



U.S. Customs Considers Easing Rules on Post-Importation Price Adjustments in Related Party Sales

On September 23, 2011, U.S. Customs and Border Protection (CBP) [announced](#) that it is re-examining its approach to valuing imported merchandise from related parties and may decide to allow use of the transaction value basis of appraisal for entries that involve post-importation price adjustments, both upward and downward. Importers would have to use the reconciliation program under this new approach. CBP has requested comments from the public concerning this potential change, which could have far-reaching consequences for corporate groups. Comments are due by October 23, 2011.

Current Approach

Importations into the United States involving transactions between related parties raise complex valuation issues under both customs and tax laws. Related parties, such as a parent and subsidiary, often put in place inter-company policies or agreements to ensure that their transfer prices comply with applicable tax requirements. In some cases, these policies and agreements call for post-importation adjustments to transfer prices.

Such post-importation price adjustments historically have complicated the appraisal of merchandise for customs purposes. In certain instances CBP has allowed the adjustments, but not under the “transaction value” method of appraisal. Rather, the adjustments were allowed under the “fallback” method of appraisal because the price arguably 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). Importers generally favor the transaction value method (which typically looks to invoice prices) because this method is more straightforward than the fallback method.

CBP has refused to allow post-importation adjustments using the transaction value method of appraisal based on the rationale that the resulting transfer price was not determined using an objective formula, as required by CBP’s regulations. CBP sought to avoid situations where importers would manipulate entered value through post-importation price adjustments with related parties, thereby reducing artificially the amount of duties owed.

Potential Change

CBP is now reconsidering its interpretation of what constitutes an objective formula for the purposes of using the transaction value method of appraisal in transactions involving related parties and revoking a longstanding

Headquarters Ruling Letter, [HQ 547654](#). CBP's announcement reflects the agency's view that, in certain circumstances, a post-importation price adjustment between related parties could be the result of a formal internal transfer pricing policy or formula that would qualify for transaction value treatment.

CBP has identified certain factors which, in its view, are indicative that a transfer pricing policy calling for post-importation price adjustments should be considered an objective formula for transaction value purposes. CBP therefore is considering applying these factors, identified below, to evaluate transfer pricing policies and permit upward and downward post-importation price adjustments made pursuant to qualifying policies. In CBP's view, no single factor would be determinative, and CBP's finding with respect to whether an objective formula exists would be made on a case-by-case basis.

Factors Being Considered by CBP

- A written "Intercompany Transfer Pricing Determination Policy" is created which sets out the process for determining transfer price prior to importation;
- The importer/buyer is a U.S. taxpayer that applies the policy in its corporate tax returns and in determining the transfer price for relevant products;
- The policy specifically covers the products subject to post-importation price adjustment;
- The policy specifies the adjustments that must be made to the transfer price and the method for determining the adjustments;
- The adjustments do not result in value manipulation;
- If adjustments are made, the importer/buyer provides detailed explanation and calculations of the adjustments incurred in the United States and claimed after importation;
- The policy is in effect prior to an importation in which an adjustment is claimed; and
- There are no other circumstances indicating that a price adjustment results in a non-arm's length price between related parties.

In order to claim post-importation adjustments pursuant to a qualifying transfer pricing policy, importers would have to use CBP's reconciliation program. In addition, importers would have to be prepared to demonstrate that transaction value is otherwise appropriate as the basis for appraisal under one of CBP's established tests (*i.e.*, "circumstances of the sale" test or "test value" test).

Comments Requested

CBP has requested comments in advance of formally proposing this change to valuing imported merchandise from related parties. Comments are due on October 23, 2011 and should be submitted to EarlyInputMailbox@dhs.gov, with "Transfer Process" in the subject line. After analyzing the comments, CBP will consider whether to proceed with formally proposing the change.

Sidley Austin LLP has a team of lawyers experienced in advising corporate groups on customs valuation issues. We would be pleased to assist companies in assessing the impact of the proposed methodological change and developing comments for submission to CBP.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

The Customs Practice

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Our members have served in numerous U.S. government, European Commission and international organization roles. Through our representation of prominent trade associations, foreign sovereigns and multinationals, we stay at the front lines of customs reform, trade facilitation, and the challenging integration of the new customs mission of cargo security.

A substantial part of our practice is in the trade compliance arena. We have assisted companies in the development of import compliance programs. We also regularly conduct internal reviews and devise remedial measures as warranted.

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