

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



VIEW FROM THE PIKE



U.S. CUSTOMS SOLICITS COMMENTS ON NEW TRANSFER PRICING POLICY



In a development sure to have global ramifications, U.S. Customs and Border Protection is considering a change in its policy regarding post-importation price adjustments. The agency recently posted the following notice on its website, and requested advance comments by October 22, 2011. Because this is one of the most significant developments in customs valuation law since the enactment of the Trade Agreements Act of 1979, we urge our readers and clients to respond to Customs by this date.

Request for Advance Public Comments on the Proposed Revocation of Headquarters Ruling Letter ("HRL") 547654 and of Treatment Relating to the Applicability of Transaction Value and Post-Importation Adjustments

(09/23/2011) Customs and Border Protection ("CBP") is in the process of re-examining its approach to the applicability of transaction value in the context of post-importation adjustments. Specifically, CBP is asking the public to provide comments on the broadening of CBP's interpretation of what constitutes a "formula" for purposes of using transaction value, thereby allowing post-importation adjustments. In order to permit the orderly administration of these upward and downward post-importation adjustments, CBP is considering modifying prior rulings in order to allow the transaction value basis of appraisement in these circumstances, provided that the importers use the reconciliation program for declaring the value of the affected importations.

Background: Many importations into the United States involve transactions between related parties, which present a number of appraisement issues, such as ensuring that the relationship between the parties does not affect the price. Moreover, such transactions often involve arrangements in which the parties have in place formal inter-company policies that call for adjustments after importation to the price paid (i.e., the transfer price). These arrangements raise the issue of whether transaction value is the proper basis of appraisement and, if so, how to treat the adjustments.

In certain instances CBP has allowed the adjustments, but not under transaction value. Rather, the adjustments were allowed under the "fallback" method of appraisement because the price was not determined via an objective formula. In other instances, CBP has disallowed the adjustments because CBP considered a decrease in the transfer price to be a post-importation rebate or decrease under 19 U.S.C. §1401a(b)(4)(B). CBP has reviewed this matter and is considering proposing a broader interpretation of what is permitted under transaction value in the transfer pricing context.

Legal Authorities: Merchandise imported into the United States is appraised under 19 U.S.C. §1401a. The primary method of appraisement is transaction value, defined as "the price actually paid or payable for the

merchandise when sold for exportation to the United States,” plus certain additions to the extent not otherwise included in the price actually paid or payable. See 19 U.S.C. §1401a(b)(1). As provided in 19 U.S.C. §1401a(b)(4)(A), the term “price actually paid or payable” means the total payment (whether direct or indirect ...) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller. Normally transaction value is fixed at the time of importation. However, transaction value may be arrived at by using a formula. See 19 CFR § 152.103(a)(1). Rebates, or any other decrease in the price actually paid or payable made or effected after the date of importation are to be disregarded for the purposes of determining transaction value. 19 U.S.C. §1401a(b)(4)(B).

Analysis: Related party transactions may involve adjustments to initial transfer prices after importation, in accordance with the company’s formal transfer pricing policy/formula. In some cases, the transfer pricing policy may provide for year-end “compensating adjustments” to comply with the requirements of an Advance Pricing Agreement (“APA”) between the U.S. party and the Internal Revenue Service (“IRS”). Such adjustments could affect whether the price is considered fixed or determinable by objective formula at the time of importation.

The issue of the treatment of post-importation adjustments is addressed in HRL 547654, dated November 9, 2001. In HRL 547654, the price for the goods was arrived at pursuant to a methodology that included an initial sum subject to adjustments. CBP determined that transaction value did not apply because the price was not considered to be fixed or determinable pursuant to an objective formula prior to importation because at least one of the elements for determining the price was within the control of the buyer and/or the seller. Nonetheless, following the hierarchy of the valuation statute, CBP found that the goods could be appraised using the “fallback” method of valuation based on the related party price and that the adjustments could be reported (and claimed) to CBP through reconciliation.

Upon review of this matter, CBP is proposing that even though the parties are related and certain costs may be within the control of the parties, if the transfer pricing policy is set before importation and is used by the parties, it may be considered an objective formula, allowing the use of transaction value, provided that certain additional criteria are met. In requesting reconsideration of HRL 547654, the importer described its transfer pricing policy and the distinction between its treatment of variable and fixed costs. According to the policy, none of the variable costs and profits are subject to any post-importation price adjustments. Therefore, the transfer price declared to CBP upon importation is fixed and any fluctuations are not re-invoiced or remitted back to the seller/exporter. The company also provided CBP with a copy of an inter-company memorandum, illustrating how the fixed costs are calculated and set in advance. According to the importer, the fixed costs paid are set; only allocation of those fixed costs to the individual import entries is not fixed until after the month has passed. Pursuant to its transfer pricing policy, the importer seeks to report, via reconciliation, the actual, final amount paid to the Seller for the imported goods. Furthermore, with respect to the profit margin element of the importer’s transfer pricing formula, the margin is calculated based on a study of comparable and available data, of sales in the uncontrolled market to allow a reasonable profit to be earned. The margin is confirmed as often as required by the U.S. transfer pricing regulations, by a joint external study of the importer’s and exporter’s finance departments, also submitted by the importer for CBP’s consideration.

A. Factors to consider

CBP is considering that since the following criteria were met, the company may use the transaction value method of appraisal: (1) a written “Intercompany Transfer Pricing Determination Policy,” which sets out how the transfer price is to be determined prior to the importation; (2) the importer/buyer is the U.S. taxpayer, and it uses its transfer pricing methodology in filing its corporate income tax returns and in determining the transfer price for the products covered by the transfer pricing policy; (3) the company’s transfer pricing policy specifically covers the products for which the value is to be adjusted; (4) the policy specifies what adjustments must be made to the transfer price, and how those adjustments are to be determined; (5) the adjustments, although to a certain extent within the “control” of the parties, do not result in value manipulation; (6) if adjustments are made, the company provides detailed explanations and calculations of the adjustments incurred in the United States and claimed after the importation; (7) the relevant transfer pricing policy, pursuant to which adjustments are claimed is in effect prior to the importation; and, (8) there is an absence of other circumstances which may indicate that the compensating adjustments do not result in an

arm's length price between the parties. No single factor is determinative, and CBP's finding with respect to whether an objective formula exists will be made on a case-by-case basis.

Furthermore, CBP is considering that downward adjustments in the transfer price made pursuant to the transfer pricing study are not rebates of, or other decreases in, the price actually paid or payable that are made or otherwise effected between the buyer and seller after the date of importation of the merchandise into the United States (see 19 U.S.C. §1401a(b)(4)(B)). Instead, the post-importation adjustments represent an element of the determination of the price actually paid or payable in accordance with 19 CFR §152.103(a)(1). Therefore, the post-importation adjustments made pursuant to the transfer pricing policy in the proposed revocation simply reflect what should have been reported as the invoice price upon entry, had the exact price information of the imported merchandise been available at the time.

Of course as with any other transaction, in addition to the foregoing, companies must be prepared to show that transaction value is acceptable under one of the two tests: (1) circumstances of the sale, or (2) test values.

B. Reconciliation

In order for companies to claim post-importations adjustments, it is contemplated that importers must use the reconciliation program to properly apply transaction value and account for the total "price paid or payable for" imported merchandise where a formal transfer pricing study or policy, or an APA, provides for upward or downward post-importation adjustments that directly (or indirectly) relate to the value of the merchandise. Reconciliation allows companies to provide CBP with information not available at the time of entry summary filing and which is necessary to ascertain the final appraisal of imported merchandise. Furthermore, reconciliation allows for the information to be filed up to 21 months from the date of the first entry summary with extensions of time as available to importers. CBP believes this flexibility makes reconciliation an ideal tool to declare all adjustments (upward and downward) within the timeframe allowed by an APA or transfer pricing study or policy.

All comments relating to this pre-publication proposal should be sent to EarlyInputMailbox@dhs.gov no later than thirty days from the date of publication. Please put "Transfer Pricing" in the subject line. After analyzing the comments, CBP will consider whether to proceed further with this action in accordance with 19 U.S.C. §1625(c) by publishing a proposed revocation of [HRL 547654](#).

Please note that statements provided in response to this request and the names of the submitters are not confidential and may be subject to disclosure upon a written Freedom of Information Act request.

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!

