



## P.A.E.I. and Tuttle Law Present

# Hot Topics in Customs Valuation Tuesday, February 25, 2020

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❖ **Areas Covered in this Webinar:**

- Acceptability of related party pricing for imports
- Deductions in value for expenses incident to the international shipment of goods
- Proper use of the “First Sale” rule for customs valuation
- Customs treatment of payments for royalties & licenses fees
- Treatment of price reductions and rebates
- Reporting errors using prior disclosure and entry reconciliation

# Acceptability of related party pricing for imports

- ❖ Why is the relationship between the parties important?
- ❖ When are parties related?
- ❖ What happens if the parties are related?
- ❖ How do we establish that the relationship does not influence the price?

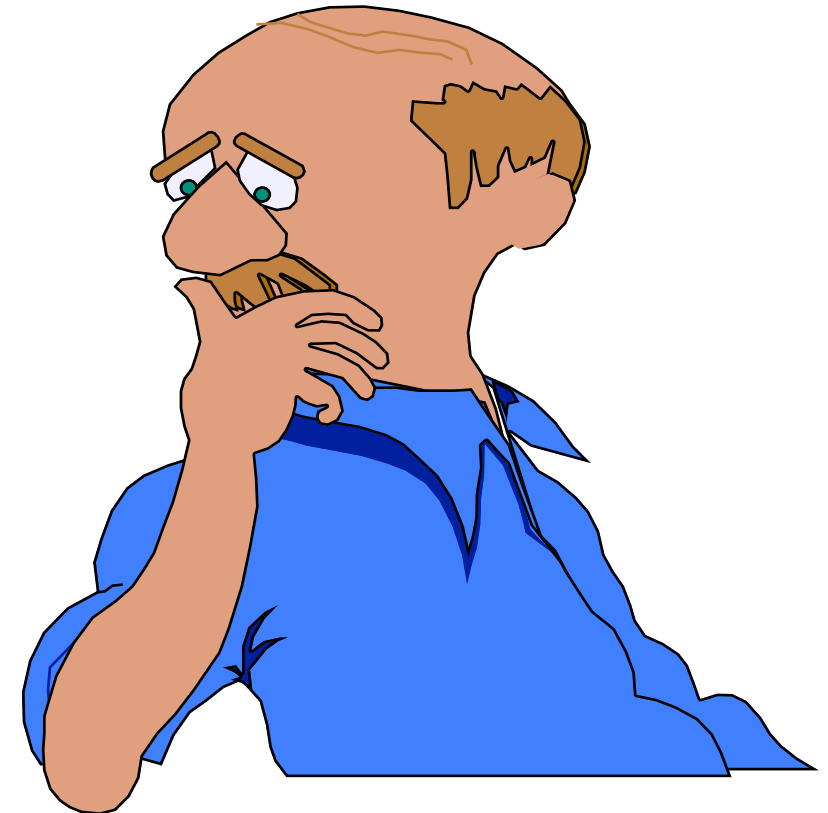
DEPARTMENT OF HOMELAND SECURITY U.S. Customs and Border Protection			OMB No. 1651-0023 Exp. 09-30-2019	
<b>REQUEST FOR INFORMATION</b> 19 CFR 151.11			1. Date of Request 01/17/2020	
			2. Date of Entry and Importation 05/30/2019	
3. Manufacturer/Seller/Shipper [REDACTED]		4. Carrier [REDACTED]		5. Entry No. [REDACTED]
5a. Invoice Description of Merchandise various		5b. Invoice No. various		6. HTSUS Item No. 99038803
7. Country of Origin/Exportation CN CN		8. CBP Broker and Reference or File No. [REDACTED]		
9. TO: [REDACTED] US		10. FROM: U.S. CBP 726 EXCHANGE ST BUFFALO, NY 14210-1484 US		
Production of Documents and/or Information Required by Law: If you have provided the information requested on this form to U.S. Customs and Border Protection at other ports, please indicate the port of entry to which it was supplied, and furnish a copy of your reply to this office, if possible.			11a. Port 1401	11b. Date Information Furnished
General Information and Instructions				
12. Please Answer Indicated Question(s)			13. Please Furnish Indicated Item(s)	
<input checked="" type="checkbox"/> A. Are you related (see reverse) in any way to the seller of this merchandise? <b>If you are related, please describe the relationship, and explain how this relationship affects the price paid or payable for the merchandise.</b>			<input checked="" type="checkbox"/> A. Copy of contract (or purchase order and seller's confirmation thereof) covering this transaction, and any revisions thereto.	
<input checked="" type="checkbox"/> B. Identify and give details of any additional costs/expenses incurred in this transaction, such as: <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> (1) packing</li> <li><input checked="" type="checkbox"/> (2) commissions</li> <li><input checked="" type="checkbox"/> (3) proceeds that accrue to the seller</li> <li><input checked="" type="checkbox"/> (4) assists</li> <li><input checked="" type="checkbox"/> (5) royalties and/or license fees</li> </ul>			<input checked="" type="checkbox"/> B. Descriptive or illustrative literature or information explaining what the merchandise is, where and how it is used, and exactly how it operates.	
			<input type="checkbox"/> C. Breakdown of components, materials, or ingredients by weight and the actual cost of the components at the time of assembly into the finished article.	
			<input type="checkbox"/> D. Submit samples: Article number and description _____ from container _____ mark(s) and number _____ Samples consumed in analysis, and other samples whose return is not specifically requested, will not normally be returned.	
			<input checked="" type="checkbox"/> E. See item 14 below.	
14. CBP Officer Message See continuation sheet				
15. Reply Message (Use additional sheets if more space is needed.)				
16. CERTIFICATION It is required that an appropriate corporate/company official execute this certificate and/or endorse all correspondence in response to the information requested. (NOTE: NOT REQUIRED IF FOREIGN FIRM COMPLETES THIS FORM.)				
I hereby certify that the information furnished herewith or upon this form in response to this inquiry is true and correct, and that any samples provided were taken from the shipment covered by this entry.			16a. Name and Title/Position of Signer (Owner, Importer, or Corporate/Company Official)	
			16b. Signature	
			16c. Telephone No.	16d. Date
17. CBP Official Jason Schug		18. Team Designation 038		19. Telephone No. 716-843-8381
20. Fax No.		21. Email jason.g.schug@cbp.dhs.gov		

# Methods Of Customs Valuation

## -- 19 USC 1401a(a)



- ❖ Customs Value law provides five methods of valuation, in order of preference:
  - Transaction value
  - Transaction value of identical or similar merchandise
  - Deductive value
  - Computed value
  - a derived (or fall-back) method reasonably adjusted for the circumstances



# Transaction Value: 19 USC §1401a(b)



## ❖ What is Transaction Value?

- Defined as:

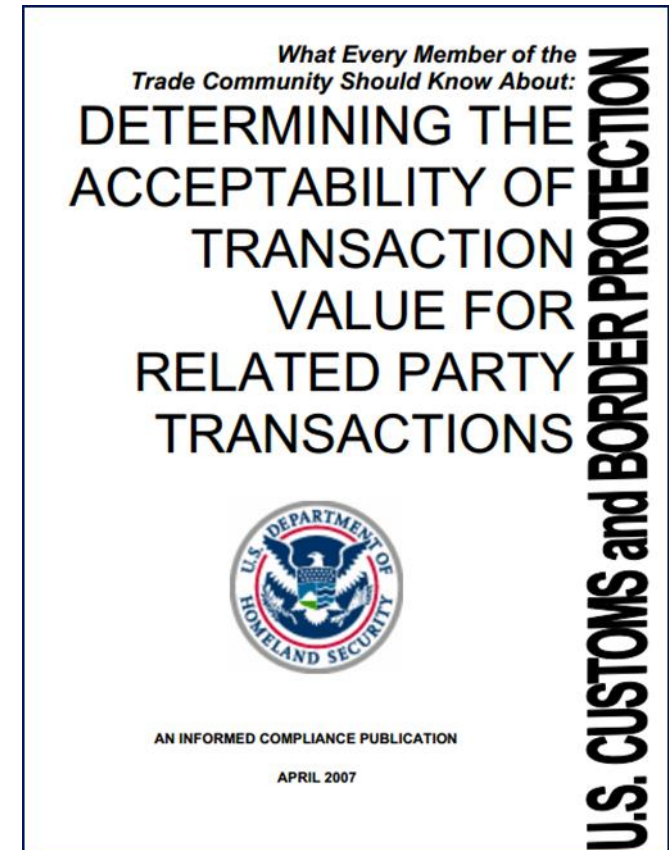
“... the price actually paid or payable . . . when sold for exportation to the United States”

(Plus any statutory additions, such as assists, royalties, etc.)

# Customs Valuation -- 1401a(b)(2) Related Party Rule



- ❖ Statute requires imported goods be appraised at “transaction value” unless it is found to be 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 the importer to establish that the relationship does not affect the price



# Transaction Value: When are parties related?



## ❖ Common related party situations (19 U.S.C. 1401a(f))

- Companies that share an officer or director with another organization, if that person is also an officer or director in the other organization
- Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the 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

❖ 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, or
- may be adjusted after importation to change profit and cost allocations (See HQ W548314 (2012))





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

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- ❖ 1401a(b)(2) Related Party Rule
  - Transaction value between a related buyer and seller is acceptable if an examination of either:
    - the transaction value of the imported merchandise closely approximates a “**test value.**”
    - The **circumstances of sale** indicates that the relationship did not influence the price

# 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 same 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).

# 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.”

# 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.
- ❖ 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.



## Transaction Value Related Parties -- Summary

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- ❖ 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.

# 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.



# Customs Value -- Resources




The screenshot shows a web browser with the following elements:

- Browser tabs: "eCFR — Code of Federal R..." and "Informed Compliance Publ..."
- Address bar: "www.cbp.gov/trade/rulings/informed-compliance-publications"
- Search bar: "Search"
- Navigation bar: "http://rulings.cbp.gov/", "ear\_data.html", "Lexis Advance® - Sign...", "Customs Bulletin and ...", "(IPR) search - cpb.gov", "http://tess2.uspto.gov/", "WebVoyage", "Factory Five Roadsters ...", "GPO Electron"
- Main content area (left): A dark image of a bed with pillows.
- Main content area (right): A list of resources:
  - Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages
  - Customs Brokers
  - Customs Value
  - Customs Valuation Encyclopedia (1980 - 2010)** (indicated by a red arrow)
  - 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** (indicated by a red arrow)
  - Diodes, Transistors & Similar Semiconductor Devices

# 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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  - 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**

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**WCO GUIDE TO CUSTOMS VALUATION AND TRANSFER PRICING**



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# Deductions in value for charges incident to the international shipment of goods



- ❖ Proper deductions for international freight, insurance, and related costs:
  - Customs position that the amount to be deducted from the price actually paid or payable for freight, insurance and other costs incident to the international shipment of merchandise, including foreign inland freight, are the actual, as opposed to estimated, costs.
- ❖ T.D. 00-20 states (page 87):
  - Costs associated with freight and insurance are not the estimated costs, but the actual costs paid to the freight forwarder, transport company, etc. See, ("HRL") 542206 , dated March 23, 1981, HRL 544538 , dated December 17, 1982, and HRL 542467 , dated August 13, 1981.
  - In HRL 546226 , dated March 25, 1996, ... if the actual costs are not available or cannot be verified, costs for international transportation and insurance will not be excluded from transaction value.

*What Every Member of the  
Trade Community Should Know About:*

## ***Proper Deductions Of Freight And Other Costs From Customs Value***



An Advanced Level  
Informed Compliance Publication of the  
U.S. Customs Service

# Deductions in value for expenses incident to the international shipment of goods



## ❖ Evidence Of Actual Cost Of Freight

- Importer must be able to document **actual payments** for int'l transportation, insurance and related services. Examples of some documents which typically serve as proof of such actual costs:
- Commercial documents to and from the service provider such as:
  - an invoice or written contract separately listing freight/insurance costs,
  - a freight/insurance bill,
  - a through bill of lading or proof of payment of the freight/insurance charges (i.e., letters of credit, checks, bank statements) are.
- Other types of evidence may be acceptable
- **HQ H060455, October 7, 2009** -- Rejected "special freight invoices" from Chinese supplier. No bills of lading or invoices from the carrier or freight forwarder were submitted for CBP's review.
- As explained in HQ W548519 dated September 20, 2004, CBP has always looked to documentation from the freight company, when determining actual freight charges.



# 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 sales price includes a delivery of the goods to the port of export, whether or not itemized separately on the invoices or other commercial documents, charge will be part of the value if the imported merchandise.



# Foreign Inland Freight

- ❖ Sales other than ex-factory. 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 they are identified separately
    - Occurred 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.
  - HQ H189076, June 26, 2013 (term of sale "FCA Supplier" was use)

# Transaction Value: Other Deductions



## ❖ “Services incident to international shipment” (“illustrative”)

- 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.
- 10+2 management fee, carrier agent booking fee, carrier bill of lading, CFS receiving, customs clearance,
- 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 H235776 April 16, 2013; H249096, March 17, 2015; H092560, H148715, and H219516, provided that all documentary requirements are satisfied.

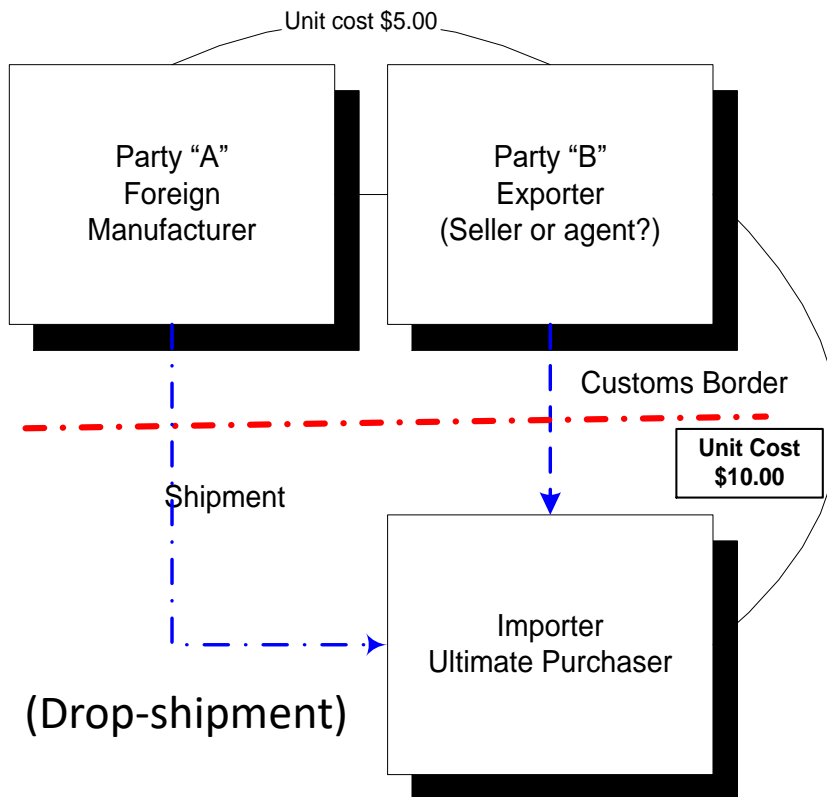
## ❖ Post Shipment deductions, if separately itemized:

- 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.





## 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)
- negotiated at arm's length, free from any non-market influences
- 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

## ➤ “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” For Customs Valuation

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- 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 not required to request appraisement 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
  - Clearly destined for export to the United States at the time it was sold to the middleman.



# Title and Transfer Issues

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- 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 or not a bona fide sale has occurred.

# Title and Title 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



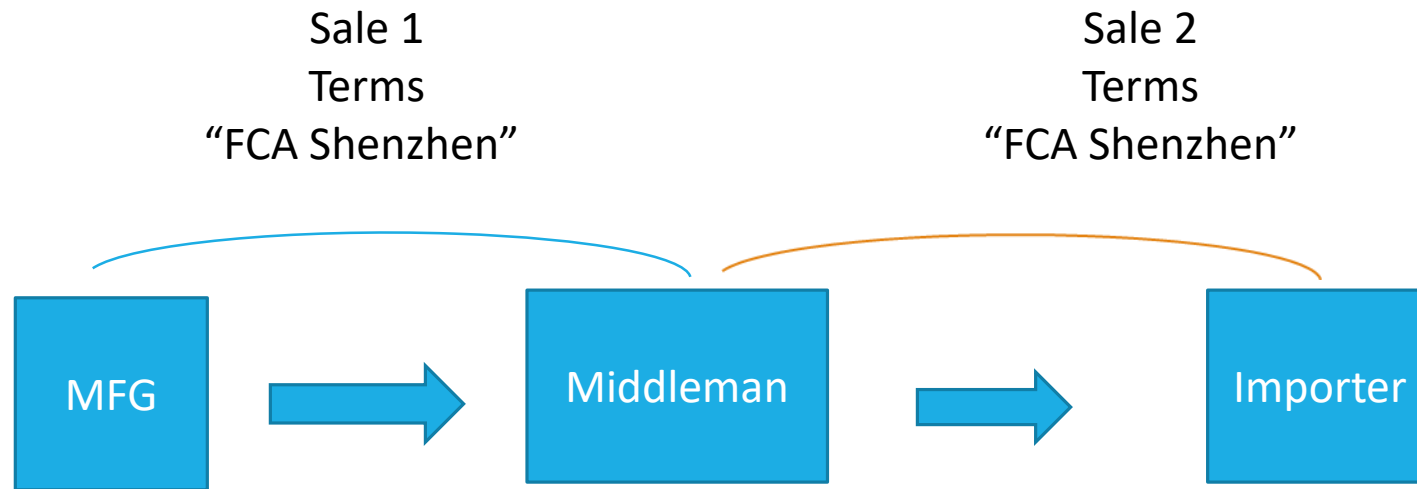
# Title and Transfer Issues

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## ➤ Title transfers

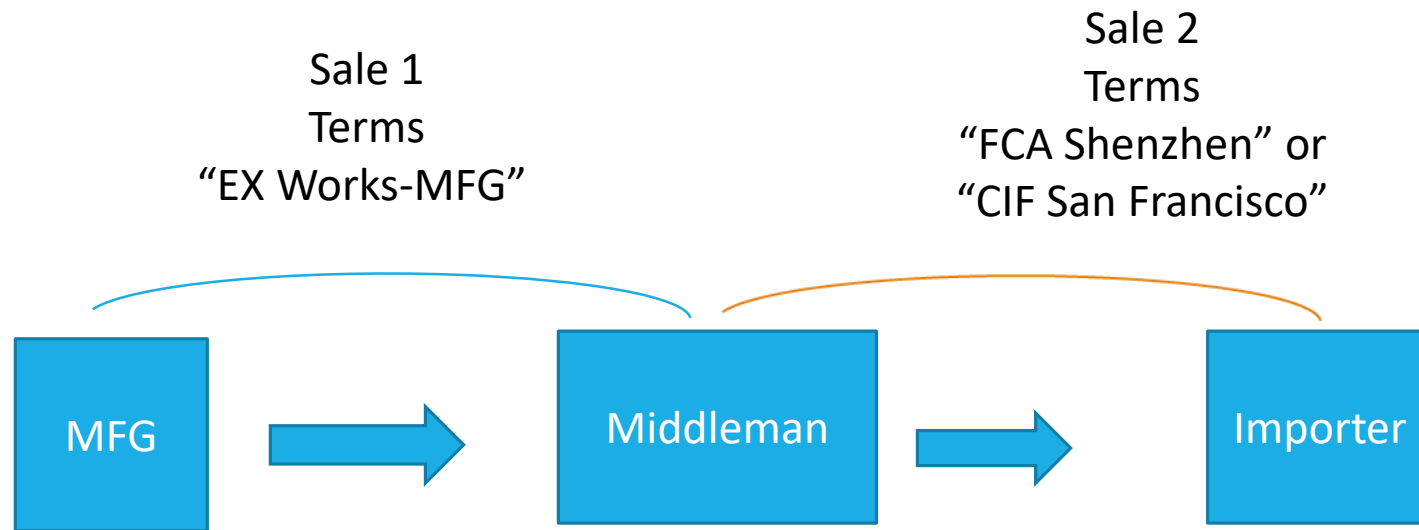
- In a shipment contract, when seller completes physical delivery to the carrier
  - Ex works
  - F-terms (FCA, FAS, FOB, etc.)
  - C-terms (CIF, C & F, etc.)
  
- In a destination contract, when goods are physically delivered to the location required
  - D-Terms (i.e., DDU and DDP)

# Simultaneous or Flash Transfer of Title



Middleman does not have “possession of goods”

# Consecutive transfer of Title



Middleman has “possession of the goods”



# Simultaneous or Flash Transfer of Title



## ❖ HQ H266540, September 8, 2016

- By itself, flash transfer of title does not equate to a failure to show a bona fide sale, but this factor along with who carries the risk of loss are considered by CBP in its determination of whether or not a bona fide sale has occurred.
- ❖ Customs may consider whether the middleman was acting as an agent for the importer or an “independent seller” (HQ 546192, February 23, 1996):
  - a. provides (or could provide) instructions to the seller;
  - b. was free to sell the items at any price he or she desired;
  - c. selected (or could select) his or her own customers without consulting the seller; and
  - d. could order the imported merchandise and have it delivered for his or her own inventory.



# “First Sale” For Customs Valuation

## ➤ Information and Documentation Requirements

- Importer must 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.
  - Relevant documents include:
    - 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
- HQ H246429, January 7, 2014

# 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.

❖ First sale price must account for all elements of “TV” including assists and supplemental payments.

# Customs Treatment of Payments for Royalties & Licenses Fees



- ❖ Some royalty or licensing fees are an **addition** to the Transaction Value and others are not.
  - A royalty or licensing fee paid for the right to use a **patented process or trade secret** to make the **imported article** is always a part of the Transaction Value regardless of who you pay!
  - A royalty or licensing fee paid for the right to use a **trade mark or trade name** in connection with the subsequent sale or use of the imported article is **not** part of the Transaction Value, **unless**:
    - Payment is made to the **seller** of the imported merchandise or a party related to the seller (i.e., parent or subsidiary)
    - Payment of the fee is **inexorably tied to the production or sale for exportation** of the merchandise to the United States

# Royalties & License Fees



❖ In HQ H004991, dated April 2, 2007

- The fact that royalty payments are made to an unrelated third party is not 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 or are inextricably intertwined with the imported merchandise.

# Royalties & License Fees



## ❖ “inextricably intertwined” means:

- There are provisions in the agreement for the purchase of the imported merchandise that include or require the payment of the royalties;
- license agreements which refer to or provide for the sale of the imported merchandise, or require the buyer's purchase of the merchandise from the seller/licensor;
- termination of either the purchase or license agreement upon termination of the other, or
- termination of the purchase agreement for failure to pay the royalties;

## ❖ HQ H294766, May 31, 2018 (Coravin Wine System)



# Royalties & License Fees (the Clear Nexus Rule)



## ❖ HQ H233376, dated September 19, 2016.

- importer paid an unrelated manufacturer to produce merchandise for importation into the United States
- The importer separately paid the U.S. licensor, the owner of a utility patent, royalty fees that became due and payable upon sale of the merchandise after importation.
- CBP found that even though the royalties were paid to an unrelated third party, without the license agreement, the vendor would not have the right to manufacture the merchandise and without such right, the merchandise could not be manufactured, purchased and imported.
- Without entering into the agreement and committing to the payment of the royalties, the importer would not have the requisite technology to allow the manufacturer to produce the imported merchandise.
- Thus, there was a clear nexus between the imported merchandise, the patented technology, and the royalty payments.

# Royalties & License Fees (Minimum Royalty Fee )



## ❖ HQ H168397, February 14, 2012

- the license agreement provided different causes for termination of the agreement, including the non-payment of royalties.
- Even though the royalties were based on sales to third parties after importation, a minimum royalty was required regardless of whether there were earned royalties.
- If the earned royalties, based on sales, were less than the aggregate annual minimum for two consecutive years, the licensor had the right to terminate the agreement.
- These provisions indicated to CBP that the royalty payments were necessary for the licensee to utilize the patents and manufacture the licensed products.
- Therefore, the royalty payments were not optional by the terms of the agreement and CBP found that the royalty payments were inextricably linked to the imported merchandise.



# Determining Total Price Paid: Rebates & Price Reductions



## REBATES SUBSEQUENT TO IMPORTATION

“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 importation of the merchandise into the United States shall be disregarded in determining the transaction value.”

19 U.S.C. 1401a(b)(4)(B).



# Transaction Value: Discounts

- ❖ CBP has consistently enumerated three criteria in determining whether a discount or price adjustment should be considered part of the transaction value
  1. The discount must be agreed to and effected prior to importation of the merchandise
  2. Importer must be able to furnish CBP with sufficient documentary evidence to support the existence of the discount and establish that it was agreed to before the time of entry.
  3. The discount or price adjustment be unconditional, or if conditional all the conditions must be met prior to importation.
    - HQ H003356 2-Feb-07; discounts. Purchase Price discounts; defective merchandise discount; reviews rulings on allowance of discounts
    - HQ H261556, June 25, 2015
    - **Post entry discounts or price reductions will generally not affect transaction value.**

# Transaction Value: Price Reductions



- ❖ In Headquarters Ruling Letter ("HRL") W548314, dated May 16, 2012, CBP examined the issue **post-importation adjustments** to value in related-party sales.
- ❖ CBP held that companies may claim compensating adjustments and other post-importation adjustments if they are based on an **objective formula and** provided the company's transfer pricing policy meets certain factors.
- ❖ Thus, CBP allows both upward and downward post-importation adjustments to related-party sales prices made pursuant to a formal transfer pricing policy that meets the following criteria:
  - Written "Intercompany Transfer Pricing Determination Policy" is in place prior to importation and the policy is prepared taking IRS code section 482 into account;
  - 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;
  - 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;
  - The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States; and,
  - No other conditions exist that may affect the acceptance of the transfer price by CBP.



# Prior Disclosures

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- ❖ Importers and their brokers are expected to exercise **reasonable care** in fulfilling responsibilities involving entry of merchandise.
  - Any **material false statement** is negligence and subject by a penalty under 19 USC 1592
- ❖ A “Prior Disclosure” is a statutory provision that operates as a “safe harbor” from 1592 penalties
- ❖ Is it better to Disclose or wait for CBP to issue a Penalty Notice?



# Prior Disclosure Resources

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- ❖ Prior Disclosure Statute: 19 USC 1592(c)(4)
- ❖ § 162.74 Prior disclosure Regulation
- ❖ Appendix B to Part 171-Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592
- ❖ Customs' Informed Compliance Publication on Prior Disclosure (2017 version)



# Required Elements of a Prior Disclosure

- ❖ A statement, generally written (but may be oral) that you are:
  - Disclosing the circumstances of a violation of 19 U.S.C. 1592 or 19 U.S.C. 1593a (Drawback)
  - Identifies the **class or kind of merchandise** involved
  - **Identifies the importations** or drawback entries
  - Specifies the **material false statements**, omissions or acts
  - Specifies the true and **accurate information or data** that should have been provided, to the best of the disclosing party's knowledge.
  - Initiates the disclosure process **before or without knowledge of**, the commencement of a formal investigation.
  - Tenders the amount of duty owed (if any).



# Prior Disclosures

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## ❖ Recognizing when you need to file a Prior Disclosure

- CF-28's alert Brokers and importers that there may be a mistake
- Census Warnings
- Calls from CBP asking questions about products or company
- Responding to CF-28, etc., without consideration of the answer
- **Receiving a CF-29 Notice of Action**
- **A CF-29 can be used to alert importer that CBP has initiated a "formal investigation" of a violation!**
- **Maybe too late to file a Prior Disclosure**

# Prior Disclosure

- What if you disclose the existence of an assist?
- What or how much information do you provide to respond to Q.A?
- What if you discover you have a payment for molds or tooling?
- Should you research the accuracy of the classifications before submitting the response?

DEPARTMENT OF HOMELAND SECURITY  
U.S. Customs and Border Protection

**REQUEST FOR INFORMATION**  
19 CFR 151.11

OMB No. 1651-0023  
Exp. 09-30-2019

3. Manufacturer/Seller/Shipper		4. Carrier	1. Date of Request 01/17/2020	
5a. Invoice Description of Merchandise various		5b. Invoice No. various	2. Date of Entry and Importation 05/30/2019	
7. Country of Origin/Exportation CN CN		8. CBP Broker and Reference or File No.		5. Entry No.
9. TO: US		10. FROM: U.S. CBP 726 EXCHANGE ST BUFFALO, NY 14210-1484 US		6. HTSUS Item No. 99038803
Production of Documents and/or Information Required by Law: If you have provided the information requested on this form to U.S. Customs and Border Protection at other ports, please indicate the port of entry to which it was supplied, and furnish a copy of your reply to this office, if possible.		11a. Port 1401	11b. Date Information Furnished	
<b>General Information and Instructions</b>				
12. Please Answer Indicated Question(s)			13. Please Furnish Indicated Item(s)	
<input checked="" type="checkbox"/> A. Are you related (see reverse) in any way to the seller of this merchandise? <b>If you are related, please describe the relationship, and explain how this relationship affects the price paid or payable for the merchandise.</b>			<input checked="" type="checkbox"/> A. Copy of contract (or purchase order and seller's confirmation thereof) covering this transaction, and any revisions thereto.	
<input checked="" type="checkbox"/> B. Identify and give details of any additional costs/expenses incurred in this transaction, such as: <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> (1) packing</li> <li><input checked="" type="checkbox"/> (2) commissions</li> <li><input checked="" type="checkbox"/> (3) proceeds that accrue to the seller</li> <li><input checked="" type="checkbox"/> (4) assists</li> <li><input checked="" type="checkbox"/> (5) royalties and/or license fees</li> </ul>			<input type="checkbox"/> B. Descriptive or illustrative literature or information explaining what the merchandise is, where and how it is used, and exactly how it operates.	
			<input type="checkbox"/> C. Breakdown of components, materials, or ingredients by weight and the actual cost of the components at the time of assembly into the finished article.	
			<input type="checkbox"/> D. Submit samples: Article number and description _____ from container _____ mark(s) and number _____ Samples consumed in analysis, and other samples whose return is not specifically requested, will not normally be returned.	
			<input checked="" type="checkbox"/> E. See item 14 below.	
14. CBP Officer Message See continuation sheet				
15. Reply Message (Use additional sheets if more space is needed.)				
16. CERTIFICATION				
I hereby certify that the information furnished herewith or upon this form in response to this inquiry is true and correct, and that any samples provided were taken from the shipment covered by this entry.				
16a. Name and Title/Position of Signer (Owner, Importer, or Corporate/Company Official)		16b. Signature		16c. Telephone No.
				16d. Date
17. CBP Official Jason Schug		18. Team Designation 038		19. Telephone No. 716-843-8381
20. Fax No.		21. Email jason.g.schug@cbp.dhs.gov		





# What is Reconciliation?

## ❖ Reconciliation is an “entry”

- The ACE Reconciliation Entry serves as the exclusive means for reconciling post- summary adjustments for value
- Recon Entries can be filed up to 21 months following entry (12 months for FTAs)
- To use, importer must have a valid continuous bond and a valid reconciliation bond rider on file for each importer of record number
- Electronically “flag” the entry and issue at the time of original importation designating it for Recon
- The following issues are eligible for reconciliation :
  - Value (all value issues)
  - HTS US 9802 (Goods assembled abroad with U.S. components), and
  - Free Trade Agreements (FTAs)
  - Classification (very limited basis)

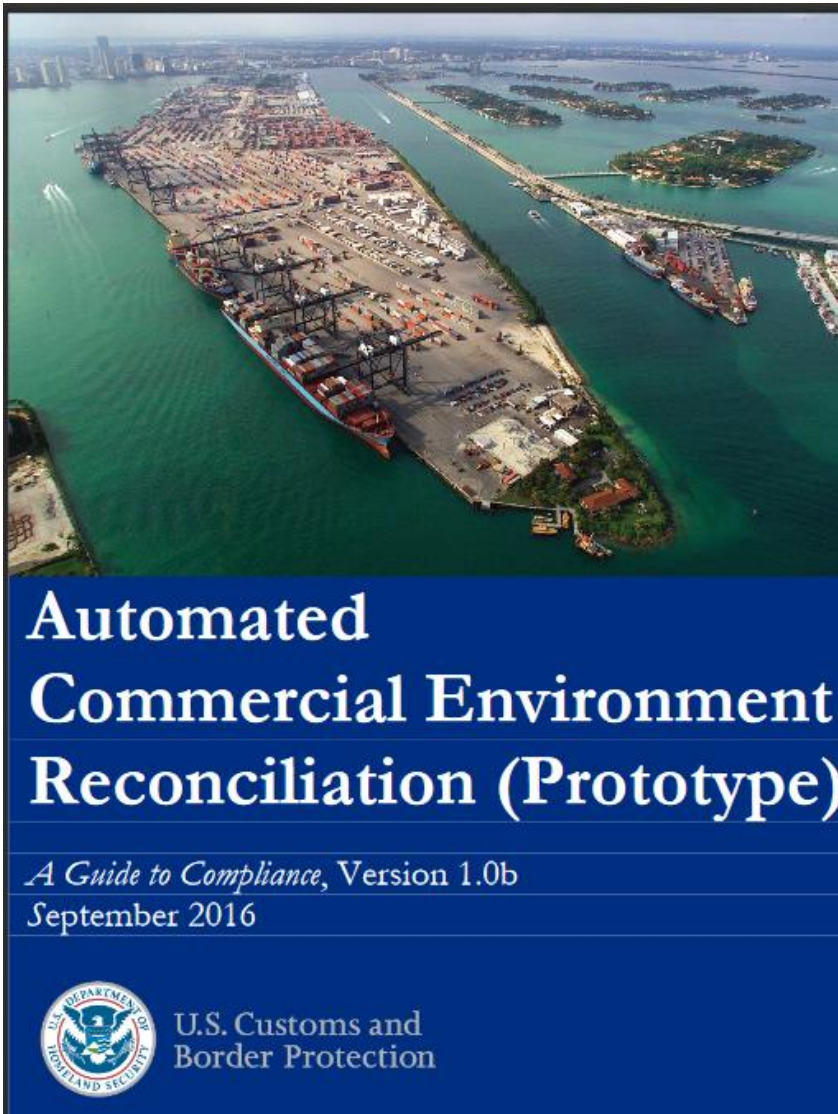
# Entry Reconciliation: When to Participate?



## ❖ Common situations requiring Reconciliation

- Standard Cost / Computed Value / Tolling contracts (i.e., services only contracts )
- Related Party Transfer Pricing Adjustments
- Assists that are not quantifiable at time of entry (including foreign research, development, design, etc.)
- Supplemental Payments to foreign vendors (tooling, mold, equipment, or other)
- Proceeds paid to foreign vendors (e.g. 5% of net sales are remitted to vendor after entry)
- Material acquisition charges or surcharges that are not known at time of entry (spot buy charges, precious metal surcharges based on a market rate [e.g., LME - London Metals Exchange], etc.)
- Product rework or testing charges
- Other post entry price adjustments or any adjustments to the value declared to Customs at time of entry

# Customs Reconciliation Guide



- ❖ the new ACE Reconciliation Handbook was published on CBP.gov on September 1, 2016.
- ❖ The handbook can be found at: [cbp.gov/document/guides/ace-reconciliation-prototype-guide](https://www.cbp.gov/document/guides/ace-reconciliation-prototype-guide).
- ❖ Provides rules and desktop instructions on how to apply and file recon entry
- ❖ <https://www.cbp.gov/trade/programs-administration/entry-summary/reconciliation>