

The Pike Law Firm, P.C.

Customs and International Trade



Transfer Pricing Tops Topics At ABA's International Section Fall Meeting

November 24, 2009

With a packed agenda over two and a half days, the Fall Meeting of the American Bar Association's International Section took place in Miami Beach, Florida at the end of October. I was pleased to participate on a panel entitled "Transfer Pricing: More Than Income Tax," which focused on the overlap between customs valuation rules for imported merchandise and income tax transfer pricing rules for related party pricing. In addition to legal practitioners from the U.S., Canada, and Mexico, the Chief of the Valuation & Special Programs Branch at U.S. Customs HQ, Monika Brenner, also appeared on the panel. While Ms. Brenner reviewed the valuation rules in the U.S. and noted that the agency is still grappling with the issue of "compensating adjustments" and their impact on declared customs values (especially when duty refunds are involved), most of the panel's discussion focused on a "Case Study" involving the automotive industry - one of the most globalized industries in existence where almost every major player has a bilateral Advance Pricing Agreement ("APA") with the IRS and a foreign income tax authority. View the [Case Study](#) here along with some of the thought-provoking questions also covered during the panel discussion.



Australian Customs Issues Formal Policy Directive On Transfer Pricing

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In a welcome move for multinational companies, Australia issued a formal "Practice Statement" addressing the use of transfer pricing studies, APA's, and other income tax documentation to support declared customs values of imported merchandise. The document ([PS121/09](#)), released in July, is noteworthy for several reasons. First, it acknowledges that the definition of "transfer pricing" encompasses compensating adjustments as a normal and expected part of inter-company pricing. Secondly, it directs that duty refunds may be allowed under certain circumstances where post-importation price adjustments for income tax reasons result in lower declared customs value. Finally, and most significantly, it directs that the importer must obtain a "valuation advice" (the equivalent of the U.S. Customs HQ ruling) when seeking to use transfer pricing rules as the basis for customs valuation, especially when duties are owed or refunds are claimed due to the adjustment issue. (This aspect of the policy statement echoes the advice I have been giving to clients for many years: when in doubt, apply for a ruling!) (Readers might also be interested in comparing Australia's position to that of U.S. Customs, which issued its own "[Informed Compliance Publication](#)" on the subject of transfer pricing in April of 2007.)



U.S. Customs Proposal On Audits and Prior Disclosures Acknowledges Commercial Reality

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In a little-noticed but important proposed rule change, U.S. Customs and Border Protection ("CBP") has finally taken note of commercial practices that have taken place for many years in the context of a customs audit or a Prior Disclosure procedure. On October 21, 2009, CBP proposed newly expanded rules to use sampling methods in these two kinds of proceedings pervasive in the trade community. As importers are only too well aware, CBP reporting for imports takes place on a transaction-by-transaction basis, which can result in thousands upon thousands of "entries" to address when an audit takes place or a violation is discovered and the importer wishes to disclose the error to CBP via a Prior Disclosure. Because of the enormous administrative burden involved for both the importer and CBP in attempting to follow a "letter of the law" application of the rules, many local CBP ports and Regulatory Audit teams have worked with importers to narrow the scope of any audit by defining a sample universe of entries to be audited, allowing statistical sampling techniques to "disclose the circumstances of a violation" and calculating the loss of duty, fees, and other revenue for Prior Disclosures. The new rules now propose to formally adopt these heretofore informal procedures which have been used for many years. Comments to the agency are due by December 21, 2009. View a copy of the [Federal Register](#) notice announcing the proposed rule here.



Canadian Customs Applies New Interpretation To "Subsequent Proceeds" Provision Of Valuation Law

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With much international tax planning now focused on the treatment of intangibles and other kinds of payments not directly related to the cost of production of a manufactured article, Canada Border Services Agency recently injected a new dynamic into that planning with its publication of [Memorandum D13-4-13](#). This controversial policy directive changes years of interpretation of Canada's valuation statute (previously based on the 1979 GATT Valuation Agreement used by all major trading nations). The new policy sets forth much broader guidelines for what kinds of payments a buyer/importer makes that must be declared to Canadian Customs as part of the "transaction value" of imported merchandise, especially when those payments are related to something other than the invoice price of the imported goods. Specifically, the law requires that where any part of the proceeds of any subsequent resale, disposal or use of the goods by the importer accrue, directly or indirectly, to the vendor, then the transaction value must include an amount for those proceeds. However, the new interpretation of this law imposes a sweeping definition of "subsequent proceeds:" *any type of payment made by a purchaser after the importation of the goods into Canada*. The directive goes on to list many kinds of payments that

will be considered "fair game" for inclusion in the transaction value of imported goods, e.g., management and administrative fees, contributions for worldwide marketing or promotion, and contributions for research and development - none of which have ever been considered dutiable. Other members of the World Customs Organization, including the U.S., Japan, and the European Union, will no doubt be emboldened by Canada's new policy to take similarly aggressive positions, and importers should start proactively reviewing their tax planning to address this unwelcome development.

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