

The Pike Law Firm, P.C.
Customs and International Trade



VIEW FROM THE PIKE



WHEN IS A “PRIOR DISCLOSURE” NOT A PRIOR DISCLOSURE?



**CUSTOMS LAWYERS
ASSOCIATION**

Because all corporate entities are keenly interested in minimizing potential exposure to government penalties, the “Prior Disclosure” is a popular mechanism for importers to report errors and omissions to U.S. Customs. Making a valid disclosure, however, often involves “beating the clock” because importers may only submit disclosures before the commencement of a “formal investigation.”

This term has been the subject of much discussion and debate in the trade community for years. While one would think that a formal investigation must be commenced by the Office of Investigations (now part of ICE, or Immigration and Customs Enforcement), this has not been true in the “real world.” Customs has broadly applied this term such that importers are prevented from filing Prior Disclosures in many kinds of circumstances amounting to much less than a “formal investigation.” The Request for Information (CF28) has been a particular favorite of the agency when attempting to prevent importers from filing valid disclosures by claiming that the CF28 launches a formal investigation. However, the recently-retired head of U.S. Customs’ Fines, Penalties & Forfeitures Branch (Charles Ressin) announced at the annual meeting of the Customs Lawyers Association in June that the CF28 would no longer be considered the commencement of a “formal investigation.” U.S. Customs will soon formalize this policy decision, and we’ll publish the details when they are made public. But in the meantime, this would be a good time for importers to undertake a comprehensive review of their import compliance and report any shortcomings in a single, consolidated Prior Disclosure -- accompanied by a voluntary tender of duties if necessary. With U.S. Customs (like all other federal agencies) scrambling to increase its revenue collection, enforcement is at the top of its priority list for 2010 and beyond. Only a valid Prior Disclosure can prevent U.S. Customs from imposing penalties – so get started now!

AMERICAN BAR ASSOCIATION’S CUSTOMS LAW COMMITTEE



I’m pleased to announce that I have been appointed as Vice-Chair of the Customs Law Committee of the

International Law Section of the American Bar Association. The ABA is the premier professional organization for attorneys in the United States, and has significant influence over the policy and direction of legal developments in the U.S. – and abroad.

At a recent ABA Leadership Retreat at the historic Claremont Hotel in Berkeley, California, I had the opportunity to meet fellow members of my Committee and the International Law section. For this coming year, I will be working on the Customs Law Committee's special projects, which will include the development and adoption of a joint ABA "Blanket Authority" between the Tax and International Law Sections concerning the issue of transfer pricing and customs valuation (see more below), particularly related to the issue of "compensating adjustments." (With ABA Blanket Authority, the Sections may present a policy statement on matters within their primary or special expertise and jurisdiction to a federal, state, or municipal legislative body, governmental agency, court (with respect to procedural rules only), interstate governmental body, or international governmental body.) Look for the details of this initiative in our next edition!

TRANSFER PRICING SUPPORT FOR CUSTOMS VALUATION CONTINUES EVOLUTION



U.S. Customs HQ continues to display a thoughtful and measured approach towards the goal of harmonizing transfer pricing ("TP") rules and documentation into the world of customs valuation. In addition to [HQ H029658](#) (Dec. 2009 - discussed in our last newsletter), two other HQ rulings have recently shed further light onto the current state of affairs when importers seek to use TP studies to support their use of "transaction value" – that is, inter-company invoice prices between related parties set pursuant to their global TP policy and documentation. While [HQ H037375](#) (Dec. 2009) ruled that transaction value based on the "Resale Price Method"

using, in part, an external set of comparables in the importer's TP study was acceptable, [HQ H032883](#) (Mar. 2010) presented a more difficult set of circumstances for the agency.

The heart of Customs' dilemma concerned the importer's various TP studies, which all used the IRS' "Comparable Profits Method" --or as it is known internationally, the "Transactional Net Margin Method." Because of this methodology's focus on an entity's aggregate profit (instead of profit on discrete sets of transactions), U.S. Customs has traditionally disfavored this TP method unless a bilateral APA supported the ruling request. Nonetheless, the non-resident importer's position prevailed primarily because, in addition to its U.S. parent's TP study as the distributor/re-seller of the imported goods, it also presented its own TP study as the manufacturer showing that the producer earned back all of its costs plus a profit on sales of one class or kind of merchandise -- the only product sold between the related parties at issue. This lengthy ruling makes for absorbing reading, and offers valuable insight into the path importers should follow in seeking a unified approach to global transfer pricing and customs valuation.

Please don't hesitate to [contact me](#) if you need further information about the topics above, or on any other customs and trade-related matter. Until the next newsletter,

may your businesses continue to thrive!

A handwritten signature in black ink that reads "Damon Pike". The letters are cursive and fluid, with the first letter of each name being significantly larger and more stylized.

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