

Fundamentals of Customs Valuation: Related Party Transfer Pricing & Transaction Value

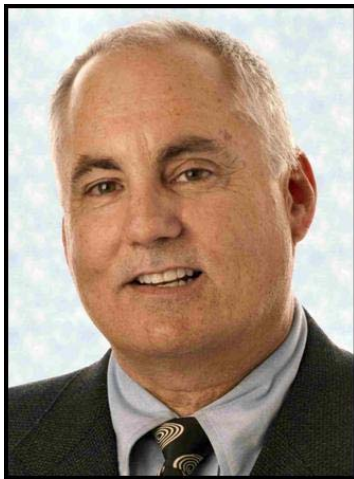


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About your Speaker



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 30 years. George's practice emphasis is on Customs, international trade regulation, and export compliance. He works with both small and large 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.

Recently, he acted as editor and a principal author for Chapter 9 "Focused Assessments" – of the American Bar Association's publication U.S. Customs Law: A Practitioner's Guide. He has also contributed materials for the ABA's annual publication Customs Law Committee Year in Review for 2013 and 2014.

He and the firm also 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.

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Importance of Correct Customs Values



❖ Obligation to Report The Correct Value

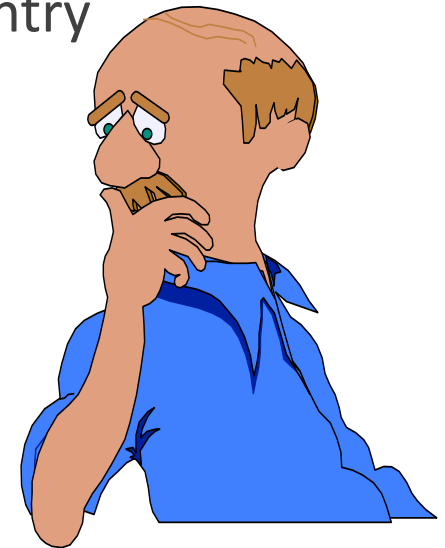
- All invoices for imported merchandise are required to set forth . . . "the purchase price of each item" *19 U.S.C. § 1481(a)(5)*.
- An importer making an entry . . . must file a **declaration** under oath stating . . . "the prices set forth in the invoice are true . . . [and that] all other statements in the invoice . . . or in the entry itself, are true and correct . . ." *19 U.S.C. § 1485(a)(2) & (3)*.

The “Reasonable Care” Requirement



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

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

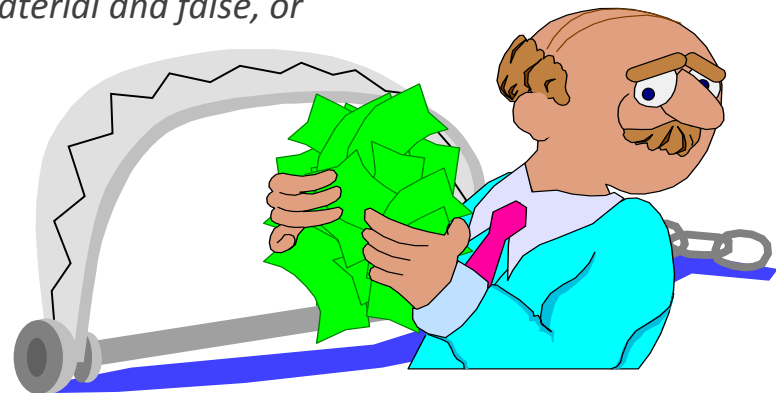


Importance of Correct Customs Values

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 . . . by means of—

- *(i) any document, written or oral statement, or act which is material and false, or*
- *(ii) an omission which is material*



Negligence Under 1592



- ❖ A violation is consider “negligent” if it results from:
 - an act (of commission or omission) done through the failure to exercise the degree of **reasonable care** and competence expected from a person in the same circumstances in:
 - **Ascertaining facts** or in drawing inferences from them
 - ascertaining one’s **obligations** under the statute; or
 - **Communicating information** in a manner so that it may be understood by the recipient.

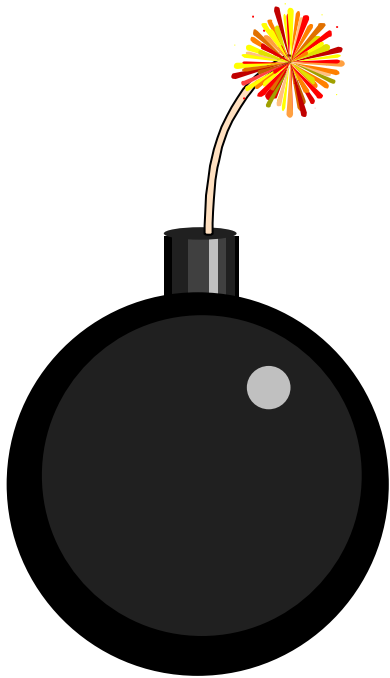


What is “Negligence”?

- ❖ A violation is negligent if:
 - it results from failure to exercise reasonable care and competence to:
 - ensure that statements made and information provided are complete and accurate; or
 - perform any material act required by statute or regulation.

- ❖ Appendix B to Part 171-Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592

Degrees of Culpability Under 1592



Negligence

- Statutory Penalty
- 2 times loss of revenue
- 20% of dutiable value of merchandise if violation does not involve loss of revenue

Gross negligence

- 4x loss of revenue
- 40% of dutiable value of merchandise if violation does not involve loss of revenue
- Definition: “actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.”

United States v. Ford Motor Company;

491 F. Supp. 2d 1248 (2007)



- ❖ Ford did not inform CBP that the values provided in the entry documents were not final and
- ❖ failed to adhere to an agreement with Port to report lump sum payments and reconcile payments with the entries.
- ❖ Court said Ford was negligent and imposed a maximum penalty of \$ 11,755,825, plus the LOR of \$ 5,877,912
- ❖ Importance of CBP's entry reconciliation program.



Customs Valuation -- Regulations

Subpart D [Reserved]

Subpart E—Valuation of Merchandise

- §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.
-

Customs Value -- Resources



A screenshot of a web browser window. The address bar shows "www.cbp.gov/trade/rulings/informed-compliance-publications". The page content is a list of links. Two red arrows point to the following links: "Customs Value" and "Customs Valuation Encyclopedia (1980 - 2010)". Other visible links include "Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages", "Customs Brokers", "Cutlery of Headings 8211 Through 8215 of the Harmonized Tariff Schedule of the United States", "Decals, Decorative Stickers and Window Clings", "Decorative Glassware", "Determining the Acceptability of Transaction Value for Related Party Transactions", and "Diodes, Transistors & Similar Semiconductor Devices". The browser's tab bar shows several open tabs, including "eCFR - Code of Federal R...", "Informed Compliance Publ...", "http://rulings.cbp.gov/", "ear_data.html", "Lexis Advance® - Sign...", "Customs Bulletin and ...", "(IPR) search - cpb.gov", "http://tess2.uspto.gov/", "WebVoyage", and "Factory Five Roadsters ...".

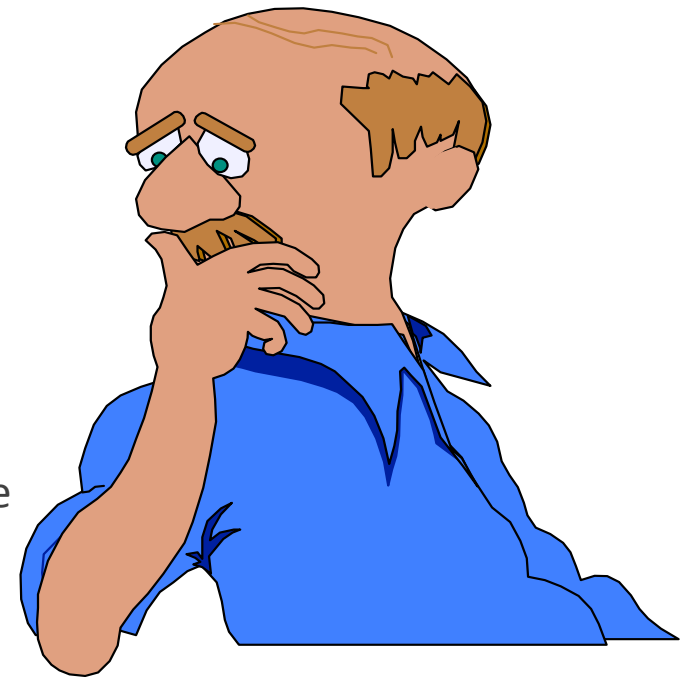
Methods Of Customs Valuation

-- 19 USC 1401a(a)



Customs Value law provides six methods of valuation, in order of preference:

- Transaction value
- Transaction value of identical or similar merchandise
- Deductive value
- Computed value
- a derived (fall-back) method reasonably adjusted for the circumstances



Transaction Value: 19 USC §1401a(b)



❖ What is Transaction Value?

○ Defined as:

“transaction value of imported merchandise is the price actually paid or payable . . . when sold for exportation to the United States”

❖ 19 CFR 152.103

Transaction Value



❖ § 152.103 Transaction value.

○ (a) Price actually paid or payable –

- (1) General. In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation.
- It may be the result of discounts, increases, or negotiations, or
- may be arrived at by the application of a formula
- such as the “price in effect on the date of export in the London Commodity Market.”

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

Transaction Value: Related Parties



- ❖ When are parties related? (19 U.S.C. 1401a(f))
 - (A) Members of the same family.
 - (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.

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, or
- may be adjusted after importation to change profit and cost allocations

IRS Code Section 482



❖ **Sec. 1.482-3 -- Methods to determine taxable income in connection with a transfer of tangible property.**

- a) The arm's length amount charged in a controlled transfer must be determined by **one** of following **methods**:
 - (1) The comparable uncontrolled price method (CUP)
 - (2) The resale price method (RPM),
 - (3) The cost plus method
 - (4) The comparable profits method (CPM);
 - (5) The profit split method,
 - (6) other methods

Advance Pricing Agreements (APA)



- ❖ Taxpayer is not obligated to review basis of transfer price with IRS.
- ❖ Taxpayers may do so under an “advanced pricing agreement,” or APA process, allowing parties to agree on:
 - Facts to which agreement applies
 - The TP method employed
 - Expected range of results

Acceptability of Transfer Prices For Customs 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 Transfer Pricing

- ❖ 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.”

1401a(b)(2) 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, or if
 - the transaction value of the imported merchandise closely approximates a **test value**.

Transaction Value Related Parties: Test Values



❖ Test Values

- The “transaction value” of the imported merchandise must closely approximate -
 - the transaction value of identical or of similar merchandise in sales to **unrelated** buyers in the United States; or
 - the deductive value or computed value of identical merchandise or similar merchandise.

Transaction Value Related Parties: Test Values



- ❖ The term "**test value**" refers to values [previously](#) determined pursuant to actual appraisements of imported merchandise by CBP.
- ❖ Deductive value can only serve as a “test value” if it represents an actual appraisement of merchandise. HQ 543568, dated May 30, 1986 and HQ H169975, January 20, 2012
- ❖ If there are no previously accepted test values, the “circumstances-of-the-sale” method **must** be used to determine the acceptability of transaction value. HQ W563467, dated June 22, 2009
- ❖ HQ H206715, January 29, 2015.

Transaction Value: Related Parties Circumstances-of-Sale



- ❖ Circumstances-of-sale test (COS)
 - Appraisal . . . 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).

“Normal Pricing Practices of the Industry”



- ❖ HQ 542261 (Mar. 11, 1981) (TAA No. 19)
 - References to prices published in a trade journal or similar public forum (the posted price) and
 - The posted price is used by other buyers and sellers as the basis of contract prices.

- ❖ How would you establish that your RP prices are determined according to the “normal pricing practices of your industry”?

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.
- ❖ Again, one of a problem of evidence. How do you prove?

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

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.

Evaluating Related Party Transactions



Circumstances of Sale

1. Industry Practices (CoS 1)
2. Unrelated Party Practices (CoS 2)
3. All Costs Plus Profit (CoS 3)
4. Other Methods (“totality of information”)

Transaction Value -- Related Parties: Transfer Pricing – Objective Formula



❖ Transaction value

- To have PPP, price must be fixed at time of importation or based on an objective formula

❖ Question #1

- Is the **Transfer Price** **fixed** or determined by an **objective formula** at the time of importation?

Transaction Value -- Related Parties: Requirement of An Objective Formula



- ❖ When the price is determined pursuant to a **formula**, a firm price need not be known or ascertainable at the time of importation. HRL 542701, dated April 28, 1982, TAA No. 47
- ❖ For the formula to be **fixed or determinable at importation** it must be based on an event or occurrence **outside the control of the seller or the buyer**. HRL 545622, dated April 28, 1994.

Transaction Value -- Related Parties: Requirement of An Objective Formula



- ❖ If a related party import transaction involves post-importation adjustments, and
- ❖ Importer seeks to claim downward adjustments (upward adjustments always required reporting), then
- ❖ Transfer pricing policy must constitute a "formula" within the meaning of 19 CFR 152.103(a)(1).
- ❖ **Downward Adjustments** and **IRS 1059A** (see HQ H022287 December 30, 2010)
 - Under 1059A, "inventory value" may not be greater than Customs value (after adjustments).
 - Post entry upward adjustments to transfer prices or debit notes from seller must be reported to CBP
 - Downward adjustments or credits to importer to transfer prices do not need to be reported to CBP should be reviewed with tax department.

Transaction Value -- Related Parties: Requirement of An Objective Formula



- ❖ If a transfer price is subject to post importation adjustments and the adjustments are within the control of either the buyer or the seller:
- ❖ then transaction value cannot be applied, the merchandise must be appraised using one of the other valuation methods in 19 U.S.C. §1401a.
- ❖ HRL 544680, dated June 26, 1992, HRL 545388, dated October 21, 1994:
- ❖ For example:
 - ❖ allocation of costs incurred or the profit earned, the formula exception to the fixed price rule would not apply.
- ❖ HRL 547654, 11/9/2001 – Rejected TP for valuation of certain bulk chemicals.
 - ❖ Parties wanted to engage in post import end of the year adjustments based on a cost true-up.

Transaction Value -- Related Parties: Transfer Pricing – Objective Formula



❖ HQ W548314, May 16, 2012:

- “While this analysis [HRL 547654] was consistent with CBP’s interpretation at the time we now conclude that notwithstanding that there may be some element of control, additional considerations should be taken into account in evaluating whether an intercompany transfer pricing formula is an **objective formula** when it provides for post-importation adjustments to the price.”
- It is [now] CBP’s view that when analyzing whether transaction value may be used between related parties, which may result in post-importation adjustments, certain factors should be examined to determine whether there is a **fixed price, pursuant to a formula**.

Transaction Value -- Related Parties: Transfer Pricing – Objective Formula



❖ HQ W548314, May 16, 2012

- Importer wanted to take advantage of downward adjustments as well as report upward adjustments to end of year intercompany price
 - had an APA agreement with Taxing authorities of both Jurisdictions and provided information regarding the “circumstances of the sale.”
 - provided detailed information regarding the Seller’s sale price data for the products sold to related and unrelated buyers around the world
 - submitted detailed charts including data from 2000 and 2001 pertaining to the Seller’s global sales of the imported products.
- CBP found that (a) this Transfer Price Agreement was an “**objective formula**” and
- (b) the prices were settled in a manner consistent with the way the seller settles prices in sales to unrelated buyers

CBP's Five Factors for Determining whether an Objective Transfer Price Formula is in place: HQ W548314



- ❖ CBP Identified **five factors** for determining whether an **objective formula** is in place prior to importation:
 - (1) A written “Intercompany Transfer Pricing Determination Policy” is in place prior to importation and the policy is prepared taking IRS code section 482 into account;
 - (2) The U.S. taxpayer uses its transfer pricing policy in filing its income tax return, and any adjustments resulting from the transfer pricing policy are reported or used by the taxpayer in filing its income tax return;
 - (3) The company’s transfer pricing policy specifies how the transfer price and any adjustments are determined with respect to all products covered by the transfer pricing policy for which the value is to be adjusted;
 - (4) The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States; and,
 - (5) No other conditions exist that may affect the acceptance of the transfer price by CBP.

Transaction Value -- Related Parties: HQ W548314



- ❖ Even if the formula requirement is met, the circumstances of **the sale test** must also be satisfied. HQ W548314, May 16, 2012 and HQ H236152, April 8, 2015:
- ❖ Post-importation analysis has two requirements:
 - (1) Is there a “formula” within the meaning of 19 CFR §152.103(a)(1), so that properly documented adjustments may be claimed if they occur; and
 - (2) the parties satisfy the requirements under 19 U.S.C. §1401a to show that **the relationship did not influence the price.**
- ❖ CBP’s analysis under these two requirements is not overlapping;
 - one of the requirements deals with the appropriateness of claiming the post-importation adjustments in cases that fall under CBP’s interpretation of a formula, fixed prior to the importation, and
 - the other requirement goes to the **validity** of the prices declared to CBP.

Transaction Value -- Related Parties: COS Test



❖ Question #2

- Assuming the price is **fixed** or otherwise determined by an **objective formula** then:
- Do the **circumstances-of-sale** establish that the price actually paid or payable was
 - **not influenced by the relationship of the parties** and therefore acceptable for the purposes of transaction value?

Transaction Value Related Parties -- Summary



❖ 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”

Transaction Value Related Parties -- Summary



- ❖ Whether products covered by a TP study or APA are comparable to the imported products at issue is an important consideration. See HQ H037375; HQ 547672, dated May 21, 2002.
- ❖ The transfer pricing study should included same class or kind as the imported merchandise.
- ❖ The transfer pricing study should included companies in the same industry as the importer, including some competitors
- ❖ 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.
- ❖ The methodology selected for use in a transfer pricing study is also relevant. See HQ 548482, dated July 23, 2004. CBP notes that CPM is the least relevant method for customs purposes. See HQ H219515 (October 11, 2012)

Transaction Value Related Parties -- Summary



- ❖ CBP has noted that the RP Importer must have objective evidence of how prices are set in the relevant industry in order to establish the "normal pricing practices of the industry" in question.
- ❖ The pricing practices must relate to the industry in question, which generally includes the industry that produces goods of the same class or kind as the imported merchandise. See HQ 546998, dated January 19, 2000; and HQ 548095, dated September 19, 2002.
- ❖ 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.

Other Methods Of Appraisement



- ❖ Transaction value can not be established
 - 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



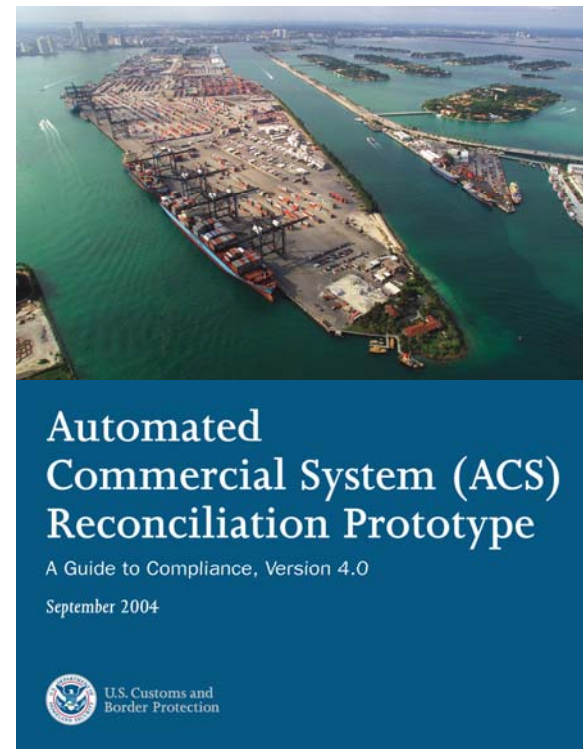
What is Entry Reconciliation?

- ❖ A process that allows importers to
 - ✓ file entries using the **best available information** and
 - ✓ *electronically “flag” entry data elements that are **estimated***
 - ✓ “actual final information” is submitted at a later date
- ❖ “*Reconciliation*” Entry (type 09)
 - ✓ can cover one or thousands of previously filed individual entries (only entry types 01-Consumption, 02-Quota/Visa Consumption, 06-FTZ Consumption)
 - ✓ a Reconciliation entry is “liquidated,” with a single bill or refund, as appropriate
 - ✓ CBP decisions on reconciliation entries can be protested and contested in court

Customs Reconciliation Guide



- ❖ http://www.cbp.gov/sites/default/files/documents/acs_recon_guide.pdf
- ❖ Provides rules and desktop instructions
- ❖ 21 months from date of importation to file reconciliation containing “correct” value
- ❖ Reconciliation entry is type “09”
- ❖ Reconciliation entry is processed in ABI and will liquidate just like a typical entry.
- ❖ If on recon, value adjustments should not be made by PEA or PSC.



Entry Recon Flagging & Time Periods



❖ Flagging:

- Identifies unknown information
- Transfers liability for those issues to a Reconciliation
- “**Elements**” that are flagged are withheld from liquidation
- Permits normal liquidation of the remainder of the entry summary

❖ Time Period For Filing Recon Entries

- Participants in Recon program have up to 21 months from the flagged entry date to file the recon.
- Except for NAFTA/FTA claims– limit is **12 months** from date of entry
- **Failure to file a timely reconciliation will result in the assessment of a liquidated damages.**

Recon Flagging– Individual or Blanket



- ❖ A filer may flag entries via an *individual entry flag* or a *blanket flag*
 - **Individual entry flagging**-- The entry filer flags the underlying entries on the header record of an entry summary at the time of filing
 - **Blanket Flagging** -- A flag is automatically added by CBP to all entries for all ports made under the recon-filer’s importer of record number.
 - Means each entry summary must be closed by a Reconciliation, even entries that do not require adjustments.
 - entries that do not require adjustments can be filed on a separate **“no change”** recon entry.

Getting Started: How Do I Reconcile?



- ❖ The role and responsibility of the reconciliation processing port is to address the reconciliation **not the underlying issues**.

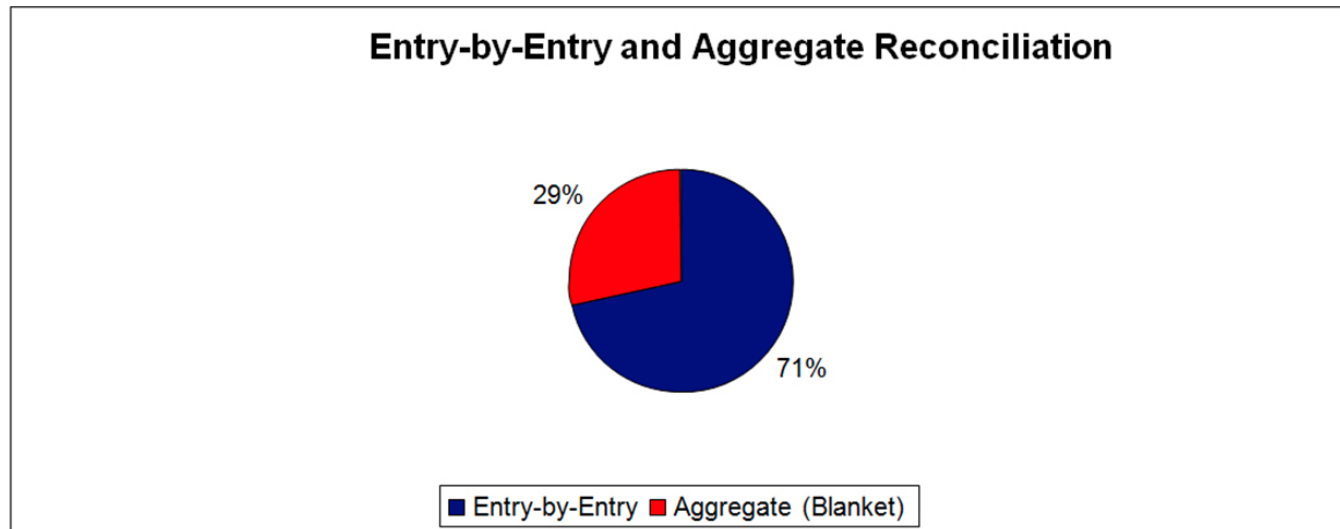
Administration

Difference between the underlying port of entry and the **reconciliation processing port**.

It is the responsibility of the port at which the underlying entry was filed to determine the basis of appraisement. The responsibility of the **reconciliation processing port** is to verify the accuracy of post-importation adjustments to the value initially declared upon the importation of the merchandise. **Reconciliation ports** that receive unresolved appraisement issues (i.e., statutory basis of appraisement, omission of a transfer pricing formula, questionable related party transactions, etc.) related to the initial entry should refer the unresolved issue back to the port where the underlying entry was filed for resolution and acceptance. The originating port of entry may pursue corrective action against the Customs broker and/or the importer participating in reconciliation regarding the unresolved appraisement issue(s).

Types of Reconciliations

- ❖ Two types of Reconciliations may be filed:
 - Entry-by-Entry
 - Aggregate





The Recon Entry

- ❖ The major difference between Aggregate and Entry-by-Entry Reconciliation is the structure of the association file
 - The *association file* contains a list of affected entry summaries flagged for Reconciliation sorted by Port code where they were filed.
 - For Entry-By-Entry Reconciliation, the following elements are also required:
 - The actual amount of duties and fees, deposited per underlying entry summary
 - The reconciled amount of duties and fees owed for each underlying entry
 - Can include upwards and downward adjustments in value and can provide for duty refunds at the entry level.

Appendix – Recent Related Party Rulings



- ❖ 14 (+) rulings on acceptability of related party transfer price as a Transaction Value since May of 2012 and HQ W548314.
- ❖ 40 (+/-) issued between 2000 and May of 2012 and HQ W548312

Ruling #	Date	Products	APA	TPS	Trans Value	Basis
H236154	4/8/15	Truck Control Parts	No	No	Accepted	COS-3
H233328	4/1/15	Earth moving	No	Yes	Rejected	Computed
H260036	2/24/2015	Food Ingredients	Yes	Yes	Accepted	COS-4
H238027	2/19/15	Watches	Yes	Yes	Accepted	COS-4
H160935	2/11/15	Processing Equip	no	Yes	Accepted	COS-2
H206715	1/29/15	Pharma	NA	NA	Rejected	Computed
H186055	1/15/15	parts/ accessories	Yes	Yes	Accepted	COS-4
H204329	8/18/14	Pharma	NA	NA	Rejected	NA
H238990	4/7/14	Refractory Metals	No	No	Accepted	COS-3
H176775	3/6/14	Flash memory Prod	No	Yes	Accepted	NA
H243689	1/9/14	Home Appliances	No	Yes	Rejected	Deductive
h024857	1/7/14	Food Proc Equip	No	Yes	Accepted	COS-2
H018314	3/18/13	Contact lenses	No	Yes	Accepted	COS-3
H219515	10/11/12	Instruments	NA	Yes	Accepted	COS-4

Related Party Rulings



❖ HQ H260036, February 24, 2015

- Importer of food additives from related parties.
- Importer has a unilateral APA agreement with the IRS with the importer as the tested party
- No information was provided as to what comparable companies were used to achieve the arm's length range in the APA:

“We have consistently held over the years that 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.”

- Importer failed to establish that its RP transfer price met any of the Circumstance-of-Tests
- Valuation was based on a deductive value-fall back method.

❖ HQ H238027, February 19, 2015

- Importer of swiss watches from related party
- Parties have a bilateral APA with the IRS and the foreign tax authority, but the comparable companies are not of the same class or kind
- though none of the information provided strictly falls under the three illustrative examples under 19 CFR §152.103(l)(1)(i)-(iii), we find that the sales price will not be considered influenced by the relationship for purposes of the circumstances of the sale test based on the totality of the information

Current Decisions – Related Party Rulings



❖ H065024 dated July 28, 2011

- Company purchased and imported chemistry products, data products, and mass spectrometry instruments from its subsidiary.
- 2 transfer pricing studies were submitted: for the IRS and Customs purposes; **no APA**;
- CPM was utilized with Gross Margin; products sold by comparable companies used for the analysis were **not** of the same class or kind as the imported merchandise.
- Company tried to meet the circumstances of the sale test based on COS-3 test and provided CBP with the profits of the parent company and its subsidiaries.
- Only the prices for mass spectrometry instruments were found to be at arm's length.



Current Decisions – Related Party Rulings

❖ H065024 dated July 28, 2011

- The existence of a transfer pricing study does **not**, by itself, obviate the need for CBP to examine the circumstances of sale in order to determine whether a related party price is acceptable. HQ H037375, dated December 11, 2009; HQ 546979, dated August 30, 2000.
- Information provided to CBP in a transfer pricing study may be relevant in examining circumstances of the sale, but the weight given will vary depending on the details set forth in the study. HQ H037375; HQ 548482, dated July 23, 2004.
- A significant factor is whether the transfer pricing study has been reviewed and approved by the IRS. HQ H037375; HQ 546979, dated August 30, 2000.

Related Party Rulings



❖ H065015, dated April 14, 2011

- This decision involved a company that submitted multiple transfer pricing studies covering the manufacturing activities of its affiliates in Singapore and the United Kingdom and distribution activities of the US Importer.
- There was no APA; all transfer pricing studies utilized CPM.
- All of the transfer pricing studies focused on functional comparability of the companies (the transfer pricing studies fell short of achieving product comparability for customs purposes).
- Transfer price rejected

Related Party Rulings



❖ HRL H029658, December 8, 2009

- Company was a U.S. exclusive distributor of motor vehicles, parts, accessories, and service tools for its foreign-owned parent company.
- Company provided a detailed description of its sales process.
- The U.S. Buyer/Importer had a bilateral APA with the IRS that covered all of its imported items (vehicles and parts).
- The tested party was the U.S. Buyer/Importer. The term of the importer's APA was for five tax years.
- The comparable profits method ("CPM") was identified as the method to use.
- The arm's length price range of operating profits was selected by comparing the profitability of the tested party (US Buyer/Importer) to that of unrelated companies.
- Continued . . .

Current Decisions – Related party Rulings



❖ HRL H029658, December 8, 2009

- None of the comparable companies selected for the analysis were automobile distributors
- Compensating adjustments were not at issue (company's profits always fall within the range) for the period at issue.
- Issue: whether the price paid between the related seller/manufacturer and the buyer/importer, established pursuant to the approved bilateral APA, was an acceptable transaction value?
- The decision noted that the regulatory examples are just that, examples.
- Other factors may be relevant to show the related party relationship did not influence the price.
- Although the company did not definitively satisfy the test under any one of the relevant examples in 19 CFR Part 152, **CBP said it was persuaded by "the totality of the evidence."**

Related Party Rulings



- Only gross profit margins were submitted – not having an operating profit complicated CBP’s assessment of the case.
- no evidence presented to show that the price was consistent with industry standards (unlike H037375 and H029658).
- The parent company did not present evidence of a bilateral pricing agreement, as the importer did in HQ H029658.
- The parent company showed profits that were quite different from its competitors, and they were quite different between the subsidiary and the parent company.
- The transfer pricing study prepared exclusively for CBP did not include companies that import and distribute products of the **same class or kind** as the imported merchandise.

Related Party Rulings



❖ H037375 (2009)

- This ruling involved a variety of imported healthcare products entered under transaction value.
 - A transfer pricing study had been conducted using the resale profit method, comparing the profits of the importer to other similarly situated companies.
 - No APA was in place.
- ❖ In examining the circumstances of sale, CBP considered:
- The transfer pricing study included companies in the same industry as the importer, including some competitors.
 - Consistency of the gross margins on resale of imported products among these companies allowed CBP to conclude that the importer's pricing was consistent with the market as a whole and in accordance with normal industry practice.

Related Party Rulings



❖ HQ 548482 (2004)

- Customs rejects transfer price as acceptable transaction value.
- Agreement between parties calls for a quarterly pricing adjustment so that “buyer will realize a reasonable operation profit on products purchased from seller.”
- Profit to be based on range suggested by a CPM analysis of 11 “comparable” companies.
- Customs was unable to verify that Transfer Pricing Study was sufficient to establish that TP was set in accordance with normal industry pricing practices.
- Evidence showed that the tested party was the buyer and therefore there was no evidence that the seller received a price that enable recovery of all costs plus a reasonable profit.
- TP study was not reviewed by IRS and no agreement with conclusions in study.

Other Related Party Rulings



❖ HQ 548233 (2003)

- Customs accepts transfer price.
- Importer submits APA agreement accepted by IRS and Japanese Tax authorities to Customs.
- APA TP method is based on CPM and Modified Resale Price Method that sets forth allocation of costs and profits of both selling and buying parties.
- All products were covered by the agreement.
- APA was not conclusive but considered “valuable” information.

Other Related Party Rulings



❖ HQ 548095 (2002)

- Customs rejects transfer price based on Comparable Profits Method.
- (Comparable range of profits was -0.15% and 10.16%- importer was 4%).
- The Study was not clear that the "comparable companies" used were engaged in the sale of same class or kind (High Fashion and/or Designer merchandise).
- The Study didn't provide detailed information or documentation regarding sellers costs, e.g. accounting records.
- More importantly however, the distribution agreement indicates that the price between the parties doesn't necessarily have to include a profit.

Other Related Party Rulings



❖ HQ 547672 (2002) (Volvo Ruling)

- CBP rejects transfer price as acceptable transaction value
- Importer submitted data to suggest that profits of related party seller were in-line with a **range of profits** of European contract Mfg. industry.
- Customs rejects that price was settled in a manner consistent with “normal pricing practices of industry”
 - Information submitted was not specific enough to establish pricing practice of auto industry.
 - Profit level indicator was based on company function and risk, not on products sold, which is required by Customs law.
 - Study looked a aggregate profits and not on individual products.

Other Related Party Rulings



❖ HRL 547654 (2001):

- The TP for the goods was arrived at pursuant to a methodology that included an initial sum subject to **adjustments**.
- The Importer provided limited details of the transaction and little documentation explaining the relevant transfer pricing policies.
- Although there was a formula it allowed for post-importation adjustments
- Because the parties could control whether and to what degree the price would be adjusted the use of transaction value was precluded.
- CBP found that the transfer pricing policy was not fixed and could not be considered an objective “formula”.

Other Related Party Rulings



- ❖ HQ 546979, (2000)-- Customs accepts transfer price.
 - The transfer pricing methodology had been approved by the IRS through the **Advance Pricing Agreement (APA) Program**;
 - Customs participated in the **APA** pre-filing conference between the Importer and the IRS, and had access to the information provided to the IRS throughout the **APA** process;
 - All of the Importer's imported products were covered by the **APA**.
 - Customs cautioned that any changes in the profit range would need to be reviewed.

Other Related Party Rulings



- ❖ HQ 546998, dated January 2000 (Seiko)-
- ❖ Customs accepts transfer price. Importer provided evidence that:
 - Seller's (HK) price adequately ensures its recovery of all **costs plus profit** equivalent to Japan's (the "firm"s), overall profit for sales of timepieces and clocks.
 - markup comparison between HK to JP, and other companies selling merchandise of the same class or kind indicate that HK's cost and profit figures are consistent with the market as a whole.
 - demonstrates that the price was settled in a manner consistent with the normal pricing practices of the industry.