1347 (2007).

➤ CBP Informed Compliance Publication: "Bona Fide Sales and Sales for Exportation."



“First Sale” For Customs Valuation



- T.D. 96-87, Determining Transaction Value in Multi-Tiered Transactions, Vol. 30/31, Customs Bulletin No. 52/1 (January 2, 1997)
- CBP presumes that transaction value is based on the price paid by the importer
- Importer must be able to support appraisal based on the price paid by the middleman to the foreign manufacturer
- Importer must present sufficient evidence that:
 - First sale was a bona fide "arm's length sale;" and free from “non-market influences.”
 - clearly destined for export to the United States at the time it was sold to the middleman.
 - Watch out for related party issues and existence of assists or supplemental payments



First Sale Title and Transfer Issues



- Simultaneous or flash transfer of title
 - Where the middleman and the buyer obtain **title at virtually the same moment**, as evidenced by both parties having the **same terms of sale** may cause CBP to more closely scrutinize a transaction.
 - By itself, flash transfer of title does not equate to a failure to show a bona fide sale (for instance, see HRL W563605, dated November 19, 2009).
 - But this factor along with who carries **the risk of loss** are considered by CBP in its determination of whether a bona fide sale has occurred.



First Sale Title and Transfer Issues



➤ HRL H016966, dated December 17, 2007

- "Whenever 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."
- "In such situations the middleman may be a buying or selling agent rather than an independent buyer/seller and the sale will be said to occur between the party identified as the first seller and the ultimate U.S. purchaser."
- A determination of when title and risk of loss pass from the seller to the buyer in a particular transaction depends on whether the applicable contract is a "shipment" or "destination" contract. HQ H246429, January 7, 2014



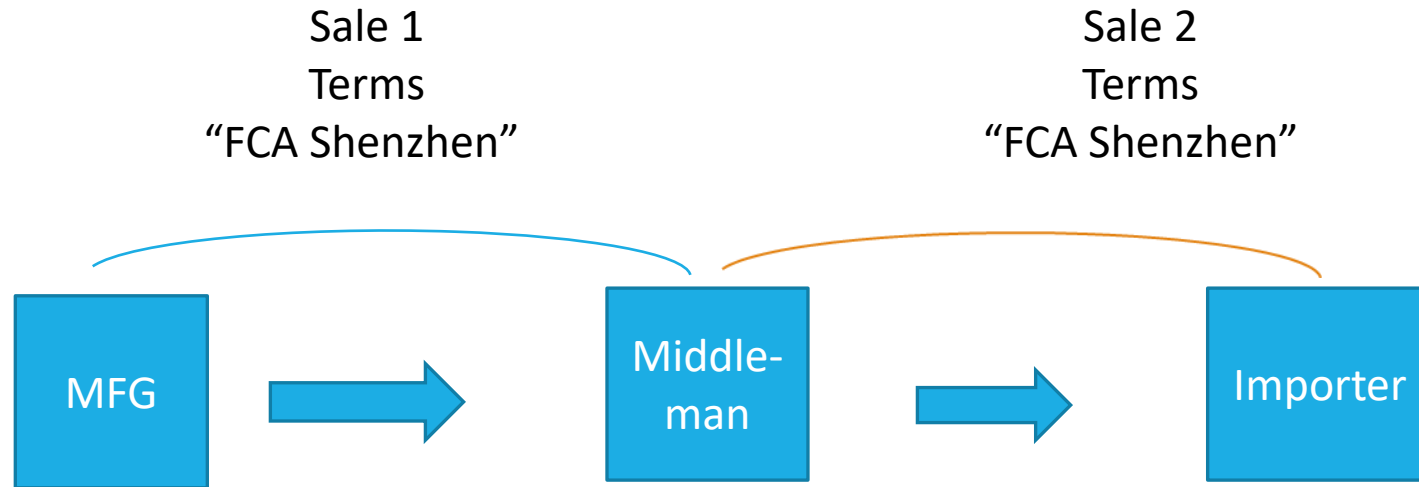
First Sale Title and Transfer Issues



➤ Title Transfers

- In a shipment contract, when seller completes physical delivery to the carrier
 - Ex works
 - F-terms (FCA, FAS, FOB, etc.)
 - C-terms (CIF, C & F, etc.)
- In a destination contract, when goods are physically delivered to the location required
 - D-Terms (i.e., DDU and DDP)

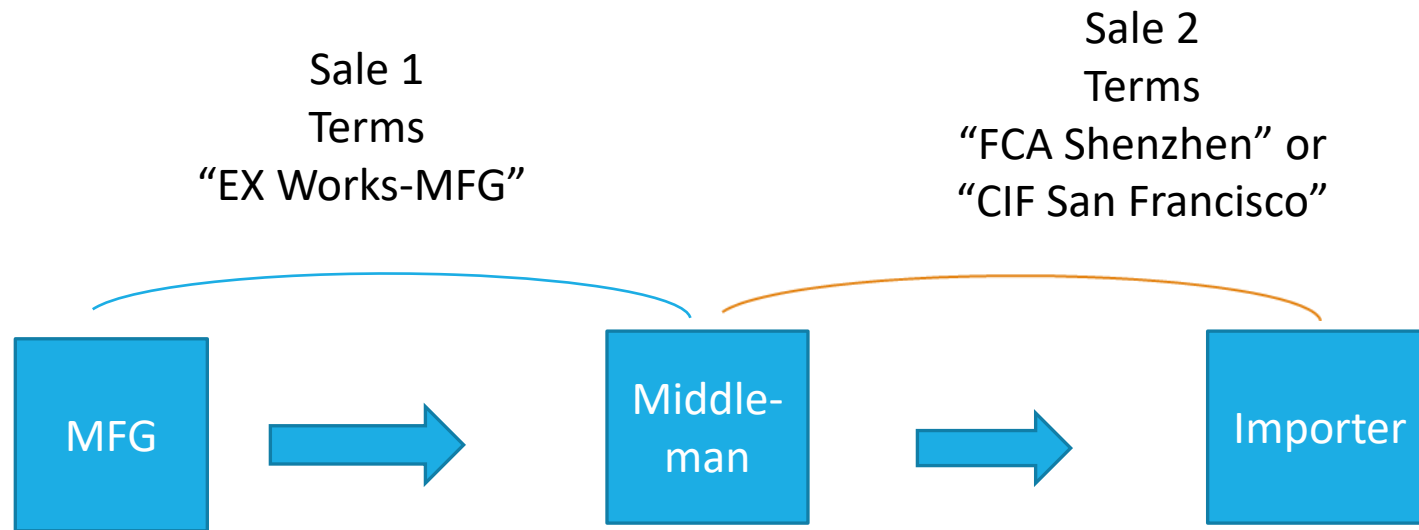
Simultaneous or Flash Transfer of Title



Middleman does not have “possession of goods”



Consecutive Transfer of Title



Middleman has “possession of the goods”



“First Sale” for Customs Valuation



- Information and Documentation Requirements -- HQ H246429, January 7, 2014; Treasury Decision (T.D.) 96-87, dated January 2, 1997:
 - Importer must be able to describe
 - Roles of all parties and furnish relevant documents pertaining to each transaction that was involved in the exportation of the merchandise to the United States.
 - Provide relevant documents including:
 - purchase orders, invoices, proof of payment, contracts and any additional documents (e.g. correspondence), demonstrating how the parties dealt with one another and which support the claim that the merchandise was clearly destined to the United States
 - CBP looking for complete paper trail of the imported merchandise showing the structure of the entire transaction
 - Importer must also inform CBP of any statutory additions and their amounts



Transaction Value: First Sale Issues



- ❖ If the foreign manufacturer and the reseller are **related**, the sale will not be acceptable to CBP unless the **intercompany sale** transaction is a **valid transaction value**. HQ H256779, January 20, 2016
 - HQ H255028, November 21, 2014:

... it is the importer's responsibility ... to show that the "first sale" price is acceptable under the standard set forth in Nissho Iwai. That is, the importer must present sufficient evidence that the alleged sale was a bona fide "arm's length sale," and that it was "a sale for export to the United States" within the meaning of 19 U.S.C. 1401a.
 - Related middleman will have to provide documentation to support “circumstances of sale” test
 - All costs + profit
 - Same sales price to unrelated parties
 - Price established in a manner consistent with normal industry pricing practice
 - Any statutory additions provided to mfg by middleman or importer?



Transaction Value: First Sale Issues



- ❖ Incoterms: Risk of loss and the simultaneous (back-to-back) transfer of title
 - Middleman should possess merchandise or risk of loss
 - In HQ H016966, dated December 17, 2007, CBP stated that:

Whenever 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.

... 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.
- See HQ H236428, September 8, 2014; HQ 546192, February 23, 1996
- HQ H272113, March 9, 2016 – rejects First Sale appraisalment of merchandise
- HQ H224598, December 30, 2014– accepts First Sale appraisalment of merchandise



“First Sale” For Customs Valuation



- ❖ “Clearly destined for export to the United States”
 - Goods shipped directly to the United States. HQ 547382, February 14, 2002
 - Purchase order and invoices specify the goods are for/destined to the U.S.
 - Manufacture, design, and other unique specifications or characteristics of the merchandise – labels, logos, stock numbers, or unique marks are in conformity with U.S. buyer's standards
 - Marking, visas, warranties or other types of certification or characteristics required for entry or operation in the U.S.
 - Avoid simultaneous transfers of title or passage of risk of loss



First Sale and the Concept of “Freely Offered”



❖ The concept in [Nissho Iwai](#) that the first price had to “be free from any non-market influences” has not receive a great deal of attention since the decision was issue in 1992.

❖ [Meyers Corp. v. United States](#), Slip Op. 21 – 26 (CIT, March 1, 2021) changed this.

- Meyers – importer of cookware from **China** and **Thailand**
- Meyers argued that First Sale applied to its import transactions that were under protest
- Looking at the Nissho factors, the court said:

Whether due to first sale tests being generally applied to transactions from market economy countries, the last consideration [“absent any distortive nonmarket influences”] has generally been neglected, but it is not irrelevant in the context of this case.”

Meyer must further establish the absence of any market-distortive influences on the price of the cookware, both for that manufactured in the PRC and for the Thai cookware with components from China.



First Sale and the Meyers Decision



- List of non-market economy countries: <https://www.trade.gov/nme-countries-list>
- Two most prominent countries are China and Vietnam
- Court required importer to demonstrate that “first price” was “free from any non-market influences” by using the Department of Commerce test:

One method that could be used to establish the absence of PRC non-market influence are the factors used by entities located there to obtain a duty rate other than the country-wide rate established by the U.S. Department of Commerce in antidumping-duty proceedings involving non-market economy participants.



First Sale and the Meyers Decision



- ❖ See Advanced Tech. & Materials Co. v. United States, 36 CIT ___, 885 F.Supp.2d 1343 (2012).
- ❖ To obtain a separate rate in that context, an entity must satisfy three de jure factors and four de facto factors:
- ❖ The **de jure** (legal) factors are:
 - (1) an absence of restrictive stipulations associated with an individual exporter’s business and export licenses,
 - (2) any legislative enactments decentralizing control of companies, and
 - (3) other formal measures by the government decentralizing control of companies.”
- ❖ Typically-considered **de facto** factors include:
 - (1) the ability to set export prices independently of the government and without the approval of a government authority,
 - (2) the authority to negotiate and sign contracts and other agreements,
 - (3) the possession of autonomy from the government regarding the “selection” of management, and
 - (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses.
- ❖ You can get your “separate rate application” at: <https://enforcement.trade.gov/nme/nme-sep-rate.html>



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Guide to Customs Valuation and Transfer Pricing

Customs Valuation Compendium



The WCO Technical Committee on Customs Valuation (TCCV) makes technical decisions and publishes them as instruments in the form of:

- Advisory Opinions
- Commentaries
- Explanatory Notes
- Case Studies
- Studies

These instruments are not binding on Customs administrations, and do not amount to international valuation law. However, it is expected that the decisions of the Technical Committee are to play an important and vital role in achieving uniformity in the interpretation and application of the Agreement. The full text of instruments can be obtained in the [WCO Customs Valuation Compendium](#) on the WTO Agreement and Texts of the Technical Committee.

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